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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

Registrar

Important Information

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No. WAD 36 of 2025

Federal Court of Australia

District Registry: Western Australia

Division: General

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 named in the schedule

Respondents

Applicant's Outline of Submissions in Reply

Overview.

1. Asset Energy submits that the matters raised in the first respondent's Outline of Submissions dated 2 September 2025 **(Respondent's Submissions)** do not prevent Asset Energy from obtaining the relief it seeks.[1] Save for where express concessions are made, these reply submissions ought not be read as evidencing a concession merely because a point remains unaddressed herein.

Public Interest Ground.

There is no onus or burden shift in Asset Energy's case regarding the operation of parliamentary privilege.

2. Asset Energy and the first respondent agree that the Hansard which was central to the Public Interest Ground is subject to parliamentary privilege. The only substantive difference between the parties concerns which way this Court should "jump" in applying parliamentary privilege in litigation. By "jump" this Court has a choice between two alternatives.[2] The first alternative is to allow parliamentary privilege to be used by an administrative decision maker to create unfalsifiable facts in judicial review proceedings. This approach is inconsistent with the settled proposition that "[t]he notion of manufactured truth is irreconcilable with the duty and function of a court to find the facts relevant to the issues in dispute in a case before it": *Mees* (2003) 128 FCR 418, [85]. The second alternative is that parliamentary privilege disables both parties from relying on or otherwise contesting the truth of Hansard in judicial review proceedings.
3. The first respondent's case is that Asset Energy ought to be disabled from questioning the relevant Hansard such that it could never discharge the onus of proof or burden of persuasion regarding the Public Interest Ground: Respondent's Submissions, [23]–[33]. Asset Energy's case is that the

[1] Terms defined in Asset Energy's Outline of Submissions of 5 August 2025 **(Applicant's Submissions)** are used here.

[2] A third option would be to allow the parties to contest the Hansard and not apply parliamentary privilege.

first respondent should be disabled from relying on the truth of the relevant Hansard in these proceedings just as it cannot contest the truth of the Hansard: Applicant's Submissions, [26]–[36]. Properly understood, neither approach concerns the onus of proof or burden of persuasion. The question is simply which party (or parties) should be disabled from either relying on or questioning the truth of the Hansard.

4. Asset Energy's position is clear. The first respondent is disabled from relying on the truth of the Hansard and Asset Energy is disabled from contesting the truth of the Hansard. The onus of proof and burden of persuasion remains with Asset Energy. There is no "reversal" of onus or burden. The reason why the Public Interest Ground cannot be sustained is that the impugned Hansard provides an essential premise for the Minister's Final Reasons. Once this Court disregards the Hansard then there is nothing left on the face of the Minister's Final Reasons or record to support the Public Interest Ground. The onus of proof and burden of persuasion are met by the tender of the Minister's Final Reasons and paucity of the reasoning contained therein: *LPDT* (2024) 280 CLR 321, [11].

5. So, the first respondent's use of the metaphor that Asset Energy is wielding parliamentary privilege as a sword is inapt. It was the first respondent who chose what material he would rely upon. As a result of that choice, the first respondent now invites this Court to enter a world of unfalsifiable facts and unreviewable decisions. It is an invitation that this Court ought not accept.

The evidence and analysis underpinning the Public Interest Ground is legally and logically flawed.

6. Applying the decision in ***CKL21*** (2022) 293 FCR 634, [29], the first respondent asserts that the conclusion that there was "a broadly held community opposition within NSW to gas exploration activities" was not required to be supported by evidence: Respondent's Submissions, [20]–[21]. This is said to follow from the fact that "as the Minister in the migration context need have no 'evidence' for his conception of 'community expectations'.... nor did the Joint Authority need 'evidence' for its conception of 'community opposition'": Respondent's Submissions, [21]. This submission should be rejected for at least three reasons.

7. *First*, it is a *non-sequitur*. It does not follow from *CKL21*, [29] that the first respondent was entitled to conclude that there was broadly held opposition to gas exploration activities absent any probative evidence. The reasoning process for the purposes of applying the expectations of the Australian community, as explained in the ministerial direction, for the purposes of s 501CA of the *Migration Act 1958* (Cth), is made evident in the very next paragraph of the Full Court's reasons. That manner of reasoning requires the Minister to hypothesise "what the Australian community would expect if, like the Minister, *it were informed of all relevant facts and circumstances*":

CKL21, [30] (emphasis added). Such a reasoning process does not resemble the reasoning underpinning the Public Interest Grounds in this case: Applicant's Submissions, [12]–[13].

8. *Second*, and consistent with the preceding paragraph, no party has identified a case in which *CKL21*, [29] has been applied outside the specific context of applying the expectations of the Australian community for the purposes of the *Migration Act 1958* (Cth).

9. *Third*, the conclusion in *CKL21* supports Asset Energy's case. The Full Court *accepted* the applicant for review's submission that "the Minister made an irrational finding in ways relevant to the ultimate finding that [the applicant for review] would present an 'unacceptable risk' to the Australian community if he were released": see at [49], [77]–[80], [86]. In this connection the Court, with respect, correctly rejected the Minister's submissions that the impugned conclusion was a value judgment that was not required to be supported by evidence: see at [57], [77]. So, notwithstanding the first respondent's conclusion that there was "a broadly held community opposition within NSW to gas exploration activities" being an evaluative judgment, it is not immunised from review and requires a probative basis. The logical fallacies (*CKL21*, [80]) in the Public Interest Ground are set out in the Applicant's Submissions, [36]–[48].

Financial Capacity Ground.

It was a denial of procedural fairness not to disclose information within the Undisclosed Advice.

10. It is of the first importance to be precise about how the Undisclosed Advice was used in the Minister's Final Reasons. The estimated well costing information contained in the Undisclosed Advice was: (i) based on *external information* (Undisclosed Advice, p 10); and (ii) relied upon by the first respondent to make the *adverse* finding that the amount which the Titleholders estimated for the existing and proposed work was substantially underestimated: Minister's Final Reasons, [86], [94], [100], [109], [124], and [125]. It appears common ground between the parties that the Undisclosed Advice (i) was provided to the first respondent on 4 December 2024 being in response to Asset Energy's final submissions made on 15 November 2024; and (ii) that no content from the Undisclosed Advice was disclosed to Asset Energy prior to the impugned decisions.

11. The Respondent's Submissions at [40]–[49] provide no basis for taking this case outside of the well settled principle that adverse information that is credible, relevant and significant to the decision to be made should ordinarily be disclosed and an opportunity be given to deal with it.[3]

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[3] *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, [99] (Gaudron J), [140] (McHugh J), [187] (Kirby J); *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966, [123] (McHugh J), [227] (Kirby J); *Applicant VEAL of 2002 v Minister for Immigration* (2005) 225 CLR 88, [15] (the Court); *El Ossman v Minister for Immigration and Border Protection* (2017) 248 FCR 491; [2017] FCA 636, [82] (Wigney J).

12. *First*, the information in the Undisclosed Advice was manifestly averse to Asset Energy. The information was provided to the first respondent as a specific *response* to Asset Energy's final response to the Minister's Preliminary Reasons: Undisclosed Advice, pp 1, 6. The information went to the question of the estimated well costings: Undisclosed Advice, p 10. The information in the Undisclosed Advice was said to be calibrated to the particular exploration activities proposed by Asset Energy "using the schedule provided by the titleholders on 18 April 2023" (i.e. the information was specific to Asset Energy): Undisclosed Advice, p 10. The estimated well costings were material to the Minister's Final Reasons as the information was used by the first respondent to make adverse findings against Asset Energy: Minister's Final Reasons, [86], [94], [100], [109], [124], and [125].

13. *Second,* the information underpinning the Undisclosed Advice was external information, it was said to be "[based] on permanently confidential information provided to NOPTA during regulatory submissions from titleholders (Annual Titles Assessment Reports and Daily Drilling Reports)": Undisclosed Advice, p 10. It falls squarely within the principles for procedurally fair disclosure of relevant information. The fact that the information was contained in a NOPTA advice does not convert that information into being an "internal public service memoranda": *contra* Respondent's Submissions, [45]. The facts are not at all analogous to the *truncated* citation of *Asiamet (No 1) Resources Pty Ltd* (2004) 137 FCR 146, [183] as the *part* of the quotation provided by the first respondent manifestly relates to public service documents *per se* and not adverse information. It follows that to accept the proposition in the Respondent's Submissions, at [45] would be a triumph of form over substance. As is made clear in the Applicant's Submissions at [60], it was open to the first respondent to provide Asset Energy with the *gist* of the relevant well costing information as contained in the Undisclosed Advice. No public service document nor any confidential information (if proved) need to have been disclosed.

14. *Third,* the rules of procedural fairness dictate that an impugned material non-disclosure needs to be assessed against the circumstances of the case. This includes the fact that the salient issues in an administrative decision can change over time. Here, Asset Energy repeats the matters set out in paragraph 60 of the Applicant's Submissions which weigh strongly in its favour. Further, as Asset Energy articulated to the Joint Authority on 15 November 2024 regarding its costings "NOPTA previously advised the Titleholders to have the estimated costs in the amended work program reflect the estimated costs as identified in the pre-existing work program".[4] This fact was

[4] First Breeze Affidavit, DLB48 at [19(a) and (c)]. See too DLB28, [18], [21], DLB30, [1(a)].

not doubted by the first respondent in the Minister's Final Reasons, [95], where the first respondent took the view that the Minister's Preliminary Reasons sufficed to cure any uncertainty on the part of Asset Energy. But this overlooks the fact that on 15 November 2024 Asset Energy was willing pragmatically and appropriately to accede to the Minister's then costings to put any issue of significantly underestimating such costs to one side: Applicant's Submissions, [56].

15. *Fourth*, the non-disclosure of the information contained in the Undisclosed Advice was material. Even accepting, for the sake of argument, the most favourable view of the facts to the first respondent, Asset Energy could have acceded to the proposed well costings contained therein and had the Applications decided on that basis. At that point, there would be no basis for concluding that Asset Energy underestimated substantially the proposed exploration well costs.

16. *Fifth*, in any event, it is not evident that the information contained within the Undisclosed Advice could not be disclosed under s 712(2)(d) and/or s 715(2)(d) of the OPGGS Act. The term *administration* in those sections bears its natural ordinary meaning[5] and the impugned decisions here under ss 264 and 265 were made under the exercise of executive powers under the OPGGS Act and the relevant information in the Undisclosed Advice used in the exercise of those powers.

17. *Sixth*, as an example, insofar as the Daily Drilling Reports referred to in the Waters Affidavit, at [6], [10], [11] contain public information or information disclosed to the ASX then that information could not be confidential in character.

18. *Seventh*, further or in the alternative, for the reasons referred to in paragraphs 10 to 15 above and paragraphs 61 to 68 of the Applicant's Submissions, the first respondent's conclusion that Asset Energy failed to estimate accurately the costs of its proposed exploration well was unreasonable or unsupported by probative evidence.

The interpretation of ss 264 and 265 of the OPGGS Act.

19. The first respondent misconstrued ss 264 and 265 of the OPGGS Act (cf. Respondent's Submissions, [10]). While the powers contained therein are broad, they are circumscribed by the purposes for which they are conferred. A power in s 264 to vary, suspend or exempt the holder of a statutory exploration licence from conditions provides no warrant to consider whether exploration activities *per se* are publicly desirable. To apply s 264 in this manner is to derogate from a grant of a statutory licence. The power of extension in s 265 cannot be applied unrestrained by s 264 to outflank this principle. For example, in *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, Dixon J said that "[p]rima facie a power to make by-laws regulating a subject

[5] Macquarie Dictionary (9th edn, Macquarie 2023), 18.

matter does not extend to prohibiting it either altogether" (at 762). In *Swan Hill* the High Court of Australia held that a widely drawn power to make by-laws to "regulate" and "restrain" did not confer a power to make by-laws to "prohibit".

How parliamentary privilege applies.

20. Asset Energy agrees with the analysis in paragraph 25 of the Respondent's Submissions regarding the path by which the privileges of the Parliament of New South Wales are engaged in this case. The preferable view is that the privileges of the Parliament of New South Wales apply here as a substantive principle of New South Wales law and do not require s 79 (nor arguably s 80) of the *Judiciary Act 1903* (Cth) to apply: *Trevor (No 2)*; [2017] FCA 927; (2017) 122 ACSR 418, [33]. *Rizeq v Western Australia* [2017] HCA 23; 262 CLR 1, [55]–[56], [63]–[64], [90]–[92], [103]–[105] also supports this approach. Asset Energy withdraws the reference to s 79 of the *Judiciary Act 1903* (Cth) in footnote 43 of the Applicant's Submissions.

Conclusion.

21. The impugned decisions of the Joint Authority should be quashed and remitted. The first respondent ought to pay Asset Energy's costs to be assessed if not agreed.

Date: 9 September 2025

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Schedule

No. WAD36 of 2025

Federal Court of Australia

District Registry: Western Australia

Division: General

Respondents

Second Respondent:	**Minister for Natural Resources, as Responsible State Minister of the Commonwealth-New South Wales Offshore Petroleum Joint Authority**