

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re Application of APR Energy Holdings :
  
Limited for Judicial Assistance in : Docket No.: \_\_\_\_\_
  
Obtaining Evidence in this District for Use :
  
in a Foreign and International Proceeding :
  
Pursuant to 28 U.S.C. § 1782 :
  
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**DECLARATION OF HAROLD E. PATRICOFF IN SUPPORT OF APPLICATION FOR JUDICIAL ASSISTANCE PURSUANT TO 28 U.S.C. § 1782**

Under penalties of perjury, pursuant to 28 U.S.C. § 1746, and being duly authorized, I, HAROLD E. PATRICOFF, declare as follows:

1. I submit this declaration (the “Declaration”) in support of APR Energy Holdings Limited’s (“APR”) *ex parte* application for an Order, pursuant to 28 U.S.C. § 1782 (the “Application”), for leave to serve Australia and New Zealand Banking Group Limited (“ANZ Bank”) with a discovery subpoena in connection with an arbitral proceeding commenced against the Commonwealth of Australia (“Australia”).

2. I am a partner with the U.S. law firm Shutts & Bowen LLP. My firm has been retained by APR to assist with APR’s investigations and prosecution of the claims raised in the arbitration initiated by APR and other related entities against Australia pursuant to the arbitration rules of the United Nations Commission on International Trade Law (the “UNCITRAL Rules”) and the Australia-United States Free Trade Agreement (“AUSFTA”) (this proceeding referred to as the “UNCITRAL Arbitration”). I am familiar with the facts set forth in this Declaration, either from personal knowledge or on the basis of documents or communications that have been provided to me. Insofar as the facts set forth are within my own personal knowledge, I testify to the facts and matters to the best of my own knowledge and belief.

3. I have reviewed the Application, the Memorandum of Law in support of the Application, and the documents filed as Exhibits to the Application.

**Relevant Parties**

4. APR is a company constituted under the laws of England and Wales, with its principal place of business in Jacksonville, Florida, dedicated to, among other activities, the business of supplying power to governmental agencies, utilities, and owners and operators of power plants. APR provides turnkey power generation solutions for public and private projects worldwide by rapidly deploying mobile, large-scale power plants. APR operates through a number of affiliate entities, including APR Energy plc and APR Energy, LLC.

5. Power Rental Asset Co Two, LLC (“Asset Co”) and Power Rental Op Co Australia, LLC (“Op Co”) each are limited liability companies existing under the laws of Delaware. Asset Co and Op Co are subsidiaries of APR.

6. The three APR entities identified above have substantial business activities in the United States.

7. ANZ Bank is a bank with offices and/or branches worldwide. ANZ Bank’s website states that it maintains a branch within this district at 277 Park Avenue, 31st Floor, New York, New York 10172. *See* <https://www.anz.com/unitedstates/en/auxiliary/contact%2Dus/> (Mar. 21, 2017, 11:01 AM), a true and correct copy of which is attached as **Exhibit 1**. ANZ Bank lists several key contacts with telephone numbers in this district, including Truett Tate, Chief Executive Officer, America and Robert Toher, Head of Compliance and Regulatory Relations, America. *See id.*

8. Australia and the United States are parties to the AUSFTA.

9. Forge Group Power Pty Ltd (“Forge”), now in liquidation, was a publicly traded company existing under the laws of Australia. ANZ Bank is Forge’s primary lender.

**Basis for the UNCITRAL Arbitration**

10. In March 2013, General Electric International, Inc. (“GEI”), a subsidiary of General Electric Company (“GE”), entered into a written agreement with Forge, under which Forge agreed to lease four GE model TM 2500+ mobile gas turbine generator sets and balance of plant (the “Power Generation Facility”) from GEI for a term of two years (the “Rental Agreement”). The purpose of the Rental Agreement was to install and operate a power generation facility for Horizon Power, a state-owned utility in Western Australia (the “Horizon Power Facility”).

11. In October 2013, APR Energy plc entered into a Business Transfer Agreement with GE pursuant to which APR Energy plc’s affiliates would acquire GE’s portable power generation business. As part of this transaction, GEI assigned its ownership interest in the Power Generation Facility to a newly-created subsidiary, Asset Co, and it assigned the Rental Agreement and the right to payments thereunder to another newly-created subsidiary, Op Co. The membership interests in these subsidiaries were sold to APR. The transaction by which APR, through its subsidiaries, acquired the Power Generation Facility leased by Forge was consented to by Forge in a signed approval letter provided to GEI.

12. The Rental Agreement provides that, in the event of Forge’s insolvency, the Rental Agreement terminates and the Power Generation Facility is required to be returned to the lessor in Houston, Texas. In the Rental Agreement, Forge also represented and warranted that the Power Generation Facility would remain free and clear of liens or other third-party security

interests. In addition, the Rental Agreement expressly states that APR retains exclusive ownership of the Power Generation Facility.

13. Despite Forge's contractual agreement to hold APR's subsidiaries' (at the time, GEI's subsidiaries') property free and clear of all liens, Forge granted to ANZ Bank a general security interest in all of Forge's property—then in existence or acquired thereafter—to secure loan funds that ANZ Bank advanced to Forge.

14. Delivery of the Power Generation Facility to Forge took place in September and October 2013 in Texas, prior to the APR-GE transaction. By the time that the Power Generation Facility arrived on site in Australia, the business transfer from GE to APR had taken place, and APR had become the owner of Asset Co and Op Co. Specifically, the closing on the Business Transfer Agreement occurred on October 28, 2013.

15. APR installed the Power Generation Facility at the location of the Horizon power generation facility in Western Australia in January 2014. Shortly thereafter, on February 11, 2014, the Board of Directors of Forge appointed administrators, the first step in Australia's corporate insolvency process.

16. At the same time, ANZ Bank, as the primary secured lender of Forge, appointed KordaMentha Pty Ltd, Scott Langdon and Mark Mentha ("Receivers" or "KM"), to act as receivers and managers. The Receivers were charged with identifying Forge's assets, reducing them to money, and paying the money to ANZ Bank.

17. At the time Forge declared its insolvency, based on the terms of the Rental Agreement, APR and its subsidiaries had the immediate right to demand the return of its Power Generation Facility and retake possession. Forge was obligated to return the Power Generation Facility to the point of delivery in Houston, Texas. Immediately upon learning of the

appointment of administrators by Forge, APR demanded the return of the Power Generation Facility.

18. The Receivers denied APR's request in violation of the Rental Agreement, asserting that APR's rights in the Power Generation Facility had vested in Forge immediately prior to the administration, pursuant to the provisions of the Personal Property Securities Act (2009) ("PPSA"), Australia's recently enacted statute governing security interests. The Receivers asserted that APR's ownership and legal rights in the Power Generation Facility had vested in Forge immediately prior to Forge's voluntary administration, pursuant to the provisions of the PPSA. In contravention of the Rental Agreement and U.S. law, the Receivers asserted that, under the PPSA, the Rental Agreement was automatically deemed to be a security interest and that, because GEI failed to perfect the security interest by recording a registration statement, Forge, upon commencing a voluntary administration, acquired all ownership rights in the Power Generation Facility.

19. The Receivers also asserted that ANZ Bank, through an affiliated agent, had registered a security interest in all of the assets of Forge and that, as a result of this registration, ANZ Bank obtained a first-ranking security interest in the Power Generation Facility.

20. The Receivers refused to release the Power Generation Facility to Asset Co and Op Co. To obtain possession of the Power Generation Facility in order to re-let the facility directly to the utility and thereby mitigate their damages, Asset Co and Op Co, joined by GEI, entered into an agreement with the Receivers, titled "Interim Arrangement Deed," pursuant to which the parties to that agreement agreed to litigate certain issues concerning the applicability of the PPSA in an Australian court. In exchange for the Receivers transferring possession of the Power Generation Facility to Asset Co and Op Co, Asset Co and Op Co agreed to and did

procure a US\$44 million letter of credit in favor of the Receivers to serve as a bond. APR disputes the application of this law, which is repugnant to U.S. law and is one of the central issues raised in the UNCITRAL Arbitration.

21. The two Australian courts that have considered the question have confirmed the application of the PPSA. The trial court ruled that as a result of the appointment of administrators by Forge, immediately prior to the appointment of insolvency administrators, Forge acquired superior title, right and interest in the Power Generation Facility at the expense of APR. According to the court, this occurred by operation of Australia's Corporations Act and the PPSA.

22. The appellate court affirmed the trial court, and noted that the creditor's possession of title to the leased property was totally irrelevant to the analysis and to the outcome.

23. APR has petitioned to the High Court of Australia (equivalent to the U.S. Supreme Court) for review of the lower courts' ruling, and that application remains pending. In the event the High Court of Australia affirms the lower courts' rulings or declines to consider the case, the US\$44 million letter of credit will be drawn on by the Receivers for ANZ Bank, and the proceeds will be paid to ANZ Bank.

24. APR has sustained substantial damages above and beyond the US\$44 million letter of credit, including over US\$5 million in fees and expenses to maintain the letter of credit, over \$200 million in lost enterprise value as a result of the taking of the Power Generation Facility, and substantial legal fees and court costs.

25. ANZ Bank did not advance any credit to Forge in reliance on the Power Generation Facility being owned by Forge, and, indeed, the Power Generation Facility was not

owned by Forge, and it is believed that ANZ Bank knew this fact. Further, ANZ Bank recorded its blanket registration before Forge obtained possession of the Power Generation Facility.

**Relevance of the Requested Discovery**

26. The purpose of this Application is to gather evidence from ANZ Bank concerning, *inter alia*, the bank's actions taken with respect to Forge, its knowledge of Forge's operations and assets, and its communications with Forge, both prior and subsequent to Forge's declaration of insolvency. Moreover, ANZ Bank has intimate knowledge of Forge's financial condition at the time Forge entered into the Rental Agreement with GEI (which APR later acquired through its subsidiaries) and thereafter. As Forge's principal creditor, ANZ Bank has substantial knowledge and information about Forge and its financial condition and about any liens or interests filed by ANZ Bank against the Power Generation Facility.

27. By October 2013, when Forge took possession of the Power Generation Facility, ANZ Bank was aware of Forge's distressed financial condition and the high likelihood of a future insolvency proceeding. Mere weeks after taking possession of APR's subsidiaries' property, Forge, in close cooperation with ANZ Bank, entered into a voluntary administration. Evidencing a close degree of cooperation and coordination, ANZ Bank, on the very day that Forge's Board of Directors appointed insolvency administrators, appointed the Receivers and instructed the Receivers to collect and liquidate all collateral in order to repay the ANZ Bank loan including APR's Power Generation Facility.

28. Through the operation of the PPSA, as construed by the Australian courts, ANZ Bank obtained an enormous windfall and APR, in turn, suffered an enormous loss, forfeiture and expropriation of the Power Generation Facility. In the event that APR is unsuccessful in the

High Court or in other legal proceedings that may be pursued, the Receivers for ANZ Bank will be entitled to draw upon the US\$44 million letter of credit posted by APR.

29. ANZ Bank possesses substantial documents and records concerning financial transactions with Forge, Forge's financial condition during all stages of negotiations leading up to the Rental Agreement and thereafter, Forge's insolvency and the steps taken following its placement into voluntary administration, and actions taken by the Receivers with respect to the Power Generation Facility following Forge's insolvency.

30. More specifically, ANZ Bank possesses loan agreements, pledges, financing statements, and other security documents executed by Forge, evidencing the substantial outstanding debt obligations in the amount of AU\$260 million<sup>1</sup> to ANZ Bank. In connection with the loan documents that delineate Forge's obligations to ANZ Bank, there exists substantial communications between Forge and ANZ Bank relating to Forge's financial condition and instability. In addition, ANZ Bank has substantial knowledge of Forge's financial condition and instability after the time in which Forge entered into the Rental Agreement with GEI and most certainly prior to delivery of the Power Generation Facility to Forge in late 2013.

31. Likewise, ANZ Bank is in possession of numerous communications with Forge that point to ANZ Bank's right and ability to acquire a security interest in all of Forge's assets in the event of a declaration of insolvency. ANZ Bank also likely possesses internal evaluations of Forge's assets, liabilities, cash flow, and business projections, which would give ANZ Bank superior knowledge about Forge's financial condition during the time APR was delivering and installing the Power Generation Facility at the Horizon Power Facility. APR is in need of this

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<sup>1</sup> Approximately US\$195 million (source: <http://www.oanda.com> (Apr. 12, 2017, 2:49 PM)).



documentary evidence to establish the inappropriate expropriation and private taking by the Receivers and by ANZ Bank of APR's title to the Power Generation Facility.

32. In addition, APR requires documentary evidence referencing ANZ Bank's communications and agreements with the Receivers to demonstrate how ANZ Bank anticipated Forge's insolvency, how ANZ Bank stood to benefit by the taking of APR's title to the Power Generation Facility by operation of the PPSA, and how ANZ Bank directed the activities of the Receivers who were acting at all material times for the benefit of ANZ Bank.

### **The UNCITRAL Arbitration**

33. This Application is in support of international arbitration proceedings commenced by APR, Asset Co and Op Co (the "APR Parties") against Australia, pursuant to the UNCITRAL Rules and the AUSFTA.

34. On November 30, 2016, the APR Parties transmitted to Australia (addressed to Hon. Malcolm Turnbull MP, Prime Minister, and Hon. George Brandis QC, Attorney-General) a letter notifying Australia of the APR Parties' intent—in the event the parties were unable to settle—to submit a dispute to arbitration to address Australia's violations of certain provisions of the AUSFTA with respect to the APR Parties and their investment. A true and correct copy of the Notice of Intent is attached as **Exhibit 2**.

35. Australia responded to the APR Parties' Notice of Intent with two letters, each of them dated January 11, 2017, with the second letter attempting to retract the first letter. In both letters, Australia attempted to deny the APR Parties' right to bring a claim in arbitration against Australia. In the first letter, Australia also made substantive determinations regarding the claims made by the APR Parties. True and correct copies of the Response Letters are attached as **Composite Exhibit 3**.

36. On April 14, 2017, the APR Parties filed a Notice of Arbitration to formally commence the UNCITRAL Arbitration pursuant to Article 11.16(2) of the AUSFTA, to address Australia's breach of its obligations toward the APR Parties in violation of the AUSFTA. Specifically, the APR Parties allege that Australia has violated AUSFTA Articles 11.4 (Most-Favored Nation Treatment), 11.5 (Minimum Standard of Treatment), and 11.7 (Expropriation and Compensation).

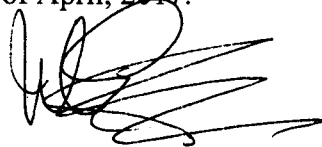
37. An international tribunal appointed pursuant to the procedures set forth in the UNCITRAL Rules will preside over the UNCITRAL Arbitration.

38. No provision under the UNCITRAL Rules or the AUSFTA would provide the international tribunal appointed in the UNCITRAL Arbitration the authority to compel discovery, or disclosures, from any non-party to the arbitration.

39. No provision within the UNCITRAL Rules or the AUSFTA, nor any order or ruling that would govern the UNCITRAL Arbitration prohibits the filing of APR's Application or the request for evidence being made through this Application.

40. No previous application for this relief has been made in the United States.

I have executed this Declaration under penalty of perjury under the laws of the United States of America, 28 U.S.C. § 1746, this 17 day of April, 2017.



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HAROLD E. PATRICOFF