



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 Oct 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: H2/2021
File Title: Hobart International Airport Pty Ltd v. Clarence City Council
Registry: Hobart
Document filed: Form 27F - Second respondent's outline of oral argument
Filing party: Respondents
Date filed: 12 Oct 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

BETWEEN:

NO H2 OF 2021

HOBART INTERNATIONAL AIRPORT PTY LTD

Appellant

AND

10

CLARENCE CITY COUNCIL

First Respondent

THE COMMONWEALTH OF AUSTRALIA

Second Respondent

AND

NO H3 OF 2021

20

AUSTRALIA PACIFIC AIRPORTS (LAUNCESTON) PTY LTD

(ACN 081 578 903)

Appellant

AND

NORTHERN MIDLANDS COUNCIL

First Respondent

30

THE COMMONWEALTH OF AUSTRALIA

Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE SECOND RESPONDENT

40

PART I: INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The “matter” requirement

2. A “matter” will exist where a proceeding will determine a controversy as to an immediate right, duty or liability of one or more of the parties by the application of judicial power. Ch III does not require the immediate right, duty or liability to be established to be one in which the parties have correlative interests, or indeed that the grant of relief will affect the applicant’s legal interests at all (**CS [12]**).
 - *Truth About Motorways* (2000) 200 CLR 591 at [16]-[17], [20] (Gleeson CJ and McHugh J), [44]-[50] (Gaudron J), [76]-[77], [94]-[95], [99]-[100], [122] (Gummow J), [183]-[185] (Hayne J). See also [152] (Kirby J), [203]-[204], [211] (Callinan J) (**JBA 4, tab 26**)
3. This Court has held that questions of standing (relevant to relief) are “subsumed” within the constitutional requirement that there be a “matter” (relevant to jurisdiction). That is so because, while a matter requires the existence of a controversy between the parties for the quelling of which judicial power is invoked, ordinarily a claim by a person who has the interest necessary to seek particular relief will itself establish the existence of such a controversy.
 - *Re McBain* (2002) 209 CLR 372 at [62] (Gaudron and Gummow JJ) (**JBA 4, tab 23**)
 - *Croome* (1997) 191 CLR 119 at 126 (Brennan CJ, Dawson and Toohey JJ) (**JBA 3, tab 15**)
 - *Kuczborski* (2014) 254 CLR 51 at [5] (French CJ) (**JBA 3, tab 19**)
4. A “matter” can exist even in the absence of a dispute between parties to a contract, as the boundaries of the justiciable controversy may not be determined by the contractual relationship (**CS [13]**).
 - *Ashmere Cove* (2008) 166 FCR 398 at [48]-[52] (Heerey, Sackville and Siopis JJ) (**JBA 5, tab 33**)

5. There is no basis to apply a different or more onerous test for identifying a “matter” in the context of private law than applies in public law. Further, as the facts of the current case illustrate, there is no clear dichotomy between public and private law cases (CS [15]-[16], [18]).

- *Truth About Motorways* (2000) 200 CLR 591 at [2] (Gleeson CJ and McHugh J), [44]-[50] (Gaudron J), [93]-[95] (Gummow J), [162] (Kirby J), [183]-[184] (Hayne J), [211] (Callinan J) (**JBA 4, tab 26**)

- 10
- *Airports (Transitional) Act 1996* (Cth) Pt 3 (**JBA 1, tab 3**)
 - Federal Airports Corporation Policy Manual, Vol 8 Property Policy (October 1994) (**Councils’ BFM tab 4, p 60**)

The standing requirement

6. Standing to obtain declaratory relief turns on whether the applicant has a “real” interest in obtaining that relief (CS [24]). That test was developed in the context of private law, and is not confined to the public law context (CS [25]).

- *Forster* (1972) 127 CLR 421 at 437-438 (Gibbs J) (**JBA 3, tab 18**)
- *Smethurst* (2020) 94 ALJR 502 at [98] (Kiefel CJ, Bell and Keane JJ) (**JBA 5, tab 42**)

7. An applicant may have a “real” interest to obtain declaratory relief whether or not the grant of that relief will affect the applicant’s legal rights (CS [26]).

- 30
- *CGU* (2016) 259 CLR 339 at [41]-[42] (French CJ, Kiefel, Bell and Keane JJ) (**JBA 3, tab 13**)
 - *Plaintiff M61* (2010) 243 CLR 319 at [99], [100], [103] (the Court) (**JBA 4, tab 22**)

8. An applicant will have a “real” interest to obtain declaratory relief if the relief sought is of “real practical importance” to the applicant, or the applicant has a “real commercial interest” in the relief sought (CS [27]-[28]).

- 40
- *Aussie Airlines* (1996) 68 FCR 406 at 415D-G (Lockhart J, Spender and Cooper JJ agreeing) (**JBA 5, tab 30**)
 - *Edwards v Santos* (2011) 242 CLR 421 at [34], [36], [38] (Heydon J, all members of the Court agreeing) (**JBA 3, tab 16**)

- *CGU* (2016) 259 CLR 339 at [41]-[42] (French CJ, Kiefel, Bell and Keane JJ) and [96]-[102] (Nettle J) (**JBA 3, tab 13**)

9. The Full Court was correct (**CAB 157-158 [183]**) to hold that the Councils have a real interest in the interpretation of clause 26.2 of the lease (**CS [31]-[33]**).

9.1. The Council is an active participant in the process established for the making of the payments for which cl 26.2(a) provides, such that, while they are not party to the leases, nor are they strangers to it (**CAB 156 [177]-[178]**).

10

9.2. The construction of that clause has financial ramifications for the Councils (**CAB 156-157 [179], [181]-[182]**).

9.3. If the Councils obtain the declaration they seek, their interests in the negotiations contemplated and required by cl 26.2(a) will be advanced.

Dated: 12 October 2021

20



Stephen Donaghue QC

Craig Lenehan SC

Kathleen Foley

30

40