

NOTICE OF FILING

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| File Number: | WAD36/2025 |
| 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

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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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 SUBMISSIONS ON THE APPLICATION OF THE PRIVILEGES OF THE PARLIAMENT OF NSW

CONTEXT AND OVERVIEW

1. The applicant (**Asset**) seeks judicial review of a **Decision** made by the respondents (**Joint Authority**) under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. The first respondent (**Minister**) submits that the application should be dismissed, for reasons developed in the Minister's primary submissions (dated 2 September 2025).
2. In connection with the Public Interest Ground for the Decision,¹ the Joint Authority had regard to a Second Reading Speech made by the Hon. Paul Scully in the Parliament of New South Wales. This speech was given during proceedings in the NSW Parliament, and therefore engages the privileges of the NSW Parliament: *Prebble v Television New Zealand* [1995] 1 AC 321 at 328
3. Two of the grounds of review advanced by Asset raise issues about the scope of NSW parliamentary privilege:
 - 3.1. By **Ground 2**, Asset alleges that there was "no evidence" for the Public Interest Ground of the Decision. Asset alleges that the Minister cannot resist the allegation without infringing parliamentary privilege (by relying on the "truth" of statements

¹ As explained in the Minister's primary submissions, the Decision was made on two bases: the Public Interest Ground, and the Financial Capacity Ground.

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in the speech). The Minister, however, submits that it is Asset’s challenge that would be contrary to parliamentary privilege.

- 3.2. **Ground 3** is a contention of unreasonableness. The Minister submits that aspects of Asset’s argument in support of this ground would be contrary to parliamentary privilege, by engaging in a “critical examination” of the content of the parliamentary statements, and making submissions about their “true meaning”: cf *Mees v Roads Corporation* (2003) 128 FCR 418 at [80]–[81] (Gray J).
4. At the hearing on 16 September 2025, the Court made orders:
 - 4.1. that the proceeding is to be heard and determined in New South Wales at the Court’s New South Wales Registry; and
 - 4.2. giving the parties leave to file and serve written submissions concerning the issues raised in notices served under s 78B of the *Judiciary Act 1903* (Cth), including the application of the parliamentary privilege of the Parliament of New South Wales to the proceeding when the Court is sitting and determining the matter in New South Wales.
5. These submissions set out the Minister’s position as why NSW parliamentary privilege applies to this proceeding, following the orders made on 16 September 2025. In summary
 - 5.1. The privileges of the NSW parliament apply of their own force, as part of the composite body of law applicable in federal jurisdiction. This follows from s 6 of the *Imperial Acts Application Act 1969* (NSW) and by necessary implication from the *Constitution Act 1902* (NSW).² The application of NSW parliamentary privilege does not depend on s 79 of the *Judiciary Act*.
 - 5.2. However, if the Minister’s submissions are not accepted, it follows that the NSW Acts are laws that “regulate the manner of exercise of jurisdiction”: *Rizeq v Western Australia* (2017) 262 CLR 1 at [83]. Therefore, even if the NSW Acts do not apply of their own force, they apply in federal jurisdiction when the court is sitting in NSW by virtue of s 79 of the *Judiciary Act*.
6. Accordingly: whether the NSW Acts are characterised as laws which apply of their own force, or as laws which regulate jurisdiction (and therefore, depend for their operation in federal jurisdiction on s 79 of the *Judiciary Act*), the NSW Acts apply in federal

² Together, “the NSW Acts”.

jurisdiction when the Court is sitting in NSW. Accordingly, it may not be necessary for the Court to determine which of these characterisations is correct because – whichever of these characterisations is accepted – NSW parliamentary privilege would apply.

7. Further, in this context, it is not necessary to determine any novel constitutional issues raised by the NSW Attorney-General regarding s 106 of the *Constitution* in his submissions dated 12 September 2025. The Minister embraces the NSW Attorney-General’s submissions regarding the prudential approach to resolving constitutional questions: 12 September 2025 submissions at [7]–[10].

APPLICATION OF NSW PARLIAMENTARY PRIVILEGE

8. This proceeding was commenced in the Western Australian Registry, and was to be heard in Western Australia. In the Minister’s primary submissions, the Minister identified three pathways by which NSW parliamentary privilege could be accepted to apply in the proceeding, if the proceeding were heard in Western Australia: at [25]. However, as the proceeding will now be heard and determined in NSW, different considerations apply.

Laws which apply in federal jurisdiction

9. Uncontroversially, this proceeding is in federal jurisdiction. The principles concerning laws applicable in federal jurisdiction were explained by the High Court in *Rizeq* and in *Masson v Parsons* (2019) 266 CLR 554. State laws apply in federal jurisdiction (according to their terms), subject to the limitations on State legislative power arising from Ch III of the Constitution (and subject to s 109 of the Constitution, not presently relevant). It is useful to distinguish two categories of State law in this respect (noting that some State laws may not “fall neatly” within one or the other category³):

- 9.1. **State laws which apply “of their own force”, being laws that are “determinative of the rights and duties of persons” or apply “independently of anything done by a court”:** *Masson v Parsons* at [30], [39]; *Rizeq* at [105]. This category of laws excludes State laws which purport to govern or regulate the manner of exercise of federal jurisdiction, because States do not have legislative power to affect the exercise of federal jurisdiction: *Rizeq* at [58], [61]. Otherwise, State laws form part of the “single though composite body of law” applicable in federal jurisdiction: *Rizeq* at [48] (see also at [98]).

³ *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at [224]; see also [222]–[223] (Edelman J).

- 9.2. **State laws which are “picked up” and applied as federal law by s 79 of the *Judiciary Act*.** The “incapacity” of State laws to affect federal jurisdiction “explains the necessity for s 79 of the *Judiciary Act* and is the key to understanding the nature and extent of its operation”: *Rizeq* at [63]. Accordingly, s 79 “picks up” State laws which govern or “regulate the manner of exercise” of jurisdiction, including laws of evidence, and laws “which regulate the procedure of a court”: *Rizeq* at [83], [89] (see also [100]; *Masson v Parsons* at [38]). By its terms, s 79 of the *Judiciary Act* picks up the laws of the State in which the Court is exercising federal jurisdiction (not the laws of all States, simultaneously).

NSW parliamentary privilege applies of its own force

10. The Minister submits that the law of NSW parliamentary privilege, regarding the freedom of speech in parliamentary debates, applies of its own force in federal jurisdiction in NSW, arising from two sources.

First source — under the Imperial Acts Application Act (IAA Act)

11. Article 9 of the *Bill of Rights 1688* enshrines parliamentary privilege.⁴ It states “[t]hat 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 Bill of Rights is continued in force “in New South Wales” by s 6 of the *IAA Act*, which relevantly states:

6 Preserved Imperial enactments

Each Imperial enactment mentioned in Part 1 of the Second Schedule to this Act ... so far in either case as it was in force in England on the twenty-fifth day of July, one thousand eight hundred and twenty-eight—

- (a) is declared to have been in force in New South Wales on that day by virtue of the Imperial Act 9 George IV Chapter 83, and
- (b) except so far as affected by any Imperial enactments or State Acts from time to time in force in New South Wales—
 - (i) is declared to have remained in force in New South Wales from that day,
 - (ii) shall from the commencement of this Act be in force in New South Wales, and
- (c) is not repealed by section eight of this Act.

⁴ Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003), p 10; see also *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 333 [H]–334 [C].

- 11.1. The *Bill of Rights* is “mentioned” in Sch 2 Pt 1 to *IAA Act*. It is not otherwise “affected” by any Imperial enactments or other State Acts.⁵ Therefore the *Bill of Rights* is presently “in force in New South Wales”: s 6(b)(ii).
12. Section 6 of the *IAA Act* was considered in *Egan v Willis* (1998) 195 CLR 424. At [23], Gaudron, Gummow and Hayne JJ acknowledged that “[a]pplying the Bill of Rights in New South Wales presents some textual problems, if only because it is a statute that, when enacted, was directed to the English courts and Parliament.” Yet their Honours accepted that s 6 of the *IAA Act* concerned the NSW Parliament, stating:
- the evident intention ... is that the constitutional norms prescribed by the Bill of Rights should apply in New South Wales. In particular, so far as presently relevant, the evident intention was that there should be some limits upon the extent to which events happening in the New South Wales legislature may be considered in the courts. It may very well be that effect is to be given to that intention simply by reading the references in Art 9 to ‘court’ and ‘parliament’ as references to the courts and Parliament of the State.
- 12.1. At [129], Kirby J stated “Against the background of its constitutional importance, and the trouble taken by the New South Wales Parliament as recently as 1969⁶ to preserve its operation in that State, it is plain that the language of Art 9 must be taken to refer, with such modifications as are necessary, to the Parliament of the State and hence to each of the chambers which constitute it in which ‘speech and debates or proceedings’ take place ... Any suggestion that Art 9 is inapplicable to the Council of the Parliament of New South Wales must therefore be rejected.”⁷
13. Accordingly, s 6 of the *IAA Act* should be read (in its operation with Sch 2 Pt 1) as protecting the privileges of the NSW Parliament, at least “in New South Wales”. The Court will hear and determine the proceeding in New South Wales. Therefore, the hearing and determination of this proceeding falls within the terms of s 6. If s 6 of the *IAA Act* applies in federal jurisdiction (addressed below), then NSW parliamentary privilege applies in this proceeding.

⁵ No party has in this proceeding suggested otherwise. Similarly, in *Egan v Willis* (1998) 195 CLR 424 at [22], Gaudron, Gummow and Hayne JJ recorded (without disapproval) that “It was not suggested that Art 9 of the Bill of Rights had been affected by any Imperial or State Act”.

⁶ Being a reference to the *IAA Act*, which was enacted in 1969.

⁷ See also Callinan J at [180] and McHugh J at [69].

Second source — by the doctrine of necessity

14. The privileges of the NSW Parliament also derive from the doctrine of necessity. The *IAA Act* does not supervene parliamentary privilege derived in that manner (either by clear language or by necessary implication).⁸ Rather, the two sources for parliamentary privilege exist concurrently.
15. The privileges of the NSW Parliament — including the freedom of speech in NSW Parliament — have been emphatically recognised as fundamental and inherently necessary to the functioning of the NSW Parliament: *Gipps v McElhone* (1881) 2 LR (NSW) 18 at 21 (Sir Martin CJ), 24 (Sir W Manning J), 25 (Windeyer J); *Chenard & Co v Arissol* [1949] AC 127 at 134 (Privy Council); see also Campbell, *Parliamentary Privilege* at 10. Therefore, parliamentary privilege must be taken to be necessarily implicit in the *Constitution Act 1902* (NSW) (which establishes the Parliament): see also Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004), at 490. If the *Constitution Act 1902* (NSW) applies in federal jurisdiction, then by necessary implication, NSW parliamentary privilege applies in this proceeding.

NSW parliamentary privilege applies of its own force

16. Given that parliamentary privilege limits the use (and therefore, the admissibility) of evidence in court proceedings, it might be argued that parliamentary privilege regulates the exercise of jurisdiction, and cannot apply “of its own force” in federal jurisdiction. However, such a characterisation of parliamentary privilege does not reflect the full scope of parliamentary privilege, and should not be accepted, for the following reasons.
17. ***First***, by their terms, the NSW Acts apply “independently of anything done by a court”, using the language of *Rizeq* at [105]. Parliamentary privilege (as encapsulated in Art 9 of the Bill of Rights) imposes a rule of conduct (a prohibition on impeaching or questioning parliamentary proceedings) that applies “in any court or place out of Parliament”.⁹ Indeed, it has been recognised that responsibility for applying and enforcing parliamentary privileges lies also with the Parliament itself: “it is for the courts to judge of the existence ... of a privilege, but, given an undoubted privilege, it is

⁸ *Coco v The Queen* (1994) 179 CLR 427 at 437–438 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁹ As to the meaning of “place out of Parliament”, see *Mees* (2003) 128 FCR 418 at [77]–[78]; *The President of the Legislative Council (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.

for the House to judge of the occasion and of the manner of its exercise”: *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162. This indicates that the NSW Acts apply of their own force in federal jurisdiction.

18. **Second**, as observed by Jagot J in *Re Trevor (No 2)*, “Parliamentary privilege is not a mere exclusionary rule of evidence. It is a fundamental Constitutional doctrine essential to the separation of powers”: (2017) 122 ACSR 418 at [36(4)]. Similarly, Gordon and Edelman JJ have remarked that parliamentary privilege is a “bulwark of representative government” which “allows Parliament to perform its functions without obstruction”: *Crime and Corruption Commission (Qld) v Carne* (2023) 97 ALJR 737 at [106].

18.1. Also in *Re Trevor (No 2)*, Jagot J described as “cogent” a submission that the law of Parliamentary privilege (in that case, of the Parliament of Western Australia) was “a substantive and fundamental principle” which applied in any matter irrespective of s 79 of the *Judiciary Act*: at [33]. It was not necessary for her Honour to decide the issues raised concerning parliamentary privilege: [34].

19. **Third**, parliamentary privilege confers an immunity on parliamentarians for things said or done in the course of parliamentary proceedings: *Rann v Olsen* (2000) 76 SASR 450 at [172], [178]–[180] (Doyle CJ); *Mees* at [76]; see also Campbell, *Parliamentary Privilege* at 11. By way of illustration, parliamentary privilege precludes (*inter alia*) any action for defamation which could otherwise be brought for a publication of defamatory imputations in the course of parliamentary proceedings. Therefore, parliamentary privilege — given force by s 6 of the IAA Act, and arising from the *Constitution Act 1902* (NSW) — is “determinative of the rights and duties of persons”; it is not “directed to the manner of exercise of jurisdiction”: cf *Masson v Parsons* at [38], *Rizeq* at [88]–[89].

If the Minister’s position is not accepted then NSW parliamentary privilege would be picked up by s 79 of the *Judiciary Act*

20. For the reasons developed above, NSW parliamentary privilege applies in this proceeding by virtue of the *IAA Act*, and by necessary implication from the *Constitution Act 1902* (NSW). The Minister’s submission is that NSW parliamentary privilege is not merely a law which governs or regulates the manner or exercise of jurisdiction. If the Minister’s submission is accepted, then NSW parliamentary privilege need not, and cannot, be “picked up” by s 79 of the *Judiciary Act*.

21. But if the Court does not accept the Minister’s submissions, it must follow that s 79 operates to “pick up” the NSW Acts, and that NSW parliamentary privilege applies in this proceeding anyway, through that mechanism.¹⁰
22. If the Court considers that the law of NSW parliamentary privilege does not apply of its own force, it follows that the law is of the other type explained in *Rizeq* — a law which governs or regulates “the manner of exercise” of jurisdiction: at [63], [89], [103]–[104]; *Masson v Parsons* at [30].
23. Assuming that to be the case, s 79(1) of the *Judiciary Act* would be engaged:
- 23.1. Section 79(1) relevantly provides: “The laws of each State [of the type explained in *Rizeq*] ... shall, except as otherwise provided by the Constitution of the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State ... in all cases to which they are applicable.”
- 23.2. In this proceeding, the Court is exercising federal jurisdiction in NSW — because the proceeding is in the NSW Registry, and the Court will hear and determine the matter in NSW. The *IAA Act* and the *Constitution Act 1902* are laws of NSW (“that State”).
- 23.3. There is no provision to the contrary in the Constitution or in the laws of the Commonwealth. The *Evidence Act 1995* (Cth) expressly states that it “does not affect the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament”: s 10(1).¹¹
24. It might be thought that *Mees* and *Sportsbet Pty Ltd v New South Wales (No 3)* (2009) 262 ALR 27 provide some support for this approach. But for the reasons addressed below, those cases reflect a superseded understanding of s 79 of the *Judiciary Act*.
- 24.1. In *Mees*, Gray J (constituting the Federal Court, sitting in Victoria) considered the application of Victorian parliamentary privilege. His Honour observed that “an Act of the Victorian Parliament would not ordinarily have a direct effect on the exercise of the judicial power of the Commonwealth by this court”, and referred

¹⁰ If the Minister’s submissions are accepted, then s 79 is not required for the NSW Acts to apply in federal jurisdiction.

¹¹ In its ordinary meaning, the phrase “any Australian Parliament” refers to the Parliaments of the Commonwealth, States and Territories.

to s 79. Justice Gray concluded that Victorian parliamentary privilege applied in the proceeding, reasoning as follows (at [75]):

No provision of the Constitution, or of any Commonwealth Act, having the effect of preventing s 79 operating to make s 19 of the *Constitution Act 1975* (Vic) applicable in this proceeding was raised in argument. Indeed, s 10(1) of the *Evidence Act 1995* (Cth) expressly provides that that Act does not affect the law relating to the privileges of any Australian Parliament or any house of any Australian Parliament. There appears, therefore, to be no constitutional or other difficulty about the recognition by this court of the privileges of the two houses of the Victorian Parliament.

24.2. In *Sportsbet (No 3)*, Jagot J (also in the Federal Court) referred to the passage from *Mees* set out above, and “adopt[ed] the same reasoning”: at [17]. On that basis, her Honour accepted that NSW parliamentary privilege applied in the Federal Court sitting in NSW: at [19], [21]–[22] (cf *Re Trevor (No 2)*, described above at [18.1]).

25. However, both *Mees* and *Sportsbet (No 3)* were decided before *Rizeq* (in the High Court’s language) “resolve[d] some doubts ... about the sources of law in federal jurisdiction and about the operation of s 79 of the *Judiciary Act*”: at [39]. Professor James Stellios (as his Honour then was) used more forceful language, explaining that *Rizeq* “reconceptualised the purpose and operation of s 79(1) of the *Judiciary Act*”.¹² In light of this shift in understanding of s 79, *Mees* and *Sportsbet* should not be treated as authority for the proposition that State parliamentary privileges apply in federal jurisdiction only by virtue of s 79.

CONCLUSION

26. This Court should be satisfied that NSW parliamentary privilege applies in this proceeding, which will be heard and determined in NSW at the Court’s NSW Registry.

Dated: 7 October 2025

N Wood
A Wharldall

¹² James Stellios, ‘Choice of law in federal jurisdiction after *Rizeq v Western Australia*’ (2018) 46 *Australian Bar Review* 187, 187.