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

No. WAD 36 of 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

Supplementary Submissions of the Attorney General of New South Wales (intervening) filed pursuant to Order 7 made by Jackson J on 16 September 2025

Introduction

1. By order made on 16 September 2025, this proceeding will be heard in the New South Wales Registry of the Court. As a result of that transfer, there is no longer an issue about how the privilege of freedom of speech in the Houses of the New South Wales Parliament applies before a court exercising federal jurisdiction sitting in Western Australia. That issue need not (and therefore ought not) be decided. As a result of the transfer, the issue is how the privilege applies before a court exercising federal jurisdiction sitting in New South Wales.

2. The Attorney General of New South Wales makes the following submissions:

   (a) The Attorney agrees with the Applicant and the First Respondent that the privilege of freedom of speech in the Houses of the New South Wales Parliament applies of its own force in this Court sitting in New South Wales.

   (b) The Attorney agrees with the Applicant and the First Respondent that, in the alternative, the privilege is ***at least*** "picked up" by s 79 of the *Judiciary Act 1903* (Cth).

   (c) The privilege is ***also*** picked up by s 106 of the Constitution. However, the Court need not – and therefore ought not – decide that issue. That means, in particular, that it should not decide whether the privilege is picked up (if at all) ***only*** by s 79.

The privilege applies of its own force

3. In order to identify the applicable pathway for the application of the privilege in these proceedings, it is necessary to determine whether, as a matter of characterisation, Article 9 of the Bill of Rights is a law that regulates the exercise of federal jurisdiction. That is

because a State Parliament has no power to command a court as to the manner of exercise of federal jurisdiction conferred on or invested in that court: *Rizeq v Western Australia*.[1] Accordingly, if Article 9 were such a law, it could only operate if Commonwealth law provided for it to apply. If, however, Article 9 were not such a law, it may apply of its own force (subject to its being inconsistent with the Constitution or a law of the Commonwealth).

4. A Full Court of this Court has said that "the task of identifying whether a State law is one falling within the operation of s 79 of the *Judiciary Act* requires consideration to be given to the statutory context".[2] It is necessary to answer "a question of characterisation as to whether the law is directed to the parties' rights, liabilities, powers or privileges, or alternatively if it is a command to the court".[3]

5. In ***Masson*** *v Parsons*,[4] the High Court held that New South Wales legislation providing for an "irrebuttable" presumption that the biological father of a child born as a result of a fertilisation procedure is not the father of the child is not a law to which s 79 of the *Judiciary Act* applies. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ explained that "s 79(1) is not directed to, and it does not add to or subtract from, laws which are determinative of the rights and duties of persons as opposed to the manner of exercise of jurisdiction".[5] Their Honours said that the presumption in issue that case was "a rule of law determinative of parental status which applies independently of anything done by a court or other tribunal, and which, as such, stands in contrast to a provision that regulates the exercise of jurisdiction".[6]

6. To similar effect, Edelman J said that s 79(1) "is concerned only with laws that regulate or govern the court's authority to decide", and "says nothing about laws that create rules that are generally binding on people" or "anything about the existing powers of the State, Territory or federal courts to recognise or enforce those rules or to sanction their breach".[7] His Honour went on to say that s 79(1) is not concerned with "a State law that creates a general rule that is binding on people and empowers a court to enforce the rule or to

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1 (2017) 262 CLR 1 at [61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

2 *Hitachi Construction Machinery (Australia) Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* (2024) 306 FCR 486 at [181] (Rangiah, Charlesworth and Dowling JJ).

3 Leeming, *Cowen and Zines's Federal Jurisdiction in Australia* (5th ed, 2025) 20.

4 (2019) 266 CLR 554.

5 (2019) 266 CLR 554 at [30].

6 (2019) 266 CLR 554 at [34], see also [39].

7 (2019) 266 CLR 554 at [62].

sanction its breach".[8] On the facts, his Honour agreed that the relevant provisions at issue applied of their own force.[9]

7. *Masson* illustrates how questions of characterisation for the purpose of s 79 depend on substance rather than form. Even though the law in question in that case was framed as a "presumption", which in some contexts might be a mere presumption of proof, it was characterised as a law determinative of rights and duties, rather than merely regulating a mode of proof.

8. Turning to Article 9, it is true that, in one of its operations, it can be seen to have the effect of regulating the exercise of jurisdiction by courts. That is because, where it applies, it prohibits evidence being adduced, or inferences being drawn, or submissions being made about "proceedings in Parliament". However, the operation of Article 9 is not limited to courts. In its terms, it applies in "any court or place out of Parliament".[10] Properly characterised, it is analogous to the presumption considered in *Masson*. It is a law that is "generally binding on people" which courts, including this Court, have power to enforce where it applies in proceedings in those courts. Properly characterised, it is therefore a law that applies of its own force in federal jurisdiction.

9. For the reasons set out in the Attorney's primary submissions dated 12 September 2025 (at [13]-[17]), the privilege reflected in Article 9 exists both at common law and in statute (by reason of s 6 of *Imperial Acts Application Act 1969* (NSW)). The First Respondent's submission, that the *Constitution Act 1902* (NSW) "establishes the Parliament" of New South Wales (**RS [15]**), is legally and historically inaccurate.[11] It may be that the privilege is now "necessarily implicit" in the *Constitution Act*. However, the privilege existed at common law well before the enactment of the *Constitution Act*. For present purposes, the privilege applies of its own force in these proceedings both at common law and by reason of the *Imperial Acts Application Act*.

10. In its reasons for transferring the proceeding to the New South Wales Registry, the Court suggested that it was "likely" that the privilege is picked up by s 79, and only "possible" that the privilege "applies by the direct application of the New South Wales *Imperial Acts*

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8 (2019) 266 CLR 554 at [64].

9 (2019) 266 CLR 554 at [72].

10 As to the "place[s] out of Parliament" to which Article 9 applies, see *The President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 at [136]-[137]; and Frappell and Blunt (eds), *New South Wales Legislative Council Practice* (2nd ed, 2021) 120-122.

11 See *Egan v Willis* (1996) 40 NSWLR 650 at 658 (Gleeson CJ) ("when the New South Wales *Constitution Act* 1902 was enacted … the two Houses of Parliament, the Legislative Council and the Legislative Assembly, were already in existence"). See also *Egan v Willis* (1998) 195 CLR 424 at [37] (Gaudron, Gummow and Hayne JJ).

Application Act".[12] With the benefit of submissions and an opportunity for further consideration of the issue, the Court should be satisfied that, in fact, the privilege ***does*** apply of its own force and that it is ***not*** picked up by s 79 because it is not a law of a character that needs to be picked up by federal law.

In the alternative, the privilege is at least picked up by s 79

11. If, contrary to the submissions of the parties and of the Attorney, the Court were to conclude that the privilege does not apply of its own force, then the privilege is "picked up" by s 79 of the *Judiciary Act*. On this view, the privilege would be properly characterised as a law of New South Wales governing or regulating the exercise of federal jurisdiction. It is therefore "binding" on this Court sitting in New South Wales.

12. To say that the privilege is picked up by s 79 is not to say that it is not ***also*** picked up by another federal law and any holding about the application of s 79 should not be expressed to the exclusion of, in particular, the privilege being picked up by s 106 of the Constitution.

The privilege is also picked up by s 106 of the Constitution, but that should not be decided

13. In his submissions filed on 12 September 2025, the Attorney submitted that s 106 of the Constitution is a "further or alternative pathway" by which the privilege applies in the Federal Court sitting in Western Australia. In summary, Article 9 is part of the "Constitution of the State" as at Federation, which was "continued" by s 106 and is binding on this Court by reason of covering cl 5 of the Constitution.

14. The Attorney's position is that, if the privilege did not apply of its own force and required a federal law in order for it to apply in federal jurisdiction, s 106 of the Constitution also provides a "further or alternative" pathway by which the privilege applies in the Federal Court sitting in New South Wales.

15. However, the Attorney submits that the Court need not – and ought not – decide whether s 106 operates to "pick up" the New South Wales privilege. In contrast to the position where the proceedings were being heard in Western Australia, it is now clear that the New South Wales privilege applies ***either*** of its own force ***or*** by being "picked up" by s 79 of the *Judiciary Act*. Once the Court accepts that the privilege applies via one of those pathways, it is unnecessary for the Court to decide whether the privilege ***also*** applies through an additional pathway.

16. That is consistent with the prudential approach discussed in the Attorney's primary submissions (at [7]-[11]). Indeed, the present circumstances provide a clear illustration of

[12] *Asset Energy Pty Ltd v Commonwealth Minister for Industry and Science* [2025] FCA 1163 at [36].

an "implication" of the prudential approach identified by the plurality of the High Court in *Mineralogy Pty Ltd v Western Australia*,[13] being that "the necessity of answering the question of law to the judicial resolution of the controversy may not sufficiently appear where there remains a prospect that the controversy can be judicially determined on another basis".

Conclusion

17. The privilege of freedom of speech in the Houses of the New South Wales Parliament applies in these proceedings of its own force.

18. The Attorney does not seek his costs and submits that none should be awarded against him.

Date: 20 October 2025

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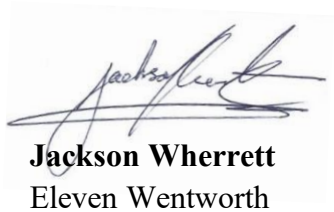

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[13] (2021) 274 CLR 219 at [60].