

NOTICE OF FILING

Details of Filing

Document Lodged: Notice of a Constitutional Matter under s78B Judiciary Act 1903 - Form 18 - Rule 8.11(2)
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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.

The date of the filing of the document is determined pursuant to the Court's Rules.



Form 18
Rule 8.11(2)

Notice of a Constitutional matter under section 78B of the Judiciary Act 1903

No. WAD36 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

Respondents

The Attorney General for New South Wales, Intervener, gives notice that the proceeding involves a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903*.

A Notice of Constitutional matter was filed and served by the First Respondent on 1 September 2025 (**First Respondent's Notice**). A copy of the First Respondent's Notice is annexed.

Nature of Constitutional matter

1. The Constitutional matters which may arise in this proceeding concern the basis on which a privilege of the Parliament of New South Wales – namely, the rule that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament” – forms part of the applicable law in the proceeding.
2. Further to the matters raised at [2(a)]–[2(c)] of the First Respondent's Notice, a Constitutional matter which may arise is whether and to what extent section 106 of

Filed on behalf of (name & role of party)	Attorney General for New South Wales, Intervener	
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the Constitution supplies a basis for, or is otherwise relevant to, the application of the privilege of the NSW Parliament identified in [1] above in this proceeding.

3. The Attorney General for New South Wales says that it is not necessary for the Court to resolve any question as to the relevance of section 106 of the Constitution because its resolution does not materially affect the application and content of the relevant privilege of the NSW Parliament in the circumstances of this case. The position of the Attorney General for New South Wales is that the Court can and should proceed on the basis accepted by the Applicant and First Respondent that the privilege applies in the proceedings (without determining how it applies).

Facts showing that section 78B Judiciary Act 1903 applies

1. The background to the proceedings and the circumstances in which a question concerning parliamentary privilege arises, are set out in the First Respondent's Notice at [1]-[5].
2. The bases for the First Respondent's contentions that NSW parliamentary privilege applies to the proceeding are set out in the First Respondent's Notice at [6]-[7].
3. The Applicant has indicated, in its reply submissions filed on 9 September 2025, that it agrees with the First Respondent's analysis regarding the path by which NSW parliamentary privilege is part of the law to be applied by the Court in the proceeding.
4. The Attorney General for New South Wales says that the First Respondent's contentions concerning the manner in which the relevant privilege of the NSW Parliament applies in this proceeding may give rise to a further question as to whether section 106 of the Constitution supplies a basis for, or is otherwise relevant to, the application of that privilege.

Date: 11 September 2025

Signed by Karen Smith, Crown Solicitor
Solicitor for the Attorney General for
New South Wales

Signed in my capacity as a solicitor
employed in the office of the said
Karen Smith



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**Notice of a Constitutional matter
under section 78B of the Judiciary Act 1903**

No. WAD36 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

Respondents

The First Respondent gives notice that the proceeding involves a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903*. As explained below, this Notice is issued out of an abundance of caution.

Nature of Constitutional matter

1. In short, the Constitutional matters which may arise in this proceeding concern the *basis* on which the privileges of the Parliament of New South Wales (in particular, the rule that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'¹) are part of the applicable law in the proceeding, being a proceeding in federal jurisdiction, being heard by the Federal Court sitting in Western Australia. No party disputes that those privileges are part of the applicable law in the proceeding.

¹ Article 9 of the Bill of Rights 1688 (UK), a statute which is declared to be 'in force in New South Wales' by s 6 of the *Imperial Acts Application Act 1969* (NSW).

Filed on behalf of (name & role of party)	The First Respondent		
Prepared by (name of person/lawyer)	Cain Sibley		
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2. More particularly, the Constitutional matters are:

- a. Whether one reason that the privileges of the NSW Parliament are part of the applicable law in this proceeding is that the common law of Australia requires the Court to apply the law that provides for the privileges of the New South Wales Parliament as part of the applicable law in the proceeding.
- b. Whether the proposition in [2(a)] above arises by reason of a common law choice of law rule that requires the Federal Court, sitting in Western Australia, to apply Art 9 (as part of the statute law of NSW), such a choice of law rule having been developed by the common law of Australia in conformity with the Constitution because:

It is now well accepted that the common law must adapt to the Constitution. Ideally, it should also adapt so as to provide practical solutions to particular legal problems which occur in the federal system. Thus, ideally, the choice of law rules should provide certainty and uniformity of outcome no matter where in the Australian federation a matter is litigated, and whether it is litigated in federal or non federal-jurisdiction.

(John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36; (2000) 203 CLR 503 at [44] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), cited in connection with the privileges of Parliament in a State in *Trevor, in the matter of Bell Group NV (in liq)* (No 2) 2017 FCA 927 at [33] (Jagot J).

- c. Whether a further reason that the privileges of the NSW Parliament are part of the applicable law in this proceeding is that the development of the common law of Australia to reflect the constitutional fact of federation gives rise to the recognition of parliamentary privilege as part of the common law of Australia.

Facts showing that section 78B of the Judiciary Act applies

1. On 13 February 2025, the applicant commenced proceedings in the Western Australian District Registry of the Federal Court of Australia pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth).
2. The applicant seeks relief that the decisions of the Commonwealth-New South Wales Offshore Petroleum **Joint Authority**, constituted under s 56 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), to refuse two applications to vary and suspend the conditions of Petroleum Exploration **Permit** NSW-11, pursuant to s 264(2) of the Act, and to extend the term of the Permit, pursuant to s 265 of the Act, be quashed or set aside (**Decision**).

3. In making the Decision, the Joint Authority stated that ‘it would not be in the public interest to grant the [two applications] in light of the community opposition to the gas exploration activities being conducted in areas that included the Permit area, and that this public interest consideration would support a decision to refuse the [applications]’: Statement of Reasons [75].
4. The applicant alleges, among other things, that there was no evidence or material before the Joint Authority to justify the conclusion that the grant of the two applications was not in the public interest on the basis that:
 - a. The only material cited by the Joint Authority to support its view that there is community opposition within NSW to gas exploration activities being conducted in or adjacent to NSW coastal waters were things said or done in NSW Parliament, namely the bipartisan support for the passage by the Parliament of New South Wales of the *Environmental Planning and Assessment Amendment (Sea Bed Mining and Exploration) Act 2024* (NSW) and statements made in a second reading speech in support of the related Bill by the Hon. Paul Scully: Statement of Reasons at [56], and [73] to [75].
 - b. The material described in [4(a)] above constitutes ‘proceedings in Parliament’ within the meaning of **Art 9** of the *Bill of Rights 1688* (UK) 1 Wm & M Sess 2, such that the material cannot, as a matter of law, be relied upon out of Parliament as evidence of the truth or correctness of what was said.
 - c. Article 9 is the source of parliamentary privilege in New South Wales by operation of s 6 of the *Imperial Acts Application Act 1969* (NSW) and applies in this proceeding in federal jurisdiction by operation of s 79 of the Judiciary Act.
 - d. For the reasons set out in sub-paragraphs (a) to (c) above, there was no evidence to satisfy the Joint Authority’s conclusion that the grant of the two applications was not in the public interest.
5. There is no dispute between the parties that:
 - a. the proceeding is in federal jurisdiction;
 - b. the material described in [4(a)] above forms part of ‘proceedings in Parliament’ of NSW for the purposes of Art 9, and
 - c. the law that provides for the privileges of the NSW Parliament is part of the applicable law in the proceeding.
6. The First Respondent says that s 79 of the Judiciary Act is not capable, on its proper construction, of ‘picking up’ and applying s 6 of the *Imperial Act Application Act 1969*

(NSW) in this proceeding because (inter alia) s 6 is not a 'law of' Western Australia within the meaning of s 79 of the Judiciary Act.

7. The First Respondent instead says that NSW parliamentary privilege applies to this proceeding because:
 - a. The *Constitution Act 1902* (NSW), by necessary implication, carries with it all the privileges that are necessary for the NSW Parliament to function effectively, including the right for its proceedings not to be impeached or questioned. This implied privilege has extraterritorial force throughout the federation.
 - b. Further or alternatively, s 80 of the Judiciary Act picks up the common law choice of law rules in federal jurisdiction which direct the court of the forum to apply the law pertaining to the parliamentary privilege of the State whose proceedings in Parliament are in issue in the case at hand: see *Trevor, in the matter of the Bell Group NV (in liq) (No 2)* [2017] FCA 927, [33] (Jagot J).
 - c. Further or alternatively, the development of the common law of Australia to reflect the constitutional fact of federation gives rise to the recognition of parliamentary privilege as part of the common law of Australia: see *Trevor* [33].
8. No party disputes that the privileges of the Parliament of NSW are part of the applicable law in the proceeding. Accordingly, this s 78B notice has been issued solely out of an abundance of caution.

Date: 1 September 2025



Signed by Cain Sibley
Lawyer for the First Respondent