



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY**

NO H2 OF 2021

BETWEEN:

**HOBART INTERNATIONAL AIRPORT PTY
LTD**
Appellant

and

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CLARENCE CITY COUNCIL

First Respondent

and

THE COMMONWEALTH OF AUSTRALIA

Second Respondent

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NO H3 OF 2021

BETWEEN:

**AUSTRALIA PACIFIC AIRPORTS
(LAUNCESTON) PTY LTD (ACN 081 578 903)**
Appellant

and

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NORTHERN MIDLANDS COUNCIL

First Respondent

and

THE COMMONWEALTH OF AUSTRALIA

Second Respondent

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SUPPLEMENTARY SUBMISSIONS OF THE SECOND RESPONDENT

Introduction

1. Pursuant to leave given on 21 October 2021, these submissions are filed by the Second Respondent (the **Commonwealth**) in relation to the trusts issue raised in the course of oral argument before the Full Court on 12 October 2021.
2. The Councils, by their Supplementary Submissions of 18 October 2021 (**CSS**), seek leave to advance a new contention on the appeal. The Councils wish to contend that cl 26.2(a) in each lease gives rise to a trust of the benefit of the promise made by the lessees until an agreement is entered into by them with the Councils: CSS [2], [16].
3. The Commonwealth does not oppose leave being granted to the Councils to advance this new argument. However, for the reasons developed in these submissions, the Commonwealth submits that the argument should not be accepted.

Relevant principles

4. The Councils' submission, expressed at CSS [16], is that the Commonwealth is "the trustee of the benefit of the promise made by the lessees".
5. The analysis leading to this conclusion proceeds from the premise that the same principles are applicable to determining whether the Commonwealth is a trustee as apply when a private person has entered into a contract pursuant to which a benefit is conferred on a third party. In fact, however, the case law establishes that where the Crown is said to have assumed obligations as a trustee, different considerations apply. For that reason, *Bahr v Nicolay (No 2)*¹ is of limited utility in determining the new argument that the Councils seek to raise, because that case did not involve a body politic entering into a contract for the benefit of another.
6. Where it is asserted that the Crown has assumed obligations as a trustee, the starting point is the decision of the House of Lords in *Kinloch v Secretary of State for India*.² This Court has described the principle established by *Kinloch* as being that "clear words" are required "before an obligation on the part of the Crown or a servant or agent of the Crown, even if described as a trust obligation, will be treated as a trust according to ordinary principles or, as it is sometimes called, a 'true trust'; rather, in the absence of clear words,

¹ (1988) 164 CLR 604.

² (1882) 7 App Cas 619 at 625-626 (*Kinloch*).

the obligation will be characterized as a governmental or political obligation, sometimes referred to in the decided cases as a trust ‘in the higher sense’ or ‘a political trust’.³

7. The *Kinloch* principle was considered by this Court in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation (Registrar)*.⁴ The question arising in *Registrar* was whether the appellant (a statutory office holder) was a trustee of money credited to accounts held by him with respect to awards of compensation under a statutory scheme for the purposes of the *Income Tax Assessment Act 1936* (Cth).⁵
- 10 8. The majority in *Registrar* stated that *Kinloch* “does no more than state a rule of construction to be applied in ascertaining whether an intention to create a trust according to ordinary principles is to be discerned from the language of the instrument involved”.⁶ The majority emphasized, however, that subject matter and context are “also important” and may sometimes be “more revealing of intention” than the words used.⁷ Because *Registrar* involved a statutory officer holder, the Court considered issues that do not arise here (for example, the fact that a statutory officer holder may exercise some functions
- 20 that are Crown or governmental functions and some that are not).⁸ For present purposes, what is relevant is that the majority approved of the *Kinloch* principle as a principle of construction applicable in cases where “it appears that there is some governmental interest or function involved”.⁹ The minority also saw the question arising as one of statutory construction: does the statute intend the property in question to be held in trust?¹⁰
- 30 9. The *Kinloch* principle recognises that executive governments engage in activities for the benefit of others in a variety of ways and on a large scale. That is why an executive government stands in a different position to a body corporate or an individual. The

³ *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 162-163 (Mason CJ, Deane, Toohey and Gaudron JJ). See also *Aboriginal Development Commission v Treka Aboriginal Arts and Crafts Ltd* [1984] 3 NSWLR 502 at 516-517 (Hutley JA).

⁴ *Registrar* (1993) 178 CLR 145.

⁵ *Registrar* (1993) 178 CLR 145 at 161 (Mason CJ, Deane, Toohey and Gaudron JJ).

⁶ *Registrar* (1993) 178 CLR 145 at 163 (Mason CJ, Deane, Toohey and Gaudron JJ).

⁷ *Registrar* (1993) 178 CLR 145 at 163 (Mason CJ, Deane, Toohey and Gaudron JJ). See also *Kinloch* (1882) 7 App Cas 619 at 626 (Lord Selborne, LC) (the sense in which the words “in trust for” are used is “to be determined, looking at the whole instrument and at its nature and effect”); and *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 216 (Megarry V-C).

⁸ See, eg, *Registrar* (1993) 178 CLR 145 at 163 (Mason CJ, Deane, Toohey and Gaudron JJ).

⁹ *Registrar* (1993) 178 CLR 145 at 164 (Mason CJ, Deane, Toohey and Gaudron JJ).

¹⁰ *Registrar* (1993) 178 CLR 145 at 181 (Brennan, Dawson and McHugh JJ).

circumstances in which it might be reasonable to infer an intention to create a trust where the asserted trustee is an individual cannot be applied without modification when the asserted trustee is the executive government, for that would fail to account for the public character and duties of the executive government (that being a critical contextual feature). Amongst other things, and consistently with Hogg’s observations in the Canadian context,¹¹ when the Crown acts there is a body of law that operates to govern those actions (including, for example, the availability of judicial review). Those actions also take place within the overarching framework of the principles of representative and responsible government. Any intention to “overlay these principles” with additional private law duties should be founded only upon “clear statutory language or surrounding circumstances that place the Crown in a relationship that clearly indicates the assumption of a fiduciary duty”.¹²

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10. Consistently with the majority and minority judgments in *Registrar*, a statute only creates a trust relationship between the Commonwealth (or a State) and a third party if the statute, properly construed, evinces a clear intention to create a trust. Typically that requires express words, although as *Kinloch* demonstrates even the use of the words “in trust for” may not be determinative.¹³ In the case of a lease granted pursuant to a statute, the same principles apply. The Court should construe each lease in its context to assess whether the requisite intention exists.

Analysis

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11. In the present case, cl 26.2(a) does not use the word “trust” or any other language that is ordinarily used to signify an intention to create a trust, such as “for the benefit of”. Indeed, cl 26.2(a) imposes no obligations at all on the Commonwealth in respect of the payments to be made to the Councils under the cl 26.2(a) mechanism. The focus of cl 26.2(a) is the relationship between the Airports and the Councils. Accordingly, the express words of cl 26.2(a) do not support the Councils’ contention at CSS [16] that the Commonwealth is “the trustee of the benefit of the promise made by the lessees”.

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¹¹ Hogg, Peter, *Liability of the Crown* (4th ed, 2011), 379.

¹² Hogg, Peter, *Liability of the Crown* (4th ed, 2011), 379.

¹³ In *Kinloch*, the Queen had by Royal Warrant granted certain booty of war to the Secretary of State for India in Council “in trust for the use of” the officers and men of certain forces: (1882) 7 App Cas 619 at 625 (Lord Selborne, LC). See also *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 216.

12. There is also nothing in the subject matter of the leases or the subject matter of the broader legislative context warranting a different conclusion.

10 12.1. First, it is significant that the Airport lessees contracted with the Commonwealth itself (not a Commonwealth authority or statutory office-holder), which means (on the Councils' argument) the trustee is said to be the Commonwealth itself. In *Kinloch*, Lord Selborne noted that the Royal Warrant used the corporate description "the Secretary of State for India in Council" rather than the title "Secretary of State" or the name of the individual holder of that office.¹⁴ Lord Selborne considered these matters went to show "not in a small way" that it "could not have been the intention of the Crown ... to constitute a trust in the manner insisted upon".¹⁵ In the Commonwealth's submission, a similar point can be made here. If the parties intended to constitute a trust and thereby impose obligations on the trustee, it would be expected that the trustee would be an individual (such as a statutory office-holder) or a statutory body, not simply "the Commonwealth".

20 12.2. Second, the leases concern important public infrastructure and were granted pursuant to s 22 of the *Airports (Transitional) Act 1996* (Cth) (***Transitional Act***). As the objects of the *Airports Act 1996* (Cth) (***Airports Act***) make clear,¹⁶ there is a governmental interest¹⁷ in the regulation of (inter alia) the ownership and control of airports. The fact that the leases are granted pursuant to a statutory power and give effect to a longstanding governmental policy confirms that, in entering into and
30 administering the leases, the Commonwealth is performing a governmental function. Unlike the position in *Registrar*, the system of statutory regulation in which the lease was entered into was directed to "the interests of airport users and

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¹⁴ *Kinloch* (1882) 7 App Cas 619 at 623 (Lord Selborne, LC).

¹⁵ *Kinloch* (1882) 7 App Cas 619 at 623 (Lord Selborne, LC).

¹⁶ *Airports Act 1996* (Cth) s 3(b), (c), (e), (f) and (g).

¹⁷ *Registrar* (1993) 178 CLR 145 at 164 (Mason CJ, Deane, Toohey and Gaudron JJ).

the general community”¹⁸ at large and would “ordinarily [be] perceived” as governmental in nature.¹⁹

- 10 13. That the parties included cl 26.2(a) in the leases to benefit the Councils says nothing about whether the Commonwealth assumed trust obligations. By way of comparison, it is not unusual for a statutory provision to have the purpose of conferring a benefit on an identifiable part of the community. The conferral of such a benefit does not, in and of itself, indicate an intention to constitute a trust. Looking to purpose more broadly, the fact that the leases are granted pursuant to s 22 of the *Transitional Act* and need to comply with the rules in Pt 2 of the *Airports Act* mean they give effect to the governmental interest (manifest in the objects of the *Airports Act*) in regulating the ownership and control of airports for the benefit of the public generally. That points strongly against the creation of a trust.

Conclusion

- 20 14. Reading the leases in their entirety, and in the context of the statutory framework that underpins them, there are no “clear words” (in cl 26.2(a) or otherwise) that would warrant the conclusion that the parties intended to constitute a trust by cl 26.2(a). Accordingly, the Court should not accept the Councils’ argument that the Commonwealth is the trustee of the benefit of the promise made by the lessees pursuant to cl 26.2(a) of the leases.

Dated: 28 October 2021

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<p>Stephen Donaghue Solicitor-General of the Commonwealth T: (02) 6141 4145 E: stephen.donaghue@ag.gov.au</p>	<p>Craig Lenehan Fifth Floor St James’ Hall T: (02) 8257 2530 E: craiglenehan@stjames.net.au</p>	<p>Kathleen Foley Owen Dixon Chambers West T: (03) 9225 6136 E: kfoley@vicbar.com.au</p>
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¹⁸ See *Airports Act 1996* (Cth) s 3(b). Cf the nature of the function in issue in *Registrar* (the administration of compensation moneys awarded to or for the benefit of particular workers or, in the case of their death, their dependents).

¹⁹ *Registrar* (1993) 178 CLR 145 at 164 (Mason CJ, Deane, Toohey and Gaudron JJ). See also *Mines Rescue Board (NSW) v Commissioner of Taxation* (2000) 101 FCR 91 at [26] (the Court).