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File Title: ASSET ENERGY PTY LTD ACN 120 013 390 v THE COMMONWEALTH
MINISTER FOR INDUSTRY AND SCIENCE AS THE RESPONSIBLE
COMMONWEALTH MINISTER OF THE COMMONWEALTH-NEW
SOUTH WALES OFFSHORE PETROLEUM JOINT AUTHORITY & ANOR
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

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Federal Court of Australia
District Registry: Western Australia
Division: General

No. WAD36/2025

Asset Energy Pty Ltd (ACN 120 013 390)

Applicant

The Commonwealth Minister for Industry and Science, as the Responsible Commonwealth Minister of the Commonwealth-New South Wales Offshore Petroleum Joint Authority and another

Respondents

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS

INTRODUCTION

1. The applicant (**Asset**) has applied for judicial review of the **Decision** made by the respondents (**Joint Authority**) in January 2025 under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to refuse two applications for a variation and suspension of work program conditions, and an extension of the term, of Petroleum Exploration **Permit** No. 11. The first respondent (**Minister**) submits that the application should be dismissed.¹
2. As Asset accepts (Asset's Submissions (**AS**) [11]), the Decision was made on two independent bases, each described as “an issue of such significance that it would constitute a basis to refuse” the applications (Reasons, [130]), being: the “public interest consideration” and “the uncertainty regarding [Asset’s] financial capacity”.² For convenience, the Minister adopts Asset’s reference to these bases for the Decision as the “Public Interest Ground” and the “Financial Capacity Ground” (AS [11]).

¹ The second respondent has filed a notice of submitting appearance.

² Statement of **Reasons**, January 2025, [130]: First Breeze Affidavit, DLB-51, p 870.

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3. Accordingly, to succeed in establishing a material error affecting the Decision that justifies the grant of relief, Asset would need to impeach **both** bases for the Decision. Accordingly, Asset would need to succeed on:
 - 3.1. ground 1 of review; **or**
 - 3.2. one of grounds 2 or 3 of review (affecting the Public Interest Ground) **and** one of grounds 4 or 5 (affecting the Financial Capacity Ground).
4. For the reasons outlined below, the Court should reject each of the grounds of review. By way of summary, the Minister submits:
 - 4.1. **Ground 1 of review:** The Joint Authority did not misconstrue ss 264 or 265. Ground 1 (as pleaded) does not allege a material error (see [9]–[11] below). Asset attempts to expand this ground in writing, to allege an error in the Joint Authority’s approach to the assessment of the public interest (see [12]–[15]). Neither the ground as pleaded, nor the attempted expanded ground, should be upheld.
 - 4.2. **Grounds 2 and 3 of review (Public Interest Ground of Decision):** The Joint Authority reasoned that granting the applications was not in the public interest, which in turn was informed by the Joint Authority’s conception of the existence of broadly-held community opposition to gas exploration activities in or adjacent to the coastal waters of New South Wales. As to ground 2, the Joint Authority’s conception of the existence of community opposition is not susceptible to challenge on the basis that there was “no evidence” for it. That is because existence or otherwise of community opposition is not a concept to be “measured” as “provable fact” for which “evidence” is required (see [20]–[21] below). In any event, it is Asset’s challenge on this ground that infringes parliamentary privilege, with the consequence that the ground cannot be entertained and must be dismissed. Asset’s argument is flawed, because it seeks to reverse the onus of proof or burden of persuasion (see [22]–[33] below). Insofar as ground 3 also seeks to (or needs to) impugn the Reasons on the basis that the “true meaning” of the parliamentary statements does not support the Minister’s “finding”, then it too would infringe parliamentary privilege and cannot be entertained. Otherwise, Asset’s criticisms of the Joint Authority’s reasoning in ground 3 proceed on a misconception of the Reasons (see [34]–[37] below).

- 4.3. **Ground 4 of review (Financial Capacity Ground of Decision):** Asset was informed of the “factors critical” to the Decision, and was not denied the opportunity to deal with any “adverse information that [was] credible, relevant and significant” to the Decision, and was not denied practical justice. Asset’s financial capacity to complete the proposed works, and the accuracy of Asset’s estimate of the cost of the proposed works, were identified to Asset as “factors critical” to the decision to be made in prior correspondence before the Decision was made (see [42]–[44] below). The Joint Authority did not disclose to Asset the advice given by the National Offshore Petroleum Titles Administrator (**NOPTA**) in December 2024 (**NOPTA Advice**). It is doubtful that the NOPTA Advice was “adverse” to Asset. In any event, Asset could not meaningfully have critiqued the NOPTA Advice without the confidential source information, and Asset had already had multiple opportunities to provide its own estimates of the cost of the proposed works (see [45]–[49]).
- 4.4. **Ground 5 of review (Financial Capacity Ground of Decision):** The Joint Authority’s conclusion that Asset had failed to estimate the costs accurately was not unreasonable or made without evidence (see [50]–[55] below).

CONSTRUCTION OF SS 264 AND 265

The legislative scheme

5. In broad terms, the Act provides a regulatory framework for petroleum exploration and recovery in offshore areas.³ The relevant Permit authorises activities, which are otherwise prohibited, to be carried out for a specified, limited duration: ss 97, 98, 102. As occurred in this case,⁴ under s 99(5), conditions may be specified in a permit:
- requiring the permittee⁵ to carry out work in, or in relation to, the permit area (including conditions requiring the permittee to carry out the work during a period of 12 months or longer, or during periods each of which is 12 months or longer);
6. Part 2.11 of the Act concerns “variation, suspension and exemption”. Section 264 provides for variation, suspension and exemptions in relation to “conditions of titles”, including petroleum exploration permits. Section 264 applies if (relevantly) the permittee

³ Act, s 3(a).

⁴ First Breeze Affidavit, DLB-1, p 20; Decision Brief (Reasons (Annexure 4)), p 135; Annexure 6, p 164.

⁵ Being the “registered holder” of the permit (s 7) — here, Asset and Bounty Oil and Gas NL.

“applies in writing for a variation or suspension of any of the conditions to which the permit...is subject”.⁶ Where s 264 applies, the Joint Authority “may, by written notice” vary or suspend any of the conditions to which a permit is subject, on such conditions (if any) as are specified in the notice.⁷

7. The discretion in s 264 is textually unconfined and broad.⁸ An applicant is not entitled to receive a variation or suspension; the extrinsic material explains that the “principle” behind the variation power is that “in the ordinary course of events, the conditions under which a titleholder operates should not change during the term of the title.”⁹
8. The term of a permit may be extended under s 265, which applies if the Joint Authority “decides to suspend” permit conditions under s 264. The Joint Authority may extend the term “by a period that the Joint Authority considers appropriate”, “if the Joint Authority consider that the circumstances make it reasonable to do so”: s 264(2). The Joint Authority “must have regard to” the length of the period of suspension and “such other matters (if any) it considers relevant”: s 264(3).

Ground 1: no misconstruction of ss 264 or 265

9. The Reasons demonstrate that the Joint Authority understood the operation of ss 264 and 265, noting that the power in s 265 “is only engaged if the Joint Authority has suspended a condition under s 264”: [63]. That approach is consistent with AS [70].
10. The Joint Authority did not impermissibly collapse the analysis of matters relevant under ss 264 and 265: *contra* Ground 1 (as particularised); AS [72]. The Joint Authority observed and took into account that “any suspension of a condition ... would be rendered futile if the period of the Permit were not extended”: Reasons, [63]. That is not an impermissible approach. A permit is necessarily of limited duration under s 102 of the Act. Therefore, whether the activities authorised by the Permit can feasibly be performed during the term of the permit rationally bears on whether a variation should be approved.

⁶ Act, s 264(1), Table Item 1.

⁷ Act, s 264(2).

⁸ *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J). Section 264(2AA) identifies matters to which the Joint Authority may have regard, but applies only to applications made after its enactment (in March 2022), by the *Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Act 2021* (Cth), Sch 3 cl 237.

⁹ Explanatory Memorandum to Offshore Petroleum Bill 2005, p 106 (regarding cl 277, equivalent to s 264).

Equally, if no extension were required, that would weigh in favour a variation being approved.

11. Even if that approach was erroneous, it was immaterial to the Decision. The Joint Authority expressly disclaimed “any reliance” on “that concern” about the time remaining to comply with the Permit: Reasons, [80]. The dual bases of the Decision were unconnected with the term of the Permit. Therefore, any error was not jurisdictional (*LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [7]), and the decision did not “involve” an error of law for the purpose of s 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353, 384).
12. Asset’s submissions venture beyond the particulars given in the Originating Application, impugning the Joint Authority’s approach to the public interest: AS [71], [73].
13. If entertained, Asset’s additional submissions should be rejected. Asset’s submissions stray into merits review, downplaying the Applications as merely a “minor amendment and related extension”: AS [73].
14. Further, Asset’s characterisation of the Joint Authority’s reasoning ignores the time-limited nature of permits. Asset contends that the Joint Authority could not consider “whether it was desirable for that Permit to exist in the first place”: AS [71], [73]. That was not the evaluation undertaken by the Joint Authority. At the time of the Decision, the time for Asset to undertake the authorised activities had passed. The Joint Authority considered whether, at the time of its decision, it was “in the public interest to grant the First Application or the Second Application”: that is, to grant the variation and suspension of the Permit (see Reasons, [75]). The Joint Authority found that it was not. Particularly where the period of the Permit is subject to statutory time limits, it is permissible to consider whether the proposed activities should be undertaken at the point in time when the decision is made.
15. Asset points to the specific prescribed factors which must be considered in the context of an application to renew a permit: Act, s 125(2), AS [71]. Those prescribed factors do not include the “public interest” (unless prescribed by regulation). Asset contends that s 125(2) is “a strong contextual indicator” that the public interest cannot be considered under s 264: AS [71]. That contention is not reflected in the Originating Application, and in any event should be rejected. The power to renew is different from the power to vary.

And the fact that a consideration is not expressly identified as a **mandatory** consideration does not suggest that it is a **prohibited** consideration. There are no prescribed mandatory considerations for decisions under s 264. The absence of such a prescription underscores the breadth of discretion. Section 779 positively affirms (“for the avoidance of doubt”) that express statements in the Act which require the Joint Authority to have regard to the public interest “in making a particular decision” under the Act do not, by implication, prevent the Joint Authority from having regard to the public interest when making other decisions. That is the case with respect to s 264.

PUBLIC INTEREST GROUND

16. One basis for the Decision — the Public Interest Ground — was the Joint Authority’s view that granting the Applications would not be in the public interest “in light of the community opposition to the gas exploration activities being conducted in areas including the Permit area” (Reasons, [75]). This is the subject of Grounds 2 and 3 of review.

No evidence (ground 2 of review)

17. There are two reasons why Asset’s attempt to impugn the Joint Authority’s assessment of the “public interest” as being based on “no evidence” should be rejected:
 - 17.1. **First**, contrary to a premise or assumption underpinning Asset’s ground, the Joint Authority did not need “evidence” (certainly not “evidence” of an ordinary kind) in order to ascertain or conceive the existence of “community opposition” to gas exploration activities. Accordingly, the Joint Authority’s conclusion that such “community opposition” existed is not susceptible to challenge on the basis that there was “no evidence” for it.
 - 17.2. **Second**, and in any event, Asset’s attempt to wield parliamentary privilege as a weapon must be rejected. It is Asset’s case which infringes parliamentary privilege. And, given that Asset bears the onus of proof or burden of persuasion, it is Asset’s case that fails.

Width of decisional freedom in assessing public interest

18. Assessment of the public interest “classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in

view” (*O’Sullivan v Farrer* (1989) 168 CLR 210 at 216). Consistently, it has been held that conferring a power on a Minister to decide what is in the public interest “is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of political office” (*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42]).

19. In that light, in assessing whether granting the applications was in the public interest, it was open to the Joint Authority to have regard to its conception of community support or opposition to the conduct of activity the subject of the applications.

Community opposition not a provable “fact” for which “probative” “evidence” is required

20. Accordingly, the issue becomes: by what means may the Joint Authority conceive of the existence of community support or opposition to the activities the subject of the applications? As the Full Court explained in *CKL21 v Minister for Home Affairs* (2022) 293 FCR 634 at [29], for many years, the Minister administering the *Migration Act 1958* has directed delegates and the Administrative Appeals Tribunal (now the Administrative Review Tribunal) to “take into account the expectations of the Australian community, as explained in the ministerial direction” in making discretionary visa decisions. Importantly, the Court held that “[t]he concept of community expectations is not a matter to be measured as though it is a provable fact”. Rather, what Ministerial directions reflect is “the Minister’s conception of those [community] expectations” (*CKL21* at [30]).
21. Just as the Minister in the migration context need have no “evidence” for his conception of “community expectations” as bearing on discretionary visa decisions, nor did the Joint Authority need “evidence” for its conception of “community opposition” with respect to the proposed activities the subject of the applications. The Joint Authority’s conception of community opposition was influenced by opposition expressed by statements made in the NSW Parliament (Reasons, [73]–[75]). But it is erroneous to proceed, as Asset’s case does (see AS [24]–[25]), on the premise that “evidence” was required for the Joint Authority’s “finding of fact” as to the existence of “community opposition”, and that the “evidence” that the Joint Authority relied on did not satisfy a minimum threshold of “probative value” in that respect.¹⁰ On this basis alone, ground 2 fails.

¹⁰ In this context, “evidence” may be regarded as any material which has “some probative value”: see *Mahon v Air New Zealand* [1984] AC 808 at 820–821. But see *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [89]–[90], discussed in *Muggeridge v Minister for Immigration and*

In any event, Asset’s attempt to wield parliamentary privilege is misconceived

22. As the Minister understands Asset’s argument at AS [26]–[36], it is to this effect:¹¹

22.1. Parliamentary privilege precludes the Court from accepting the “truth” of statements made by the Hon Paul Scully MP in a second reading speech (**Speech**)¹² in the NSW Parliament that is referred to in the Reasons (AS [26]–[32]).

22.2. Accordingly, the Speech “cannot be relied upon” by the Minister in this proceeding for its “truth” “in opposition to the ‘no evidence’ or ‘unreasonableness/irrationality’ grounds of review”. “[S]uch a use would involve allowing the substance of what is said in the Parliament of New South Wales to be the subject of a submission or inference” (AS [33]). Likewise, Asset “cannot contest the truth of the impugned parliamentary statement” (AS [34]).

22.3. Accordingly, the “truth” of the parliamentary statement should be “put to one side”, and accordingly the Minister’s finding as to the existence of community opposition “cannot be sustained” (AS [36]).

23. The argument is misconceived, for the reasons outlined below.

24. Parliamentary privilege was “enshrined”¹³ in Art 9 of the *Bill of Rights 1688* as follows: “That the Freedom of Speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place outside of Parliament.” The relevant privilege here is the privilege of the NSW Parliament, which exists as a matter of common law and also by the continuation of the Bill of Rights (“in force in New South Wales”) by s 6 of the *Imperial Acts Application Act 1969* (NSW) (see Enid Campbell, *Parliamentary*

Border Protection [2017] FCA 730 at [42]–[48]. See also *BSE17 v Minister for Home Affairs* [2018] FCA 1926 at [33]; *Djokovic v Minister for Immigrant Services and Multicultural Affairs* (2022) 289 FCR 21 at [28], [78]–[90].

¹¹ The Minister does not understand Asset to contend that the Joint Authority **as decision-maker** infringed parliamentary privilege by having regard to the parliamentary statement, as distinct from Asset’s contention that the Minister **as litigant** would infringe parliamentary privilege in the way set out above. (In particular, the Minister notes that Asset concedes that the Minister “was at liberty to decide on what basis he would determine the Applications and what evidence he would rely on”, and he “[c]hose a second reading speech” (AS [35]).) Any such contention would be a radical one, unsupported by authority: see *Egan v Willis* (1998) 195 CLR 424 at 490–491; *Mees* (2003) 128 FCR 418 at [77]–[78]; *The President of the Legislative Council of WA v Corruption and Crime Commission (No 2)* [2021] WASC 223 at [136]–[137]. See also Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) at 19–21. Such a contention, if it were to be made, may raise significant constitutional issues, in respect of which no notices have been served under s 78B of the *Judiciary Act 1903*.

¹² A second reading speech made with respect to the Bill that became the *Environmental Planning and Assessment (Sea Bed Mining and Exploration) Act 2024* (NSW) (**EPAA Act**).

¹³ Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003), p 10; see also *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 333 [H]–334 [C], and *Pepper v Hart* [1993] AC 593, 638 [G]–639 [B].

Privilege (Federation Press, 2003), p 10; see also *Prebble* at 333 [H]–334 [C], and *Pepper v Hart* at 638 [G]–639 [B]).

25. It can be accepted that NSW parliamentary privilege applies to this proceeding, though not by operation of s 79 of the *Judiciary Act* as Asset suggests (AS [27]),¹⁴ but rather having regard to:
- 25.1. The doctrine of necessity (see e.g. *Gipps v McElhorne* (1881) 2 LR (NSW) 18 at 21, 24, 25; Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) at 490). The relevant rule, that things said or done in the parliament cannot be questioned or impeached, is so fundamental to the proper functioning of the NSW parliament that this rule must be taken not only to be necessarily implicit in the *Constitution Act 1902* (NSW), but also to have been intended to apply to the maximum extent of NSW legislative power. The rule therefore applies extraterritorially, throughout the federation.
- 25.2. Further or alternatively, the development of the common law of Australia to reflect the constitutional fact of federation giving rise to a choice of law rule¹⁵ that, in any part of Australia, where a question arises concerning proceedings of parliament of a State, the applicable law is the law pertaining to parliamentary privilege of that State (see *Re Trevor (No 2)* [2017] FCA 927 at [33]).
- 25.3. Further or alternatively, the development of the common law of Australia to reflect the constitutional fact of federation giving rise to the recognition of parliamentary privilege as part of the common law of Australia (see *Re Trevor (No 2)* at [33]).
26. The purpose of Art 9 is “to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts” (*Prebble* at 334).
27. The concept of “impeaching” or “questioning” parliamentary proceedings has not been defined exhaustively. But certain parameters are clearly established. Parliamentary

¹⁴ Section 79 of the *Judiciary Act* could not, on its proper construction, pick up s 6 of the *Imperial Act Application Act 1969* (NSW) in this proceeding (being conducted in Western Australia), because s 6 is not a “law of” Western Australia within the meaning of s 79 of the *Judiciary Act*. Moreover, it seems doubtful that s 6 would apply of its own force in WA because by its terms it provides that the Bill of Rights shall “be in force in New South Wales”. Cf. *Sportsbet Pty Ltd v New South Wales (No 3)* [2009] FCA 1283 at [15]–[18]; *Mees v Road Corporation* (2003) 128 FCR 418 at [75]).

¹⁵ Section 80 of the *Judiciary Act* operates to direct the Court to identify the relevant choice of law rule: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [44], [103] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

privilege is not a blanket prohibition on courts referring to the proceedings of Parliament at all. Modern authorities have evolved since the broad view taken by Blackstone (*Prebble* at 334; *Pepper v Hart* at 638; cf. AS [28]). Evidence of parliamentary proceedings **can** be used to prove “what was done and said in Parliament as a matter of history” provided that it does not go any further than this and engage in an examination of that parliamentary event (*Prebble* at 337; *Mees* at [80]).

28. Accordingly, as Asset acknowledges (AS [33]), the Court can receive evidence of what the Hon Paul Scully MP said in fact, as recorded in the Reasons and annexed thereto.
29. Critically, it is the **applicant** for judicial review who bears the onus of showing error (*LPDT* at [10]). So, relevantly to ground 2 of review, it is **Asset** who bears the onus of proving, or the burden of persuasion, that there was “an absence of evidence (or material)” for a finding made in connection with the Decision (*Bond* at 358; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [585]). In particular, it is Asset who bears the onus of proving, or the burden of persuading, that the Speech (in fact given) had no probative value in support of the Minister’s “finding” (in fact made) that “broadly held community opposition” existed within NSW to relevant activities.
30. Contrary to Asset’s submissions, it is not incumbent on the Minister (as a respondent in these proceedings) to seek to prove the “truth” of what was stated by the Hon Paul Scully MP. Indeed, the Minister has no onus of proof, or burden of persuasion, in this judicial review proceeding whatsoever.
31. For Asset to discharge its onus or burden, it would need to invite the Court to engage in, at the very least, a “critical examination of the content of what has been said to Parliament” (see *Mees* at [80]) — or in other words, to engage in a process of determining what was “the true meaning of [the statement], and what were the proper inferences to be drawn from [it]” (see *R v Secretary of State for Trade; ex parte Anderson Strathclyde plc* [1983] 2 All ER 233 at 239, cited in *Mees* at [81]). That is impermissible (see *Mees* at [80]–[81]; *Prebble* at 337; *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 225–227 and 230–231.).
32. Thus, it is **Asset** who seeks to “impeach” the Speech in this proceeding; it is Asset whose case must infringe parliamentary privilege. The Court cannot entertain such a case. Therefore, faithfully applying orthodox principles as to who bears the onus of proof or

burden of persuasion, ground 2 should be dismissed. The flaw in Asset’s argument is that it invites the Court to reverse the onus of proof or burden of persuasion.

33. Insofar as the operation of parliamentary privilege may produce “unfairness”, in that it may operate here to preclude Asset from making a submission that it might otherwise have made as to the probative value of the parliamentary statement (cf. AS [34]–[35]), that is not something the Court can remedy: see *Carrigan v Cash* [2016] FCA 1466 at [13] and the cases referred to therein. A similar result obtains when public interest immunity applies: see *Plaintiff M46 v Minister for Immigration* (2014) 139 ALD 277 at [37]; *SDCV v Director-General of Security* (2022) 277 CLR 241 at [13], [77], [313]. That is, the fact that parliamentary privilege (or public interest immunity) “handicaps one of the parties to the litigation” does not preclude the Court from exercising its ordinary jurisdiction: cf. *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [24].

Unreasonableness (ground 3 of review)

34. The Joint Authority’s conclusion that granting the Applications was not in the public interest had an evident and intelligible justification. For the reasons addressed at [15] and [18]–[19] above: it was permissible for the Joint Authority to consider whether it would be in the public interest to grant the applications; and it was permissible for the Joint Authority to have regard to what it conceived to be the existence of broadly held community opposition in NSW to the relevant activities when assessing the public interest.
35. Asset challenges the Joint Authority’s reasoning on three bases: *first*, Asset says that the Joint Authority’s consideration of the EPAA Act “infringes the principle of non-contradiction” (AS [43]–[44]); *second*, Asset says that the Joint Authority afforded “excessive deference” to the passage of the EPAA Act and the Speech (AS [45]–[47]); *third*, Assets says that the Speech was “taken out of context and is of no probative value” (AS [48]).
36. All three arguments may be answered together. First, insofar as Asset’s arguments on this ground seek to (or need to) impugn the Joint Authority’s reasoning on the basis that the “true meaning” of the parliamentary statements does not support the Minister’s “finding”, then they would infringe parliamentary privilege for the reasons outlined at [26]–[27] and [31]–[32] and cannot be entertained.

37. Second, in any event, the Joint Authority’s Reasons do not commit errors of logic as alleged by Asset. What the Joint Authority in fact did was to reach a view about the existence of community opposition to the activities the subject of the Applications, based on statements by parliamentarians made in connection with the Bill that became the EPAA Act. Read fairly, that is what the Reasons evince at [71]–[74] (cf. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272). Ascertaining community opposition from **statements by parliamentarians** made in connection with a Bill is not the same thing as relying on the **enactment of an Act** (cf. AS [46]) or the **legal effect** of such an Act (cf. AS [43]–[44]). Once that is understood, the Joint Authority’s reasoning involves no contradiction of any kind. In particular, it does not involve attributing any statement made in Parliament as “indicative of the objective intention of Parliament” (cf. *Wilson v First County Trust (No 2)* [2004] 1 AC 816 at [66]), or suppose that the members of Parliament in enacting the EPAA Act “necessarily agreed with the minister’s reasoning or his conclusions” (cf. AS [66]).

Materiality

38. The Minister accepts that if the Decision cannot be sustained based on the Public Interest Ground (grounds 2 and 3 of review), then attention would turn to the Financial Capacity Ground (grounds 4 and 5 of review). By the same token, given that the Financial Capacity Ground was an independent basis for the Joint Authority’s Decision, it also follows that if none of grounds 1 to 3 are established, then the proceeding must be dismissed irrespective of grounds 4 or 5: the Decision could not have been different even if ground 4 or 5 have merit (see *LPDT* at [7]; *Bond* at 353, 384).
39. In any event, grounds 4 and 5 should also be rejected for the reasons outlined below.

THE FINANCIAL CAPACITY GROUND

Procedural fairness (ground 4 of review)

40. The Minister accepts that the Joint Authority was required to afford Asset procedural fairness when considering the Applications: AS [49]. The Joint Authority did so. The Joint Authority gave Asset “practical, direct and non-misleading advice” about the “factors critical” to its decision (*Stowers v Minister for Immigration and Border Protection* (2018) 265 FCR 177 at [49], [53]). And the Joint Authority did not fail to give Asset an opportunity to deal with “adverse information that [was] credible, relevant and

significant to the decision to be made” (*AB v Independent Broad-based Anti-corruption Commission* (2024) 278 CLR 300 at [25]); in any event, Asset suffered no practical injustice.

41. The crux of Asset’s complaint is that the Joint Authority did not disclose to it advice that the Joint Authority received from NOPTA. However, it is important to understand the context in which that advice was received, the nature and limitations of the advice, and what NOPTA could give to Asset.
42. Under the Act, NOPTA communicates on behalf of the Joint Authority, and otherwise assists and advises the Joint Authority.¹⁶ In particular, NOPTA’s functions include “to provide information, assessments, analysis, reports, advice and recommendations” to the responsible State Minister and/or the responsible Commonwealth Minister in relation to the performance of the functions, or the exercise of the powers, of the Joint Authority.¹⁷
43. The issues of whether Asset had the financial capacity to complete the proposed works, and the accuracy of Asset’s estimate of the cost of the works, were both squarely raised by the Joint Authority (via NOPTA) with Asset, before the Joint Authority made the Decision.
 - 43.1. On 23 March 2023, NOPTA wrote to Asset and noted that, in order to facilitate decisions by the Joint Authority on the applications, Asset may wish to provide “[u]pdated information about Asset’s financial ... capacity to undertake the requested work program”.¹⁸
 - 43.2. On 18 April 2023, Asset responded, and said that the Joint Authority had no basis to conclude that the titleholders lacked “the availability of the financial means” to undertake the work program, as the titleholders had “establishe[d] a history of raising capital for works regarding PEP-11”.¹⁹ Annexure 3 to the response set out “Indicative Expenditure” for both Applications.²⁰
 - 43.3. On 22 May 2023, NOPTA wrote to Asset and requested further information about its financial capacity.²¹ Relevantly, NOPTA sought Asset’s confirmation of its

¹⁶ Act, s 63, 695B.

¹⁷ Act, s 695B(1)(a) and (b).

¹⁸ First Breeze Affidavit, p 235–236.

¹⁹ First Breeze Affidavit, p 238, 246 [19].

²⁰ First Breeze Affidavit, p 261–262.

²¹ First Breeze Affidavit, p 269.

understanding drawn from the April 2023 submission referred to above (being that the indicative expenditure for the drill exploration well had risen from approximately \$15M to approximately \$20M), and requested that Asset provide relevant information to demonstrate sufficient financial resources.²² NOPTA also sent copies of its factsheets and guidelines for assessment of applications.

43.4. On 28 June 2023, Asset responded.²³ However, Asset gave no further specific information on the likely cost of the program.²⁴

43.5. On 12 September 2023, NOPTA emailed Asset and requested that it identify the estimated costs for particular aspects of the program, being its operational costs, preparation and submission of an environmental plan, and rig booking.²⁵ Asset responded by letter on 2 October 2023.²⁶

43.6. On 18 September 2024, NOPTA wrote to Asset annexing a statement of reasons for the Minister’s “preliminary view” that the applications should be refused, and invited submissions in response (**Preliminary Reasons**).²⁷ The Preliminary Reasons address in some detail the Minister’s “concern[] that the cost of the proposed exploration well may be significantly in excess of the amounts estimated by the Applicant to date” ([60]ff). Ultimately, after addressing the proposal submitted by Asset (from COSL Drilling Europe (CDE)) and considering the cost of the previous well drilled by Asset, the Preliminary Reasons state that the “the cost of the exploration well...is likely to be at least \$40 million, and potentially higher”: [73]. “[I]t appears that the cost of drilling the exploration well is likely to be double or more the cost that is presently estimated”: [80].

43.7. On 15 November 2024, Asset made submissions in response to the Preliminary Reasons.²⁸ Relevantly, Asset stated: that the titleholders’ “indicative figure” of \$20M was “within the range of equivalent estimates provided by other titleholders” ([19(b)]), referring to an appendix with a “random sample” of indicative costs given for 17 exploration permits in the NEATS online system; that “detailed costings for

²² First Breeze Affidavit, p 270-271.

²³ First Breeze Affidavit, p 330.

²⁴ Cf. First Breeze Affidavit, p 331 [6], 332 [6].

²⁵ First Breeze Affidavit, p 452.

²⁶ First Breeze Affidavit, p 455.

²⁷ First Breeze Affidavit, p 492.

²⁸ First Breeze Affidavit, p 525.

exploration wells are not required for work bid programmes” ([19(d)]; that “the amount it will cost to drill the exploration well will be determined by the market”; that “[i]t can be accepted that this figure may prove to be greater than the indicative cost given in the work programme of \$20m” but that “on the responsible Commonwealth Minister’s view that the proposed well will cost c.\$41m...the Applications should still be granted as the Titleholders will have, and will raise, sufficient capital to complete the proposed work programs” ([19(e)]), noting the Titleholders’ plan to raise \$73M ([19(f)], [20(c)iii]).

44. There can have been no denial of procedural fairness on the basis that Asset was not fairly notified of a critical issue bearing on the Decision. It was not necessary for the Joint Authority to make any more specific request for “revised estimated costings for the proposed exploration well” (cf. AS[52]).²⁹ The correspondence made perfectly clear that an issue in the making of a decision was likely to be whether \$20M may be an underestimate of the proposed well cost (or, more precisely, whether the cost was “likely to be double or more the cost” estimated by Asset (i.e., \$40M or more) (see Preliminary Reasons, [80]).³⁰ Asset had ample opportunity to say whatever it wished to the Joint Authority about this (including by providing revised estimated costings if it so chose).
45. It was in the context outlined above that NOPTA gave the advice. In giving the advice, NOPTA was performing its statutory function of providing “information, assessments, analysis, reports, advice and recommendations” to the Joint Authority: Act, s 695B. It has been held by a Full Court that “[t]here is no principle by reference to which internal public service memoranda in connection with an impugned decision need (except, perhaps, in extraordinary circumstances) be provided” to the subject of a decision (*Commissioner of Taxation v Asiamet (No 1) Resources Pty Ltd* (2004) 137 FCR 146 at [183]). That is apposite by analogy here, and there are no such extraordinary circumstances.
46. Regarding the issue of financial capacity, the NOPTA Advice stated “NOPTA **agrees** with the titleholders (paragraph 19(e) of the Response) that the cost to drill the exploration well will be determined by the market.” (emphasis added) The NOPTA Advice also contained an estimate of the potential costs of the proposed works, being that the well

²⁹ And cf. Second Breeze Affidavit, [7(d)].

³⁰ In the result, the Joint Authority **downwardly revised** its estimate: the cost of drilling the well was “likely to be one and a half times or more the cost that is presently estimate by the Applicant” (i.e., \$30M or more): Reasons, [124].

would cost “approximately A\$36 million using a jack-up rig or A\$53 million using a semi-submersible rig.”³¹ The NOPTA estimates were based on confidential information received by NOPTA as part of its regulatory functions.³² The confidential information could not have been provided to Asset, and was not even provided to the Joint Authority.³³

47. In all of these circumstances, there was no unfairness; there was no “practical injustice”.
- 47.1. Absent source information, which as noted above could not be provided to Asset, Asset could not have critiqued the NOPTA Advice in any meaningful way.³⁴ Lacking source information, Asset could not have commented on the basis of the figures in the NOPTA Advice estimates, or rationally have sought to distinguish its proposed well from the other projects on which those figures were based.
- 47.2. All that Asset could have said, in response to the NOPTA estimates, was that it estimated its project would cost “\$X”. Asset had already been given multiple opportunities to do so, particularly in its response to the Preliminary Reasons.³⁵ Further, Asset had the opportunity to address the particular concerns of the Minister reflected in the Preliminary Reasons as to why Asset may have underestimated the cost of the proposed works: at [61]—[67].
- 47.3. Asset had communicated its position clearly on the estimated costs of the works. Asset’s response to the Preliminary Reasons was that: the cost will be “determined by the market”; the cost “may prove to be greater than the indicative cost given in the work programme of \$20m”; and Asset would raise sufficient capital to complete the proposed works, even if the well cost “c.\$41m”, as contemplated in the Preliminary Reasons.³⁶
48. Indeed, in the context of Asset’s and NOPTA’s correspondence about the estimated costs of the well; Asset’s acceptance (in response to the Preliminary Reasons) that the cost would be determined by the market and that the market cost might be “c.\$41m”; and Asset’s submissions on those accepted premises, it is difficult to see how the NOPTA Advice is properly characterised as **adverse** information that was credible, relevant and

³¹ NOPTA Advice (Annexures 51 and 52 to Reasons: Decision Brief, pp 1963, 1979).

³² Affidavit of Graeme Waters.

³³ Affidavit of Graeme Waters, [13].

³⁴ Cf. Second Breeze Affidavit, [7(a)-(c)].

³⁵ And on the other occasions identified at [43] above.

³⁶ Letter from Asset, 15 November 2024, [19(e)] (Annexure 49 to Reasons: Decision Brief, p 1667).

significant to the Decision or, in any event, how Asset suffered any practical injustice (cf. *BLX16 v Minister for Immigration and Border Protection* [2019] FCAFC 176, [49]).³⁷ At most, the NOPTA Advice set out information, the basis of which could not be disclosed to Asset, as to what the actual cost of other wells had been, as some sort of benchmark for what the market **might** determine the cost to be (cf. *Snedden v Minister for Justice for the Commonwealth of Australia* (2014) 230 FCR 82 at [201], [204], [222]). Asset had had abundant opportunity to provide whatever evidence it wished, as to what the actual market cost of drilling the well might be.

49. Asset has not established that there was any practical unfairness in the decision-making process. Ground 4 should be rejected.

Failure to estimate well costings accurately (ground 5 of review)

50. Asset alleges error in the Joint Authority’s interpretation of a works proposal issued by CDE (**CDE Offer**), particularly in its accounting for CDE’s requirement of an “on-demand bank guarantee” (AS [63]–[66]). The terms and availability of the required bank guarantee are not apparent on the face of the CDE Offer. There is no error apparent on the face of the documents (cf. AS [66]).
51. In any event, the Joint Authority’s conclusion that Asset had failed to estimate well costings accurately did not depend on its interpretation of the CDE Offer. The Court should not find that there was “no evidence”³⁸ for that conclusion; nor was the conclusion unreasonable. There was probative material to support the conclusion that Asset had significantly underestimated the costs of the proposed works, as follows:
- 51.1. The compilation of estimated costs of other wells submitted by Asset indicated “an average cost per well of \$30 million”, which was 150% of Asset’s “indicative”³⁹ estimate of \$20 million: Reasons at [85], [94].
- 51.2. The New Seaclem 1 well, which Asset had previously drilled in the Permit area, had a total cost of \$29,977,916: Reasons at [87].

³⁷ Notably also, after receiving the NOPTA Advice, the Joint Authority effectively **revised downward** its estimate of the likely costs of drilling the well compared to that which was disclosed to Asset in the Preliminary Reasons: the Preliminary Reasons estimated c\$40M (i.e., “double” or more the indicative cost of \$20M); whereas the Reasons estimated c\$30M (i.e., “one and a half times” or more the indicative cost of \$20M).

³⁸ In the sense explained above at [29].

³⁹ Letter from Asset, 15 November 2024, [19(b), (e)] (Annexure 49 to Reasons: Decision Brief, p 1667–8).

- 51.3. It was likely that the proposed well would cost more than the New Seaclem 1 well, because the proposed well was significantly deeper (3,714m compared to 750m): Reasons at [88].
- 51.4. The CDE Offer was premised on a period of 31 days, but a revised work schedule indicated that “the scope of the proposed drilling window totalled 67 days”: Reasons at [90]. Although this factor was not expressly relied on by the Joint Authority, the discrepancy (of over 100%) in estimated drilling time would also have been a rational basis to accept that the costs of the works would be more than Asset’s estimate.
- 51.5. As noted above, Asset itself acknowledged that the cost of the works “may prove to be greater than the indicative cost given in the work programme of \$20m”, and it indeed might cost “c.\$41M”.
52. The effluxion of time does not advance Asset’s position: cf AS [67]–[68]. As explained above, the estimated costs of the works were raised squarely by the Joint Authority. It was open to Asset to obtain a revised and updated work proposal at any time.
53. In light of the matters listed above, there was probative material on which a rational person could reasonably conclude that Asset had underestimated the cost of the works.
54. Moreover, the Minister’s interpretation of the CDE Offer was set out in the Preliminary Reasons (at [64]–[67]). In its detailed response, Asset did not say that there was any error in that interpretation.⁴⁰ The same approach was taken by the Joint Authority in the final Reasons, at [89]–[92]. The failure of Asset to identify any error in the Preliminary Reasons tends to undermine the position now taken by Asset that this was irrational, or an obvious error: AS [66]; the failure of Asset to identify any error (despite otherwise comprehensively addressing alleged flaws in the Preliminary Reasons) itself provided a rational foundation for the Joint Authority to proceed on the basis of that interpretation.
55. Ground 5 should be rejected.
56. Further, the failure of Asset to identify any error in the same analysis set out in the Preliminary Reasons would be relevant to the Court’s remedial discretion, and would weigh against the granting of relief in light of the (same) Reasons subsequently given, even if some irrationality were demonstrated (which has not been demonstrated).

⁴⁰ See Letter from Asset, 15 November 2024 (Annexure 49 to Reasons: Decision Brief, p 1662).

CONCLUSION

57. No material error has been established in the Decision. Asset's application for judicial review should be dismissed with costs.

Dated: 2 September 2025

**N Wood
A Wharldall**