

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

Matter No H2/2021

HOBART INTERNATIONAL AIRPORT PTY LTD APPELLANT

AND

CLARENCE CITY COUNCIL & ANOR RESPONDENTS

Matter No H3/2021

AUSTRALIA PACIFIC AIRPORTS (LAUNCESTON) PTY LTD APPELLANT

AND

NORTHERN MIDLANDS COUNCIL & ANOR RESPONDENTS

*Hobart International Airport Pty Ltd v Clarence City Council
Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands
Council*

[2022] HCA 5

Date of Hearing: 12 October 2021

Date of Judgment: 9 March 2022

H2/2021 & H3/2021

ORDER

In each matter:

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

K A Stern SC with L A Coleman for the appellant in each matter (instructed by Corrs Chambers Westgarth, Tierney Law and King & Wood Mallets)

S B McElwaine SC and K Cuthbertson for the first respondent in each matter (instructed by Simmons Wolfhagen)

S P Donaghue QC, Solicitor-General of the Commonwealth, with C L Lenehan SC and K E Foley for the second respondent in each matter (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Hobart International Airport Pty Ltd v Clarence City Council Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council

Constitutional Law (Cth) – Judicial power of Commonwealth – Meaning of "matter" – Where Commonwealth entered leases ("Leases") with operators of Hobart Airport and Launceston Airport ("Lessees") for Hobart Airport site and Launceston Airport site ("Airports") – Where Clarence City Council and Northern Midlands Council ("Councils") administer municipal area covering Airports – Where Airports not amenable to council rates or State land tax because located on Commonwealth land – Where cl 26.2(a) of Leases requires that, in lieu of rates, Lessees pay Councils amount that would have been payable if Airports not on Commonwealth land, but relevantly only in respect of parts of Airports on which "trading or financial operations are undertaken" – Where Lessees required to use "all reasonable endeavours" to enter agreements with Councils to make such payments – Where Commonwealth and Lessees not in dispute about meaning of cl 26.2(a) or Lessees' compliance with it – Where Councils not parties to Leases – Where Councils sought declaratory relief regarding proper construction of cl 26.2(a) and Lessees' obligations to make payments – Whether dispute involves "matter" for purposes of Ch III of *Constitution* – Whether dispute involves justiciable controversy – Whether Councils have standing to have dispute determined.

Words and phrases – "all reasonable endeavours", "declaratory relief", "doctrine of privity", "federal jurisdiction", "heads of jurisdiction", "immediate right, duty or liability to be established", "judicial power of the Commonwealth", "justiciable controversy", "legally enforceable remedy", "material interest", "matter", "outsider to a contract", "private rights", "public rights", "real commercial interest", "real interest", "real practical importance", "special interest", "standing", "subject matter requirement", "sufficient interest", "third party", "trading or financial operations".

Constitution, Ch III.

Airports (Transitional) Act 1996 (Cth), s 22.

1 KIEFEL CJ, KEANE AND GORDON JJ. The Hobart Airport site and the Launceston Airport site ("the Airports") are on Commonwealth land. They are not amenable to council rates or State land tax because s 114 of the *Constitution* prohibits States (without the consent of the Commonwealth Parliament) from imposing "any tax on property of any kind belonging to the Commonwealth"¹.

2 The Clarence City Council administers the municipal area covering the eastern suburbs of Hobart and surrounding localities, including the Hobart Airport site. The Northern Midlands Council administers the municipal area extending from the south of Launceston to the Tasmanian central midlands, including the Launceston Airport site.

3 During the 1980s, most significant federal airports were operated by the Federal Airports Corporation ("the FAC") as government business enterprises². There was "a long standing Government policy that the Commonwealth [would] make payments equivalent to rates to local authorities in certain circumstances"³. Notwithstanding that the FAC was exempt from paying taxes under any Commonwealth, State or Territory law⁴, the FAC agreed to maintain the Commonwealth Government's policy by "making payments in lieu of rates for areas [of federal airports] which were used for commercial activities and for which the [FAC] received an annual rent"⁵. The FAC paid the Clarence City Council

1 See also s 52(i) of the *Constitution*, which relevantly confers exclusive power on the Commonwealth Parliament to make laws with respect to "all places acquired by the Commonwealth for public purposes".

2 Bartsch, *Aviation Law in Australia*, 5th ed (2019) at 596 [13.10]; Commonwealth, Auditor-General, *Management of Airport Leases: Follow up*, Audit Report No 25 2006-07 (2007) at 21 [1.1].

3 Federal Airports Corporation, *Policy Manual, Volume 8: Property Policy*, Revision 1 (November 1995) at [4.6.1].

4 *Federal Airports Corporation Act 1986* (Cth), s 45(1).

5 Federal Airports Corporation, *Policy Manual, Volume 8: Property Policy*, Revision 1 (November 1995) at [4.6.1].

"rates on an ex-gratia basis" in respect of the Hobart Airport⁶ and tenants at the Launceston Airport paid "rates directly to [the] Northern Midlands Council"⁷.

4 On 11 April 1995, the Commonwealth and the States and Territories entered into the "Competition Principles Agreement"⁸ ("the CPA"), by which they recorded the agreement of the Council of Australian Governments to adopt certain principles of competition policy and to apply competition laws across the public sector⁹. One of the overarching purposes of the CPA was "to achieve and maintain consistent and complementary competition laws and policies which [would] apply to all businesses in Australia regardless of ownership"¹⁰. One of the principles agreed to in the CPA was the principle of "competitive neutrality", which cl 3 of the CPA described as "the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities"¹¹.

5 During the late 1990s and early 2000s, the Commonwealth entered into a number of long-term leases with airport operators as part of a project to privatise Australia's federal airports¹² ("the privatisation project"). Legislation to

6 Commonwealth, *Phase 2 Federal Airports: Hobart Airport Information Memorandum* (November 1997) at 56 [8.3.2]; see also 4. It seems that, after making ex-gratia payments in lieu of rates, the FAC passed on the rate notices to tenants of properties at the Hobart Airport to charge them for the amounts under the outgoings terms of their leases.

7 Commonwealth, *Phase 2 Federal Airports: Launceston Airport Information Memorandum* (November 1997) at 50 [8.3.2].

8 See Miller, *Miller's Australian Competition Law and Policy*, 3rd ed (2018) at 501-512.

9 See *Rail Access Corporation v New South Wales Minerals Council Ltd* (1998) 87 FCR 517 at 518; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 409 [71].

10 See Miller, *Miller's Australian Competition Law and Policy*, 3rd ed (2018) at 501.

11 See Miller, *Miller's Australian Competition Law and Policy*, 3rd ed (2018) at 503.

12 See Commonwealth, Auditor-General, *Management of Federal Airport Leases*, Audit Report No 50 2003-04 (2004) at 9 [1], [3], 27-29 [1.1]-[1.6]; Commonwealth, Auditor-General, *Management of Airport Leases: Follow up*,

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facilitate the privatisation project was enacted. The *Airports Act 1996* (Cth) "establish[ed] the regulatory arrangements to apply to the airports [then] owned and operated on behalf of the Commonwealth by the [FAC] ... following the leasing of those airports"¹³. The *Airports (Transitional) Act 1996* (Cth) ("the *Transitional Act*") established "a framework [to give] effect to the Government's decision to lease all the Federal airports effectively as ongoing businesses with staff and management in place"¹⁴. The simplified outline of the *Transitional Act* provided¹⁵:

- "● This Act provides for the leasing of certain airports.
- Airport land and other airport assets will be transferred from the [FAC] to the Commonwealth.
- The Commonwealth will grant an airport lease to a company. The company is called an *airport-lessee company*.
- Immediately after the grant of the airport lease, the Commonwealth may transfer or lease certain assets to the airport-lessee company.
- Certain employees, assets, contracts and liabilities of the FAC will be transferred to the airport-lessee company."

6

At the time of the privatisation project, the Commonwealth sought to create a "level playing field" between the operators of newly privatised airports and their actual or potential competitors. The Commonwealth recognised that a competitive imbalance arose from the fact that the newly privatised airports were situated on Commonwealth land and, therefore, were not amenable to council rates or State land tax. Consistently with the Commonwealth's long-standing policy of making payments equivalent to rates in respect of federal airports, and in order to implement the principle of competitive neutrality agreed to in the CPA,

Audit Report No 25 2006-07 (2007) at 11 [1], 21-23 [1.1]-[1.5]; Bartsch, *Aviation Law in Australia*, 5th ed (2019) at 598 [13.15].

13 Australia, House of Representatives, *Airports Bill 1996*, Explanatory Memorandum at 1.

14 Australia, House of Representatives, *Airports (Transitional) Bill 1996*, Explanatory Memorandum at 9.

15 *Transitional Act*, s 3.

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the Commonwealth included in federal airport leases a term requiring lessees to pay to the relevant council a "fictional" or "notional" equivalent to the rates that would have been payable if the airport sites were not on Commonwealth land.

7 These appeals are concerned with the following leases ("the Leases") granted by the Commonwealth pursuant to s 22 of the *Transitional Act*¹⁶:

- (1) a lease between the Commonwealth and Hobart International Airport Pty Ltd ("HIAPL") (the operator of the Hobart Airport) for the Hobart Airport site dated 10 June 1998, which commenced on 11 June 1998, for a term of 50 years, with a 49-year option to renew; and
- (2) a lease between the Commonwealth and Australia Pacific Airports (Launceston) Pty Ltd ("APAL") (the operator of the Launceston Airport) for the Launceston Airport site dated 28 May 1998, which commenced on 29 May 1998, also for a term of 50 years, with a 49-year option to renew.

8 The Leases contain materially similar terms. The dispute giving rise to these appeals concerns cl 26, headed "Rates and Land Tax and Taxes". Clause 26.1 provides that "[t]he Lessee must pay, on or before the due date, all Rates, Land Tax and Taxes without contribution from the Lessor". Clause 26.2, headed "Ex Gratia Payment in Lieu of Rates and Land Tax", creates a mechanism whereby, if council rates and taxes are not payable by HIAPL and APAL ("the Lessees") because the Airports are situated on land owned by the Commonwealth, the Lessees must pay certain amounts to the relevant "Governmental Authority" or the Commonwealth, as the case may be.

9 Most relevantly for present purposes, cl 26.2(a) provides:

"Where *Rates*^[17] are not payable under sub-clause 26.1 because the Airport Site is owned by the Commonwealth, the Lessee must promptly pay to the

16 The Leases are governed by and construed in accordance with the laws of Tasmania: cl 30 of the Leases. In some Australian States and Territories, but not Tasmania, third parties may, in compliance with statutory requirements, enforce contractual promises made for their benefit by direct action: see *Property Law Act 1974* (Qld), s 55; *Property Law Act 1969* (WA), s 11; *Law of Property Act 2000* (NT), s 56.

17 "Rates" is defined in cl 2.1 of the Leases to mean "all rates (including water rates and sewerage rates), and levies to defray expenses levied or imposed by a Governmental Authority on land or on owners or occupiers of land in relation to their ownership or occupation of that land".

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relevant Governmental Authority^[18] such amount as may be notified to the Lessee by such Governmental Authority as being equivalent to the amount which would be payable for rates as if such rates were leviable or payable in respect of those parts of the Airport Site:

- (i) which are sub-leased to tenants; or
- (ii) on which *trading or financial operations* are undertaken including but not limited to retail outlets and concessions, car parks and valet car parks, golf courses and turf farms, but excluding runways, taxiways, aprons, roads, vacant land, buffer zones and grass verges, and land identified in the airport Master Plan for these purposes,

unless these areas are occupied by the Commonwealth or an authority constituted under Commonwealth law which is excluded from paying rates by Commonwealth policy or law. *The Lessee must use all reasonable endeavours to enter into an agreement with the relevant Governmental Authority, body or person to make such payments.*" (emphasis added)

10 The Clarence City Council and the Northern Midlands Council ("the Councils"), established under the *Local Government Act 1993* (Tas)¹⁹, are respectively the relevant "Governmental Authority" for the Hobart Airport and the Launceston Airport. The Councils are not, and have never been, parties to the Leases.

11 Between 1998 and 2013, there was no issue about the operation of cl 26.2(a). The Lessees made payments to the Councils in accordance with independent valuations of the Airports in each financial year. In the 2014 financial year, the Valuer-General for Tasmania ("the Valuer-General") undertook a re-valuation of the Airports. The outcome was a significant increase in the quantum of the equivalent amount payable by the Lessees to the Councils under cl 26.2(a) of the Leases. The Lessees objected to the valuation on the bases that the Valuer-General incorrectly identified the portions of the Airports on which trading or financial operations were undertaken to be included for calculating the amount payable under cl 26.2(a) (for example, by including common user areas of

18 "Governmental Authority" is defined in cl 2.1 of the Leases to mean "the Commonwealth government or any government of any State or Territory of Australia, administrative body, governmental body, department or agency of any such government or local government authority".

19 *Local Government Act*, s 18, Sch 3.

the Airports, such as the check-in areas and departure lounges) and that the wrong methodology had been applied.

12 Protracted correspondence and meetings subsequently ensued between the Lessees, the Councils and the Commonwealth in an effort to resolve the disagreement. The Commonwealth engaged an independent valuer, Herron Todd White ("HTW"). In 2016, HTW provided a valuation report, which the Commonwealth considered accurately reflected the Lessees' obligations under cl 26.2(a). The Commonwealth told HIAPL that, because it had made payments to the Clarence City Council exceeding the amounts determined in the valuation report, it considered HIAPL had met its obligations under cl 26.2(a) for the years addressed by the valuation (namely, the 2014, 2015 and 2016 financial years). The Commonwealth told APAL that if it made payments to the Northern Midlands Council in line with the valuation report, it would consider APAL to have met its obligations under cl 26.2(a) for the 2014, 2015 and 2016 financial years, and APAL subsequently made payments accordingly.

13 In 2017, HTW provided a revised valuation report. HTW did not apply a value to the common user areas in the revised valuation. The Commonwealth informed the Lessees that "[g]oing forward", absent any formal agreement between the Councils and the Lessees, it would consider the Lessees compliant with their obligations under cl 26.2(a) if they made "payments in lieu of rates to [the Councils] on the basis of a valuation and methodology consistent with" the revised HTW valuation. The Commonwealth encouraged the Lessees to enter into negotiations with the Councils, "with a view to reaching mutually agreed arrangements around the payment of ex-gratia rates for future years". Subsequently, for the purposes of cl 26.2(a), the Lessees paid the Councils on the basis of the valuations and methodology set out in HTW's revised valuation for the 2017 and 2018 financial years.

14 There was therefore no dispute between the parties to the Leases – the Commonwealth and the Lessees – about the operation of cl 26.2(a) or the Lessees' compliance with it. The Lessees and the Councils have not relevantly entered into any agreements about ex-gratia payments as contemplated by the final sentence of cl 26.2(a)²⁰.

15 The Councils, however, contended that the Valuer-General had correctly identified the portions of each Airport on which trading or financial operations

20 HIAPL and the Clarence City Council entered into an agreement dated 14 May 2004 which specified the basis upon which "Lease Compliance Payments" (as defined in that agreement) would be payable by HIAPL to the Clarence City Council. That agreement had a term of five years and was not renewed.

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were undertaken in calculating the equivalent quantum under cl 26.2(a) and applied the correct methodology. The Councils, therefore, did not accept that the Lessees' payments to them of amounts calculated in accordance with HTW's valuations (and not the higher amounts based on the Valuer-General's valuation) satisfied the Lessees' obligations under cl 26.2(a).

16 The Councils then commenced proceedings in the Federal Court of Australia against the Commonwealth and the Lessees seeking, among other things, declaratory relief pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) with respect to the proper construction of cl 26.2(a) of the Leases and the Lessees' obligations to make payments pursuant to the Leases for the financial years for 2014/2015 to 2017/2018 inclusive.

17 In substance, the Councils contended that the whole of each of the Airports is "rateable", except for the areas occupied by the Commonwealth or a Commonwealth authority or which comprise runways, taxiways, aprons, roads, vacant land, buffer zones and grassed verges, because "trading or financial operations" (within the meaning of cl 26.2(a)) are undertaken on all other areas of the Airports. The Lessees and the Commonwealth disagreed with the Councils' construction of the phrase "trading or financial operations". They contended, among other things, that when regard is had to the principle of competitive neutrality which was the rationale for cl 26.2(a), it is evident that "trading or financial operations" was not intended to apply to "aeronautical services and facilities" (which the Councils said were included in the rateable areas) on the basis that the Lessees could not enjoy a competitive advantage over such services and facilities where there was no comparable business.

18 Throughout the proceedings, it has remained the position that the Commonwealth and the Lessees are not in dispute about the operation of cl 26.2(a) or the Lessees' compliance with that clause.

Decisions below

19 The primary judge dismissed the Councils' applications on the basis that the Councils lacked standing to obtain the declaratory relief sought.

20 The Councils appealed to a Full Court of the Federal Court (Jagot, Kerr and Anderson JJ) on various grounds essentially directed to arguing that the Councils had standing to seek the declaratory relief in respect of the interpretation and application of the Leases. The Commonwealth's position was not materially different to that adopted by the Councils.

21 The Lessees contended that the primary judge correctly found that the Councils did not have standing. They also filed notices of contention arguing, in

the alternative, that the primary judge's decision should be affirmed on three grounds: (1) the Councils' claims did not involve a justiciable controversy so as to constitute a "matter" for the purposes of Ch III of the *Constitution* in respect of which the Federal Court had jurisdiction; (2) the Federal Court did not have original jurisdiction as any "matter" did not arise under any law made by the Commonwealth Parliament within the meaning of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth); or (3) the Federal Court should decline to exercise its discretion to grant the relief sought by the Councils. The Full Court unanimously allowed the Councils' appeals, dismissed the Lessees' notices of contention and remitted the proceedings to the primary judge to determine whether the Councils should be granted the declaratory relief sought.

22 By grant of special leave, the Lessees appealed to this Court. Each of the Lessees contended that the proceeding to which it is a party does not involve a "matter" for the purposes of Ch III of the *Constitution* as there is no justiciable controversy to be quelled and the only rights, duties or liabilities to be established are the contractual rights, duties or liabilities of two contracting parties inter se between whom there is no dispute about the meaning or effect of the relevant lease. The Lessees also contended that the doctrine of privity of contract prevented the Councils from seeking declaratory relief regarding the interpretation or application of the Leases and that the Councils lacked standing.

23 The Councils filed notices of contention contending that if the doctrine of privity of contract ordinarily prevents a third party from seeking declaratory relief about the meaning or effect of a contract, then this case involves "exceptional circumstances" sufficient to establish standing or the Court should confine the doctrine so that it does not deny standing where the third party is a participant in respect of the contract.

Issue

24 The dispute sought to be agitated by the Councils, which was the subject of the declaratory relief sought by the Councils, concerned the meaning of a contractual term – cl 26.2(a) of the Leases – and, specifically, the meaning of the phrase "trading or financial operations" ("the dispute"). The rights, duties and liabilities of the Commonwealth and the Lessees under cl 26.2(a) of the Leases lay at the heart of the dispute²¹. Although the rights, duties and liabilities in issue might be described as having a "public" dimension or complexion at least insofar as the

21 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 405-406 [62].

Leases were granted pursuant to statute and cl 26.2(a) gave effect to a governmental policy, they are nonetheless private law rights, duties and liabilities.

25 The question in these appeals is whether the dispute involves a "matter" for the purposes of Ch III of the *Constitution* capable of determination by a court exercising the judicial power of the Commonwealth when the parties to the Leases – the Commonwealth and the Lessees – are not in dispute about the operation of cl 26.2(a) of the Leases or about the Lessees' compliance with that clause.

Matter

26 "Matter" has two elements: "the subject matter itself as defined by reference to the heads of jurisdiction set out in [Ch] III [of the *Constitution*], and the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy"²².

Subject matter

27 The Councils' claims for declaratory relief satisfy the first element – the subject matter requirement. The rights and obligations of the Commonwealth and the Lessees under the Leases owe their existence to a Commonwealth law, the *Transitional Act*, such that the claims "aris[e] under" a Commonwealth law within s 76(ii) of the *Constitution*²³.

28 The fact that the Commonwealth is a party to the proceedings, within s 75(iii) of the *Constitution*, does not provide a separate basis for satisfying the subject matter requirement. Section 39B(1A) of the *Judiciary Act* does not invest federal jurisdiction in the Federal Court in relation to *all matters* within s 75(iii), only those in which "the Commonwealth is seeking an injunction or a

22 *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 351 [27], quoting Burmester, "Limitations on Federal Adjudication", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System* (2000) 227 at 232.

23 See *Judiciary Act*, s 39B(1A)(c); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; *Edwards v Santos Ltd* (2011) 242 CLR 421 at 438 [45].

declaration"²⁴. In these proceedings, the Commonwealth does not seek such relief. The Commonwealth's submission to the contrary is rejected.

Justiciable controversy

29 Central to both the notions of judicial power and "matter" within Ch III of the *Constitution* is the second element – the requirement that the dispute involves a "justiciable controversy"²⁵. The established position remains that "there can be no matter within the meaning of [ss 75 and 76 of the *Constitution*] unless there is some immediate right, duty or liability to be established by the determination of the Court"²⁶.

30 In these appeals, whether there is a justiciable controversy may be addressed by asking if the applicable principles permit the Councils to seek declaratory relief in relation to the dispute. That is, in these appeals (but not in all cases), the answer to the question of whether there is a justiciable controversy turns on whether the Councils have standing to have the dispute determined and to seek the declaratory relief sought.

31 The question in these appeals can be approached in this way because, in federal jurisdiction, "questions of 'standing' to seek equitable remedies such as those of declaration and injunction, [when they arise,] are subsumed within the constitutional requirement of a 'matter'"²⁷. The "significance of standing to the

24 *Judiciary Act*, s 39B(1A)(a).

25 *Re Judiciary* (1921) 29 CLR 257 at 265, 266-267; *Fencott v Muller* (1983) 152 CLR 570 at 603, 606, 608; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 303; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-524 [22]-[25], 561 [140], 585 [215]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 606 [31]; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21-22 [54]; *CGU Insurance* (2016) 259 CLR 339 at 350 [26], 351 [27], 352 [29]; *Palmer v Ayres* (2017) 259 CLR 478 at 490-491 [26]-[27].

26 *Re Judiciary* (1921) 29 CLR 257 at 265.

27 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 68 [152]. See also *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 550-551; *Croome v Tasmania* (1997) 191 CLR 119 at 124-126, 132-136; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37]; *Truth About Motorways* (2000) 200 CLR 591 at 610-613 [42]-[50], 629-633 [101]-[109], 659-660 [177]-[179];

existence of a matter for the purposes of Ch III"²⁸ is, in essence, that there is no "matter" "unless there is a remedy available at the suit of the person instituting the proceedings in question"²⁹. While "[a] negative answer to the question – is there a matter before the Court in which it has federal jurisdiction? – would render the question of the plaintiff's standing moot", "an affirmative answer to the question – is there a matter? – may not be sufficient to answer the question whether the plaintiff has standing"³⁰. It may be that standing to seek relief ordinarily provides the "justiciable" aspect of the controversy, but it is unnecessary to determine whether, in every case where an applicant has "standing", there is necessarily a "justiciable controversy".

32 It is for those reasons that the particular question in these appeals is whether the Councils have standing. What is required to establish "standing" varies depending on the relief sought³¹. Here, the Councils seek declaratory relief. The breadth of the jurisdiction to grant declaratory relief was considered by Gibbs J in *Forster v Jododex Aust Pty Ltd*³². The question must be real, not theoretical. There must be a proper contradictor – someone presently existing who has a true interest to oppose the declaration sought. And the applicant must

Kuczborski v Queensland (2014) 254 CLR 51 at 60-61 [5], 87-88 [98]-[100], 130-132 [278].

28 *Truth About Motorways* (2000) 200 CLR 591 at 612 [47].

29 *Truth About Motorways* (2000) 200 CLR 591 at 612 [48]; see also 612-613 [49]-[50].

30 *Kuczborski* (2014) 254 CLR 51 at 61 [5].

31 *Australian Conservation Foundation* (1980) 146 CLR 493 at 511, quoted with approval in *Bateman's Bay* (1998) 194 CLR 247 at 266 [47], 282 [97]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 659 [68], quoting *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 174 [15].

32 (1972) 127 CLR 421 at 437-438, quoting with approval *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438 at 448. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582, 596.

have a "sufficient" or "real" interest in obtaining the relief³³. There is no requirement that an applicant for declaratory relief have a cause of action in order to obtain it³⁴. Those principles are not exhaustive³⁵. These appeals turn on the nature and adequacy of the Councils' interest in the resolution of the dispute.

Sufficient or real interest

33 The requirement that an applicant for declaratory relief have a "sufficient" or "real" interest in obtaining the relief has work to do in both public and private law contexts. "However, the requirement applies differently to different sorts of controversies"³⁶.

34 In respect of private rights, the general principle is clear: an applicant for declaratory relief will have a "sufficient" or "real" interest in obtaining relief where it pertains to declaring the existence of legally enforceable rights or liabilities of the applicant, including statutory rights³⁷. Here, the Councils did not assert that they had any legally enforceable contractual rights under the Leases or any

33 See *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 at 414; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 359 [103]; *Santos* (2011) 242 CLR 421 at 435 [36], 436 [37]-[38]; see also 425 [1].

34 *Plaintiff S10* (2012) 246 CLR 636 at 659 [68]. See also *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 at 572; *J N Taylor Holdings Ltd (In liq) v Bond* (1993) 59 SASR 432 at 435; *Martin v Taylor* [2000] FCA 1002 at [27]; Witzleb, Bant, Degeling and Barker, *Remedies: Commentary and Materials*, 6th ed (2015) at 1159.

35 See *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10; *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188, 189; 18 ALR 55 at 69, 71; *Ainsworth* (1992) 175 CLR 564 at 581-582; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 133 [23].

36 *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 626 [19-175].

37 See *Aussie Airlines* (1996) 68 FCR 406 at 414; *Bateman's Bay* (1998) 194 CLR 247 at 264 [43]; *Truth About Motorways* (2000) 200 CLR 591 at 611-612 [46]; *Santos* (2011) 242 CLR 421 at 434 [34]; see also 425 [1]; *CGU Insurance* (2016) 259 CLR 339 at 357 [42], 371 [96], 376 [109].

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statutory right which they could enforce and, at least in the proceedings below, they disavowed that they enjoyed the benefit of a contractual promise held on trust.

35

Although lack of privity is a factor relevant to standing and a reason for a court approaching the question of the standing of an outsider with considerable caution³⁸, an outsider to a contract may, "for other reasons"³⁹ – what might be described as "exceptional circumstances"⁴⁰ – have a "sufficient" or "real" interest to seek declaratory relief as to the meaning and effect of a contract between contracting parties. As the Full Court put it below, "there is reason to be concerned as to the potential for what might be described as unfounded intermeddling by a third party to a contract. But, in the context of declaratory relief, the solution to that concern is not the doctrine of privity of contract"⁴¹.

38 See *Anderson v The Commonwealth* (1932) 47 CLR 50 at 51; *Meadows Indemnity Co Ltd v Insurance Corporation of Ireland Plc* [1989] 2 Lloyd's Rep 298 at 309; *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at 410-412 [49]-[62]; *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 630-631 [19-210]-[19-215]; *CGU Insurance* (2016) 259 CLR 339 at 371 [96]. See also *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 67, 80; *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 478, 494; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 128, 131, 141-142.

39 *Aussie Airlines* (1996) 68 FCR 406 at 415. See also *Santos* (2011) 242 CLR 421 at 436 [38]; see also 425 [1]; *CGU Insurance* (2016) 259 CLR 339 at 357 [42], 363-364 [67], 371 [96].

40 See, eg, *CGU Insurance* (2016) 259 CLR 339 at 371 [95]-[96], citing *Meadows Indemnity* [1989] 2 Lloyd's Rep 298 at 309. See also *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 631 [19.215].

41 *Clarence City Council v The Commonwealth* (2020) 280 FCR 265 at 309 [129].

36 In *Edwards v Santos Ltd*⁴², Heydon J referred to the decision of the Full Court of the Federal Court in *Aussie Airlines Pty Ltd v Australian Airlines Ltd*⁴³ as an example of how a person (in that case, an outsider to a contract) can have standing to obtain a declaration and how a court can have jurisdiction to grant a declaration (relevantly, in relation to the contract). In *Aussie Airlines*, head leases of airport facilities required the head lessee to grant a sublease to any "new entrant to the domestic aviation industry"⁴⁴. Aussie Airlines Pty Ltd claimed to be a "new entrant to the domestic aviation industry"⁴⁵. The Full Court of the Federal Court held that Aussie Airlines had standing to obtain a declaration that it was a "new entrant to the domestic aviation industry" even though it was not found to have rights under the head lease enforceable against the head lessee⁴⁶. The Court held that the question of whether Aussie Airlines was a "new entrant to the domestic aviation industry" was not "hypothetical"; the resolution of the question was of "real practical importance" to Aussie Airlines; Aussie Airlines had a "real commercial interest" in the relief; the head lessee was "plainly a contradictor"; and there was "obviously a real controversy"⁴⁷.

37 The declaratory relief sought (as to whether Aussie Airlines was a "new entrant to the domestic aviation industry" within the meaning of head leases to which it was not a party) was "of real practical importance" to Aussie Airlines because "[i]f negotiations commence[d] and result[ed] in the grant of subleases" there would be "far-reaching ramifications for the prospective business activities

42 (2011) 242 CLR 421 at 436 [38]; see also 425 [1]. See also *Interchase Corporation Ltd (In liq) v FAI General Insurance Co Ltd* [2000] 2 Qd R 301 at 311, endorsed in *CGU Insurance* (2016) 259 CLR 339 at 356-357 [41]-[42]; *Ashmere Cove* (2008) 166 FCR 398 at 410 [52]-[53]; *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949 at 73,116 [132]; see also 73,100-73,101 [37]-[40]; *CGU Insurance* (2016) 259 CLR 339 at 363-364 [67], 369 [90], 373 [102].

43 (1996) 68 FCR 406.

44 (1996) 68 FCR 406 at 408-409.

45 *Aussie Airlines* (1996) 68 FCR 406 at 410.

46 *Aussie Airlines* (1996) 68 FCR 406 at 415, 420.

47 *Aussie Airlines* (1996) 68 FCR 406 at 415.

15.

of Aussie Airlines"⁴⁸. Aussie Airlines also had "a real commercial interest in obtaining or being refused the declaration" because its future business activities depended upon it obtaining subleases and becoming a new entrant⁴⁹.

38 Similarly, the Councils have a "sufficient" and "real" interest in seeking declaratory relief about the proper construction of cl 26.2(a) of the Leases. Under cl 26.2(a), the Councils are made active participants in the process established under that clause for the making of ex-gratia payments by the Lessees to the Councils. That process contemplates that the Councils will notify the Lessees of the amount which is "equivalent to the amount which would be payable for rates as if such rates were leviable or payable" in respect of particular parts of the Airports, with the Lessees being obliged to use "all reasonable endeavours" to enter into an agreement with the Councils "to make" those ex-gratia payments. In that sense, and to that extent, the Councils could not be described as "outsider[s]" to the Leases⁵⁰. The proper construction of the words "trading or financial operations" in cl 26.2(a) is of real practical importance to the Councils, given their contemplated role under the Leases.

39 The Councils also have a real commercial interest in the relief. The meaning of the words "trading or financial operations" in cl 26.2(a) will bear upon the calculations made by the Councils as to the quantum of the amount notified by the Councils. That will have direct and far-reaching ramifications⁵¹ for the financial position of the Councils.

40 In *Santos*⁵², Heydon J regarded it as significant that the plaintiffs' success in obtaining the declaratory relief sought in that case "would advance their interests in the negotiations which the parties were contractually obliged to conduct". The same is true here. If the construction of cl 26.2(a) is determined in favour of the Councils, that would advance their interests for the purposes of future

48 *Aussie Airlines* (1996) 68 FCR 406 at 415.

49 *Aussie Airlines* (1996) 68 FCR 406 at 415.

50 *CGU Insurance* (2016) 259 CLR 339 at 371 [96].

51 See, by analogy, *Aussie Airlines* (1996) 68 FCR 406 at 415; *CGU Insurance* (2016) 259 CLR 339 at 373 [102], 376 [109].

52 (2011) 242 CLR 421 at 436 [37].

negotiations contemplated and required by cl 26.2(a)⁵³. The Leases still have 26 years to run, with an option to renew.

41 These reasons should not be read as suggesting that possessing a mere commercial interest in obtaining declaratory relief about the meaning and effect of a contract to which an applicant for declaratory relief is not a party, on its own, would give rise to a "sufficient" or "real" interest. What makes this case exceptional is the combination of circumstances identified at [38]-[40] above. Moreover, these reasons are only concerned with the Councils' claims for declaratory relief. The sufficiency of interest that might be required for a non-party to a contract to establish standing to obtain other forms of relief (for example, an injunction, damages or specific performance) does not arise in these appeals.

42 After the hearing, the Councils filed written submissions seeking to contend, for the first time, that they had standing to seek the declaratory relief sought because they enjoyed the benefit of a contractual promise under the Leases which was held on trust for them. As the Councils have standing to seek the declaratory relief for the reasons set out above, it is unnecessary to address that contention. The issues raised by the Councils' notices of contention also do not arise.

Contradictor

43 Finally, the fact that the Lessees are obliged under cl 26.2(a) of the Leases to use all reasonable endeavours to enter into an agreement with the Councils to make the ex-gratia payments and ultimately are obliged to pay amounts to the Councils means that each Lessee is plainly a contradictor. The Lessees certainly do not wish to pay more than they are contractually bound to pay under cl 26.2(a) of the Leases – they each have a real interest in opposing the declaratory relief sought⁵⁴, indeed they opposed the Councils' construction of cl 26.2(a) before the primary judge.

Conclusion and orders

44 For those reasons, each proceeding involves a "matter". The appeals are dismissed with costs.

53 cf *Aussie Airlines* (1996) 68 FCR 406 at 415; *Santos* (2011) 242 CLR 421 at 436 [37].

54 *Forster* (1972) 127 CLR 421 at 437-438, quoting *Russian Commercial* [1921] 2 AC 438 at 448.

45 GAGELER AND GLEESON JJ. The Federal Court of Australia has, and can only have, such jurisdiction as is vested in it by the Commonwealth Parliament. The jurisdiction of the Federal Court is defined by the *Judiciary Act 1903* (Cth) to include original jurisdiction in any civil matter arising under any law made by the Parliament⁵⁵.

46 The term "matter" connotes "everything which can possibly arise within the ambit" of the federal jurisdiction that is capable of being vested by the Commonwealth Parliament in a court under Ch III of the *Constitution*⁵⁶. These two appeals do not call for an exploration of the limits of the term⁵⁷.

47 Each appeal is concerned rather with determining whether there exists a matter within the central conception of the term. The central conception of a matter is of a justiciable controversy between defined persons or classes of persons about an existing legal right or legal obligation⁵⁸. The controversy is justiciable if it is capable of being resolved in the exercise of judicial power by an order of a court which, if made, would operate to put an end to the question in controversy through the creation of "a new charter by reference to which that question is in future to be decided as between those persons or classes of persons"⁵⁹. Conversely, a controversy between defined persons or classes of persons about an existing legal right or legal obligation which is not capable of being resolved in the exercise of judicial power by an order of a court is not justiciable and is not a matter.

48 That was the point made by Gleeson CJ and McHugh J when they said in *Abebe v The Commonwealth*⁶⁰:

55 Section 39B(1A)(c) of the *Judiciary Act 1903* (Cth).

56 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 31 January 1898 at 319. See also *South Australia v Victoria* (1911) 12 CLR 667 at 675, 708; *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37.

57 cf *R v Davison* (1954) 90 CLR 353 at 368; *Palmer v Ayres* (2017) 259 CLR 478 at 516 [102].

58 *Fencott v Muller* (1983) 152 CLR 570 at 608.

59 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

60 (1999) 197 CLR 510 at 527 [31] (cleaned up).

"A matter cannot exist in the abstract. If there is no legal remedy for a wrong, there can be no matter. A legally enforceable remedy is as essential to the existence of a matter as the right, duty or liability which gives rise to the remedy. Without the right to bring a curial proceeding, there can be no matter."

Their Honours spelt out the implications of the relationship between the availability of a remedy and the existence of a matter⁶¹:

"That does not mean that there can be no matter unless the existence of a right, duty or liability is established. It is sufficient that the moving party claims that he or she has a legal remedy in the court where the proceedings have been commenced to enforce the right, duty or liability in question. It does mean, however, that there must be a remedy enforceable in a court of justice, that it must be enforceable in the court in which the proceedings are commenced and that the person claiming the remedy must have sufficient interest in enforcing the right, duty or liability to make the controversy justiciable. Questions of standing cannot be divorced from the notion of a matter."

Their Honours' reference to a "legally enforceable remedy" must be understood as a reference to an order capable of being made by a court in the exercise of coercive judicial power which, subject to appeal, authoritatively determines the question about the right, duty or liability in controversy⁶². There is no added need for the order to be capable of being enforced by execution⁶³.

49 Taking up the point made by Gleeson CJ and McHugh J, the justiciability of a controversy between defined persons or classes of persons about the content of an existing legal right or obligation depends on: (1) the power of a court to make an order that would operate to resolve the controversy between those persons; and (2) the right of one or more of those persons to seek that order from that court. Standing, in the sense of a right to seek from a court an order that would operate to resolve the controversy, is in that way inseparable from justiciability and, therefore, is intrinsic to the existence of the matter without which the federal

⁶¹ (1999) 197 CLR 510 at 528 [32] (cleaned up).

⁶² *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553-554 [28]-[29].

⁶³ cf *EB 9 & 10 Pty Ltd v The Owners of Strata Plan 934* (2018) 98 NSWLR 889 at 899 [35], explaining *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 527-528.

jurisdiction of the court to make the order cannot exist. That is what has been meant when it has often been said that standing is "subsumed within the constitutional requirement of a matter"⁶⁴.

50 A matter can be characterised as one "arising under any laws made by the Parliament" in a range of circumstances⁶⁵. Once again, these appeals do not call for an exploration of the limits of that range. Each appeal is concerned with a controversy about an existing contractual obligation. If that controversy is justiciable, so as to constitute a matter within the central conception of that term, then that justiciable controversy is properly characterised as a matter arising under a law made by the Parliament on the basis that the contract imposing the obligation came into existence as an incident of the exercise of a capacity to "grant an airport lease" conferred on the Commonwealth by a law made by the Parliament⁶⁶.

51 In circumstances recounted by Kiefel CJ, Keane and Gordon JJ, each appeal turns on the justiciability of the controversy which has been brewing for some time between a Council (on the one hand) and the Commonwealth as lessor and a Lessee (on the other hand) about the content of the contractual obligation owed by the Lessee to the Commonwealth under cl 26.2 of its Lease. In the proceeding giving rise to each appeal, a Council sought to resolve that controversy by asking the Federal Court to make a declaration about the content of the contractual obligation. The Council asked the Federal Court to make that declaration in a proceeding to which it joined both the Lessee and the Commonwealth as parties. The Council sought no other substantive order.

52 There is no doubt as to the power of the Federal Court to make a declaration of the kind sought by each Council in a proceeding to which the Lessee and the Commonwealth, being the persons whose rights and obligations would be directly

64 See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 68 [152] (cleaned up) and the cases there cited. See also *Attorney-General for NSW v Brewery Employees Union of NSW* ("the Union Label Case") (1908) 6 CLR 469 at 491.

65 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; *Edwards v Santos Ltd* (2011) 242 CLR 421 at 438 [45]; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 351-352 [28]-[29].

66 Section 22 of the *Airports (Transitional) Act 1996* (Cth). See *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 7-8; *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In liq)* (2013) 251 CLR 592 at 610 [61].

affected by the declaration⁶⁷, are parties. The *Federal Court of Australia Act 1976* (Cth) specifically empowers the Federal Court to make a binding declaration of right in any civil proceeding in relation to a matter in which it has original jurisdiction, whether or not any consequential relief is or could be claimed⁶⁸, and goes on to spell out that a civil proceeding brought by one party against another is not open to objection on the ground that the only order sought is such a declaration⁶⁹.

53 There is also no doubt that a declaration of the kind sought by each Council would determine conclusively as between the Lessee and the Commonwealth (and their successors in title) the legal and factual content of the contractual obligation owed by the Lessee to the Commonwealth to the extent that the content of the obligation is in issue between the Council (on the one hand) and the Commonwealth and a Lessee (on the other hand) in the proceeding and to the extent that the resolution of the issue is addressed in the terms of the declaration. The declaration would amount to a "judicial determination directly involving an issue of fact or of law" the legal effect of which would be that the declaration "disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies"⁷⁰. The notion floated in argument that the efficacy of a declaration would in some way depend on the Commonwealth, as a "model litigant"⁷¹, choosing to abide by the declaration in dealing with the Lessee overlooked that final and preclusive legal effect.

54 The question as to the justiciability of the controversy between each Council (on the one hand) and the Commonwealth and a Lessee (on the other hand)

67 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 46 [131]-[132], applying *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 523-525.

68 Section 21(1) of the *Federal Court of Australia Act 1976* (Cth).

69 Section 21(2) of the *Federal Court of Australia Act 1976* (Cth).

70 *Blair v Curran* (1939) 62 CLR 464 at 531; *Jackson v Goldsmith* (1950) 81 CLR 446 at 466. See also *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 42; *Magman International Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 1 at 15, quoting *International General Electric Co of New York Ltd v Commissioners of Customs and Excise* [1962] Ch 784 at 789.

71 cf *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at 434-435 [239]-[240].

therefore comes down to a question of the standing of the Council to seek the declaratory relief which it claimed before the Federal Court.

55 Within our constitutional system, standing to seek an order from a court is not conceived of as an exogenous and antecedent fact which must be found as a precondition to jurisdiction. That is to say, we do not conceive of standing as necessarily depending on the person being able to establish some "injury in fact"⁷² to a legally cognisable interest which the order is apt to redress.

56 Instead, we conceive of standing to seek an order from a court as an aspect of the positive law that defines the jurisdiction of the court to hear and determine the proceeding in which the order is sought. What, if anything, a person must establish to have a right to seek a particular order from a particular court in the exercise of a jurisdiction vested in it by a Commonwealth law depends on what, if anything, the Commonwealth law vesting that jurisdiction in that court expressly or implicitly requires to be established⁷³.

57 To the extent that the jurisdiction vested in a court is to grant a common law remedy on a common law cause of action, standing to seek the remedy is implicit in the definition of the elements of the cause of action⁷⁴. In respect of a claim to an entitlement to judgment at common law founded on a cause of action based on contract, standing is limited through the operation of the substantive common law doctrines of privity and consideration. Their combined operation means that, subject to exceptions of no present moment, "at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds"⁷⁵.

58 To the extent that the jurisdiction vested in a court is to grant equitable relief, the position is and always has been more complex. Traditionally, standing

72 *cf Lujan v Defenders of Wildlife* (1992) 504 US 555 at 560; *Spokeo Inc v Robins* (2016) 136 S Ct 1540 at 1547-1548.

73 See *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

74 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 626-627 [92].

75 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 494, quoting *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 at 79. See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 115-116, 128-143, 155-162, 173-174.

to seek equitable relief was expressed in terms of the plaintiff needing to establish an "equity"⁷⁶. That expression has been said to be "somewhat protean in character"⁷⁷, but has never been doubted to include an equitable interest in property and in particular the interest of a beneficiary under a trust.

59 In *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*⁷⁸, in a passage to which attention was drawn in *Bahr v Nicolay [No 2]*⁷⁹ and in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*⁸⁰, it was pointed out that a person not party to a contract for whose benefit a contractual obligation has been entered into can enforce the contractual obligation in equity, in a proceeding to which the contractual obligor and contractual obligee are joined, if an intention to hold the obligation on trust for the person can be imputed to the contractual obligee. Subsequently, in *Korda v Australian Executor Trustees (SA) Ltd*⁸¹, it was explained that "where parties to a contract have refrained from contractual use of the terminology of trust, an intention to create a trust will be imputed to them only if, and to the extent that, a trust is the legal mechanism which is appropriate to give legal effect to the relationship ... between a party and a third party, as established or acknowledged by the express or implied terms of the contract". The inquiry into whether a trust of the contractual obligation is the mechanism appropriate to give effect to the relationship between the contracting party and a third party established or acknowledged by the terms of the contract does not turn simply on whether the contractual obligation was entered into or operates for the benefit of the third party but on whether the relationship between the contractual obligee and the third party is such that the contractual obligee holds the custody and administration of the

76 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257 [25].

77 Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 124-125.

78 (1955) 95 CLR 43 at 67.

79 (1988) 164 CLR 604 at 618-619.

80 (1988) 165 CLR 107 at 146-148. See also (1988) 165 CLR 107 at 115, 138-139, 156-157, 167; *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 at 414-415.

81 (2015) 255 CLR 62 at 100 [109]. See also at 72-73 [10]-[11], 123-124 [204]-[208].

contractual obligation on behalf of the third party so as to be accountable to the third party for that custody and administration⁸².

60 The possibility that each Council might be able to take advantage of an imputed trust to establish an equitable interest in the performance of the whole or some part of the obligation owed by the Lessee to the Commonwealth under cl 26.2 of the Lease was raised in argument on the appeals. The possibility should be rejected. The absence of the terminology of trust in cl 26.2 of the Lease is significant, as is the consequence that holding the contractual obligation of the Lessee on trust would necessarily entail the Commonwealth being accountable to the Council for the administration of the obligation. In the absence of clear contractual language, no intention is to be imputed to the Commonwealth either to subject itself to a duty of trust enforceable in a court administering equity⁸³ or to subject itself to any duty enforceable at the suit of a State⁸⁴ or of a local government body, which is a creation and instrumentality of a State⁸⁵.

61 Each Council's lack of ability to sue on a common law cause of action or to enforce a beneficial interest in a trust cannot be determinative of its standing to seek a declaration, however, given that the declaratory order sought by each Council is neither a common law judgment nor an equitable remedy. The relatively recent observation that a superior court has "inherent power" to make a declaratory order⁸⁶ cannot be taken to contradict the historical fact that the power to declare the existence or non-existence of a legal right or obligation is statutory in origin. The power was unknown to a common law court. The power was also unknown to a court administering equity other than as prefatory to the making of another order

82 *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 at 123-124 [206]-[208], applying *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 523-524 [113].

83 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 162-163, 180-181, referring to *Kinloch v Secretary of State for India* (1882) 7 App Cas 619.

84 *South Australia v The Commonwealth* (1962) 108 CLR 130; *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353.

85 *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 240.

86 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 346 [13].

capable of enforcement by execution⁸⁷ or in certain proceedings against the Crown⁸⁸. The power came to be conferred incrementally by statute on the English Court of Chancery in the 1850s and on the English High Court of Justice in the 1870s⁸⁹. The Supreme Court of New South Wales lacked general power to declare the existence or non-existence of a legal right or obligation before that power was conferred by statute in 1965⁹⁰. Together with this Court, that Court was then instrumental in pioneering the expansion of the practice of entertaining proceedings for declaratory orders that occurred soon afterwards in Australia⁹¹.

62 The incidents of a general power to make a binding declaration of right in a civil proceeding, including as to the standing of a person to seek its exercise, came to be expounded in a series of cases in this Court in the final three decades of the last century. The first was *Forster v Jododex Australia Pty Ltd*⁹². There, as later in *Ainsworth v Criminal Justice Commission*⁹³ and *Oil Basins Ltd v The Commonwealth*⁹⁴, the Court adopted language of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*⁹⁵ in

87 See Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 610-611.

88 See Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 616-617.

89 Woolf and Woolf, *Zamir & Woolf: The Declaratory Judgment*, 4th ed (2011) at 11-12.

90 Section 10 of the *Equity Act 1901* (NSW) as substituted by the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW). See Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 612-614.

91 Sir Anthony Mason, "Declarations, Injunctions and Constructive Trusts: Divergent Developments in England and Australia" (1980) 11 *University of Queensland Law Journal* 121 at 124.

92 (1972) 127 CLR 421 at 437-438.

93 (1992) 175 CLR 564 at 581-582, 595-597.

94 (1993) 178 CLR 643 at 649.

95 [1921] 2 AC 438 at 448.

couching standing to seek a declaration in terms of a person having a "real interest" in seeking it.

63 In the meantime, in other cases, standing to seek a declaration was equated with standing to seek an injunction and expressed in language derived from that of Buckley J in *Boyce v Paddington Borough Council*⁹⁶ in terms of a person needing to have a "sufficient interest" or a "special interest" in seeking it beyond the interest of an ordinary member of the public. The Court approached the question of standing using that language in a disparate range of controversies – in *Robinson v Western Australian Museum*⁹⁷ (where the controversy was about the validity of legislation), in *Australian Conservation Foundation v The Commonwealth*⁹⁸, *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd*⁹⁹ and *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*¹⁰⁰ (where the controversy in each case was about the lawfulness of executive action), in *Day v Pinglen Pty Ltd*¹⁰¹ and *Wentworth v Woollahra Municipal Council*¹⁰² (where the controversy in each case was about whether a building was erected in compliance with planning restrictions), in *Onus v Alcoa of Australia Ltd*¹⁰³ (where the controversy was about whether a mining company was in breach of a statutory prohibition) and in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*¹⁰⁴ (where the controversy was about whether the conduct of a business by bodies corporate was permitted by statute).

96 [1903] 1 Ch 109.

97 (1977) 138 CLR 283 at 327-329.

98 (1980) 146 CLR 493 at 526-528, 530-531, 547-548.

99 (1981) 146 CLR 249 at 256-257.

100 (1995) 183 CLR 552 at 558-559.

101 (1981) 148 CLR 289 at 299-300.

102 (1982) 149 CLR 672 at 680-681.

103 (1981) 149 CLR 27 at 35-36, 75.

104 (1998) 194 CLR 247 at 264-265 [44]-[45], 267 [50], 280-284 [92]-[103].

64 In *Croome v Tasmania*¹⁰⁵, standing to seek a declaration was expressed in language drawn from that of Dixon J in *British Medical Association v The Commonwealth*¹⁰⁶, in terms of a person needing to have a "sufficient material interest" in seeking it, as well as in terms of a person needing to have a "real interest" in seeking it. And in *Plaintiff M61/2010E v The Commonwealth*¹⁰⁷, standing was expressed in terms of a person having "a 'real interest' in raising the question to which the declaration would go".

65 Though the expression of standing has been variously in terms of a "sufficient interest", a "sufficient material interest", a "special interest" or a "real interest", the conception of standing developed through that body of case law has been consistent. That conception of standing has involved recognition that a person who does not claim to have a legal right or equitable interest to be vindicated by a declaration or other order that would resolve a controversy about a right or obligation may yet have a material interest in seeking the order. In this context, an interest will be "material" if the person "is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if [the order is made] or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if [the order is not made]"¹⁰⁸. Depending on the totality of the circumstances, the material interest that the person has in seeking the order may be sufficient to justify a court entertaining the proceeding in which the order is sought.

66 In *Robinson*¹⁰⁹, Mason J observed that "cases are infinitely various" and that "what is a sufficient interest in one case may be less than sufficient in another". In *Onus*¹¹⁰, Brennan J added to that observation that the sufficiency of the interest of a person in a particular case "must be a question of degree, but not a question of

105 (1997) 191 CLR 119 at 126-127, 138.

106 See (1949) 79 CLR 201 at 257.

107 (2010) 243 CLR 319 at 359 [103] (footnote omitted).

108 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530.

109 (1977) 138 CLR 283 at 327-328. See also *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc [No 2]* (1993) 41 FCR 89 at 110.

110 (1981) 149 CLR 27 at 75, quoting *Baker v Carr* (1962) 369 US 186 at 204. See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 109 [184]-[186].

discretion" and that in answering that question of degree it is appropriate to consider both whether the interest is "sufficient to assure that 'concrete adverseness which sharpens the presentation of issues' falling for determination" and whether the interest is "so distinctive" as to avoid a multiplicity of proceedings.

67 The course of authority in this Court did not follow developments in the United Kingdom in the 1970s and early 1980s, in cases such as *Gouriet v Union of Post Office Workers*¹¹¹ and *O'Reilly v Mackman*¹¹², which introduced a substantive and procedural distinction for doctrinal purposes between standing in "private law" contexts and standing in "public law" contexts¹¹³. No distinction between "private law" and "public law" could ever be clear cut¹¹⁴. The distinction has been said in Australia to be "so imprecise that it has contributed little to the construction of legal theory or to the formulation of rules applied by the courts"¹¹⁵.

68 Nor has the course of authority in this Court followed that in the United Kingdom in the manner in which it has accommodated considerations of public interest. The plurality in *Bateman's Bay*¹¹⁶ specifically rejected, as inconsistent with Australian conditions, the view expressed in *Gouriet* that an Attorney-General has an "exclusive right ... to represent the public interest"¹¹⁷. True it remains that, within our system of government, "[i]t is an ordinary function of the Attorney-General, whose office it is to represent the Crown in Courts of Justice, to sue for the protection of any public advantage enjoyed under the law as of

111 [1978] AC 435.

112 [1983] 2 AC 237.

113 Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (2000) at 4-12, 23-26. See also Jolowicz, "Civil Proceedings in the Public Interest" (1982) 13 *Cambrian Law Review* 32 at 39 footnote 43.

114 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 [42].

115 Sir Anthony Mason, "Foreword" (2013) 36 *University of New South Wales Law Journal* 170 at 170.

116 (1998) 194 CLR 247 at 261-263 [35]-[38].

117 [1978] AC 435 at 481.

common right"¹¹⁸. But it would defy our experience of government¹¹⁹ to expect an Attorney-General to act as an apolitical "guardian of the public interest"¹²⁰ in all cases of granting to, or withholding from, some other person a "fiat" ("simply a contraction of the expression fiat justitia, meaning 'let justice be done'"¹²¹) authorising that other person to sue in a "relator action" in the name of the Attorney-General¹²². As the plurality observed in *Bateman's Bay*, given that an Attorney-General is commonly here a member of Cabinet, "it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible"¹²³. The plurality emphasised that the approach to standing that has developed in Australia recognises "that the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject matter"¹²⁴.

69 Where a person is shown to have a material interest in seeking a declaration or other order, considerations bearing on the public interest can contribute to the sufficiency of that material interest to justify a court entertaining the proceeding in which the order is sought. A weighty public interest consideration, where it is applicable, is that the person's interest is within the scope of interests sought to be protected or advanced by the exercise of a statutory power or executive authority through which the right or obligation in controversy has come into existence¹²⁵. Another weighty consideration, where it is applicable, is that a party by or against

118 *Tasmania v Victoria* (1935) 52 CLR 157 at 186.

119 See Hanlon, "The Modern First Law Officer in Australia", in Appleby, Keyzer and Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (2014) 119 at 126-131.

120 Kyriakides, "The Law Officers of the Crown and the Rule of Law in the United Kingdom", in Appleby, Keyzer and Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (2014) 185 at 196.

121 *Re Suncorp Insurance and Finance* [1991] 2 Qd R 704 at 711.

122 cf *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 402-403 [53], 473-474 [287].

123 (1998) 194 CLR 247 at 262-263 [38].

124 (1998) 194 CLR 247 at 267 [50].

125 cf *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 73.

whom the right or obligation is held and against whom the declaration is sought is a public authority or an executive government, which "acts, or is supposed to act, not according to standards of private interest, but in the public interest"¹²⁶.

70 In *CGU Insurance Ltd v Blakeley*¹²⁷, Nettle J referred to the proposition "that a person not a party to a contract has no [standing], save perhaps in exceptional circumstances, to obtain a declaration in respect of the rights of other parties to that particular contract"¹²⁸ as "largely" according with Australian authority. His Honour went on to explain that "[g]enerally speaking it may be correct to say that an outsider has no standing to seek a declaration about the meaning and effect of a contract to which the outsider is not party". His Honour immediately added this qualification: "that depends on what is meant by an 'outsider' and upon the circumstances in which the parties to the contract have chosen, or been influenced, not to raise an issue". His Honour's observation emphasises the absence of any bright-line rule governing when a person who is not a party to a contract has standing to seek a declaration about its meaning and effect.

71 The doctrines of privity and consideration will ordinarily prevent a person who is not a party to a contract being able to establish standing to seek a declaration about the content of a contractual obligation on the basis of a legal interest. There will be cases in which a person who is not a party to a contract will be able to establish standing on the basis of an equitable interest, one category of which will be where the contractual obligation can be established to be held on trust. But neither a legal interest nor an equitable interest exhausts the category of interests capable of amounting to a sufficient interest to seek a declaration about the content of a contractual obligation.

72 For a person to have standing to seek a declaration about the content of a contractual obligation, it is not always necessary for the person to establish an entitlement at common law or in equity to enforce that obligation. *Aussie Airlines Pty Ltd v Australian Airlines Ltd*¹²⁹, to which attention was drawn by Nettle J in

126 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51.

127 (2016) 259 CLR 339 at 371 [96].

128 *Meadows Indemnity Co Ltd v Insurance Corporation of Ireland Plc* [1989] 2 Lloyd's Rep 298 at 309.

129 (1996) 68 FCR 406.

*CGU*¹³⁰ and earlier by Heydon J in *Edwards v Santos Ltd*¹³¹, is a pertinent illustration of that proposition.

73 In *Aussie Airlines*, standard provisions of leases granted by a Commonwealth statutory authority, the Federal Airports Corporation, to Australian Airlines Ltd ("Qantas") obliged Qantas to grant a sublease to any "new entrant to the domestic aviation industry". Aussie Airlines Ltd was held to have standing to seek a declaration that it answered the contractual description of a "new entrant to the domestic aviation industry". Lockhart J, with whom Spender and Cooper JJ agreed, expressly reached that result without needing to determine a submission that Aussie Airlines had an entitlement in equity to enforce the contractual obligation against Qantas. The sufficiency of the interest of Aussie Airlines was explained by Lockhart J as follows¹³²:

"The resolution of the question whether Aussie Airlines is 'a new entrant to the domestic aviation industry', when making the request to Qantas for subleases, is of real practical importance to Aussie Airlines. ... Without subleases, Aussie Airlines will be denied a right to carry on the business which it seeks to carry on.

Further, Aussie Airlines has a real commercial interest in obtaining or being refused the declaration. Aussie Airlines was incorporated for the express purpose of operating a domestic airline business. Its future business activities, in particular its airline operation, depend entirely upon obtaining subleases of the relevant airport terminal facilities and becoming a new entrant to the domestic aviation industry."

74 The interest of each Council in obtaining a declaration about the content of the contractual obligation owed by that Lessee to the Commonwealth under cl 26.2 of each Lease might be described more as "governmental" than "practical" and more as "fiscal" than "commercial". Otherwise *Aussie Airlines* is on all fours with the present cases. Like the interest of Aussie Airlines, the interest of each Council in obtaining or being refused the declaration it seeks is distinctive, substantial and squarely within the scope of those third party interests that were sought in the public interest to be advanced through entering into the contractual obligation in the exercise of statutory authority. And like the interest of Aussie Airlines, the interest of each Council in obtaining or being refused the declaration aligns to the

130 (2016) 259 CLR 339 at 373 [102].

131 (2011) 242 CLR 421 at 436 [38].

132 (1996) 68 FCR 406 at 415.

public interest evidently sought to be advanced by cl 26.2, recognised by the Commonwealth Government and all State and Territory Governments, in "the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities"¹³³.

75 The only distinction from *Aussie Airlines* sought to be drawn by the Lessees in argument on the appeals is that Qantas was in dispute with the Federal Airports Corporation, whereas each of them is not in dispute with the Commonwealth about the content of the contractual obligation sought to be made the subject of a declaration. The distinction is not one that amounts to a legal difference. There is no reason why contracting parties must be in dispute in order to be bound by a declaration about the content of a contractual obligation obtained at the instance of a non-contracting party who has a sufficient interest to seek the declaration in a proceeding to which all are party. And there is no reason why the non-existence of a dispute between the contracting parties should operate to reduce the sufficiency of an otherwise sufficient interest of the non-contracting party in seeking the declaration.

76 The controversy between each Council (on the one hand) and the Commonwealth and a Lessee (on the other hand) about the content of the contractual obligation owed by that Lessee to the Commonwealth under cl 26.2 of its Lease is justiciable at the instance of the Council in each proceeding in the Federal Court for a declaration binding on the Commonwealth and the Lessee. The fiscal or governmental interest of each Council in obtaining or being refused the declaration is a sufficient interest to establish standing to seek the declaration.

77 Perhaps it should go without saying that to accept that the controversy about the content of the contractual obligation owed by the Lessee to the Commonwealth is justiciable at the instance of each Council is to say nothing about whether the declarations sought will ultimately be considered appropriate to be made in the form sought or in some other form. Where jurisdiction exists, the making of a declaratory order is discretionary¹³⁴:

"[I]t is thus important to distinguish between the jurisdiction of the court to entertain the [proceeding] at all, ie, to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation.

133 Competition Principles Agreement, 11 April 1995, cl 3(1).

134 *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136 at 1155, quoted in *Johnco Nominees Pty Ltd v Albury-Wodonga (New South Wales) Corporation* [1977] 1 NSWLR 43 at 55-56.

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32.

The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it."

78 The appeals must be dismissed with costs.

EDELMAN AND STEWARD JJ.

Rights, standing, and matters

79 These appeals concerned three separate but related concepts: "cause of action", "standing", and "matter". Each concept is concerned with the existence of a legal controversy but at different levels of generality. In these appeals, the expression "cause of action" was used in its less common connotation to mean the existence of an exigible legal right¹³⁵. A legal right in this sense means a claim right, privilege, power, or immunity, or their correlative concepts. In turn, a legal right is necessary, but not sufficient, before any party can have "standing" to bring a claim, in the sense of a liberty of access to the court. A person will usually only have standing if they have a private right or a special interest in enforcing a public right. And, in turn, if a person has standing – in relation to either a public or private right – to have enforced or recognised a legal right against another in relation to particular subject matter, then there will be a "matter" within ss 75 and 76 of the *Constitution* because there will be "some immediate right, duty or liability to be established by the determination of the Court"¹³⁶. For that reason, standing to enforce private and public rights is "subsumed within the constitutional requirement of a 'matter'"¹³⁷.

80 The starting point for any analysis in these appeals therefore requires, first, identification of the nature of the rights involved and, secondly, consideration of whether the first respondents have standing to seek declarations in relation to those rights. If they do not have standing, then there is no matter.

81 We gratefully adopt the facts set out in the reasons of Kiefel CJ, Keane and Gordon JJ. As those reasons also demonstrate, there are plainly rights involved in this case between the Commonwealth and the counterparties to the leases described below ("the Leases"). The relevant clauses in the lease between the

135 See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 611.

136 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265. See also *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 368 [85].

137 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 [37]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 68 [152]. See also *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 550-551; *Croome v Tasmania* (1997) 191 CLR 119 at 124-126, 132-136; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 610-613 [42]-[50], 629-633 [101]-[109], 659-660 [177]-[179].

Commonwealth and Hobart International Airport Pty Ltd ("HIAPL") concerning the land comprising Hobart Airport are the same as the clauses found in the lease between the Commonwealth and Australia Pacific Airports (Launceston) Pty Ltd ("APAL") concerning the land comprising Launceston Airport (together, "the Airport Sites"). The issues raised by the Clarence City Council in relation to the HIAPL lease are the same as the issues raised by the Northern Midlands Council in relation to the APAL lease. Therefore, resolution of the issues in the HIAPL appeal will also resolve the issues in the APAL appeal.

82 The parties with rights arising under the Leases, the Commonwealth and each of HIAPL and APAL ("the Lessees"), are not in dispute about the existence or content of their rights. Rather, third parties, the Clarence City Council and the Northern Midlands Council ("the Councils"), seek declarations concerning rights in the Leases, which have been treated throughout this proceeding as, in effect, contractual rights¹³⁸. Some of the submissions in support of the Councils' standing to seek declarations sought to abolish the distinction between standing in respect of public rights and private rights with the effect that, as with public rights, a person should be able to obtain a remedy in relation to the private rights of another if the person has a commercial interest in doing so. The distinction between public and private rights is principled, well established, and of fundamental importance. It is one that has been drawn consistently for more than 120 years and that has been repeated almost ad nauseam in this Court. The distinction should not be abolished.

83 For the reasons below, we agree with Kiefel CJ, Keane and Gordon JJ that the rights between the parties to the Leases are purely private rights. We differ from Kiefel CJ, Keane and Gordon JJ only in the respect that we do not consider that the Councils have standing in these proceedings to seek declarations concerning the private contractual rights of the Commonwealth and the Lessees. That is not a difference of principle but only of application, concerning exceptional circumstances. Whatever might be any limited scope for exceptional circumstances in which one party could obtain a declaration as to the private rights of others, the circumstances of these appeals are not exceptional. And since the rights involved are not public rights, it does not avail the Councils to point to the special interest they have in relation to those rights beyond the interest of an ordinary member of the public.

138 See *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 29-30.

The fundamental divide between public and private rights

84 The power to make a declaration in the circumstances of these appeals is expressed, in terms that have been common since the *Court of Chancery Procedure Act 1852*¹³⁹, as a power to "make binding declarations of right, whether or not any consequential relief is or could be claimed"¹⁴⁰. There is, however, a "fundamental"¹⁴¹ distinction, affirmed many times in this Court in this area of law, between public rights and private rights.

85 As to private rights, these are the rights that are distinctly owed to a particular legal person or persons, separately from the public at large. The concept of "right" is used loosely and broadly. As Professor Borchard observed of the expression "declarations of right", it is one that "must be found to cover [a claim] right, privilege, power, immunity, duty, no-right, liability, disability"¹⁴². It also extends to circumstances where it is asserted that those "legal relations have been thrown into doubt ... by the unfounded claim of a defendant"¹⁴³. Examples of private rights include claim rights, powers, or privileges of a private person against others that are recognised by the law of contract, torts, or equity. They also include statutory rights that apply to an individual, or individuals, in particular circumstances such as a right to be treated with procedural fairness¹⁴⁴.

86 Where private rights are concerned, the general rule is that only a person whose private rights are infringed or threatened has standing to seek legal remedies in relation to those private rights. Those remedies include injunctions and declarations. The general rule has been long established. The liberty of access to the courts – standing – for recognition or enforcement of a person's own legal rights or obligations has been said to be "deeply rooted in constitutional principle"¹⁴⁵.

139 15 & 16 Vict c 86, s 50.

140 *Federal Court of Australia Act 1976* (Cth), s 21(1).

141 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 482.

142 Borchard, *Declaratory Judgments*, 2nd ed (1941) at 212. See also *Sankey v Whitlam* (1978) 142 CLR 1 at 23.

143 Borchard, *Declaratory Judgments*, 2nd ed (1941) at 928.

144 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582.

145 *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 623 [55].

Conversely, a person generally has no standing where the claim concerns another person's private legal rights or obligations¹⁴⁶. Hence, for more than a century, the general rule has been that a person who is not a party to a contract is unable to obtain an injunction to enforce contractual obligations merely by showing a "material interest" in relation to those obligations, no matter how substantial, commercial, or important that interest may be. To the argument that such an interest is sufficient, the "obvious answer", which "has been applied in many cases", is that a person who is not a party to a contract "can neither sue nor be sued on that contract"¹⁴⁷.

87 In contrast with private rights and other rights of action conferred by statute, the enforcement of public rights, owed to the public at large, was usually by the Attorney-General as the representative of the public, either ex officio or on the relation of a private person¹⁴⁸. The relator action existed because the relator "cannot be said to have the ordinary private right to a remedy"¹⁴⁹. In the absence of a statutory right of action, a plaintiff will only be able to bring a legal action to enforce a purely public right if the rules of standing permit the plaintiff to enforce that public right. This fundamental distinction between public rights and private rights has been relied upon in many cases in this Court in the development of the rules of standing in relation to public rights, particularly where a plaintiff seeks relief in the form of declarations or injunctions.

88 A public right is an expression that describes legal relations involving the public generally rather than any specific person or persons. The best examples are persons who have statutory powers in relation to the public or sections of the public. The general public have rights and liabilities corresponding to the duties owed by those persons in the exercise of the powers, and the extent of the powers. In early decisions of this Court, a restrictive approach was taken to the standing of private persons to seek recognition or enforcement of public rights. In the absence of a statutory power to sue, standing to seek relief in relation to public rights was

146 *Stockport District Waterworks Co v Mayor &c of Manchester* (1862) 7 LT 545 at 548; *London Passenger Transport Board v Moscrop* [1942] AC 332 at 344.

147 *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 67.

148 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 276 [82]. See also *Taylor v Attorney-General (Cth)* (2019) 268 CLR 224 at 266 [113].

149 *Liston v Davies* (1937) 57 CLR 424 at 442.

generally limited to the relevant Attorney-General, including on the relation of a member of the public, since the Attorney-General was the representative of the relevant public¹⁵⁰. As will be seen, although that approach to standing has been liberalised, it has never been suggested that this liberalisation has stripped the Attorney-General of their power to bring a relator action or that the fundamental distinction in this field between public rights and private rights has been collapsed.

89 An early example of this Court drawing a distinction between public rights and private rights is *Anderson v The Commonwealth*¹⁵¹. In that case, the plaintiff, who paid taxes and consumed sugar, sought a declaration as to the invalidity of an agreement between the Commonwealth and the State of Queensland which prohibited the importation of sugar. This Court held that the plaintiff had no private rights since he was not a party to the agreement. And, although the agreement gave rise to public rights enforceable by the relevant Attorney-General, "[g]reat evils would arise if every member of the Commonwealth could attack the validity of the acts of the Commonwealth whenever [they] thought fit; and it is clear in law that the right of an individual to bring such an action does not exist unless [they] establish[] that [they are] 'more particularly affected than other people'"¹⁵².

90 Many cases have reiterated this distinction between, on the one hand, a person having a private right, and therefore standing to bring an action, and, on the other hand, a person seeking to enforce a public right. In the latter case, the general proposition, subject to exceptions where the person is specially or sufficiently affected, is that "a person not affected in [their] private rights may not sue for declaratory relief"¹⁵³.

91 Over time, there have been developments in the approach to determining the circumstances in which a person is sufficiently affected so as to have standing

150 *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 597.

151 (1932) 47 CLR 50. See also *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd* (1935) 54 CLR 230 at 254, 261.

152 (1932) 47 CLR 50 at 52.

153 *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 327. See also the cases discussed in the following paragraphs of these reasons as well as *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 126-127; *Davis v The Commonwealth* (1986) 61 ALJR 32 at 35; 68 ALR 18 at 23; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 599 [2], 603 [20], 609 [39], 611-612 [46], 640 [131].

to bring an action to enforce or recognise a public right. On the appeal to the Full Court of this Court in *Australian Conservation Foundation v The Commonwealth*¹⁵⁴, Gibbs J referred to the approach of Buckley J in *Boyce v Paddington Borough Council*¹⁵⁵ that a plaintiff can sue either where there is an interference with the plaintiff's private rights or "where no private right is interfered with, but the plaintiff, in respect of [a] public right, suffers special damage" – that is, damage peculiar to themselves – "from the interference with the public right". Gibbs J, with whom Mason J agreed¹⁵⁶, described the language of Buckley J as "not altogether satisfactory" and liberalised the test for when a plaintiff can enforce a public right from one of "special damage", which connoted a requirement for damage, to one of having a special interest in the subject matter of the action¹⁵⁷. Nevertheless, the reasoning of each member of the Court, except Murphy J, emphasised the distinction between public rights and private rights¹⁵⁸.

92 In *Onus v Alcoa of Australia Ltd*¹⁵⁹, the plaintiffs were Aboriginal people who sought to restrain Alcoa of Australia Ltd from carrying out construction works that were said to interfere with Aboriginal relics in contravention of s 21 of the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic). The primary judge held that the plaintiffs had no standing on the basis of either private rights or an interest to enforce the Act. An appeal to the Full Court of the Supreme Court of Victoria was dismissed. Every member of this Court held that the Act conferred no private rights upon the plaintiffs¹⁶⁰. Therefore, as Brennan J explained, the plaintiffs were "constrained to establish standing by bringing themselves within the exception to the rule that a private citizen cannot bring proceedings to prevent public wrongs"¹⁶¹. Every member of this Court allowed the appeal, accepting the appellants' alternative submission that the appellants had standing to "prevent the

154 (1980) 146 CLR 493 at 526-527.

155 [1903] 1 Ch 109 at 114.

156 (1980) 146 CLR 493 at 547.

157 (1980) 146 CLR 493 at 527-528.

158 (1980) 146 CLR 493 at 526, 537-538, 547.

159 (1981) 149 CLR 27.

160 (1981) 149 CLR 27 at 35, 41, 43, 44, 48-49, 60, 68.

161 (1981) 149 CLR 27 at 68. See also at 35-36, 41, 49. Cf the broader view of Murphy J at 44.

violation of a public right"¹⁶² where their cultural and historical interest was, or might be¹⁶³, a special interest sufficient to support standing¹⁶⁴.

93 The same principle was applied in the unanimous joint judgment of this Court in *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*¹⁶⁵. One question for this Court was whether a union with members who were shop assistants had standing to seek an injunction and a declaration as to the invalidity of exemption certificates that were proposed to be issued by the respondent Minister under the *Shop Trading Hours Act 1977 (SA)*. The joint judgment approached the question of standing in the orthodox way by first considering separately whether the rights to be enforced were private or public rights. The Court held that the *Shop Trading Hours Act* conferred no private rights but that the union could bring an action to compel observance of the Act – "to prevent the violation of a public right"¹⁶⁶ – because the shop assistants, and therefore the union, had a "special interest in the subject matter of the litigation"¹⁶⁷. The Court then applied the approach of Gibbs CJ in *Onus v Alcoa*¹⁶⁸ requiring a special interest in the subject matter of the litigation in order to enforce a public right.

94 In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*¹⁶⁹, the question again concerned the enforcement of a public right. The question was whether the respondents, a contributory funeral benefit fund and a contributory life insurance fund catering for members of the Aboriginal community in New South Wales, had standing to seek an injunction to restrain the appellants from setting up a rival business. The injunction was sought on the basis

162 (1981) 149 CLR 27 at 35. See also at 41, 45, 49, 60, 66, 68-69.

163 (1981) 149 CLR 27 at 57.

164 (1981) 149 CLR 27 at 35-36, 41-43, 44, 63, 78. See also *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530-531, 537, 547-548.

165 (1995) 183 CLR 552 at 557-559.

166 (1995) 183 CLR 552 at 558.

167 (1995) 183 CLR 552 at 558.

168 (1981) 149 CLR 27 at 35-36. Also citing *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493.

169 (1998) 194 CLR 247.

that the conduct of such a business was beyond the appellants' statutory powers. This Court held that the potential damage to the business of the respondents was a sufficiently special interest for the respondents to have standing to seek the injunction to enforce the public rights.

95 In a joint judgment, Gaudron, Gummow and Kirby JJ cast doubt upon the restrictive attitude that had been taken in cases from *Gouriet v Union of Post Office Workers*¹⁷⁰ onwards as to whether a party's interest was sufficiently special for standing to exist in cases involving public rights. They concluded that the respondents had an "immediate, significant and peculiar" interest in the observance by the appellants of the statutory limitations upon the appellants' powers¹⁷¹. Nothing said by their Honours cast any doubt upon the fundamental distinction between private rights and public rights. To the contrary, their Honours emphasised¹⁷²:

"In private law there is, in general, no separation of standing from the elements in a cause of action. Further, the requirement of a legal right determines the availability of injunctive relief and there is no separate requirement which determines entitlement to approach a court of equity."

96 In a separate judgment, McHugh J took a more traditional approach to the requirement of a special interest to enforce public rights. But, like the joint judgment, his Honour emphasised the "private rights and public rights dichotomy"¹⁷³. The language of a "dichotomy" between public rights and private rights must, however, be used carefully. Simply because a public right exists and is perhaps enforceable by a plaintiff against a defendant does not mean that, on the facts before a court, a plaintiff cannot also have a private right. The co-existence in some cases of a plaintiff's claim for public and private nuisance at common law is an exemplar of that phenomenon.

97 Unsurprisingly, given the conjunction of principle concerning standing to obtain injunctions and declarations, the distinction between public rights and private rights has been repeated constantly in this Court in cases involving

170 [1978] AC 435.

171 (1998) 194 CLR 247 at 267 [52].

172 (1998) 194 CLR 247 at 264 [43].

173 (1998) 194 CLR 247 at 275-280 [77]-[91].

injunctions¹⁷⁴. For instance, in *Cardile v LED Builders Pty Ltd*¹⁷⁵, it was said that an injunction is only available "to protect the legal (including statutory) or equitable rights of the plaintiff"; otherwise, the injunction can only be sought in respect of public rights, including for "the administration of a trust for charitable purposes, or the observance of public law at the suit of the Attorney-General, with or without a relator, or at the suit of a person with a sufficient interest".

98 The distinction between public rights and private rights is also the very reason that for more than a century courts have considered whether legislation creates private rights to enable a claim for an injunction or damages for breach of statutory duty. A person who has no special interest to enforce public rights created by statute must establish that Parliament intended to create a "private right" in order to bring a claim based on contravention of the statute¹⁷⁶. That intention must be found as a matter of statutory interpretation, usually by implication. As Kitto J remarked in *Sovar v Henry Lane Pty Ltd*¹⁷⁷, the intention of Parliament "that such a private right shall exist is not ... conjured up by judges to give effect to their own ideas of policy".

99 For these reasons, the distinction between public and private rights should not be collapsed. To do so would require rejection of more than a century of established case law. That case law is based upon the fundamental and correct distinction between a duty that is owed to, and a right that is held by, particular persons, and a duty that is owed to, and a right that is held by, the public, or a section of the public, at large. The relator action is one example of a doctrine that has developed around this distinction. Rules of standing are another. Some cases

174 See, eg, *Day v Pinglen Pty Ltd* (1981) 148 CLR 289 at 299; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 682-683.

175 (1999) 198 CLR 380 at 394 [28].

176 *Smith v William Charlick Ltd* (1924) 34 CLR 38 at 58; *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 281; *O'Connor v S P Bray Ltd* (1937) 56 CLR 464; *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36; *Leask Timber and Hardware Pty Ltd v Thorne* (1961) 106 CLR 33; *Jacob v Utah Construction and Engineering Pty Ltd* (1966) 116 CLR 200; *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

177 (1967) 116 CLR 397 at 405. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 482; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 460-461; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 633 [325].

might involve both public and private rights. Some might be at the boundaries between public and private. But, just as the existence of twilight or shades of grey does not invalidate the distinction between night and day or black and white¹⁷⁸, these boundary cases cannot invalidate the difference between public and private rights.

Interpretation issues concerning cl 26.2(a) of the Leases

100 The Councils argued that cl 26.2(a) of the Leases constituted the Commonwealth as a trustee of the benefit of rights contained in cl 26.2(a) for the Councils. That argument turns upon the interpretation of cl 26.2(a). The Councils also argued that, even if the Councils were strangers to the rights in cl 26.2(a), the nature of those rights and the circumstances in which they arose were sufficiently exceptional to permit the Councils to obtain declarations as to the meaning of cl 26.2(a). It is necessary, therefore, to interpret cl 26.2(a) in order to determine whether the Commonwealth is a trustee of any rights for the benefit of the Councils and whether any rights of the Councils under cl 26.2(a) are public rights or private rights, or both.

101 Apart from the submissions, addressed later in these reasons, concerning whether cl 26.2(a) created a trust, the parties to these proceedings made few submissions about the proper interpretation of cl 26.2(a). The parties generally assumed that cl 26.2(a) imposed a duty upon the Lessees to make payments in lieu of rates to the Councils in accordance with the formula in cl 26.2(a). This assumption by the parties concerns an issue of interpretation of cl 26.2(a) that is related to those above. It suffices for the purpose of these reasons to explain at the outset that the parties' assumption might not be correct.

102 Clause 26.2(a) provides:

"EX GRATIA PAYMENT IN LIEU OF RATES AND LAND TAX

(a) Where Rates are not payable under sub-clause 26.1 because the Airport Site is owned by the Commonwealth, the Lessee must promptly pay to the relevant Governmental Authority such amount as may be notified to the Lessee by such Governmental Authority as being equivalent to the amount which would be payable for rates as if such rates were leviable or payable in respect of those parts of the Airport Site:

(i) which are sub-leased to tenants; or

178 Gleeson, "Judicial Legitimacy" (2000) 20 *Australian Bar Review* 4 at 11.

43.

- (ii) on which trading or financial operations are undertaken including but not limited to retail outlets and concessions, car parks and valet car parks, golf courses and turf farms, but excluding runways, taxiways, aprons, roads, vacant land, buffer zones and grass verges, and land identified in the airport Master Plan for these purposes,

unless these areas are occupied by the Commonwealth or an authority constituted under Commonwealth law which is excluded from paying rates by Commonwealth policy or law. The Lessee must use all reasonable endeavours to enter into an agreement with the relevant Governmental Authority, body or person to make such payments."

103 The immediate contractual context of cl 26.2(a) includes cl 26.1, which is in these terms:

"PAYMENT OF RATES AND LAND TAX AND TAXES

The Lessee must pay, on or before the due date, all Rates, Land Tax and Taxes without contribution from the Lessor."

104 The contractual context also includes cl 26.2(b), which imposes a different obligation to pay amounts in lieu of land tax. It provides:

- "(b) Where Land Tax is not payable under sub-clause 26.1 because the Airport Site is owned by the Commonwealth, payments in lieu of Land Tax must be made by the Lessee in respect of those parts of the Airport Site:

- (i) which are sub-leased to tenants; or
- (ii) on which trading or financial operations are undertaken including, but not limited to, retail outlets and concessions, car parks and valet car parks, golf courses and turf farms, but excluding runways, taxiways, aprons, roads, vacant land, buffer zones and grass verges, and land identified in the airport Master Plan for these purposes,

unless these areas are occupied by the Commonwealth or an authority constituted under Commonwealth law which is excluded from making payments by Commonwealth policy or law. Unless otherwise directed by the Lessor, the Lessee will make payments promptly in lieu of land tax at the relevant State rate to the Commonwealth addressed as provided for in sub-clause 24.1.

These payments in lieu of Land Tax will be levied on a financial year basis. The Lessee must submit an assessment of the payment in lieu of land tax to the Commonwealth on 31 August of the current financial year with this payment due 30 days later. Land value assessment for the purposes of making payments in lieu of land tax are required at least every three years."

105 Finally, there is cl 26.2(c), which addresses stamp duty, payroll tax and the like. It is similar in effect to cl 26.2(b). It provides:

"(c) Where Taxes such as stamp duty, payroll tax, financial institutions duty and debits tax imposed by a Governmental Authority are not payable by the Lessee because they are Taxes on transactions, instruments or activities on or related to the Airport Site owned by the Commonwealth, the Lessee must pay to the relevant Governmental Authority such amount as is equivalent to the amount which would be payable for such Taxes if such Taxes were leviable or payable."

106 It is unnecessary to reach any final conclusion as to the meaning of cl 26.2(a), which may be the subject of full argument on the remittal of these proceedings. It suffices to say, however, that it is arguable that the assumption concerning the meaning of cl 26.2(a) upon which the Councils proceeded in their submissions in this Court is incorrect. That assumption was that, in the absence of any agreement between the Lessees and the Councils, the Lessees were obliged to make payments in lieu of rates to the Councils.

107 An appreciation of why the assumption may be incorrect commences with cl 26.2(b). That subclause is premised on a state of affairs in which land tax is not payable because the "Airport Site[s]", being Hobart Airport and Launceston Airport, are "owned by the Commonwealth". Clause 26.2(b), by its terms, creates a liability to pay to the Commonwealth (and not to the State of Tasmania) payments "in lieu of" land tax on a "financial year basis". Such payments "must be made". The Lessees "must submit an assessment of the payment" to the Commonwealth on 31 August every financial year, with the resulting payment being "due 30 days later". And, at least every three years, a "Land value assessment" must be completed. Clause 26.2(b) does not refer to the need for the parties to enter into any agreement for payments of money in lieu of land tax. Nor does it require any notification by the Commonwealth of the amount of the payments to be made. That is because the terms of cl 26.2(b) create the liability in question.

108 The reference in cl 26.2(b)(ii) to those parts of the Airport Sites "on which trading or financial operations are undertaken", and the examples of such operations that follow in the paragraph, use precisely the same language as that

found in cl 26.2(a)(ii). That language operates as part of the positive criteria to be applied objectively to determine the quantum payable in lieu of land tax. As such, a dispute between the parties about the meaning of that language may conformably be resolved by declaratory orders made by a court. So, for example, a dispute between the Commonwealth and Essendon Airport Pty Ltd concerning a clause in the same terms as cl 26.2(b) was resolved by the grant of declaratory relief¹⁷⁹.

109 Clause 26.2(c) is similar to cl 26.2(b). It concerns the making of payments which are equivalent to the amount that would have been payable by the Lessees, had the Airport Sites not been owned by the Commonwealth, on account of "stamp duty, payroll tax, financial institutions duty and debits tax". Like cl 26.2(b), cl 26.2(c) does not refer to the need for the parties to enter into any further agreements with the Governmental Authorities for payments of money in lieu of these taxes and duties. Nor does it require any notification by those authorities of the amount of the payments to be made. This is because, like cl 26.2(b), cl 26.2(c) creates a positive obligation to make such payments to the relevant Governmental Authority.

110 Clause 26.2(a) operates in a notably different manner from cll 26.1, 26.2(b), and 26.2(c). Several observations may be made in relation to these differences. First, cl 26.2(a) operates by requiring the Lessees to "use all reasonable endeavours to enter into an agreement" with the Councils. The agreement is not expressed as a matter of the mechanics or formula for payments that are already required. Rather, the agreement is "to make such payments". A contrast with the other three liability-creating clauses might arguably be that the only liability under cl 26.2(a) is created by an agreement, under the power contained in s 134 of the *Local Government Act 1993* (Tas).

111 Secondly, the heading to cl 26.2 suggests that there may be no obligation to make payments in lieu of rates. The heading describes the "payment in lieu of rates" as "ex gratia" (meaning by favour, or without obligation). In other words, until an agreement is reached, there is no obligation to make the payments.

112 As Gibbs CJ observed in *Hospital Products Ltd v United States Surgical Corporation*¹⁸⁰, an obligation to use "best endeavours" does not require the person "to go beyond the bounds of reason"; the person is required to do all that they "reasonably can in the circumstances to achieve the contractual object, but no more". It follows that the obligation on the Lessees, conformably with their duty to do all that they reasonably can do, may or may not result in the entry into an

179 *The Commonwealth v Essendon Airport Pty Ltd [No 2]* [2019] FCA 1694. See also *The Commonwealth v Essendon Airport Pty Ltd* [2019] FCA 1411.

180 (1984) 156 CLR 41 at 64.

agreement to make payments in lieu of rates to the Councils. Unless and until such an agreement is struck, however, any payments by the Lessees to the Councils are *ex gratia*, and the Councils have no more than a hope or expectancy of payments.

113 Thirdly, unlike cl 26.2(b) or 26.2(c), the obligation in cl 26.2(a) to pay to the Councils an amount equivalent to rates is conditioned upon "such amount as may be notified to [the Lessees] by [the Councils]". It may be that the notification to which reference is made is properly understood as concerning the amount that is due under any agreement reached. On that approach, because an agreement may never be reached, cl 26.2(a) refers only to the amount which "may be notified" by the Councils. The conditional reference, "may be notified", implicitly acknowledges that an agreement might not be reached. In any event, "may be notified" contrasts with the imperatives of "must" or "will" which are deployed in cl 26.1, 26.2(b) and 26.2(c).

114 Fourthly, and again unlike cl 26.2(b), the Commonwealth's role is not prominent in cl 26.2(a). The Commonwealth is not the administrator of cl 26.2(a) until an agreement is reached between the Lessees and the Councils. That is, save for enforcing, if necessary, the Lessees' promise to use reasonable endeavours under cl 26.2(a), the Commonwealth has nothing to do.

115 Fifthly, it may be that the phrases in dispute between the Lessees and the Councils in cl 26.2(a)(ii) as to the parts of the Airport Sites required to be included in the calculation and the valuation methodology of the payments pursuant to cl 26.2(a) give content to the duty on the Lessees to use reasonable endeavours to negotiate and enter into such an agreement. That would be because the subject matter of the agreement is the making of "such payments", namely the payments earlier described. Thus, to illustrate, the Lessees have promised, by cl 26.2(a), to use reasonable endeavours to negotiate an agreement which obliges the Lessees to make payments that are "equivalent to the amount which would be payable for rates as if such rates were leviable". The obligation to use reasonable endeavours is owed to the Commonwealth, who may enforce it, and not to the Councils.

116 If the obligation on each of the Lessees – owed to the Commonwealth – is only to use reasonable endeavours to negotiate an agreement with each of the Councils, it is relevant that, with the parameters of that negotiation informed by the general words used in cl 26.2(a), including the parts of the Airport Sites required to be included in the calculation and the valuation methodology of the payment, the Councils are not so confined. The Councils are free to make whatever offers they consider are consistent with their own duties and interests. However, knowing the constraints to which the Lessees are subject, there would be a natural incentive for the Councils also to tailor any negotiation with the Lessees to conform to cl 26.2(a).

117 Ultimately, and on any view, whether the Lessees and the Councils are able to reach such an agreement is a matter for them. They will, in that respect, be free to negotiate about which parts of the Airport Sites are to be treated as parts on which trading or financial operations are undertaken and about what type of valuation methodology should be used to determine the Lessees' liability. It does not matter whether such an agreement would or would not conform to an objective application of the words employed by cl 26.2(a) or to their correct judicial interpretation. The scope of the negotiation to be had is necessarily broader than that. That is not only because the words of cl 26.2(a) do not bind the Councils, but also because those words do not operate as the actual criteria for liability. Rather, the criteria for the liability to make payments in lieu of rates will be that which may be agreed as between the Lessees and the Councils.

118 For these reasons, it is at least arguable that, unlike cl 26.2(b) or 26.2(c), the words used in cl 26.2(a) do not constitute the criteria for liability to make payments but instead contemplate only the entry into an entirely separate agreement which would establish that liability.

Does cl 26.2(a) confer private rights enforceable by the Councils?

119 Privity of contract is an "elementary"¹⁸¹ doctrine "which is both settled and fundamental"¹⁸² and is "as well established as any [principle] in our law"¹⁸³. In *Coulls v Bagot's Executor and Trustee Co Ltd*¹⁸⁴, Barwick CJ said that "according to our law, a person not a party to a contract may not ... sue upon it so as directly to enforce its obligations". Most so-called common law "exceptions" to privity are not exceptions at all¹⁸⁵. For instance, "third parties" who claim as principal of a

181 *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 80.

182 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 128.

183 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 141.

184 (1967) 119 CLR 460 at 478. See also *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 127; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 418-419; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 371 [96].

185 *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 at 473; *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 67; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 143. Cf statutory

contracting party will generally be a party to the contract and persons who claim as a beneficiary under a trust of contractual rights held by the contracting party, or as an equitable assignee, generally do so by joinder of the party to the contract in order to assert the trustee's or assignor's rights¹⁸⁶.

120 The Councils did not make sweeping, radical submissions in support of their ability to obtain declarations concerning the rights of parties to contracts to which they were strangers. Their position was much more modest. In carefully drawn submissions, they sought only to expand the ability of a stranger to obtain relief in relation to a contract in the form of a declaration and, even then, by notice of contention, they alleged that this was only possible in exceptional circumstances, of which the present were said to be an example.

121 In *Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland Plc*¹⁸⁷, May LJ said that:

"a person not a party to a contract has no locus, save perhaps in exceptional circumstances, to obtain a declaration in respect of the rights of other parties to that particular contract. It would be contrary to the whole principle of privity to allow such a person to obtain such a declaration. [That person] has no 'rights' in respect of that contract and has no claim for relief under it."

This statement is correct. It is based on the foundational principle that a declaration of right must be concerned with the "right" of the party seeking the declaration, separate from any rights created by the declaration. The statutory conferral by the *Court of Chancery Procedure Act 1852*¹⁸⁸ of a power to make declarations of right was not a Frankensteinian creation of almost unlimited jurisdiction for a court to declare a right and then claim authority for that declaration based on the new right that was just declared. Nor did the authority to declare private rights generally extend to the declaration of private rights of others merely because a plaintiff might have an interest in how others exercise their rights. That remains the case in this

exceptions such as *Property Law Act 1969* (WA), s 11(2); *Property Law Act 1974* (Qld), s 55(1).

¹⁸⁶ See Tham, *Understanding the Law of Assignment* (2019) at 171-178.

¹⁸⁷ [1989] 2 Lloyd's Rep 298 at 309.

¹⁸⁸ 15 & 16 Vict c 86, s 50.

country, whether or not English law has "moved on"¹⁸⁹ as a result of the expansion of the power to order a "declaration of right" to a power to "make binding declarations" without an established right, including on an interim basis¹⁹⁰.

122 In *CGU Insurance Ltd v Blakeley*¹⁹¹, in the context of a contract of insurance, Nettle J endorsed the above-quoted statement of May LJ from *Meadows*, whilst also elevating the possibility of exceptional circumstances where a third party may have standing to obtain a declaration to an actuality. The approach of the other members of this Court in *CGU Insurance* may be understood as recognising standing to enforce a private right due to implied statutory authority rather than relying upon exceptional circumstances in its context of insurance¹⁹². But it must be accepted that it was not wholly novel for rights in insurance contracts to be treated as exceptional¹⁹³. Indeed, in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*¹⁹⁴, three members of this Court treated the entire doctrine of privity of contract as subject to an exception in relation to insurance contracts. Insurance contracts have also been treated by statute as a special case¹⁹⁵.

123 The danger with exceptions, however, is that unless they "prove the rule" – that is, unless they fall outside the rationale for the rule – then, without great care being taken, the growth of exceptions without an underlying rationale can overwhelm a coherent rule. Whatever the merit of an "insurance" exception, the instruments in these appeals, the Leases, were not insurance contracts. Neither the Councils nor the Commonwealth were able to point to any sufficient reason to undermine the basic rule that, without statutory authority, the Councils have no

189 *Feetum v Levy* [2006] Ch 585 at 606 [82]; *Rolls-Royce Plc v Unite the Union* [2010] 1 WLR 318 at 350 [120(4)].

190 *Civil Procedure Rules* 1998 (UK), rr 25.1(1)(b), 40.20; Woolf and Woolf, *Zamir & Woolf: The Declaratory Judgment*, 4th ed (2011) at 49 [3-23], 52 [3-29], 237-238 [5-23].

191 (2016) 259 CLR 339, especially at 371 [95]-[96].

192 (2016) 259 CLR 339 at 363-364 [67].

193 See *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398; *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-949.

194 (1988) 165 CLR 107 at 123-124, 167-172.

195 *Insurance Contracts Act* 1984 (Cth), s 48.

standing to seek the recognition or enforcement of the rights of others. The Councils unquestionably have a real commercial interest in seeking declarations as to the meaning of the Leases. But to recognise their interests as sufficient for a declaration would be to undermine the very basis of the rule by which courts granting a declaration of a private right do so at the instance of a person who is a party to that jural relationship, not a stranger to it.

124 The alternative submissions of the Councils, raised in oral submissions and in supplementary written submissions following questions from this Court, were that the Councils have rights in relation to the Leases as beneficiaries of a trust created by the Commonwealth of the promise contained in the Leases. If such a trust had been created then there is no doubt that the Councils would have standing to obtain declarations as to their legal rights under the Leases by joining the Commonwealth, in its capacity as trustee, as a defendant, and thus compelling the Commonwealth to exercise its standing to obtain the declarations¹⁹⁶.

125 In the absence of a declaration of trust separately from the terms of the contract, the existence of a trust of promised contractual rights will depend upon identifying from the terms of the contract an expression of intention to create a trust¹⁹⁷. The approach to the terms of the contract to identify any intention to create a trust is the objective approach which considers whether the meaning of the words used in all the circumstances would demonstrate an intention to create a trust by a reasonable person in the position of the parties, and an intention to undertake the duties of a trustee by a reasonable person in the position of the potential trustee¹⁹⁸.

126 The Commonwealth sought to rely, as a "starting point" for interpretation, upon English cases which had suggested 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"¹⁹⁹. Those cases were based upon a separation between "governmental"

196 See *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 at 79; *Olsson v Dyson* (1969) 120 CLR 365 at 391; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 135, 155-156.

197 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 120.

198 See, generally, *Byrnes v Kendle* (2011) 243 CLR 253 at 286-290 [102]-[115].

199 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 162-163, citing *Kinloch v Secretary of State for*

obligations of the Crown involving "the duties or functions belonging to the prerogative and the authority of the Crown" in a relationship "not enforceable by the courts" in which expressions like "trust" were used in a "higher sense" and non-governmental obligations in which the same expression was used in a "lower sense" of the creation of a trust²⁰⁰. Such an interpretative principle was clearly rejected by this Court in circumstances where the putative trustee "has a number of functions, not all of which are necessarily governmental in nature"²⁰¹. This reasoning applies a fortiori where, as in the Leases, none of the rights or obligations of the Commonwealth are governmental in nature in the prerogative sense described in the English cases.

127 In many cases, the requirement that one party to the contract confer a benefit upon a third party may be an indicator that the other party manifested an intention to hold the benefit of the first party's promise on trust²⁰². But it is only one indicium. All other indicia in these appeals point against any manifested intention by the Commonwealth to create a trust. In particular, as the Lessees submitted, cl 26.2(a) does not use the language of "trust" or holding the benefit of rights for another despite that language being used elsewhere in the Leases.

128 Much can depend upon the nature of the right that is said to be held on trust. Unlike cl 26.2(c), where the Commonwealth could have a substantial role in administering the enforcement of the obligation upon the Lessees to make payments of the taxes to the relevant Governmental Authorities, the Commonwealth, on the arguable interpretation above, would have little role in administering or supervising the open-textured duty of the Lessees to use all reasonable endeavours to enter into an agreement with the Councils.

129 Even if, on its proper interpretation, cl 26.2(a) imposed a duty upon the Lessees, without agreement, to make payments in lieu of rates to the Councils, if the Commonwealth were to hold that promise on trust for the Councils then, as the Lessees submitted, it would have the curious effect that a trust would be created, superseded, and recreated each time an agreement with the Councils was

India (1882) 7 App Cas 619 at 625-626 and *Tito v Waddell* [No 2] [1977] Ch 106 at 216-219.

200 *Tito v Waddell* [No 2] [1977] Ch 106 at 216.

201 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 164.

202 *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 67; *Bahr v Nicolay* [No 2] (1988) 164 CLR 604 at 618.

concluded or terminated. That surprising and uncertain result is a strong basis for a conclusion that the words of cl 26.2(a) do not reveal that a reasonable person in the position of the parties would have intended to create a trust and that a reasonable person in the position of the Commonwealth would have intended to accept the responsibilities of a trustee.

Does cl 26.2(a) create public rights enforceable by the Councils?

130 The Councils relied on the decision of this Court in *Edwards v Santos Ltd*²⁰³ as founding their standing to seek declarations concerning the meaning of cl 26.2(a). In that case, this Court considered the question of standing to enforce a public right. One claim was that the first and third defendants, described as the "petroleum defendants", had "no right to apply to the Minister under s 40 of the *Petroleum Act* [1923 (Qld)] because the [Authority to Prospect] had ceased to be valid" and there was no power under s 40 of the *Petroleum Act* for the Minister to grant a "production licence"²⁰⁴. Heydon J²⁰⁵ (with whom five other members of the Court agreed²⁰⁶) held, citing *Onus v Alcoa*, that the plaintiffs had standing because they had an interest "which [was] greater than that of other members of the public".

131 It is beyond argument from the issue that was involved, the test that was posed, and his reference to *Onus v Alcoa* that Heydon J was describing the test for standing to enforce a public right. Heydon J then continued, citing the decision of the Full Court of the Federal Court of Australia in *Aussie Airlines Pty Ltd v Australian Airlines Ltd*²⁰⁷ as "[a]n example of how a person can have standing to obtain a declaration"²⁰⁸. That decision, and its endorsement by Heydon J in the context of the enforcement of a public right, was the subject of much confusion in submissions in these appeals.

132 In *Aussie Airlines*, Aussie Airlines sought to become an airline carrier in the Australian domestic airline industry. The two airlines in the industry at that time, Qantas and Ansett, had been granted long-term head leases for airport

203 (2011) 242 CLR 421.

204 (2011) 242 CLR 421 at 435-436 [37].

205 (2011) 242 CLR 421 at 436 [37].

206 (2011) 242 CLR 421 at 425 [1].

207 (1996) 68 FCR 406.

208 *Edwards v Santos Ltd* (2011) 242 CLR 421 at 436 [38].

facilities by a head lessor. The head leases contained provisions that compelled Qantas and Ansett to provide subleases to any "new entrant to the domestic aviation industry". Aussie Airlines alleged that it was a new entrant within the meaning of the head leases and sought a sublease from Qantas. Qantas denied that Aussie Airlines was a new entrant and refused to grant a sublease. One question which arose for the consideration of the Full Court of the Federal Court was whether Aussie Airlines had standing to seek a declaration as to whether it was a new entrant within the meaning of the head leases.

133 The reasons of Lockhart J (with whom Spender and Cooper JJ agreed) commenced by considering whether Aussie Airlines had a private right. His Honour observed that, if Aussie Airlines had "enforceable rights under the head leases, there would be no doubt that it had standing to seek declaratory relief"²⁰⁹. But, since Aussie Airlines was not a party to the head leases, it could only have enforceable rights, by joinder of Qantas as a defendant, if the benefits of the promise concerning the grant of a sublease to any new entrant to the domestic aviation industry were held by Qantas on trust for Aussie Airlines²¹⁰. That reasoning was entirely orthodox. However, Lockhart J went on to say that it was unnecessary to determine whether Aussie Airlines had any enforceable rights under the head leases because Aussie Airlines had "the requisite interest" to support its standing to obtain a declaration due to the "real practical importance" of the subleases to Aussie Airlines²¹¹. What was missing from this reasoning, although apparent from the context in which the case was considered in *Edwards v Santos*, was an explanation of why the right was a public right and not a purely private right.

134 Although there was no argument on the point in *Aussie Airlines*, and no reasoning on the issue, there may be a basis for treating the rights under the head leases in *Aussie Airlines* as public rights as well as private rights. The relevant head lessee, Qantas, was not operating as a purely private party, nor was it assuming duties under the head leases in a purely private capacity. As Lockhart J observed, Qantas had acquired the whole of the issued share capital of Australian Airlines and was carrying on its business under the *Australian Airlines (Conversion to*

209 (1996) 68 FCR 406 at 414.

210 (1996) 68 FCR 406 at 414.

211 (1996) 68 FCR 406 at 415.

Public Company) Act 1988 (Cth)²¹². Further, as the primary judge explained²¹³, the head leases were granted as part of a public policy of deregulation of the domestic aviation industry and a competition concern to enable new entrants into the domestic aviation industry by permitting them access to public infrastructure. The terms of the head leases required any sublessee to hold or have applied for licences under the *Air Navigation Act 1920* (Cth) and the *Air Navigation Regulations*. The question whether Qantas was required to treat Aussie Airlines as a "new entrant to the domestic aviation industry" can thus be seen not merely as a matter of a private right between the head lessor and the head lessee but also as a duty that Qantas had assumed to the public generally.

135 For these reasons, the decisions of *Edwards v Santos* and *Aussie Airlines* should be understood as concerned with standing to enforce public rights on the basis of a special interest above that of the general public rather than as exceptions to the rule that private rights are enforceable only by those who hold the relevant right.

136 The Commonwealth submitted that the Lessees were in the same position as Qantas in *Aussie Airlines* and that these proceedings are not accurately described as involving purely private rights. It is true that the Leases were granted pursuant to legislation, namely s 22 of the *Airports (Transitional) Act 1996* (Cth), and that cl 26.2(a), in relation to which the declarations are sought, was consistent with a government policy concerning competition. And the relevant undertaking by the Lessees in cl 26.2(a) concerned public bodies, the Councils. But cl 26.2(a) did not create any public rights. The undertaking by the Lessees as to their obligations in relation to the Councils was made only to the Commonwealth. The Lessees, as private parties, had no interest in making such undertakings to the public at large and had no duty to do so. They did not make any public undertaking.

137 Further, if the proper interpretation of cl 26.2(a) of the Leases is that the Lessees have undertaken to the Commonwealth an obligation only to use reasonable endeavours to enter into an agreement with the Councils, then the suggestion that the Lessees made this undertaking to the public at large becomes even more far-fetched.

The declarations sought

138 Apart from their lack of standing, there may be further problems with the declaratory relief sought by the Councils. The relief sought assumed that the

212 (1996) 68 FCR 406 at 408.

213 See *Aussie Airlines Pty Ltd v Australian Airlines Ltd [No 2]* (1996) 67 FCR 451 at 454-455.

Leases created a liability to make payments to the Councils in lieu of rates in accordance with criteria said to be set out in the applicable clause, namely cl 26.2(a). The Councils thus sought declarations in relevantly identical terms. The Clarence City Council sought declarations in the following terms:

- "(a) Upon a proper construction of clause 26.2 of [the HIAPL lease] entered into between the [Commonwealth] as Lessor, and [HIAPL] as Lessee, dated 10 June 1998 and granted in respect of the land known as the Hobart Airport (the Lease) the areas that must be included in the calculation of the ex-gratia rates equivalent payment includes each of the areas specified in attachment 'A' to the amended statement of claim;
- (b) A declaration that [HIAPL] is obliged to make payments to the applicant pursuant to clause 26.2 of the [L]ease:
 - (a) calculated in accordance with valuations made by the Valuer-General pursuant to the Valuation of Land Act 2001 and as set out in the valuation list; and
 - (b) as notified by the applicant in each rates notice issued by it to [HIAPL].
- (c) A declaration that [HIAPL] has not correctly calculated the amount of each of the ex-gratia payments that it has made to the applicant in each of the financial years 2014/2015–2017/2018 inclusive pursuant to the Lease; and
- (d) Alternatively, a declaration as to how the ex-gratia payment in lieu of rates is to be calculated in accordance with clause 26.2 of the Lease."

139 The foregoing relief reflects the substance of two disputes between the Lessees and the Councils²¹⁴. The first dispute concerns the identification of those parts of the Airport Sites for which payments in lieu of rates are to be made. For that purpose, the meaning of the phrase "trading or financial operations" as used in cl 26.2(a) is in dispute. The second dispute concerns the correct valuation methodology to apply to determine the Lessees' liability. It engages with the following phrase used in cl 26.2(a): "being equivalent to the amount which would be payable for rates as if such rates were leviable or payable". The parties assumed

214 For completeness, the same two disputes also exist between APAL and the Northern Midlands Council.

that the correct meaning of each phrase of cl 26.2(a) is a matter about which a court may make declarations.

140 For the reasons already given, that assumption may be mistaken. Even if the Councils had standing to seek the declarations on remittal of this matter, if the only obligation to which the Lessees are subject in cl 26.2(a) is to use reasonable endeavours to enter into an agreement with the Councils, then declarations in the nature of those sought by the Councils could not be made. The only declaration that the Councils could seek, as informed by the language of cl 26.2(a), would be about the content of the Lessees' promise to use "reasonable endeavours".

141 Furthermore, a court should not make declarations that might inhibit the negotiations to be had between the Lessees and the Councils. Nor should a court make declarations that, in effect, write critical terms into a contract for the parties²¹⁵. It follows that, even if the Councils had standing, on the interpretation of cl 26.2(a) that confines the Lessees' obligation to using reasonable endeavours to enter into an agreement with the Councils, the Councils would be in no position to seek declarations as if the words in cl 26.2(a) created criteria for liability that may be the subject of judicial determination. Rather, the Councils may only legitimately seek a declaration about the content of the Lessees' promise in cl 26.2(a) to use reasonable endeavours. On that interpretation, it will be a matter for the trial judge on remittal of this matter to determine what declarations, if any, may be made about the content of that promise. It may even be the case that the Lessees and the Councils ultimately find that they are not in disagreement about the content of that promise.

142 The reference in the foregoing paragraph to what declarations "if any" might be made is a reference to the discretion retained by the court as to whether declarations should be ordered. In that respect, much will depend upon the content of the declarations that might be made. The Councils assert that declaratory relief will assist them in their negotiations with the Lessees. That statement warrants some scrutiny. That is because the Councils concede, properly, that they cannot enforce any declarations they might obtain against the Lessees. Because of this, practically speaking, as between the Councils and the Lessees, the parties will have obtained no more than non-binding relief, and the orders of a court will have no more substantive effect than an early neutral evaluation. Thus, if the Lessees were to state in negotiations that they did not accept the correctness of any relief obtained by the Councils, the most the Councils could then do would be to call upon the Commonwealth to intervene. In other words, declaratory relief will not

215 cf *J Kitchen & Sons Pty Ltd v Stewart's Cash and Carry Stores* (1942) 66 CLR 116 at 124; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 193; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 168 [28].

57.

arm the Councils with any legal rights they might deploy; the Councils will still only have what they presently retain, being a moral right to seek the assistance of the Commonwealth. In such circumstances, the granting of declaratory relief may be inutile.

Conclusion

143

In each appeal, orders should be made as follows:

- (1) The appeal be allowed.
- (2) Of the orders made by the Full Court of the Federal Court of Australia, set aside orders 1 to 4 made on 6 August 2020 and orders 1 to 3 made on 11 September 2020 and, in lieu thereof, order that:
 - (a) the appeal be dismissed; and
 - (b) the appellant [each Council] pay the costs of the second respondent [HIAPL and APAL respectively].
- (3) The first respondent [each Council] pay the costs of the appellant [HIAPL and APAL respectively] in this Court.