

## NOTICE OF FILING

### Details of Filing

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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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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 others named in the schedule**

Respondents

**Applicant's Outline of Further Submissions Made Pursuant to paragraph 6 of the Orders of Jackson J dated 16 September 2025**

***Overview.***

1. Asset Energy submits that no contentious issue arises as to whether the privileges of the Parliament of New South Wales (**NSW Parliamentary Privilege**) apply to these proceedings, given that they have now been transferred to the Federal Court of Australia's New South Wales Registry.<sup>1</sup> This is because NSW Parliamentary Privilege either applies directly to this matter as a result of this Court's "accrued jurisdiction"<sup>2</sup> or in the alternative, by operation of s 79 of the *Judiciary Act* 1903 (Cth).<sup>3</sup> The former pathway is preferable to the latter but the point is not necessary to decide. Furthermore, the application of NSW Parliamentary Privilege here is consistent with the existing practice of the Federal Court of Australia, which has accepted the application of State parliamentary privilege.<sup>4</sup>
2. Asset Energy also accepts that there is force in the submissions of the Attorney-General of New South Wales that NSW Parliamentary Privilege may be enshrined by s 106 of the Commonwealth

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<sup>1</sup> See paragraph 5 of the Orders of Jackson J dated 16 September 2025.

<sup>2</sup> For want of a better term and taking heed of the caution to be applied when using this term: *Rizeq v Western Australia* [2017] HCA 23; 262 CLR 1, [55] (Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>3</sup> Of which sub-section (1) provides: "[t]he laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable". Note too that a change in venue or transfer, as is the case here, can affect the applicable law by the operation of s 79(1) of the *Judiciary Act*: see *Fielding v Doran* (1984) 60 ALR 342, 346 (Dawson J).

<sup>4</sup> See *Mees v Roads Corporation* [2003] FCA 306; (2003) 128 FCR 418, [72]-[86] (Gray J); *Guy v Crown Melbourne Ltd (No 2)* [2018] FCA 36; (2018) 355 ALR 420, [398] (Mortimer J). See too the *obiter dicta* comments in *Re Bell Group NV (in liq) (No 2)* [2017] FCA 927; (2017) 122 ACSR 418, [33] (Jagot J).

**Constitution** (read with covering clause 5).<sup>5</sup> However, the extent to which NSW Parliamentary Privilege is enshrined by the Constitution need not be determined in these proceedings.<sup>6</sup>

*The Direct Operation of Parliamentary Privilege by the Accrued Jurisdiction.*

3. Asset Energy’s primary submission is that NSW Parliamentary Privilege applies here as a substantive or general rule of law on its own force.<sup>7</sup> If this submission is correct, then NSW Parliamentary Privilege is not picked up and applied as a federal law by operation of s 79 of the *Judiciary Act*. As was observed by the plurality in *Rizeq v The State of Western Australia* [2017] HCA 23; (2017) 262 CLR 1, such a State law can be applied within the Federal Court’s “accrued jurisdiction” (albeit that term has been critiqued for imprecision) (at [55]):

it is commonplace that resolution of a matter within federal jurisdiction may involve application both of Commonwealth law and of State law. Indeed it can happen that a matter in federal jurisdiction is resolved entirely through the application of State law. Application of State law in federal jurisdiction came for a period to be described, “[f]or want of a better term”, as “accrued jurisdiction”. There is “no harm in the continued use of the term ‘accrued jurisdiction’ provided it be borne in mind ... there [is] but one ‘matter’”. However, the imprecision the term introduces into the word “jurisdiction” means that the term is best avoided. There is but one matter and that matter is entirely within federal jurisdiction, as distinct from State jurisdiction.

4. Here there is a single matter arising from Asset Energy’s application for judicial review dated 12 February 2025, which involves contentious issues of substantive federal and non-federal law. The single matter arises because the determination of both the federal and non-federal issues are intertwined.<sup>8</sup> As was emphasised in *Fencott v Muller* (1982) 152 CLR 570 by Mason, Murphy, Brennan and Deane JJ (at 606–608), an illuminating method to identify a justiciable controversy is to pay close attention to the pleadings and to the factual basis of each claim. This can involve a “matter of impression and practical judgment”.<sup>9</sup>

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<sup>5</sup> See, in particular, Submissions of the Attorney General for New South Wales (intervening) dated 12 September 2025 at [26] to [32]. This issue is also raised (but not resolved) in E Campbell, *Parliamentary Privilege* (Federation Press 2003) 222–226.

<sup>6</sup> The prudent, cautious, or restrained approach to the adjudication of constitutional questions is well settled and understood, see *Mineralogy Pty Ltd v Western Australia* [2021] HCA 30; (2021) 274 CLR 219, [57]–[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); [96] (Edelman J); *Farm Transparency International Ltd v New South Wales* [2022] HCA 23; (2022) 277 CLR 537, [20] (Kiefel CJ and Keane J); [114]–[116], [120] (Gordon J). For a recent scholarly discussion on this topic see T Taylor, ‘The High Court’s Prudential Approach to Constitutional Adjudication: When Is It Necessary to Resolve a Constitutional Question’ (2024) 47(1) *UNSW Law Journal* 211.

<sup>7</sup> See, for example, *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [30]–[39], [49]–[50], (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ). See too per Edelman J at [69]–[72].

<sup>8</sup> See generally, Mark Leeming, *Cowen and Zines Federal Jurisdiction in Australia* (Federation Press 2025) 192.

<sup>9</sup> *Fencott v Muller* (1982) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

5. NSW Parliamentary Privilege provides an essential premise to ground 2 of the application for judicial review<sup>10</sup> it is also essential to the metes and bounds<sup>11</sup> of what can be argued regarding ground 3. Likewise, absent the application for judicial review brought under s 39B of the *Judiciary Act*<sup>12</sup> and s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth),<sup>13</sup> there is no reason to consider the application of NSW Parliamentary Privilege as between the litigants.<sup>14</sup> Put another way, the issues raised by NSW Parliamentary Privilege in this application do not involve an entirely severable claim or issue<sup>15</sup> from the matter that otherwise engages the jurisdiction of this Court.
6. The only issue of significance here is the pathway by which NSW Parliamentary Privilege applies. As recent decisions of the High Court of Australia have emphasised,<sup>16</sup> s 79 of the *Judiciary Act* is not the sole means by which State laws are “picked up” and applied in the exercise of federal jurisdiction. This is because, properly construed, s 79 operates only for the limited purpose of filling a “gap” in the law applicable in federal jurisdiction that results from the lack of power of a

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<sup>10</sup> See, for example, “particular v” of ground 2 of the application for judicial review dated 12 February 2025.

<sup>11</sup> See, for example, “particular i” of ground 3 (read with particulars ii to vi of ground 2) of the application for judicial review dated 12 February 2025.

<sup>12</sup> No party has contended that s 39B is not properly engaged. There being a matter in which a writ in the nature of mandamus is sought against an officer or officers of the Commonwealth (see, s 39B(1)) or otherwise arising under laws made by the Commonwealth Parliament (see, s 39B(1A)(c)). See further, *Baker v Patrick Projects Pty Ltd* (2014) 226 FCR 302, [28]–[29] (Katzmann J with whom Dowsett and Tracey JJ agreed). On a minister being an “officer”: *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1; 257 CLR 42, [127] (Gageler J). As regards the second respondent, there is nothing anomalous in the case of joint Federal–State bodies, that persons holding an office and exercising powers in terms of a Commonwealth Act can be “officers of the Commonwealth”, see *Re Cram; Ex parte NSW Colliery Proprietors’ Association Ltd* (1987) 163 CLR 117, 131 (the Court) (regarding the Commonwealth and State Coal Industry Tribunal).

<sup>13</sup> No party has contended that s 5 is not properly engaged. As to the requirements of s 5 of the ADJR Act, see, [1] to [9] of the application for judicial review dated 12 February 2025. There is no issue in dispute that the impugned decisions of the Joint Authority here are final and binding administrative decisions, made under a Commonwealth Act, in circumstances where Asset Energy is a person aggrieved, and that administrative decisions under the OPGGS Act are not excluded from the ADJR Act.

<sup>14</sup> Issues regarding parliamentary privilege ought not be determined outside of a justiciable controversy: *Egan v Willis* (1998) 195 CLR 424, [5] (Gaudron, Gummow, and Hayne JJ).

<sup>15</sup> *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 580 (Latham CJ); *Fencott v Muller* (1982) 152 CLR 570, 606–608 (Mason, Murphy, Brennan and Deane JJ).

<sup>16</sup> See, in particular, *Rizeq v The State of Western Australia* [2017] HCA 23; (2017) 262 CLR 1, [15]–[26] (Kiefel CJ); [55]–[64], [103] (Bell, Gageler, Keane, Nettle, and Gordon JJ); *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [30]–[39], [49]–[50], (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ); [62]–[69] (Edelman J).

State to otherwise regulate the exercise of federal jurisdiction.<sup>17</sup> So, stated broadly, a relevant distinction arises in the cases between:<sup>18</sup>

- (a) State laws which are “general” in the sense that they are directed to regulating the rights, duties, powers, liabilities, immunities, disabilities, and privileges (or lack thereof) between parties.<sup>19</sup> Such laws apply of their own force to affect the jural relations between the law’s subjects; and
- (b) State laws that are directed to governing or regulating the exercise of jurisdiction by a court.<sup>20</sup> Such laws are directed to regulating or governing a court’s authority to decide by, for example, delimiting the powers of that court or directing how such judicial powers are to be exercised.

7. As a general proposition, those State laws of general application (even sourced by statute)<sup>21</sup> that fall within paragraph 6(a) above apply, in concert with the unified common law and Commonwealth statutes, in federal jurisdiction by the accrued jurisdiction.<sup>22</sup> That is, such laws do not require s 79 of the *Judiciary Act* to apply. The only caveat to this analysis, discussed further below, is that such State laws can only apply to the extent that they are not rendered invalid by reason of inconsistency with Commonwealth laws.<sup>23</sup> On the other hand, State laws that regulate the exercise of jurisdiction do require s 79 of the *Judiciary Act* to apply. This is because “s 79(1) fills the gap [in Commonwealth law] by picking up texts of State laws governing the manner of

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<sup>17</sup> *Rizeq v The State of Western Australia* [2017] HCA 23; (2017) 262 CLR 1, [15]–[20] (Kiefel CJ); [60]–[64], [103] (Bell, Gageler, Keane, Nettle, and Gordon JJ); *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [1], [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ); [62] (Edelman J).

<sup>18</sup> Mark Leeming, *Cowen and Zines Federal Jurisdiction in Australia* (Federation Press 2025) 19–20.

<sup>19</sup> *Rizeq v The State of Western Australia* [2017] HCA 23; (2017) 262 CLR 1, [25]–[26] (Kiefel CJ); [55]–[64], [103] (Bell, Gageler, Keane, Nettle, and Gordon JJ); *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [1], [30]–[39], (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ); [62]–[72] (Edelman J).

<sup>20</sup> *Rizeq v The State of Western Australia* [2017] HCA 23; (2017) 262 CLR 1, [15]–[20], [32] (Kiefel CJ); [60]–[64], [103] (Bell, Gageler, Keane, Nettle, and Gordon JJ); *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [1], [30]–[31], (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ); [62]–[72] (Edelman J).

<sup>21</sup> *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [31]–[39], (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ); [62]–[72] (Edelman J). See too *Rizeq v The State of Western Australia* [2017] HCA 23; (2017) 262 CLR 1, [25] (Kiefel J).

<sup>22</sup> *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [31]–[39], (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ); [62]–[72] (Edelman J).

<sup>23</sup> *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [49]–[52] (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ); [72] (Edelman J). See too *Rizeq v The State of Western Australia* [2017] HCA 23; (2017) 262 CLR 1, [103] (Bell, Gageler, Keane, Nettle, and Gordon JJ).

exercise of State jurisdiction and applying them as Commonwealth laws governing the manner of exercise of federal jurisdiction”.<sup>24</sup>

8. Given that NSW Parliamentary Privilege either applies to these proceedings by way of the accrued jurisdiction or by s 79 of the *Judiciary Act*, there is no need for this Court to rule definitively on the issue. If this Court is, however, minded to resolve this issue then the preferable view is that NSW Parliamentary Privilege applies directly as a substantive rule of law. That is for the following reasons.
9. *First*, the scope of NSW Parliamentary Privilege applies more broadly than curial proceedings as the *purpose* of such a Privilege is to enable the houses of New South Wales Parliament to discharge effectively their functions.<sup>25</sup> It follows that NSW Parliamentary Privilege does more than govern or regulate the exercise of jurisdiction by a court. This is evident in the following features of NSW Parliamentary Privilege: (i) freedom of speech within Parliament, which is protected by *both* immunising members from liability (i.e. conferring a privilege in the true sense of that word) regarding communications made during parliamentary proceedings *and* disabling persons from using evidence of parliamentary proceedings in courts and in other extra-parliamentary fora;<sup>26</sup> (ii) the powers of Parliament to regulate its own processes including for contempt where the relevant House has been misled by a statement made by a member<sup>27</sup> (accepting that the Parliament of New South Wales does not appear to possess penal<sup>28</sup> powers); and (iii) powers of attendance and production.<sup>29</sup>
10. *Second*, the point made immediately above is consistent with the text of Art. 9 of the *Bill of Rights 1689* (UK) 1 Wm & M Sess 2 c 2 which provides that: “the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court *or Place out of Parlyament*” (emphasis added). While the metes and bounds of what is meant by any place *out of*

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<sup>24</sup> *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ).

<sup>25</sup> See, for example, *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 334 (Lord Browne-Wilkinson). Likewise, E Campbell, *Parliamentary Privilege* (Federation Press 2003) 1.

<sup>26</sup> See, for example, *Mees v Roads Corporation* [2003] FCA 306; (2003) 128 FCR 418, [85]–[86] (Gray J); *R v Secretary of State for Trade; Ex parte Anderson Strathclyde plc* [1983] 2 All ER 233, 238–239 (Dunn LJ); and E Campbell, *Parliamentary Privilege* (Federation Press 2003) Ch 2 and 6.

<sup>27</sup> See, for example, *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 335 (Lord Browne-Wilkinson); and E Campbell, *Parliamentary Privilege* (Federation Press 2003) Ch 13.

<sup>28</sup> See E Campbell, *Parliamentary Privilege* (Federation Press 2003) 189.

<sup>29</sup> See E Campbell, *Parliamentary Privilege* (Federation Press 2003) Ch 10.

*parliament* has not been authoritatively settled,<sup>30</sup> the salient point is that the breadth of NSW Parliamentary Privilege tells against the doctrine being characterised as a law that regulates the exercise of jurisdiction by a court.

11. *Third*, NSW Parliamentary Privilege impacts substantive rights and jural relations between the law's subjects of its own force and independently from curial proceedings or anything done by a court.<sup>31</sup> The fact that Parliamentary Privilege involves certain substantive "rights" (more accurately a package of rights, powers, immunities/privileges and disabilities) is captured in the following observation from the current online edition of *Erskine May* which, although lengthy, is worth setting out in full (footnotes omitted):<sup>32</sup>

Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute. Certain rights and immunities such as freedom from arrest or freedom of speech are exercised primarily by individual Members of each House. They exist in order to allow Members of each House to contribute effectively to the discharge of the functions of their House. Other rights and immunities, such as the power to punish for contempt and the power to regulate its own constitution, belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members. The Speaker has ruled that parliamentary privilege is absolute.

When any of these rights and immunities is disregarded or attacked, the offence is called a breach of privilege and is punishable under the law of Parliament. Each House also claims the right to punish contempts. These are actions which, while not necessarily breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members or its officers. The power to punish for contempt or breach of privilege has been judicially considered to be inherent in each House of Parliament not as a necessary incident of the authority and functions of a legislature (as might be argued in respect of certain privileges) but by virtue of their descent from the undivided High Court of Parliament and in right of the *lex et consuetudo parliamenti*.

12. *Fourth*, it is well settled law that NSW Parliamentary Privilege is not<sup>33</sup> merely a rule of evidence.<sup>34</sup>

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<sup>30</sup> E Campbell, *Parliamentary Privilege* (Federation Press 2003) 19–21.

<sup>31</sup> Cf *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ); [72] (Edelman J).

<sup>32</sup> D Natzler and M Hutton, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (25th edition, LexisNexis 2019) at [12.1] (accessible online at <https://erskinemay.parliament.uk/> as of 24 September 2025).

<sup>33</sup> *Hamsher v Swift* (1992) 33 FCR 545, 564 (French J); *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 335 (Lord Browne-Wilkinson).

<sup>34</sup> Cf *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ).

13. Fifth, in *Mees v Roads Corporation* [2003] FCA 306; (2003) 128 FCR 418 it is true that Gray J used s 79 of the *Judiciary Act* to apply the privileges of the Parliament of Victoria to a matter which involved the Federal Court of Australia sitting in Melbourne. In doing so, his Honour observed that, “[a]n Act of the Victorian Parliament would not ordinarily have a direct effect on the exercise of the judicial power of the Commonwealth by this Court” (at [75]). The short answer to his Honour’s view of the breadth of s 79 is that it was made without the benefit of, and through no fault of his Honour,<sup>35</sup> the more recent pronouncements of the High Court of Australia (as discussed above) regarding s 79.<sup>36</sup>
14. Finally, now that these proceedings have been transferred to New South Wales, s 6 of the *Imperial Act Application Act 1969* (NSW) applies Art 9 of the *Bill of Rights* without the need to consider any potential extra territorial effect that that provision may have (accepting here that NSW Parliamentary Privilege may also have a common law source).<sup>37</sup> Further, no party involved in these proceedings has identified a provision from a Commonwealth statute or the Constitution which prevents the application of NSW Parliamentary Privilege. Indeed, even if such a law were identified then it would need to be read subject to the principle that statutes are to be construed on the presumption that they are not intended to derogate from parliamentary privilege.<sup>38</sup>
15. The only Commonwealth statute identified by Asset Energy that appears to deal with State parliamentary privilege is s 10(1) of the *Evidence Act 1995* (Cth). That provision provides expressly that Commonwealth law *preserves* (i.e. does not affect) “the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament”. It follows that the Federal Court of Australia sitting in Sydney has no legal impediment about the recognition and

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<sup>35</sup> This aspect of Gray J’s decision in *Mees* was queried in *Re Bell Group NV (in liq) (No 2)* [2017] FCA 927; (2017) 122 ACSR 418, [39] (Jagot J).

<sup>36</sup> Being, *Rizeq v The State of Western Australia* [2017] HCA 23; (2017) 262 CLR 1; *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554.

<sup>37</sup> See *Duke of Newcastle v Morris* (1870) LR 4 HL 661, 667 (Lord Hatherley LC): “The privilege of Parliament ... is a privilege which has been recognised as being founded upon Common Law. No doubt it did stand upon the Common Law, and in the subsequent legislation on the subject care was taken that that Common Law privilege should be protected by special clauses inserted in the various Acts of Parliament”. See too A Twomey, *The Constitution of New South Wales* (Federation Press 2004) 494; *Attorney-General (Tas) v Casimaty* [2024] HCA 31; (2024) 98 ALJR 1139, [70] (Edelman J).

<sup>38</sup> *Duke of Newcastle v Morris* (1870) LR 4 HL 661, 668 (Lord Hatherley LC): “[i]t seems to me that a more sound and reasonable interpretation of such an Act of Parliament would be, that the privilege which had been established by Common Law and recognised on many occasion by Act of Parliament, should be held to be a continuous privilege which should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute” (see further at 671–672, 674 and also at 678 per Lord Westbury and at 680 per Lord Colonsay “I think that [parliamentary privilege] was a protection which could not be lost without being expressly taken away”), cited with approval by Dawson J in *Baker v Campbell* (1983) 153 CLR 52, 123.

application of the relevant privileges of the Legislative Assembly of the Parliament of New South Wales.

16. Accordingly, NSW Parliamentary Privilege ought to apply here as a substantive principle of State law which has been subsumed into the matter as between litigants.

***The Operation of Parliamentary Privilege by s 79 of the Judiciary Act.***

17. If this Court does not accept that NSW Parliamentary Privilege is directed at the creation of substantive rights, duties, powers, liabilities, immunities, disabilities, privileges (or lack thereof) but rather that it is a command directed to this Court to regulate jurisdiction, then a different pathway than the accrued jurisdiction is called for. In such circumstances s 79 of the *Judiciary Act* would be required to “pick up” NSW Parliamentary Privilege. Given that this Court is now sitting in New South Wales the application of NSW Parliamentary Privilege in this manner would be unremarkable.<sup>39</sup>
18. While Asset Energy’s position is that NSW Parliamentary Privilege is *not* a law governing or regulating the exercise of jurisdiction by a court, the best argument identified in favour of this approach can be drawn from an observation of Justice Leeming writing extrajudicially. His Honour has observed that the High Court of Australia’s recent jurisprudence on s 79 of the *Judiciary Act* has “not universally been well received”.<sup>40</sup> One reason for this is because:<sup>41</sup>

The distinction identified in *Rizeq* and *Masson* will lead to 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. *Some laws may be both.* (emphasis added)

19. The relevance of his Honour’s observation is clear. NSW Parliamentary Privilege may simply not track the dichotomy created by the High Court of Australia regarding s 79 of the *Judiciary Act*. So, while it is clear for the reasons set out at paragraphs 9 to 13 above that NSW Parliamentary Privilege does affect substantive jural relations, it could also be the case that it *also* regulates the exercise of jurisdiction by a court<sup>42</sup> (i.e. the two categories identified by the High Court of Australia may not always be mutually exclusive). If that were right, then there is some uncertainty

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<sup>39</sup> See (n 3) above.

<sup>40</sup> Mark Leeming, *Cowen and Zines Federal Jurisdiction in Australia* (Federation Press 2025) 20.

<sup>41</sup> Mark Leeming, *Cowen and Zines Federal Jurisdiction in Australia* (Federation Press 2025) 20.

<sup>42</sup> It is true that, for example, parliamentary privilege has been expressed as a restriction on the judiciary: *Attorney-General (Tas) v Casimaty* [2024] HCA 31; 98 ALJR 1139, [72] (Edelman J): “Art 9 has been recognised, in what is effectively a duty on courts, as preventing consideration of anything that would impeach or question any speech, debate or parliamentary proceeding”.

as how the dichotomy created by the High Court of Australia ought to treat such a law. The answer proffered here is that once a State law regulates the parties' substantive rights then it need not depend on s 79 of the *Judiciary Act* for its application in federal jurisdiction, irrespective of how else that law may be characterised (i.e. such a law simply has no need for s 79 of the *Judiciary Act*).<sup>43</sup>

20. The simplest way forward in the present case is to observe that no matter which pathway is adopted, NSW Parliamentary Privilege applies in any event.

***What, if anything, is left of the two notices issued under s 78B of the Judiciary Act?***

21. There are no substantive issues that arise from the respective notices issued under s 78B of the *Judiciary Act* by both the first respondent and the Attorney-General of NSW (intervening).
22. As to the notice issued “out of an abundance of caution” (see the notice at [8]) by the first respondent on 1 September 2025, as far as Asset Energy understands, the constitutional matter raised therein only concerns the potential extra-territorial application of NSW Parliamentary Privilege. Namely, the pathway by which NSW Parliamentary Privilege can apply to a matter being heard by the Federal Court of Australia sitting in Western Australia. The issue that this Court may have had to determine was whether there is a common law choice of law rule that needs to apply in conformity with the Constitution, and given the constitutional fact of federation, to ensure “uniformity of outcome no matter where in the Australian federation a matter is litigated, whether it is litigated in federal or non-federal jurisdiction” (see the notice at [2]). Given that this Court is now sitting in New South Wales the matters raised in the first respondent’s 78B notice do not arise for determination and need not be resolved.<sup>44</sup>
23. As to the notice issued by the Attorney-General of NSW on 11 September 2025, whether and to what extent NSW Parliamentary Privilege is enshrined by s 106 of the Commonwealth Constitution (read with covering clause 5) need not be determined. There appears to be no relevant or applicable attempt by the Commonwealth Parliament or another State Parliament to abrogate or modify NSW Parliamentary Privilege. There is an open question as to whether the

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<sup>43</sup> See *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554, [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ): “as was stressed in *Rizeq*, s 79(1) of the *Judiciary Act* has no broader operation than that. In particular, 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”. See too Edelman J at [72]: “in my view, it does not matter whether [the law in question is] characterised as concerned with the general statutory rights and duties of persons, or as inseparable from the powers of the court to make substantive orders, or both. Under either of those characterisations [the impugned law] is a law that applies of its own force. It is not a law that would need to be picked up by s 79(1) of the *Judiciary Act*”.

<sup>44</sup> See (n 6) above.

Commonwealth Parliament or another State parliament could prevent the application of NSW Parliamentary Privilege in circumstances where that Privilege was raised in a court of another State or otherwise within Federal jurisdiction in different factual circumstances. As noted above, there is force in the Attorney-General of NSW's submissions that NSW Parliamentary Privilege is preserved by the Constitution,<sup>45</sup> but this point does not arise for final determination to resolve this matter.

***Conclusion.***

24. This Court should be satisfied that no contentious issue arises as to whether NSW Parliamentary Privilege applies to these proceedings. NSW Parliamentary Privilege either applies directly to this matter as a result of this Court's accrued jurisdiction or otherwise, and in the alternative, by operation of s 79 of the *Judiciary Act 1903* (Cth). As submitted above, Asset Energy's position is that the former pathway is preferable to the latter but that this point is not necessary to decide.

Date: 6 October 2025

NA Tiverios

**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**

Intervener: **Attorney-General of New South Wales**

Amicus Curiae: **Speaker of the Legislative Assembly of New South Wales**

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<sup>45</sup> See (n 5) above.