FEDERAL COURT OF AUSTRALIA

Asset Energy Pty Ltd v Commonwealth Minister for Industry and Science

[2025] FCA 1163

File number:	WAD 36 of 2025
Judgment of:	**JACKSON J**
Date of judgment:	16 September 2025
Date of publication of reasons:	19 September 2025
Catchwords:	**CONSTITUTIONAL LAW** - privilege of the Parliament of New South Wales - application of parliamentary privilege to a Federal Court sitting in Western Australia **PRACTICE AND PROCEEDURE** - duty of the Court under s 78B of the *Judiciary Act 1903* (Cth) - cause arising under the *Constitution* - notice of a constitutional matter - whether reasonable time elapsed since notification to Attorneys-General - power to continue hearing matters severable from constitutional matter - whether matters severable from constitutional matter - serious risk that Court would breach s 78B duty - proceeding adjourned
Legislation:	*Constitution* s 106 *Constitution Act 1902* (NSW) *Imperial Acts Application Act 1969* (NSW) *Judiciary Act 1903* (Cth) ss 78B, 79, 80 *Bill of Rights 1688* (1 Wm & M sess 2 c 2)
Cases cited:	*Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [1999] FCA 1151; (1999) 95 FCR 292 *Irwin v Military Rehabilitation and Compensation Commission* [2009] FCAFC 33; (2009) 174 FCR 574 *Kovalev v Minister for Immigration and Multicultural Affairs* (1999) 100 FCR 323 *Lambert v Weichelt* (1954) 28 ALJ 282 *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2023] NSWCA 275; (2023) 112 NSWLR 434 *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 2)* [2010] FCA 258; (2010) 183 FCR 58

	Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3) [2010] FCA 428; (2010) 184 FCR 516 *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 4 NSWLR 549 *Tuitupou v Minister for Immigration and Multicultural Affairs* [2000] FCA 117 *VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 921
Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	39
Date of hearing:	16 September 2025
Counsel for the Applicant:	Dr N A Tiverios with Mr T Masson
Solicitor for the Applicant:	Ensign Legal
Counsel for the First Respondent:	Mr N Wood SC with Ms A Wharldall
Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The second respondent filed a submitting notice save as to costs
Counsel for the Interested Person:	Mr B Lim with Mr J Wherrett
Solicitor for the Interested Person:	Crown Solicitors Office (NSW)
Counsel for the Amicus Curiae:	Mr C Tran with Ms F Leitch
Solicitor for the Amicus Curiae:	Herbert Smith Freehills Kramer

ORDERS

WAD 36 of 2025

BETWEEN:	**ASSET ENERGY PTY LTD (ACN 120 013 390)** Applicant
AND:	**THE COMMONWEALTH MINISTER FOR INDUSTRY AND SCIENCE, AS THE RESPONSIBLE COMMONWEALTH MINISTER OF THE COMMONWEALTH-NEW SOUTH WALES OFFSHORE PETROLEUM JOINT AUTHORITY** First Respondent
	MINISTER FOR NATURAL RESOURCES, AS RESPONSIBLE STATE MINISTER OF THE COMMONWEALTH-NEW SOUTH WALES OFFSHORE PETROLEUM JOINT AUTHORITY Second Respondent
	ATTORNEY GENERAL FOR NEW SOUTH WALES Interested Person
	MR GREG PIPER, SPEAKER OF THE NEW SOUTH WALES LEGISLATIVE ASSEMBLY Amicus Curiae
ORDER MADE BY:	**JACKSON J**
DATE OF ORDER:	**16 SEPTEMBER 2025**

THE COURT ORDERS THAT:

1. Pursuant to r 9.12 of the *Federal Court Rules 2011* (Cth), the Speaker of the New South Wales Legislative Assembly (**the Speaker**) is granted leave to appear as amicus curiae, on terms that no costs order is made in favour of or against the Speaker.
2. The Speaker is granted leave to file an outline of written submissions in the form annexed as annexure MDS-6 to the Affidavit of Mark Dunlea Smyth affirmed on 11 September 2025.
3. The Speaker is granted leave to make oral submissions, limited to 30 minutes, on the issues raised in or in response to their written submissions at the hearing on 16 September 2025.
4. The proceeding is adjourned sine die.

5. Until further order, the proceeding is to be heard and determined in New South Wales at the Court's New South Wales Registry.

6. By 4.00 pm AWST on 7 October 2025, the parties must file and serve written submissions (or joint submissions) of no more than 10 pages in length concerning the issues raised in the 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.

7. By 4.00 pm AWST on 21 October 2025, the Attorney General for New South Wales and the Speaker may file and serve any written submissions of no more than 10 pages in length.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKSON J:

1 Tuesday, 16 September 2025 was the first day of the two day hearing of this matter. On the morning of that day, I adjourned the proceeding due to a constitutional issue. These are my reasons for the adjournment.

2 The constitutional issue concerns the application of the parliamentary privilege of the Parliament of New South Wales to a Federal Court sitting in Western Australia. The manner in which it arises and its significance to the proceeding require some explanation.

The proceeding and the grounds of review

3 The proceeding is an application for judicial review by **Asset Energy** Pty Ltd of a decision made by the Commonwealth-New South Wales Offshore Petroleum **Joint Authority**. The Commonwealth **Minister** for Industry and Science is the first respondent in his capacity as the responsible Commonwealth Minister of the Joint Authority. The second respondent, the Minister for Natural Resources for New South Wales in her capacity as the responsible State Minister of the Joint Authority, has filed a submitting notice of appearance.

4 The decision under review was notified to Asset Energy on 17 January 2025. The National Offshore Petroleum Titles Administrator on behalf of the Joint Authority notified the refusal of two applications by Asset Energy for the variation and suspension of conditions attaching to a petroleum exploration permit in which the company holds a majority interest. The permit covers an area of offshore waters off the coast of New South Wales.

5 By two of its grounds of review (grounds 2 and 3), Asset Energy contends that there is no evidence to support one of the bases for the refusal given in the reasons for the decision (**Reasons**), namely the Joint Authority's view that granting the variations and suspension could not be in public interest. According to the Reasons, in making that assessment the Joint Authority relied on two matters, one of which involved statements in the Legislative Assembly of New South Wales by a member of that Parliament. In broad terms, Asset Energy contends that parliamentary privilege prevents the Court from taking those statements into account, so that the Court must conclude that there was no basis for the Joint Authority's conclusion in that regard. This means that the application of the privilege of the Parliament of New South Wales

is a necessary part of Asset Energy's case in respect of those two grounds (from now on I will use the shorthand **NSW privilege**).

6 There is another ground concerning the proper construction of the provisions of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), pursuant to which the Joint Authority made its decision. There are two other grounds concerning another aspect of the Reasons, relating to Asset Energy's financial capacity to conduct exploration activities which would have been required by the permit had it been varied and extended as Asset Energy wished. These other grounds do not involve the NSW privilege.

7 Asset Energy commenced the proceeding in the Western Australian Registry of the Court and it was docketed to me. I listed it for a final hearing on the assumption that the hearing would take place in Perth, and until the commencement of the hearing, no party suggested that it should be held anywhere else.

Issues are notified under the *Judiciary Act*, an intervener and amicus curiae emerge

8 Section 78B(1) of the *Judiciary Act 1903* (Cth) is:

> Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, 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.

9 On 1 September 2025, just over two weeks before the hearing was due to commence, the Minister filed a notice pursuant to s 78B. The constitutional matter set out in the notice concerns the basis on which the NSW privilege can apply to the Federal Court sitting in Western Australia. Both Asset Energy and the Minister contend that the privilege does apply to this case. The question is how it applies. In broad terms, the question is how a privilege that arises and applies under the laws of one State, can apply to a court that is not constituted under the laws of that State, but the laws of the Commonwealth, where that court is sitting in a different State.

10 The notice advances three possible bases for the application of the NSW privilege, which are not mutually exclusive. For the purposes of these reasons, it is not necessary to articulate the bases in full. They start with the proposition that the NSW privilege is 'enshrined' in the

operation of the *Bill of Rights 1688* (1 Wm & M sess 2 c 2), which applies by reason of the *Imperial Acts Application Act 1969* (NSW). One of the bases for the application of the privilege advanced by the Minister relies on what is said to be the extraterritorial force of an implied privilege arising under the *Constitution Act 1902* (NSW), one is based on how s 80 of the *Judiciary Act* picks up the common law choice of law rules, and one on a broader contention about the recognition of the constitutional fact of federation by the common law of Australia.

11 The Minister's s 78B notice was served on the Commonwealth and State Attorneys-General on 1 September 2025. On 10 September 2025 the Attorney-General for New South Wales (**NSW Attorney**) notified the Court that he intervened in the proceeding.

12 On 11 September 2025, the NSW Attorney filed and served his own notice under s 78B. Essentially, that notice contends that there is a further basis on which the NSW privilege may apply to the proceeding (being heard in Western Australia), namely s 106 of the *Constitution,* which provides that the Constitution of each State continues until altered in accordance with the State's Constitution.

13 No other Attorney-General has intervened, although the Attorney-General for South Australia indicated that he may consider intervening should the Court decide that it needs to determine the issue raised in the notice given by the NSW Attorney (the Attorney-General for Queensland will consider intervening if the matter proceeds to the High Court).

14 On 12 September 2025, the **Speaker** of the New South Wales Legislative Assembly applied for leave to appear as amicus curiae and to file written submissions in a form annexed to a supporting affidavit. I gave that leave at the commencement of the hearing on 16 September 2025.

The submissions about the constitutional issue

15 The written submissions filed by Asset Energy for the purposes of the final hearing assume that the NSW privilege applies to the proceeding but do not say how, although in oral submissions at the hearing counsel for Asset Energy adopted all four of the 'pathways' to the application of the privilege that had been advanced in the s 78B notices.

16 The Minister's written submissions contend that the privilege applies on the three grounds set out in his s 78B notice, but go on to submit that Asset Energy's reliance on the privilege is misconceived, so that grounds 2 and 3 fail.

17 On 12 September 2025 the NSW Attorney filed written submissions concerning the constitutional issue. He contended that a further pathway to the application of the NSW privilege is as set out in his s 78B notice. But the NSW Attorney submitted that it was not necessary or appropriate for the Court to determine how the privilege applies in this case.

18 It is the well-established practice of the courts not to decide constitutional questions unless the facts of the case make it necessary to decide in order to do justice and determine the rights of the parties: *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ on behalf of the Court). Here, according to the NSW Attorney, it is not necessary to determine the question of how the NSW privilege applies because the parties and the NSW Attorney as intervener agree that it does. Thus resolving which pathway or pathways apply would serve no practical end.

19 According to the NSW Attorney, to determine the constitutional issue would raise 'large questions'. He points, for example, to the fact that if it were to be an aspect of the common law that applies the NSW privilege in Western Australia, that may be susceptible of modification by statute enacted by the Western Australian Parliament.

20 Finally, the NSW Attorney submitted that s 78B precludes the Court from resolving the issue because a reasonable time had not elapsed since either the Minister's s 78B notice (served just over two weeks before the hearing commenced) or that of the NSW Attorney himself (served five days before the hearing commenced).

21 The Speaker's written submissions likewise contend that the NSW privilege applies to the proceeding. But they go on to address the merits of grounds 2 and 3, seeking to demonstrate that even though the privilege does apply, it should not lead to the grounds being upheld. Given that the question of the application of the privilege is addressed in the submissions filed by the Minister and by the NSW Attorney, the Speaker's submissions were, appropriately, directed to the content of the privilege rather than whether and how it applies.

The position at the commencement of the hearing

22 In view of the developments just described, the position concerning the constitutional issue, as it presented itself to me at the commencement of the hearing, was as follows:

(1) The parties, the NSW Attorney and the Speaker all agreed that the NSW privilege applies to the proceeding, even though it was to be heard and determined in Western Australia.

(2) However, whether that is so is a question of law. The Court may proceed on the basis of an agreed position of law (provided that it does not go to jurisdiction), but it is not bound to: *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2023] NSWCA 275; (2023) 112 NSWLR 434 at [6] (Leeming JA, Payne and Mitchelmore JJA agreeing).

(3) The constitutional issues raised do seem to be fundamental to the operation of the federation. And the proceeding concerns, not private rights, but the legal effectiveness of a decision purportedly made by ministers of the Commonwealth and a State in the pursuance of public functions. The need for the Court to be positively satisfied of jurisdictional error is reflected in a line of authorities, like ***Kovalev*** *v Minister for Immigration and Multicultural Affairs* (1999) 100 FCR 323, which say the Court should not grant relief unless positively satisfied that there has been a jurisdictional error: see also ***Irwin*** *v Military Rehabilitation and Compensation Commission* [2009] FCAFC 33; (2009) 174 FCR 574 at [13]-[15] (Downes, Greenwood and Tracey JJ); *VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 921 at [3] (Colvin J). As such, it seemed unsatisfactory to me to proceed to apply the NSW privilege without determining whether, and therefore how, it applied.

(4) The agreement of the parties and interveners (even though they include persons in high public office) would not be enough for the Court, exercising its function as a different branch of government required to resolve disputes according to law, to proceed without deciding the question: *Irwin* at [14]-[15]; *Kovalev* at [8]-[9]. That is particularly so where they agree on the outcome but not on how the outcome is achieved. I accepted, given the unanimity of all before the Court, that it is unlikely that the Court would conclude that the privilege does not apply. But the question does not involve a factual finding or a discretionary evaluation that can be made by reference to probabilities. So as senior counsel for the Minister properly acknowledged, proceeding on the basis of the parties' agreement was unattractive.

(5) I considered whether I could nevertheless proceed on the assumption that the NSW privilege applies without determining that it does. But that would only work if I decide on the basis of the assumption that grounds 2 and 3 nevertheless fail. If I were disposed to uphold the grounds, I would not be proceeding on an assumption that the NSW privilege applies, but on the conclusion, necessary to upholding the grounds, that it does apply.

(6) Despite the written submissions of the Speaker, it was not appropriate for me to dispose of grounds 2 and 3 summarily in order to avoid confronting the constitutional issue. The Minister suggested that I could avoid dealing with those grounds at all, because his primary submission is that there were two independent grounds for the decision, so that if the other grounds fail, Asset Energy could not succeed regardless of grounds 2 and 3. But Asset Energy does not concede that the bases for the decision are as independent as the Minister submits so, once again, that was not a conclusion that I could reach summarily at the beginning of the hearing.

23 Therefore, it seemed to me that the proceeding did necessarily involve a matter arising under the *Constitution* or involving its interpretation (specifically under s 106, at least) so that it would be the duty of the Court not to proceed unless satisfied that a reasonable time since the giving of the s 78B notices had elapsed.

Had a reasonable time elapsed?

24 At the hearing, the Minister submitted that the 15 days' notice given by his s 78B notice meant that a reasonable time had elapsed, but conceded that this could not be said of the NSW Attorney's subsequent notice. The Minister accepted that the issue raised by the NSW Attorney was intertwined with the issues raised by the Minister's notice, so that on the face of things, none of the constitutional issues raised in either of the notices could be addressed at the hearing. Asset Energy suggested that the question could be 'handled pragmatically' in light of the responses to the notices that had and had not been received. But senior counsel for the Minister noted that the Commonwealth Attorney-General had given no response to the NSW Attorney's notice where, he said, arguments about the application of s 106 of the *Constitution* would have significant potential implications, so that the Commonwealth Attorney-General might seek to intervene.

25 The NSW Attorney raised the possibility that what was a 'reasonable time' for the purposes of s 78B might effectively be truncated in view of the agreement of all concerned that the privilege did apply.

26 Apart from the above, no person before the Court contended that a reasonable time had elapsed since the giving of the s 78B notices. For the reasons advanced by the NSW Attorney and the Minister, I considered that it had not.

Proposals as to how the Court might proceed

27 A few proposals emerged at the hearing as to how the Court might nevertheless be able to deal with the matter pragmatically, so as to avoid breaching its duty under s 78B.

28 It was suggested that if, after deliberation, I were to consider that the NSW privilege did not apply, I could notify the parties of that and the matter might be transferred to the New South Wales Registry of the Court or proceed in some other way in light of the view I had reached. The parties acknowledged that this would be messy.

29 Another proposal that arose at the hearing would be to adjourn off any hearing or consideration of grounds 2 and 3 but to proceed to hear the other grounds, where the constitutional questions did not arise. Asset Energy was opposed to this.

30 Another suggestion was to proceed to hear all issues other than those raised by the s 78B notices, and come back at a later time to engage with the constitutional points. This was Asset Energy's preferred course.

31 It was submitted that proceeding in any of those ways would not be inconsistent with s 78B, because s 78B(2)(c) provides that the Court 'may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation'.

32 The difficulty with this was that, on one view, the references to 'matters' and 'matter' in that provision are to a matter in the broad constitutional sense of a justiciable controversy: see *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [1999] FCA 1151; (1999) 95 FCR 292 at [19] (French J); and ***On Call Interpreters*** *and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 2)* [2010] FCA 258; (2010) 183 FCR 58 at [7]-[8] (Bromberg J). If so, it is difficult to see how individual issues can be severed; that was the view which Bromberg J reached in *On Call Interpreters.*

33 Another view is that the words 'matters' and 'matter' must be given a different meaning in s 78B(2)(c) if the provision is to have any work to do. To give them the broad 'constitutional' meaning makes it hard to see how any issue could ever be severable. I accepted that this is arguable. It may find support in the need for 'matter' to be given a narrower meaning in s 78B(1), in the context of the specificity with which the 'nature of the matter' must be specified in the s 78B notice: as to which see ***State Bank*** *of New South Wales v Commonwealth Savings Bank of Australia* (1986) 4 NSWLR 549 at 555-560 (Kirby P). Rares J appeared to take a more

liberal approach to the construction of s 78(2)(c) in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* [2010] FCA 428; (2010) 184 FCR 516 at [16]-[17]. So did the Full Court in *Tuitupou v Minister for Immigration and Multicultural Affairs* [2000] FCA 117.

34 But while a more liberal construction of s 78B(2)(c) seems to me to be arguable, I was not prepared to decide the argument without due deliberation. That is in view of the 'unusually emphatic' terms of s 78B(1) (*State Bank* at 558) which impose a duty on the Court not to proceed where it applies. In *State Bank* at 559, Kirby P observed that '[t]he emphatic language and the strictly limited exceptions stress the importance attached by Parliament to the proper fulfilment of the duty of notification'. I did not consider it appropriate to proceed on the basis of a contestable interpretation of s 78B(2)(c) without full argument, and proper time to consider that argument. That was particularly so in view of the two cases mentioned at [32] above.

35 Hence, I did not consider it open to the Court to proceed, at the listed hearing, with any of the three suggested courses outlined above.

36 Another proposal that emerged would be for the proceeding to be transferred to the Court's New South Wales Registry, to be heard and determined there. This, it was submitted, would make the application of the NSW Privilege easier to determine, since it is likely to be picked up by s 79 of the *Judiciary Act*, which provides in effect that the laws of a State in which the Court is exercising federal jurisdiction are binding on the Court (except as otherwise provided by the *Constitution* or the laws of the Commonwealth). It is possible that the NSW privilege even applies by the direct application of the New South Wales *Imperial Acts Application Act*.

37 Senior counsel for the Minister went so far as to say that if the matter were transferred to New South Wales, 'the constitutional issue would evaporate'. While that would mean that the parties would lose the current hearing dates, counsel for Asset Energy indicated that he understood the attractiveness of the proposal. It was his client's preference to proceed at the listed hearing on the basis that the non-constitutional issues could be severed, but he acknowledged that transferring the matter to New South Wales was also an appropriate course.

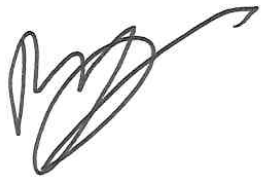
Conclusion

38 For the reasons given, I did not consider that it was possible to proceed to receive evidence and submissions about any aspect of the matter in the then listed hearing without a serious risk, at least, that in doing so the Court would be breaching its duty under s 78B of the *Judiciary Act*. An adjournment was necessary and, that being so, it appeared that the most prudent and

convenient course would be to transfer the matter to be heard in New South Wales. While that transfer may not eliminate the constitutional issues, it appears likely based on the submissions I received at the hearing that they will no longer raise the 'large questions' to which the NSW Attorney referred.

39 It will still be necessary for the parties, and open to the NSW Attorney and the Speaker, to make submissions about the proper application of the NSW Privilege to the Federal Court sitting in New South Wales. Programming orders for further written submissions were therefore made.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson.

Associate: 

Dated: 19 September 2025