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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

Important Information

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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

Submissions of the Attorney General of New South Wales (intervening)

Introduction

1. The Attorney General of New South Wales intervenes in this proceeding under s 78A of the *Judiciary Act 1903* (Cth).
2. The Attorney makes submissions concerning the pathway or pathways by which 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.
3. There is a further or alternative pathway to the three pathways identified in [25] of the Minister's submissions (**RS**) and embraced in [20] of the Applicant's reply submissions. The privilege of freedom of speech in the Houses of the New South Wales Parliament, reflected in Art 9 of the Bill of Rights 1688, forms part of the Constitution of New South Wales continued by s 106 of the Commonwealth Constitution. A court exercising federal jurisdiction sitting in Western Australia is bound to recognise and apply that privilege by reason of s 106 and covering clause 5 of the Commonwealth Constitution.
4. However, the precise pathway by which the privilege applies does not need to be decided to dispose completely of this proceeding, and therefore should not be decided. A decision as to the precise pathway would not matter to the outcome of this case, but would have large consequences that ought to await decision in a case where it is necessary to decide.
5. If, contrary to [4] above, the Court considered it to be necessary to decide the pathway by which the privilege applies in the proceeding, then it is the duty of the Court not to proceed because a "reasonable time" has not elapsed as required by s 78B of the *Judiciary Act*. There has not been a "reasonable time" either since the Minister issued the s 78B notice on 1 September 2025, or since the Attorney issued his s 78B notice on 11 September 2025.

6. These submissions address the law on the prudential approach to the resolution of constitutional questions, outline the argument for the State-constitutional character of Art 9 and why this Court does not need to determine the precise basis for applying that privilege in this case, and finally the application of s 78B of the *Judiciary Act*.

The prudential approach to the resolution of constitutional questions

7. The High Court has emphasised, on numerous occasions,¹ that “[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties”.² In *Mineralogy Pty Ltd v Western Australia*,³ Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ referred to that “cautious and restrained approach” and said:

Underlying it also is recognition that performance of an adjudicative function in an adversary setting “proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy”. That is to say, “the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity”.

8. In *Multicon Engineering Pty Ltd v Federal Airports Corporation*,⁴ Mason P (Gleeson CJ and Priestley JA agreeing) said:

Such an approach is judicially economical; it avoids unnecessary conflict between the judicial and other arms of government, thereby enhancing the standing of each; and it saves the parties and others from the potentially irremediable consequences of a determination that is beyond legislative correction. Above all, the practice reflects the truth that there are times and areas in which judges “know too little to risk the finality of precision”. (citation omitted)

9. This “prudential approach” has been applied in first instance decisions,⁵ including by this Court.⁶ In *Garth v The Queen*,⁷ Bathurst CJ (Beazley P and Simpson JA agreeing) said that

¹ See *Duncan v ICAC* (2015) 255 CLR 388 at [52] (the Court); *Knight v Victoria* (2017) 261 CLR 306 at [32]-[33] (the Court); *Clubb v Edwards* (2019) 267 CLR 171 at [35]-[36] (Kiefel CJ, Bell and Keane JJ); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1 at [90] (Kiefel CJ, Keane and Gleeson JJ); *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at [21] (the Court); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [20] (Kiefel CJ and Keane J), [114] (Gordon J).

² *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ on behalf of the Court).

³ (2021) 274 CLR 219 at [57]-[58].

⁴ (1997) 47 NSWLR 631 at 642.

⁵ See *Badger v Bayside City Council* (2022) 67 VR 15; [2022] VSC 140 at [82] (Dixon J); *Green v Legal Profession Admission Board* [2020] NSWSC 1655 at [81] (Adamson J); *R v Cranston (No 2)* [2020] NSWSC 1102 at [116]-[118] (Payne J); *WB Rural Pty Ltd v Commissioner of State Revenue (Qld)* [2018] 1 Qd R 526 at [14]-[16] (Bond J).

⁶ *Cook v Australian Postal Corporation* (2018) 279 IR 29; [2018] FCA 81 at [99] (Flick J); *Rowley v Chief of Army* (2017) 255 FCR 176 at [5] (Perry J); *Stevens v Minister for Immigration and Border Protection* (2016) 153 ALD 346; [2016] FCA 1280 at [9] (Charlesworth J); *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 at [194] (Perry J).

⁷ (2016) 261 A Crim R 583; [2016] NSWCCA 203 at [19].

“[t]he practice of declining to deal with a constitutional issue unless it is necessary to do so is well established” and is “common to all courts in the judicial hierarchy”.

10. A prudential approach may be applied even where “[l]ogically the constitutional issue should be determined first”.⁸ In *Babet v Electoral Commissioner*,⁹ one of the issues was whether the appellants had standing to seek a declaration in relation to the application of a Commonwealth Act to a forthcoming referendum. In federal jurisdiction, standing is an aspect of the existence of a “matter” and is therefore a constitutional question. The Full Court held that it had a discretion to dismiss the proceeding on its merits without deciding whether it had jurisdiction.¹⁰ The prudential justification for doing so arose because, compared to the relatively clear lack of merit in the underlying claim, the jurisdictional issues were both complex and non-dispositive.
11. In the present case, the Applicant and the Minister agree that the relevant New South Wales privilege applies in these proceedings (AS [27]; RS [25]). The Minister’s submissions, together with these submissions of the Attorney, are sufficient for the Court to be satisfied that there is at least *a pathway* by which that privilege applies. To go further and seek to resolve *which pathway or pathways* would be to no practical end in the disposition of the proceeding and would require further argument on complex and novel constitutional issues.

The privilege of freedom of speech in the Houses of the New South Wales Parliament

12. Before addressing how the privilege of freedom of speech in the Houses of the New South Wales Parliament may be applied in these proceedings, it is necessary to set out what the privilege to be applied is.
13. Unlike the Commonwealth and other States, in New South Wales the Parliament has not enacted its own legislation defining the privilege of freedom of speech in the Houses. The *Imperial Acts Application Act 1969* (NSW) provides that the Bill of Rights 1688 “is declared to be in force in New South Wales” (s 6(a)). However, Article 9 would apply to the New South Wales Parliament even without the *Imperial Acts Application Act*. In *Egan v Willis*,¹¹ Gaudron, Gummow and Hayne JJ said that s 6 of the *Imperial Acts Application Act* “restates the effect of the Imperial Act known as the *Australian Courts Act* [56 Geo III c 100]”. Their Honours went on to say:¹²

⁸ *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 125 FCR 529 at [73] (Goldberg and Finkelstein JJ).

⁹ (2023) 300 FCR 81.

¹⁰ (2023) 300 FCR 81 at [73]. See also *Babet v Electoral Commissioner* [2023] FCA 1126 at [47].

¹¹ (1998) 195 CLR 424 at [22].

¹² (1998) 195 CLR 424 at [24].

However, it may be observed that in South Australia and Western Australia, where the *Australian Courts Act* never applied, “it appears simply to have been regarded as axiomatic from the beginnings of European occupation that a statute such as the Bill of Rights would apply under the common law principles on the reception of law in settled colonies”. Further, in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*, Isaacs J referred to discussion of the Bill of Rights as being but declaratory of “the ancient law of England” and, in an appeal from New South Wales heard before the enactment of the *Imperial Acts Application Act*, Dixon CJ treated the Bill of Rights as embodying “general constitutional principle[s]”. (citations omitted)

14. To similar effect, McHugh J said:¹³

In neither *Stockdale* nor *Bradlaugh* did the judges suggest that it was Art 9 of the Bill of Rights that precluded them from exercising jurisdiction. Rather, their reasoning indicates that by parliamentary law — which as customary law is part of the common law — matters affecting the internal administration of the House of Commons are outside the jurisdiction of the common law courts. The Bill of Rights which is in force in New South Wales merely confirms the common law [fn: *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 463; *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258; *Commissioner of Stamps (SA) v Telegraph Investment Co Ply Ltd* (1995) 184 CLR 453 at 467].

15. In the more recent decision in *Attorney-General (Tas) v Casimaty*,¹⁴ Edelman J said:

Although there was once a “shadow of doubt” about this, Art 9 of the Bill of Rights applies in its terms to the Parliament of (what is now) Tasmania, not merely as part of the received common law which Art 9 reflects, but also by s 24 of the *Australian Courts Act 1828* (Imp). The Australian Courts Act is an Imperial statute which, by requiring English laws and statutes in force at that time to “be applied” in New South Wales and Tasmania “so far as [they] can be applied”, was intended to be “always speaking” in the modern sense that it would apply to new circumstances and would extend to new Parliaments. The reason for s 24 picking up the written laws of England, and not merely the common law, was that “[t]he Imperial Legislature evidently intended and had in view to legislate for the growing wants and ever-changing circumstances and condition of a new Colony just entrusted with legislative powers and functions”. (citations omitted)

16. Professor Twomey said that “[e]ven if art 9 were not expressly applied by New South Wales legislation, the principle would still apply as of necessity”.¹⁵

17. In summary, in New South Wales, the privilege reflected in Article 9 exists both at common law and in statute (which is accepted by the Minister: **RS [24]**). That privilege must be capable of being modified by the New South Wales Parliament. As discussed below, it is significant that such power to modify is expressly recognised by s 106 of the Constitution.

¹³ (1998) 195 CLR 424 at [69].

¹⁴ (2024) 98 ALJR 1139 at [70].

¹⁵ *The Constitution of New South Wales* (2004) 494 (fn 31), citing *Gipps v McElhone* (1881) 2 LR (NSW) 18 at 21; *Chenard and Co v Arissol* [1949] AC 127. See also Campbell, *Parliamentary Privilege* (2003) 10.

The Minister's possible pathways

18. The Minister, with whom the Applicant on this point now agrees, has identified three possible pathways for the application of the relevant privilege (**RS [25]**). They are, in short-hand, that the relevant privilege: has extra-territorial operation; is applicable because of a common law choice of law rule; and is part of the common law of Australia.
19. In relation to the first pathway, it may be that the privilege, in its statutory form, applies with extraterritorial effect by reason of s 6 of the *Imperial Acts Application Act*. The fact that s 6 provides that the Bill of Rights is “in force in New South Wales” does not mean that the Bill of Rights is confined to the geographic territory of New South Wales. It means that the Bill of Rights is in force in New South Wales with whatever territorial operation the Bill of Rights has. The geographical “hinge” or connection to New South Wales is the fact that it is stating a privilege that is enjoyed by the New South Wales Parliament and no further territorial connection is required.¹⁶
20. The second and third pathways, as the Minister notes, derive some support from the decision of this Court in *Re Trevor (No 2)*.¹⁷ That case involved the inverse of the present case, in that the liquidator argued that the Western Australian law of parliamentary privilege did not apply in proceedings in federal jurisdiction where the Federal Court was sitting in New South Wales.¹⁸ Jagot J described the liquidator’s argument as both “surprising” and “unattractive”.¹⁹ Her Honour identified a number of submissions relied upon in support of the Western Australian law applying, which she described as “cogent”, but ultimately did not need to determine the point.²⁰
21. However, each of the three identified pathways, if accepted to the exclusion of the further or alternative pathway of s 106, would raise several difficulties.
22. Under the mechanism of the first pathway (extra-territorial operation), it would be possible for the Western Australian Parliament to enact a law that is inconsistent with the New South Wales law. In that event, there would be an inconsistency of State laws. To date, it has never been authoritatively determined how such an inconsistency would be resolved.²¹

¹⁶ See generally *BHP Group Ltd v Impiombato* (2022) 276 CLR 611 at [59]-[62] (Gordon, Edelman and Steward JJ); *Karpik v Carnival plc* (2023) 98 ALJR 45 at [43]-[45] (the Court).

¹⁷ (2017) 122 ACSR 418; [2017] FCA 927.

¹⁸ (2017) 122 ACSR 418; [2017] FCA 927 at [31].

¹⁹ (2017) 122 ACSR 418; [2017] FCA 927 at [31], [33].

²⁰ (2017) 122 ACSR 418; [2017] FCA 927 at [33].

²¹ See *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [92] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

23. Under the mechanism of the second pathway (choice of law), it would only succeed in applying inter-State parliamentary privileges if those privileges, in their statutory form, are properly characterised as laws operating of their own force in federal jurisdiction and not as laws regulating the manner of exercise of federal jurisdiction. If Art 9 of the Bill of Rights were characterised as a law regulating the exercise of jurisdiction by a court, then its application to a court exercising federal jurisdiction would require the support of a federal law, which the second pathway (and indeed the first pathway) does not include.²² The Attorney submits that the privileges are *not* merely regulatory of the manner of exercise of jurisdiction, but it is conceivable that there could be some debate about that in a future case.
24. Under the mechanism of the third pathway (common law of Australia), it would seem to allow a Parliament other than that of New South Wales to pass legislation abrogating or modifying the common law of Australia (including, relevantly, the privilege of freedom of speech in the Houses of the New South Wales Parliament). That cannot be correct. The privileges of the Houses of the New South Wales Parliament are exclusively a matter for that Parliament to determine.
25. To the extent that the Minister suggests that his proposed pathways have a constitutional foundation, that is not fully exposed in his submissions. If there is such a suggestion, that would also raise large questions in relation to which the Attorney would seek to be heard.

Section 106 is a further or alternative pathway by which the privilege applies

26. The further or alternative pathway by which the privilege of freedom of speech in the Houses of the New South Wales Parliament is to be recognised and applied is s 106 of the Commonwealth Constitution, which provides that “[t]he Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State”. In other words, the Commonwealth Constitution recognises that there was a “Constitution of the State” as at Federation, which was “continued”, and which would be capable of being “altered in accordance with the Constitution of the State”.
27. In *New South Wales v Commonwealth (Work Choices Case)*,²³ Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said that “[t]he content of that term [“Constitution”] used in s 106 is not finally settled in this Court”. Their Honours said that “[c]ertainly,

²² *Rizeq v Western Australia* (2017) 262 CLR 1 at [61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

²³ (2006) 229 CLR 1 at [390].

determination of the answer to that question would call for a close examination of the laws of that State with a view to deciding which are, and which are not, part of its *Constitution*". In *Kable v Director of Public Prosecutions (NSW)*,²⁴ Gummow J said that "[t]here may be some uncertainty as to the range of statutes (Imperial and local), instruments, conventions and practices which together, or only in some limited fashion, comprise the Constitution of a State as it existed at the establishment of the Commonwealth".²⁵

28. Article 9 of the Bill of Rights is properly regarded as part of the "Constitution of the State" of New South Wales within the meaning of s 106 of the Constitution, although this was left undecided in *Egan v Willis*.²⁶ In *Gipps v McElhone*,²⁷ Sir J Martin CJ said that the privilege "arises from inherent necessity" that was "just as great here as in the Imperial Parliament". In *R v Turnbull*,²⁸ Gibson J accepted as accurate that "Freedom of speech, which was first demanded by the Speaker in 1541, is the essential attribute of every free legislature, and may be regarded as inherent in the constitution of Parliament". Further, in the Second Reading Speech for the Imperial Acts Application Bill 1969 (NSW), the Attorney General referred to the Bill of Rights as a "constitutional enactment", and said that its language was not being changed because its principles "relate so closely and intimately to our freedoms, that no risk should be taken on disturbing them by interfering with the language in which they are expressed".²⁹
29. The fundamental importance of Article 9 has been recognised on many occasions. In *Crime and Corruption Commission (Qld) v Carne*,³⁰ Gordon and Edelman JJ said:

Parliamentary privilege is a "bulwark of representative government". It has long antecedents. It allows Parliament to perform its functions without obstruction. Parliamentary privilege shields certain areas of legislative activity from judicial or executive review, thereby giving "the legislative branch of government the autonomy it requires to perform its constitutional functions". Parliamentary privilege operates to ensure that a person who participates in parliamentary

²⁴ (1996) 189 CLR 51 at 140-141. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 259-260 (Gummow J).

²⁵ See also *Stuart-Robertson v Lloyd* (1932) 47 CLR 482 at 491 ("...does s 106 shield against the operation of Commonwealth legislation under s 51, every provision found in the Constitution Act of a State, or only those provisions or terms, wherever found, which really define and describe the framework and scheme of its government?").

²⁶ See also *Egan v Willis* (1998) 195 CLR 424 at [33]-[34] (Gaudron, Gummow and Hayne JJ expressly noting that it was unnecessary to decide whether the Commonwealth Constitution's "continuation of the Constitution of each State of the Commonwealth (s 106) may affect the powers or privileges of the Houses of the State Parliaments"). But see at [23]-[24] (referring to the "constitutional norms prescribed by the Bill of Rights").

²⁷ (1881) 2 NSW 18 at 21, see also 24 (Sir W Manning J), 25 (Windeyer J).

²⁸ [1958] Tas SR 80 at 84.

²⁹ New South Wales Legislative Assembly, *Hansard* (26 March 1969) 5141. The *Imperial Acts Application Act* was enacted following the New South Wales Law Reform Commission's report titled "Application of Imperial Acts" (November 1967). The report described the Bill of Rights as a "constitutional enactment" with "constitutional significance" (at p 59).

³⁰ (2023) 97 ALJR 737 at [106].

proceedings can do so knowing, at the time of that participation, that what they say cannot “later be held against them in the courts”, thereby ensuring that such a person is not inhibited in providing information to the Parliament or in otherwise participating in parliamentary proceedings. This is the “basic concept underlying article 9” of the Bill of Rights 1688. (citations omitted)

30. In *Pepper v Hart*,³¹ Lord Browne-Wilkinson, who delivered the leading speech, said that “Article 9 is a provision of the highest constitutional importance and should not be narrowly construed”. In *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]*,³² Hall J said that the Bill of Rights “was essentially a compact between the new monarchs and Parliament and represents one of the foundation stones of constitutional monarchy”. In *Mees v Roads Corporation*,³³ this Court (Gray J) said that the privilege protected by Article 9 “has a modern rationale in the constitutional separation of powers”.
31. The Senate Standing Committee on Constitutional and Legal Affairs has taken the view that “the parliamentary privilege of freedom of speech is part of the Constitution of a State within the meaning of s 106 of the Commonwealth Constitution”.³⁴
32. If that is right, then s 106 may limit the legislative powers of the Commonwealth Parliament to make laws that would abrogate or modify those privileges. The Senate Standing Committee considered that s 106 had such an effect, but that was contrary to the view expressed in a 1983 joint opinion of The Hon Gareth Evans QC and Sir Maurice Byers QC.³⁵ The relationship between s 106 and s 51 of the Constitution (both of which are expressed to be “subject to [the] Constitution”) has not been resolved. *Port MacDonnell Professional Fishermen’s Association Inc v South Australia*,³⁶ indicates that “the dilemma” posed by both those sections being expressed to be “subject to this Constitution” may need to be resolved by reference to the particular placitum of s 51 in issue. There, s 51(xxxviii) was held to be superior to s 106, but only because that head of power had the purpose of “ensur[ing] that a plenitude of residual legislative power is vested in and exerciseable in co-operation by the Parliaments of the Commonwealth and the States”.³⁷

³¹ [1993] AC 593 at 638. See also *Church of Scientology v Johnson-Smith* [1972] 1 QB 522 at 531 (Browne J); *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 at 518 (Cooke P).

³² [2021] WASC 223 at [97].

³³ (2003) 128 FCR 418 at [30].

³⁴ “Report on Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments”, *Parliamentary Papers* 1985, No. 235 at [3.13].

³⁵ “Report on Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments”, *Parliamentary Papers* 1985, No. 235 at [1.1]-[1.12].

³⁶ (1989) 168 CLR 340.

³⁷ (1989) 168 CLR 340 at 381.

33. The critical point to take from the foregoing submissions is that this Court should not resolve in this proceeding the precise basis on which the privilege of freedom of speech in the Houses of the New South Wales Parliament applies. To do so would involve entering upon important and complex constitutional issues which are unnecessary to decide here.

If issue to be decided, reasonable notice has not been given

34. If, contrary to the Attorney’s primary submission, the Court determines that it should decide how the privilege of freedom of speech applies in these proceedings, then it should adjourn the argument on that question. The Attorney would seek to be heard further if the Court were to take this course.
35. Section 78B(1) of the *Judiciary Act* provides that “it is the duty of the court not to proceed” unless notice has been given “and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court”. As French J recognised in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*,³⁸ “the emphatic language of the section and the strictly limited exceptions to the duty it imposes on the Court, stress the importance attached by Parliament to the proper fulfilment of the duty of notification which should not be narrowly confined”. His Honour quoted Kirby P who said that “[t]he Court’s duty arises because of its obligation to protect the interests of the partners in the polity of the Commonwealth”.³⁹
36. What constitutes a “reasonable time” will vary in each case. It will be informed by the nature of the case (including the issues it raises and its urgency) as well as the nature of the constitutional issue.
37. This point is illustrated in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.⁴⁰ In that case, the applicant sought habeas corpus and judicial review of a decision made by the Minister. On 2 March 2020, nine days before the hearing, the applicant filed a s 78B notice. The next day, eight days before the hearing, the Minister filed a s 78B notice. Anderson J then listed a case management hearing for the purpose of deciding whether a “reasonable time” would elapse by the time of the hearing. At that listing, the parties indicated their agreement that “given the relative urgency of the applicant’s habeas corpus application” a “reasonable time” had elapsed in respect of the Minister’s s 78B notice. However, Anderson J agreed with the applicant’s submission,

³⁸ (1999) 95 FCR 292 at [12].

³⁹ *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 4 NSWLR 549 at 558-559.

⁴⁰ [2020] FCA 416 at [53]-[55].

unopposed by the Minister, that a reasonable time had not yet elapsed in respect of the applicant's s 78B notice. On that basis, his Honour "agreed to hear the applicant's application for habeas corpus (including the constitutional issues raised in the Minister's First s 78B Notice) separate from, and prior to, the applicant's application for judicial review of the Minister's Decision (including the constitutional issues raised in the Applicant's s 78B Notice)".

38. The question of how the privilege of freedom of speech in the Houses of the New South Wales Parliament applies in a court exercising federal jurisdiction in another State is a significant question. It has never previously been authoritatively determined by a court. It raises questions concerning the proper construction of s 106 of the Constitution. It is an issue in which the other States may have an interest, and therefore they may also wish to intervene in order to be heard in the proceeding. In addition, there is no significant urgency in the Applicant's application for judicial review being determined.
39. For those reasons, a "reasonable time" within the meaning of s 78B(1) has not elapsed. *First*, there has not been a reasonable time afforded to the Attorney since the Minister issued his s 78B notice. *Secondly*, there has not been a reasonable time afforded since the Attorney issued his s 78B notice. In those circumstances, it would be the duty of the Court not to proceed until a reasonable time has elapsed.
40. However, if as the Attorney submits the nature of the proceeding is such that there is no occasion to decide the question of *how* the relevant privilege is applicable in the proceeding, then there is no need for full argument on the point and a reasonable time will have elapsed such that the Court may proceed consistent with s 78B.
41. The Attorney does not seek his costs and submits that none should be awarded against him.

Date: 12 September 2025



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