

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GORDON, EDELMAN, STEWARD AND GLEESON JJ

AZC20

APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL
AFFAIRS & ORS

RESPONDENTS

*AZC20 v Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs*

[2023] HCA 26

Date of Hearing: 11 May 2023

Date of Judgment: 6 September 2023

M84/2022 & M85/2022

ORDER

Matter No M84/2022

1. *Appeal allowed with costs.*
2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 5 April 2022 in proceeding VID659/2021 and, in their place, order that:*
 - (a) *the applications for leave to appeal the orders made by the Federal Court of Australia on 13 October 2021 in proceedings VID89/2021 and VID503/2021 be refused with costs; and*
 - (b) *the appeals otherwise be dismissed with costs.*

Matter No M85/2022

1. *Appeal allowed with costs.*
2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 5 April 2022 in proceeding VID660/2021 and, in their place, order that:*
 - (a) *the applications for leave to appeal the orders made by the Federal Court of Australia on 13 October 2021 in proceedings VID89/2021 and VID503/2021 be refused with costs; and*
 - (b) *the appeals otherwise be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

C L Lenehan SC with M L L Albert and J R Murphy for the appellant (instructed by Human Rights Law Centre)

S P Donaghue KC, Solicitor-General of the Commonwealth, and P M Knowles SC with N A Wootton for the respondents (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

AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Constitutional Law (Cth) – Judicial power of the Commonwealth – Jurisdiction – Appeals – Meaning of "matter" – Where appellant commenced proceedings in Federal Court of Australia seeking mandamus to require Secretary of Department of Home Affairs to remove him from Australia to a regional processing country under s 198AD(2) of *Migration Act 1958* (Cth) – Where Federal Court made orders declaring s 198AD(2) of Act applied to appellant, requiring Secretary to perform duty under s 198AD(2) as soon as reasonably practicable, and requiring appellant be detained in immigration detention at a residential address pending removal to a regional processing country – Where Minister for Home Affairs subsequently exercised power under s 198AE(1) of Act to determine duty under s 198AD(2) did not apply to appellant – Where respondents sought to appeal primary judge's orders to Full Court of the Federal Court of Australia – Where at time of appeals primary judge's orders did not have any operative legal effect – Whether there was a "matter" within meaning of Ch III of *Constitution* at time Full Court made orders determining appeals – Whether there was a justiciable controversy before Full Court – Whether Full Court had jurisdiction to determine appeals.

Words and phrases – "advisory opinion", "appellate jurisdiction", "federal jurisdiction", "immediate right, duty or liability", "judicial power of the Commonwealth", "jurisdiction", "justiciable controversy", "matter", "standing".

Constitution, Ch III.

Federal Court of Australia Act 1976 (Cth), s 24.

Migration Act 1958 (Cth), ss 198, 198AD, 198AE.

1 KIEFEL CJ, GORDON AND STEWARD JJ. The underlying facts "reveal an
extraordinarily long deprivation of the [appellant's] liberty by way of executive
detention"¹. The appellant, a citizen of Iran, arrived in Australia by boat in July
2013 and has been in immigration detention ever since, his protection visa
application having been finally refused in February 2021.

2 The issue for decision in these appeals is narrow. Was there a "matter"
within the meaning of Ch III of the *Constitution* before the Full Court of the
Federal Court of Australia when it made the orders below? As the answer to that
question is "No", the second ground of appeal does not arise.

3 That is, the only issue in these appeals is whether the Full Court had
jurisdiction to decide the appeals below. All courts have the duty and the authority
to consider and decide whether a claim or application brought before the court is
within its jurisdiction². As will be seen, the Full Court approached the question of
whether it should hear the appeals as a matter of discretion, not jurisdiction.
In allowing the appeals and overturning the orders of the primary judge,
the Full Court in effect determined it did have jurisdiction and proceeded to
exercise judicial power³. It is well established that, as a superior court, the orders
it made are valid until set aside, even if those orders were made in excess of
jurisdiction⁴. Those orders are subject to review and correction⁵ by this Court in its
appellate jurisdiction under s 73 of the *Constitution*⁶. As these reasons will explain,
the Full Court did not have jurisdiction when it determined the appeals. Its orders
should be set aside.

1 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AZC20* (2022) 290 FCR 149 at 151 [2].

2 *New South Wales v Kable* (2013) 252 CLR 118 at 133 [31]. See also *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446; *Re Nash [No 2]* (2017) 263 CLR 443 at 450 [16]; *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at 484 [21]-[23], 492 [65]; 400 ALR 1 at 7, 18.

3 See *Citta Hobart* (2022) 96 ALJR 476 at 484 [22]-[23], 492 [63]-[65]; 400 ALR 1 at 7, 17-18.

4 *Kable* (2013) 252 CLR 118 at 133 [32], and the authorities there cited.

5 *Kable* (2013) 252 CLR 118 at 133 [31]; *Citta Hobart* (2022) 96 ALJR 476 at 492 [64]; 400 ALR 1 at 18.

6 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 300; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 38 [63].

4 It is necessary to describe the course of the two proceedings that culminate in the present appeals to this Court. That description will show that after the appellant succeeded in part at first instance and obtained orders in his favour, the Minister for Home Affairs exercised a statutory power under the *Migration Act 1958* (Cth) that deprived those orders of any continuing effect. Yet, having said to the primary judge that the step the Minister had taken had wholly deprived the orders of effect, the Commonwealth parties⁷ nevertheless sought to appeal to the Full Court of the Federal Court against those orders. And in that Court, the Commonwealth parties accepted that from the time of the Minister's step, and irrespective of the outcome of the appeals, the orders made by the primary judge ceased to have any continuing effect.

The course of the proceedings

5 As will soon become apparent, the course of the proceedings took many twists and turns because the Minister exercised a statutory power and the Commonwealth parties changed their position more than once.

6 Following the final determination of his visa application in February 2021, the appellant commenced proceedings in the Federal Court of Australia against the Minister for Home Affairs and the Commonwealth of Australia seeking an order of habeas corpus or a writ in the nature of habeas corpus, a declaration that the appellant was falsely imprisoned, and other relief ("the habeas proceeding"). In seeking habeas corpus, the appellant sought to rely on the first instance decision in *AJL20 v The Commonwealth*⁸.

7 After the hearing of the application for habeas corpus before the primary judge (Rangiah J) and while judgment was reserved, this Court delivered its judgment in *The Commonwealth v AJL20*⁹, overturning the first instance decision. The appellant sought to amend his originating application to seek mandamus to require the Commonwealth to effect his removal to a regional processing country under s 198AD of the Act. The respondents opposed the amendment on the basis that the Federal Court lacked jurisdiction to hear and determine the application in its original jurisdiction. The appellant then commenced a proceeding in the

7 The respondents to the appeals are the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Commonwealth of Australia and the Secretary, Department of Home Affairs (collectively "the Commonwealth parties", unless separately identified).

8 (2020) 279 FCR 549.

9 (2021) 273 CLR 43.

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Federal Circuit Court of Australia to seek that relief, which was transferred to the Federal Court ("the s 198AD mandamus proceeding"). The respondents in that matter were the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, and the Secretary of the Department of Home Affairs.

8 At the subsequent hearing before the primary judge, the appellant sought mandamus and habeas corpus. He contended that he fell within s 198AD(2) of the Act, which requires that an officer take an "unauthorised maritime arrival" to whom the provision applies, as soon as reasonably practicable, from Australia to a regional processing country. The Commonwealth parties¹⁰ contended that s 198AD did not apply to the appellant, so the Secretary was under no duty to take him to a regional processing country. The Commonwealth parties did not contest that, if s 198AD did apply to the appellant, it was reasonably practicable to remove him to the regional processing country, Nauru.

9 The primary judge held that s 198AD did apply to the appellant, and that it would have been reasonably practicable to have taken him to a regional processing country by no later than the end of September 2013. The primary judge held that the refusal or failure of the Secretary to act in accordance with s 198AD warranted the making of an order in the nature of mandamus.

10 The primary judge made identical orders in both proceedings on 13 October 2021 ("the 13 October 2021 orders"). The primary judge dismissed the claim for a writ of habeas corpus (order 6). The primary judge made a declaration that s 198AD(2) of the Act applied to the appellant (order 1), and ordered the Secretary to perform, or cause to be performed, the duty under s 198AD(2) of the Act to take the appellant from Australia to a regional processing country as soon as reasonably practicable (order 2) ("the s 198AD mandamus order").

11 The primary judge also made orders, which he described as ancillary to mandamus, that related to the appellant's detention pending performance of the s 198AD duty (orders 3 to 5). His Honour found that it was presently reasonably practicable to remove the appellant to Nauru, but observed that the Commonwealth parties had failed to even begin the process of effecting the taking of the appellant to Nauru and "[i]t could be weeks, or months, or longer". The appellant sought an order that he be detained at the home of one of his supporters, as this would minimise the harm to his mental health suffered as a result of the failure to comply with s 198AD. The appellant relied on an affidavit of Ms Hermann, who deposed that she and her husband would be happy to have the appellant live with them free

10 And the Minister for Home Affairs, who was a respondent to the trial proceedings, but was not a party to the appeals before the Full Court or this Court.

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of charge at their home in Perth even if the arrangement were to require the presence of a guarding officer.

12 The primary judge ordered that, pending his removal to a regional processing country, the appellant was to be detained at the address of the Hermanns by being in the company of, and restrained by, one or more officers as defined under the Act (order 3) ("the home detention order"). That order was expressed not to come into effect until 1:00pm on 27 October 2021, some two weeks later. The primary judge also made orders for mediation between the parties and the Hermanns to reach agreement upon arrangements for the detention (order 4) and to specify that the parties and the Hermanns each had liberty to apply in respect of the home detention order (order 5). Finally, the primary judge also made orders regarding costs, including that, unless submissions were filed seeking different orders, the Commonwealth parties pay the appellant's costs in the s 198AD mandamus proceeding and the costs in the habeas proceeding be reserved (order 8).

13 On the day the home detention order was to come into effect, two significant events occurred. First, early that morning Nauru advised Australia it would not accept the appellant. Section 198AG of the Act provided that s 198AD did not apply to an unauthorised maritime arrival if the regional processing country, or each regional processing country (if there was more than one such country), advised an officer that the country would not accept the unauthorised maritime arrival. There was no evidence before this Court as to whether or not, at that time, Nauru was the only regional processing country designated under the Act. Second, the Minister for Home Affairs exercised the discretionary power in s 198AE of the Act to determine that the duty to remove to a regional processing country under s 198AD did not apply to the appellant ("the s 198AE Determination").

14 That afternoon and evening, both the Commonwealth parties and the appellant filed interlocutory applications directed to the s 198AD mandamus order and the home detention order. The Commonwealth parties applied to the Federal Court to vacate both orders. The appellant applied to the Federal Court to require compliance with the home detention order or to vary it to make it dependent on any "terminating event" under s 196 of the Act, rather than the s 198AD mandamus order.

15 At the hearing of the interlocutory applications on 29 October 2021, the Commonwealth parties submitted that *both* interlocutory applications should be resolved *without* making an order of the type sought in either interlocutory application. Their submissions were, first, that the s 198AD mandamus order could remain in its current form albeit that the duty to remove under s 198AD of the Act no longer existed and was incapable of performance. Second, on its proper construction, the performance of the obligation imposed by the home detention

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order was premised upon a continuing failure to perform the duty under s 198AD of the Act and "[a]s that duty no longer exists, [the home detention order] no longer has any practical effect and the Secretary is not obliged to cause the [appellant] to be detained at the residential address".

16 The Commonwealth parties submitted that if they were incorrect in their construction of the home detention order, that order should be vacated. The primary judge dismissed the parties' applications made on 27 October 2021. The primary judge refused to vacate or vary the orders.

Applications for leave to appeal and appeals

17 About twelve days later, on 10 November 2021, the Commonwealth parties filed notices of appeal to the Full Court of the Federal Court from orders 1 to 5 and 8 of the 13 October 2021 orders¹¹. There were two grounds of appeal. First, that the primary judge erred in holding that s 198AD(2) of the Act applied to the appellant in circumstances where the appellant is a "fast track applicant" within the meaning of s 5 of the Act. Second, that the primary judge erred in holding that s 23 of the *Federal Court of Australia Act 1976* (Cth) conferred power on the primary judge to make orders, ancillary to mandamus, that "officers" detain the appellant by causing him to be in the company of, and restrained by, officers at a particular place (even if that place was not a detention centre, prison, watch house or other place of detention approved by the Minister).

18 The appellant's solicitors put the Commonwealth parties on notice by letter dated 17 December 2021 that the appellant would seek orders permanently staying or dismissing the applications and appeals because the primary judge's "operative orders were rendered moot by the Minister's determination made under s 198AE of [the Act]" and the other orders the subject of the Commonwealth parties' notices of appeal were spent. The appellant's solicitors stated that the Commonwealth parties were "seeking to have the Full Court engage in an academic exercise and to issue what would be, in effect, an advisory opinion". The appellant invited the Commonwealth parties to withdraw their appeals.

11 If and to the extent leave to appeal was required for orders 3 to 5 (the orders relating to home detention, which the primary judge had said were interlocutory), the Commonwealth parties sought dispensation with the requirements of rr 35.12 and 35.14 of the *Federal Court Rules 2011* (Cth), an extension of time to seek leave to appeal under r 1.39, and that leave to appeal be granted under s 24(1A) of the *Federal Court of Australia Act 1976* (Cth).

Commencement and adjournment of s 198 mandamus proceeding

19 On 15 November 2021, the appellant lodged a new proceeding in the Federal Circuit and Family Court of Australia against the Secretary of the Department of Home Affairs seeking both interlocutory and final orders ("the s 198 mandamus proceeding"). The grounds for the application were that the Secretary had failed to pursue or carry into effect the removal of the appellant from Australia under s 198 of the Act as soon as reasonably practicable, and that the appellant cannot lawfully be removed to Iran¹².

20 The duty under s 198(6) for an officer to remove an unlawful non-citizen from Australia as soon as reasonably practicable applies to a person who is a detainee, has made a valid application for a visa which has been finally determined (and has made no other valid applications), and is not an unauthorised maritime arrival to whom s 198AD applies¹³. The Act expressly provides that the duties of removal under s 198 do not apply to a person to whom the duty in s 198AD applies¹⁴.

21 The appellant sought two interlocutory orders: an order requiring the Secretary to pursue (but not carry into effect) the duty under s 198; and a further order that, until the final resolution of the proceeding, any detention of the appellant in immigration detention occur at the Hermanns' address in the company of and restrained by officers under the Act. By way of final orders, the appellant sought, among others, an order that the Secretary perform the duty under s 198 to remove the appellant from Australia to a place other than Iran; a declaration that it would be unlawful for the Secretary to remove, or cause to be removed, the appellant to Iran; and an order that, no later than 14 days after judgment, the Secretary cause any detention of the appellant in immigration detention pending performance of the duty under s 198 of the Act to occur at the Hermanns' address in the company of and restrained by officers under the Act.

22 On 25 November 2021, the proceeding was transferred to the Federal Court. Three weeks later, it was adjourned by the same primary judge pending the outcome of the Full Court appeals, on the basis that there appeared to be "some overlap or possibility of an overlap" between the primary judge's decision in the s 198AD mandamus proceeding and the s 198 mandamus proceeding.

12 On the basis that s 197C prohibits the removal of the appellant to Iran.

13 See *Migration Act*, s 198(6), (11).

14 *Migration Act*, s 198(11).

Full Court of the Federal Court

23 Before the Full Court, the Commonwealth parties made submissions on what they described as the "preliminary issue" of the utility of the appeals. The Commonwealth parties accepted that, irrespective of the outcome of the appeals and from the time of the s 198AE Determination, the duty in s 198(6) of the Act was applicable, and the s 198AD mandamus order and the home detention order ceased to have effect. However, the Commonwealth parties submitted that the appeals were not futile for two reasons. First, the issues in the appeals had a "substantive overlap" with the s 198 mandamus proceeding¹⁵. And second, even if the substantive issues were rendered moot, the Commonwealth parties emphasised that the Full Court retained a discretion to hear the appeals on the basis that there was a significant public interest because, as at 14 October 2021, there were approximately 130 persons potentially affected by the primary judge's conclusion that the applicable duty for persons in the appellant's position was the s 198AD duty and there were a number of proceedings on foot in which the issue of the Federal Court's power to make home detention orders was being agitated.

24 Before the Full Court, the appellant (who was, in that context, the respondent) repeated that which had been set out in the letter of 17 December 2021, namely that the applications for leave to appeal the interlocutory orders out of time should be dismissed because they were academic and lacked merit and the appeals should be permanently stayed because they solely concerned orders which were moot and the Court was being asked to engage in the task of offering an advisory opinion. The appellant also submitted that the contention that the appeal judgment would inevitably impact the s 198 mandamus proceeding was wrong. In particular, the appellant submitted that there would be no impact if he was removed from Australia (as he sought) before that application was determined or before any future home detention order or if his application failed. The appellant submitted that any order being a matter of broader concern to the Commonwealth parties did not weigh in favour of the appeals being substantively determined. If the making of a home detention order had broader application and operation, it could be appealed in one of the 130 other alleged instances where it matters and such an order has or will become operative. This was not such a case. The appellant submitted that it would be profoundly unjust to put him, as a detained person, to the task of defending an appeal which could not affect him at all.

15 The Commonwealth parties also submitted that the issues might have substantive overlap with the remaining issues in the habeas proceeding, where the appellant sought a declaration of false imprisonment. However, in his submissions to the Full Court the appellant clarified that that claim would not be pursued, observing that it was self-evidently linked to the failed habeas corpus application.

25 In light of the Commonwealth parties' submission as to the broader significance of the primary judge's decision, and the course of events after the primary judge made the 13 October 2021 orders, the Full Court raised with senior counsel for the Commonwealth parties at the hearing "whether the principal utility of the appeals related to matters of general principle and wider application, of importance to the [Commonwealth parties], but in substance largely unrelated to any ongoing effect of the primary judge's orders for the [appellant]". Following the hearing, the Commonwealth parties filed amended notices of appeal in the Full Court to reflect their position that they would not seek to disturb the costs orders made below and that they would pay the appellant's costs of the appeals.

26 In its reasons for judgment, the Full Court considered the "preliminary issue" as a question of discretion, not jurisdiction. Relevantly, the Full Court held that the s 198AE Determination had "effectively" quelled the controversy between the parties about the application of s 198AD to the appellant and that this meant that "the order in the nature of mandamus was rendered inapplicable, and there was no basis for the [home detention order] to be carried into effect".

27 However, while the Full Court accepted that the s 198AD mandamus order had been rendered moot, the Full Court did not accept the appellant's submission that the primary judge's orders were entirely "arid" in respect of any effect on the appellant's own position. The Court observed that the appellant still had the s 198 mandamus proceeding before the primary judge, in which he was seeking mandamus to compel his removal to a country other than Iran, that "a decision about his status under the ... Act, and which removal provisions apply to him, *may* be relevant to the issues between the parties in relation to any outstanding relief"¹⁶, and that the Federal Court's ability to make a home detention order¹⁷ "will also clarify some *likely* aspects of the proceeding still before the primary judge" (emphasis added).

28 The second reason given by the Full Court as to why it should deal with the Commonwealth parties' substantive arguments and proceed to determine the appeals was that the primary judge's orders and reasoning had "been employed in litigation relating to other individuals in similar circumstances, and other justices of [the Federal Court] have been invited to follow it". The Full Court said:

16 Ground one of the appeals before the Full Court.

17 Ground two of the appeals before the Full Court.

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"Once that occurs, given the [Commonwealth parties'] position on the issues, it would place another single judge in a position of deciding if they are convinced the primary judge's orders and reasoning are wrong ... *These appeals are a suitable vehicle to avoid single judges being faced with those issues of comity, which are not always straightforward.*" (emphasis added)

29 The Full Court then stated that "[w]here the primary judge's orders and reasoning are presently the subject of an appeal before [the Full] Court, it is neither efficient, nor a cost effective use of resources, to refuse to determine the correctness of those orders and that reasoning, and instead insist another case make its way up the judicial hierarchy". Not determining the appeals was said to "also introduce uncertainty in terms of *when* the issues raised might be resolved, and might place other judges at first instance in a difficult position". The Full Court concluded by stating that "[g]iven there are potentially 130 cases where this argument might be made, plus the three where it has been made (regardless of the outcome), it is in the interests of the administration of justice for this Court to determine both issues raised on the appeals" by the Commonwealth parties. The Full Court determined the two substantive grounds of the Commonwealth parties' appeals, allowing the appeals on both grounds. As will be explained, this was a course that the Full Court could not and should not have adopted.

What is a matter?

30 It is trite that federal jurisdiction arising from the subject matters in ss 75 and 76 of the *Constitution* is limited to deciding "matters"¹⁸. The original and appellate jurisdiction of the Federal Court is created by legislation passed under s 77(i) of the *Constitution*. Section 77(i) empowers Parliament to make laws, with respect to any of the matters mentioned in ss 75 and 76, defining the jurisdiction of any federal court other than the High Court. The need for there to have been a "matter" before the Full Federal Court for it to have had jurisdiction in the appeals was not in dispute¹⁹.

18 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-524 [24], citing *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 and *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 290.

19 *Constitution*, s 77, directing attention to ss 75 and 76. See also *Federal Court of Australia Act*, ss 19, 24, 30AA. See also *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315 at 323; *Abebe* (1999) 197 CLR 510 at 523-524 [24].

31 It is well established that a "matter" does not mean a legal proceeding between parties or a bare description of a subject matter that falls within a head of federal judicial power in ss 75 and 76 of the *Constitution*²⁰. Rather, "matter" has two elements: "the subject matter itself as defined by reference to the heads of jurisdiction [in ss 75 and 76], and the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy"²¹. There was no dispute in this case that the first element was satisfied.

32 As to the second element, as was most recently affirmed in *Unions NSW v New South Wales* ("*Unions [No 3]*")²², "[e]xceptional categories aside, there can be no 'matter' within the meaning of Ch III of the *Constitution* unless 'there is some immediate right, duty or liability to be established by the determination of the Court' in the administration of a law and unless the determination can result in the Court granting relief which both quells a controversy between parties and is available at the suit of the party seeking that relief". The requirement to identify some "immediate right, duty or liability" to be established by the determination of the court "reinforces that the controversy that the court is being asked to determine is genuine, and not an advisory opinion divorced from a controversy"²³. That requirement applies in both original and appellate jurisdiction.

33 *Unions [No 3]* was a matter in original jurisdiction. The concept of "matter" has been most often analysed in the context of original jurisdiction. That is unsurprising because, usually, the existence of a matter on appeal is uncontroversial. That requires explanation.

20 *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at 967 [50]; 405 ALR 402 at 414, citing *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 377 [7]. See also *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37.

21 *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. See also *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 245 [26]; 399 ALR 214 at 222.

22 (2023) 97 ALJR 150 at 156-157 [15]; 407 ALR 277 at 282 (footnotes omitted).

23 *Palmer v Ayres* (2017) 259 CLR 478 at 491 [27], citing *In re Judiciary* (1921) 29 CLR 257 at 265, *Abebe* (1999) 197 CLR 510 at 524 [25], 555 [118], *CGU Insurance* (2016) 259 CLR 339 at 350-351 [26] and *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 15 [51].

34 An appeal is against orders, not reasons for judgment²⁴. The respective rights, duties or liabilities of the parties have been determined by the orders that have been made by the court below, including, usually, an order as to costs. There has been an exercise of judicial power; the whole or part of the controversy between the parties has been quelled. Where a final judgment has been rendered, the rights and obligations in controversy, as between those persons, cease to have an independent existence: they "merge" in the final judgment²⁵ and no action can be brought upon the extinguished rights and obligations²⁶. However, orders may be set aside on appeal where the primary judge is shown to have erred²⁷. An appellate court is then obliged, unless the matter is remitted for rehearing, to "give the judgment which in its opinion ought to have been given in the first instance"²⁸.

35 On appeal, therefore, the question is not whether the party can establish the claimed legal right, duty or liability, as that question has been determined. The question is not whether the party continues to have the interest necessary to obtain relief, because that question has been overtaken by the grant of relief or by the refusal of relief. The question on appeal and for determination on appeal is

24 See *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 at 624-625; [1950] AC 235 at 294; *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64, 69; *Ah Toy v Registrar of Companies* (1985) 10 FCR 280 at 283-285.

25 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 516 [20], citing *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106, *Blair v Curran* (1939) 62 CLR 464 at 532 and *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 510.

26 *Blair* (1939) 62 CLR 464 at 531-532; *Clayton v Bant* (2020) 272 CLR 1 at 25 [66], see also 25-26 [67].

27 *Dignan* (1931) 46 CLR 73 at 109, quoting *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209]; *Norbis v Norbis* (1986) 161 CLR 513 at 518-519; *CDJ v VAJ* (1998) 197 CLR 172 at 202 [111]; *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [22]-[23]; *Western Australia v Ward* (2002) 213 CLR 1 at 87 [70]; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686 [43]; 331 ALR 550 at 558; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 555-556 [30]; *Lee v Lee* (2019) 266 CLR 129 at 148 [55].

28 *Fox v Percy* (2003) 214 CLR 118 at 125 [23], quoting *Dearman v Dearman* (1908) 7 CLR 549 at 561. See also *Warren v Coombes* (1979) 142 CLR 531 at 537; *Allesch* (2000) 203 CLR 172 at 181 [23]; *SZVFW* (2018) 264 CLR 541 at 555 [30].

whether the orders of the primary judge should be affirmed, varied or reversed – that is, whether the appeal should be allowed and, if so, what orders should be made in the place of the primary judge's orders. But the appellate court's supervisory function over the exercise of original jurisdiction by the primary judge is not an end in itself. The second element required to form a "matter" still applies – there must be a controversy over some immediate right, duty or liability. Usually, there is a live controversy because the orders of the primary judge continue to have effect in determining the parties' rights, duties or liabilities, unless set aside on appeal²⁹. In seeking to appeal the orders made at first instance, one or more of the parties are seeking to challenge the continuing effect of the orders on the determination of their respective rights, duties or liabilities. As will be explained, that critical feature – any controversy over the continuing effect of the orders on the parties' rights, duties or liabilities – was absent in the appeals before the Full Federal Court.

There was no matter in the Full Federal Court

36 The appellant submitted before this Court that there was no "matter" before the Full Federal Court because the orders that the Commonwealth parties sought to appeal had no operative legal effect by the time the Full Court determined the appeals. At the time the appeals were filed, Nauru had informed Australia it would not accept the appellant and the Minister had voluntarily engaged s 198AE such that s 198AD did not apply to the appellant. Since the home detention order was dependent on the s 198AD mandamus order, the events rendering the s 198AD mandamus order inoperative similarly made the home detention order inoperative. Even if there was a "matter" when the appeals were filed, there ceased to be a "matter" from the moment during the hearing when the Commonwealth parties undertook not to seek the costs of the trial or the appeals. Those submissions should be accepted.

37 So, what were the Commonwealth parties' arguments? The Commonwealth parties submitted that the appeals to the Full Court involved a "matter" on four separate bases, each of which was said to be sufficient. Each of the bases is addressed below and rejected.

Any appeal against an order involves a "matter"

38 The Commonwealth parties' primary argument took as accepted premises that the primary judge's orders did not have any ongoing effect on the parties'

29 *Cameron v Cole* (1944) 68 CLR 571 at 590; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177 [20], 235-236 [216], 274-275 [328]-[329]; *Kable* (2013) 252 CLR 118 at 135 [38], 140 [55]-[56].

rights, duties or liabilities at the time of the Full Court's determination of the appeals, and that the orders made on appeal would not affect the rights, duties or liabilities of the parties.

39 In short, the Commonwealth parties' argument was that, so long as there is a decision made at first instance and an appeal about the correctness of the orders made at first instance, there will always be a "matter". That was said to be so, even if the orders have no ongoing effect, because the reasons that led to the making of the orders have precedential significance.

40 The main authority that the Commonwealth parties relied on was this Court's decision in *Mellifont v Attorney-General (Q)*³⁰. In *Mellifont*, the Court held it had jurisdiction to hear an appeal from a decision of the Queensland Court of Criminal Appeal pursuant to a provision of the *Criminal Code* (Qld) that permitted referral of a question of law arising in a criminal trial to that Court in circumstances where the accused person had been acquitted or discharged. In the case of discharge, the ruling on the point of law would not play any part in any subsequent determination of the charge on the indictment because the Court proceeded "on the footing that no further proceedings on the indictment in respect of the relevant charge [would] be taken" and likewise, in the case of an acquittal, the ruling would have "no impact" on the acquittal³¹. This differed from the procedure considered in *O'Toole v Charles David Pty Ltd*, where the appellate court was asked to decide questions reserved arising in proceedings *still pending* before a trial court³².

41 The Court in *Mellifont* held that it could hear an appeal from the Queensland Court of Criminal Appeal's decision, because the decision on the reference "was made with respect to a 'matter' which was the subject-matter of the legal proceedings at first instance and was not divorced from the ordinary administration of the law"³³, emphasising that "the reference and the decision on the reference *arise out of* the proceedings on the indictment and are a statutory extension of those proceedings"³⁴.

30 (1991) 173 CLR 289.

31 *Mellifont* (1991) 173 CLR 289 at 304.

32 (1990) 171 CLR 232 at 244-245, 258-259, 281-283, 301-302. See also *Mellifont* (1991) 173 CLR 289 at 303-304.

33 (1991) 173 CLR 289 at 305.

34 (1991) 173 CLR 289 at 304 (emphasis in original).

42

The Commonwealth parties submitted that *Mellifont* is authority for the general proposition that it is constitutionally permissible to have an appeal that does not affect the rights of the parties because the appeal corrects an error of law at trial. That submission must be rejected. The key passage from the plurality's reasons reveals that there were a number of aspects to the Court's conclusion in *Mellifont*³⁵:

"True it is that the purpose of seeking and obtaining a review of the trial judge's ruling was to secure a correct statement of the law so that it would be applied correctly in future cases. However, in our view, *in the context of the criminal law*, that does not stamp the procedure for which s 669A(2) provides as something which is academic or hypothetical so as to deny that it is an exercise of judicial power. *The statutory procedure, which has counterparts in other Australian jurisdictions, is a standard procedure for correcting error of law in criminal proceedings without exposing the accused to double jeopardy.* It is a procedure which was designed to enable the Crown to secure a reversal of a ruling by a trial judge *without infringing the common law rule that the Crown cannot appeal against a verdict of acquittal*, a rule which precluded a review of a trial judge's ruling at the instance of the Crown in the case of acquittal. *The fundamental point, as it seems to us, is that s 669A(2) enables the Court of Criminal Appeal to correct an error of law at the trial.* It is that characteristic of the proceedings that stamps them as an exercise of judicial power and the decision as a judgment or order within the meaning of s 73. *Were it otherwise, the appellate jurisdiction of this Court would not extend to a review of decisions of courts of criminal appeal and full courts under s 669A(2) and similar provisions in other jurisdictions which have as their object the giving of authoritative decisions on questions of criminal law for the better administration of justice.* To repeat the words of Deane, Gaudron and McHugh JJ in *O'Toole* in a context which is only slightly different, there is no 'persuasive reason in law or policy why' a decision under s 669A(2) should not fall within the words 'judgments, decrees, orders' in s 73."

43

As this passage makes clear, *Mellifont* was decided in a very particular context, being the questions reserved procedure arising from criminal trials, and the common law principle against appealing from verdicts of acquittal. As Gaudron, Gummow and Hayne JJ observed in *Director of Public Prosecutions (SA) v B*, the relationship between the question reserved and the trial was critical

35 (1991) 173 CLR 289 at 305 (emphasis added; footnote omitted).

to the conclusion reached³⁶. It should be understood in that context. *Mellifont* is properly cited as authority for the proposition that s 73 of the *Constitution* confers jurisdiction on the High Court to hear and determine an appeal from answers given to a case stated in a court below³⁷. It is not authority for a broader proposition that appeals may be entertained where they will not affect the rights of the parties nor for a proposition that a party's concern for the "precedential significance" of a court decision is sufficient to form the basis of a "matter".

44 The Commonwealth parties also sought support from this Court's decision in *Attorney-General (Cth) v Alinta Ltd*³⁸. In *Alinta*, the Attorney-General intervened in an appeal to the Full Court of the Federal Court in which it was held that, among other things, a provision dealing with powers of the Takeovers Panel was invalid because it was inconsistent with Ch III of the *Constitution*. After special leave was granted to appeal to this Court, the commercial controversy between the parties settled. Following an application by one of the parties for the Attorney-General's grant of special leave to be revoked, the Attorney-General sought leave to amend the notice of appeal to confine it to the issue of the validity of the law. As the other parties no longer sought to present arguments in the appeal, the Attorney-General arranged for counsel to appear as amici curiae to support the declaration of invalidity made by the Full Court. The Court granted leave to the amici and proceeded to hear and determine the appeal.

45 As Hayne J explained, the controversy underpinning the matter in which the Attorney-General intervened in the Full Court included (but was not limited to) the question of validity of the Commonwealth law and, by intervening, the Attorney-General became party to that controversy³⁹. The Full Court having made the declaration of invalidity, the interest of the Attorney-General in setting aside the declaration was evident⁴⁰. The critical factor distinguishing this case from *Alinta* is that in *Alinta* the orders of the court had an ongoing operation. There was

36 (1998) 194 CLR 566 at 576 [10]; cf 576 [11]-[12].

37 See *Secretary, Department of Health and Community Services v JMB and SMB (Marion's Case)* (1992) 175 CLR 218 at 230; *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43 at 53 [27]. See also Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 422.

38 (2008) 233 CLR 542 at 567-568 [63]-[67], see also 550 [1], 557-559 [28]-[33].

39 *Alinta* (2008) 233 CLR 542 at 567-568 [65].

40 *Alinta* (2008) 233 CLR 542 at 568 [66]. cf *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 396 [26].

a declaration that a statutory provision was invalid under the *Constitution*. In the present case, as the Commonwealth parties told the primary judge and this Court, the orders had no ongoing effect. None of the parties – the appellant or the Commonwealth parties – were affected by them.

46 The Commonwealth parties identified two other decisions of this Court where it was said that there was no apparent immediate effect on the parties in determining the appeal: *Ruhani v Director of Police [No 2]*⁴¹ and *The Commonwealth v Helicopter Resources Pty Ltd*⁴². Neither supports the proposition that the Commonwealth parties advanced in this case. *Ruhani [No 2]* was a matter in the original jurisdiction of this Court arising under the *Nauru (High Court Appeals) Act 1976* (Cth) and dealt with the right of the appellant not to be unlawfully detained⁴³. *Helicopter Resources* was an appeal under s 73 of the *Constitution* and, although there were arguments about practical utility and mootness, whether the Court had jurisdiction to hear the appeal was not expressly argued⁴⁴.

47 The Commonwealth parties also sought to rely on a number of authorities of intermediate courts that have dealt with changes of circumstances depriving an appeal of utility as going to discretion, rather than jurisdiction⁴⁵. However, in each

41 (2005) 222 CLR 580.

42 (2020) 270 CLR 523.

43 See *Ruhani v Director of Police* (2005) 222 CLR 489 at 499 [7], 500-501 [14], 512 [52], 513-514 [58], 518-519 [73], 527 [106], 532 [128]. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 65 [20], 65-66 [22]-[23], 76 [64], 89 [109], 90 [112], 123-124 [235]-[236], 151-152 [349]-[350]; *Unions [No 3]* (2023) 97 ALJR 150 at 158 [21]; 407 ALR 277 at 283-284.

44 (2020) 270 CLR 523 at 537 [26]-[28], 540 [35]-[38].

45 *Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573 at 576 [13], 577 [16]; *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431 at [12]-[15]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 62 [20]-[21]; *Bonan v Hadgkiss* (2007) 160 FCR 29 at 31-33 [8]-[13]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* (2020) 276 FCR 1 at 6-7 [19]-[24]. See also *Leibler v Air New Zealand Ltd* [1998] 2 VR 525 at 529-530; *Hunter Development Corporation v Save Our Rail NSW Incorporated [No 2]* (2016) 93 NSWLR 704 at 713 [38], 715 [46].

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of those cases costs were a live issue at the time the orders were made by the appellate court.

48 Ultimately, the basis of the Commonwealth parties' submissions was that, even if there was no controversy between the immediate parties to the appeals, the orders, and the reasons for the orders, given below would have a precedential effect. This was said to be particularly significant for the Executive, which has responsibility for administering an Act in accordance with the law. However, concern over the "precedential significance" of a decision or a body of law has never been found to ground jurisdiction in itself. If that were sufficient, the rule would apply in original jurisdiction as well: any time the Attorney-General has a concern about a decision or a body of law that they think has a precedential effect on how an Act is administered, the Attorney-General could seek to litigate that issue without there needing to be any controversy. That would be asking the court to issue an advisory opinion.

49 If the Commonwealth parties wished to challenge the primary judge's orders and reasoning for why s 198AD applied to the appellant and why the home detention order was within the Federal Court's power, the Commonwealth parties could have sought an expedited appeal from the orders of the primary judge. The issues would have been live. Instead, the Minister for Home Affairs, a party to the proceedings before the primary judge, made the s 198AE Determination and, by making that determination, the Minister deprived the primary judge's orders of any continuing effect. It was inappropriate for the Commonwealth parties to then seek to appeal those orders and put the appellant to the task of defending them, on the basis of some wider public importance. If these issues arise in a different case, they will be litigated there. If there is concern that a single instance judge in the Federal Court would necessarily follow the decision asserted by the Commonwealth parties to be wrong, the Commonwealth parties could seek to have a Full Court constituted in the original jurisdiction⁴⁶. Again, in such a case, the issues would be live.

The Commonwealth parties' alternative bases

50 The Commonwealth parties put forward three other bases for why there was a "matter" before the Full Federal Court. Underlying each of the bases was the proposition that, in contrast to their primary contention, the "rights of the parties were in play" in the Full Court – the determination of the appeals would affect the parties' rights, duties or liabilities. As will be seen, those contentions must be rejected.

46 *Federal Court of Australia Act*, s 20(1A).

51 The first two bases relied on the existence of the s 198 mandamus proceeding. The Commonwealth parties submitted that the s 198 mandamus proceeding was part of the same "matter" as the Full Court appeals.

52 It is established that a "matter" is "not co-extensive with a legal proceeding"; it is "the subject matter for determination in a legal proceeding"⁴⁷. In *Fencott v Muller*, Mason, Murphy, Brennan and Deane JJ described a matter as "identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy"⁴⁸. It is the "justiciable controversy" between the actors involved, comprised of the substratum of facts representing or amounting to the dispute or controversy between them⁴⁹. Their Honours observed that "[w]hat is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships"⁵⁰. Those principles have developed in the context of determining whether non-federal claims may be heard and determined in federal jurisdiction as part of a single "matter".

53 It can be accepted that there was a common broad substratum of facts in the appeals to the Full Court and the s 198 mandamus proceeding: removal and detention under the Act. But different duties under different statutory provisions were at issue in the two sets of proceedings. Section 198AD requires removal to a regional processing country; s 198 requires removal to *any* country⁵¹. Only one duty of removal could apply at any one time⁵². The Commonwealth parties had accepted before the primary judge that it was reasonably practicable to remove the appellant to Nauru under s 198AD in the s 198AD mandamus proceeding, but the reasonable practicability of removal to another country under s 198 was in contest in the subsequent s 198 mandamus proceeding. And different orders were sought

47 *Palmer* (2017) 259 CLR 478 at 490 [26], citing *In re Judiciary* (1921) 29 CLR 257 at 265-266.

48 (1983) 152 CLR 570 at 603, discussing *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 475.

49 *Fencott* (1983) 152 CLR 570 at 603-608. See also *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 584-585 [50].

50 *Fencott* (1983) 152 CLR 570 at 608.

51 Except where qualified by s 197C(3) of the *Migration Act*.

52 *Migration Act*, s 198(11).

in the two proceedings: mandamus for removal to a regional processing country in the 198AD mandamus proceeding, compared to mandamus for removal to any country other than Iran in the s 198 mandamus proceeding.

54 In any event, for the justiciable controversy underpinning the second proceeding – the s 198 mandamus proceeding – to ground jurisdiction in the appeals, it would be necessary not only that the subject matter in controversy in the appeals was in controversy in the second proceeding but *also* that the resolution of the subject matter of the controversy in the appeals would resolve that subject matter for the purposes of the second proceeding. As will be seen, those requirements were not satisfied. It is necessary to address each in turn.

55 First, the Commonwealth parties submitted that the determination of the appeals would resolve the question of the Federal Court's power to make home detention orders. The Commonwealth parties submitted that, to the extent that the appeals to the Full Court concerned the power of the Federal Court to make home detention orders, its judgment would *decide* the justiciable controversy between the parties with respect to that issue. That submission should be rejected. Identifying the subject matter in controversy is not always straightforward. However, in this case, whether the Federal Court has power to make home detention orders is not properly characterised as the subject matter of the controversy between the parties in the s 198 mandamus proceeding. The controversy in the s 198 mandamus proceeding is whether the Secretary is, at the time of the determination of that proceeding, complying with the duty to remove the appellant from Australia as soon as reasonably practicable under s 198.

56 The power of the Federal Court to make a home detention order in respect of the appellant is a contingent issue of ancillary relief that *may* arise depending on whether the appellant is successful in making out his substantive case: that there has been failure to take reasonably practicable steps to remove pursuant to s 198 and there is therefore a basis to make an order in the nature of mandamus to comply with s 198 of the Act. Mandamus is a judicial command to compel the performance of an *unperformed* public duty⁵³. The issue of the grant of mandamus – and any relief ancillary to mandamus – will only arise for decision in the s 198 mandamus proceeding if the Secretary is found to be unlawfully failing to perform their duty under s 198 to remove the appellant from Australia⁵⁴. That failure must be

53 *Cuming Campbell Investments Pty Ltd v Collector of Imposts (Vict)* (1938) 60 CLR 741 at 749; *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 394; 72 ALR 1 at 4.

54 See *AJL20* (2021) 273 CLR 43 at 73-74 [51]-[53], 89 [93], 96 [110].

established⁵⁵. The Commonwealth parties' submission that the power to make home detention orders was in controversy between the parties effectively assumed or expected that the Secretary will be found in breach of the duty. But unless and until there is a foundation for mandamus, the question about home detention orders remains contingent, and even then it would be contingent on questions going to the issue of ancillary relief. Those questions, and the facts necessary to determine them, did not and could not arise in the Full Court appeals. And "the ordinary jurisdiction of a Court does not extend to answering questions as problems of law dependent on facts yet unascertained"⁵⁶.

57 The second basis put forward by the Commonwealth parties was that the determination of the Full Court appeals would decide issues relevant to the s 198 mandamus proceeding. In particular, the Commonwealth parties emphasised that the appeals would determine whether or not the primary judge was correct to find that the duty in s 198AD applied to the appellant at the time of the primary judge's decision. Depending on whether ground one of the appeals to the Full Court was upheld or not, the period of time during which the Secretary owed the s 198 duty to the appellant would differ (as the duties could not be owed simultaneously). Therefore, the Commonwealth parties submitted, that aspect of the Full Court's decision might affect the determination in the s 198 mandamus proceeding of whether the Secretary was in breach of the duty to remove "as soon as reasonably practicable" under s 198, given the potential relevance of delay. However, while the Full Court decision on the appeals *might have affected* or been relevant to issues *likely* to be decided in the s 198 mandamus proceeding, it would not resolve or quell any aspect of the ongoing controversy. There was and is no dispute that the Secretary owes the duty in s 198. The determination of the appeals did not and could not resolve the rights, duties or liabilities of the parties in respect of that ongoing controversy – whether the Secretary is in breach of that duty and, if so, whether the appellant is entitled to mandamus.

58 Lastly, the Commonwealth parties submitted that there was a controversy as to costs when the appeals were filed. However, even assuming that "the tail" could "wag the dog" in that manner, the requirement for a "matter" continues up

55 See *R v War Pension Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1993) 178 CLR 379 at 394. See also *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424 at 434 [58]-[59]; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 546-547 [109], 551 [118].

56 *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442 at 451.

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until the time that the orders are made by the court, as *Unions [No 3]* makes clear⁵⁷. There was no ongoing controversy as to costs at the time the Full Court determined the appeals.

Relief

59 The Full Court did not have jurisdiction to determine the appeals. The appeals to this Court should be allowed with costs. The orders made by the Full Court of the Federal Court of Australia on 5 April 2022 in proceedings VID659/2021 and VID660/2021 should be set aside and, in their place, the applications for leave to appeal the orders made by the Federal Court of Australia on 13 October 2021 in proceedings VID89/2021 and VID503/2021 should be refused with costs and the appeals otherwise dismissed with costs.

⁵⁷ (2023) 97 ALJR 150 at 157-158 [19]; 407 ALR 277 at 283.

EDELMAN J.

Introduction: the nature of controversy

60 The appeals to this Court are concerned with whether the Full Court of the Federal Court of Australia had jurisdiction to decide two appeals before it. The jurisdiction of the Full Court of the Federal Court, like that of the Federal Court, derives from legislation passed under s 77(i) of the *Constitution*. By contrast, the appellate jurisdiction of this Court derives from s 73 of the *Constitution*.

61 I entirely agree, for the reasons given in the joint reasons of Kiefel CJ, Gordon and Steward JJ, that the Full Court of the Federal Court had no jurisdiction because there was no "matter" before the Full Court. As the joint reasons observe⁵⁸, there are two central elements to a "matter" in s 77 of the *Constitution*. First, there must usually be a "justiciable controversy"⁵⁹. Secondly, the subject matter dimension of the controversy⁶⁰ must have involved⁶¹ a claim (brought for proper purposes, and not "unarguable" or "manifestly hopeless"⁶²) concerning one of the subject matters within ss 75 and 76 of the *Constitution*⁶³.

62 These appeals are concerned only with the first element of a matter: a justiciable controversy.

58 See at [31]-[32].

59 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 290; *Palmer v Ayres* (2017) 259 CLR 478 at 490 [26]; *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at 485-486 [31]; 400 ALR 1 at 9. See also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

60 *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at 968 [50]; 405 ALR 402 at 414.

61 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219; *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at 487-488 [38]-[43]; 400 ALR 1 at 11-12.

62 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219; *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at 487 [36], 487-488 [38]-[43], 492-493 [67]; 400 ALR 1 at 10, 11-12, 18-19.

63 *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at 486-487 [35]-[36], 493-494 [70]-[73]; 400 ALR 1 at 10, 19-20. See also *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at 967 [48]; 405 ALR 402 at 413.

Three scenarios lacking a justiciable controversy

63 The central question of principle in these appeals can be illustrated by three scenarios. First, suppose that the Minister had brought an action against AZC20 seeking declarations and orders concerning whether the Federal Court had power to make a home detention order, despite no order for home detention of AZC20 being possible in the circumstances or in any foreseeable circumstances. Would there be any real dispute between the Minister and AZC20 if there was no dispute about anything that had happened in the past or its consequences, and no dispute about anything further that was going to happen to AZC20 in the future? No. The real issue between the parties is moot. There is no matter. The Federal Court cannot provide the Minister with an advisory opinion on the subject.

64 Secondly, suppose that at the time that the action was commenced there was a real dispute about whether an order could be made for the home detention of AZC20 but, during the course of the action, events occurred which removed any possibility of such an order being made. Would there be a real dispute between the Minister and AZC20 if there was no longer any dispute about anything that had happened in the past and no longer any dispute about anything that was going to happen to AZC20 in the future? No. The real issue has become moot. There is no longer any matter. The Federal Court cannot provide the Minister with an advisory opinion on the subject.

65 Thirdly, and relevantly to these appeals, if, after the primary judge made orders concerning the home detention of AZC20, events occurred which removed the possibility that any steps could be taken to implement those orders, would there be a real dispute on an appeal by the Minister? The principal argument of the respondents ("the Commonwealth parties") is that unlike a hearing at first instance, a federal court has jurisdiction under s 77(i) of the *Constitution* to determine an appeal even if nothing remains in dispute. The submission is effectively that, unlike the first two scenarios, an appeal can be heard, and the Minister can be provided with an advisory appellate opinion, even if all real issues between the two parties have become entirely moot.

66 In the United States, in relation to the Cases and Controversies clause of Art III §2 of the *Constitution of the United States*, that argument has always been plainly wrong. It should not be accepted in Australia either. As the joint reasons explain, and for the reasons explained below, neither the text nor the purpose of s 77 permits an artificial subdivision of "jurisdiction" to apply different rules for appellate jurisdiction from those that apply to original jurisdiction.

67 On the present state of authority, a controversy on an appeal about a costs order is sufficient to establish a controversy about the substantive orders to which the costs order relates. But, in the present case, by the time the Commonwealth parties filed their amended notices of appeal in the Full Court of the Federal Court, there was not even a dispute about any costs order made at first instance.

The justiciable controversy element of a matter

68 The first element of a matter—a justiciable controversy—is commonly present in the exercise of judicial power. But the focus of a matter is narrower than the concept of judicial power. The element of a matter usually requiring a justiciable controversy has three aspects. First, a justiciable controversy must concern legal rights. Secondly, it must generally involve a dispute about those legal rights that can be resolved in a judicial manner by a court⁶⁴. Thirdly, the parties before the court must have standing to agitate that dispute⁶⁵. Each of these aspects is different although they are cumulative. The failure to recognise all aspects of a justiciable controversy can lead only to confusion and the dilution of its requirements.

A justiciable controversy and the need for legal rights

69 A legal controversy is a dispute about rights, duties or liabilities. The reference to "rights" is in a broad, and loose, sense which includes claim rights, powers, liberties and privileges, and immunities. In this sense, the "only kinds of rights with which courts of justice are concerned are legal rights"⁶⁶. But a controversy, in law, is limited to the consideration of these rights, duties and liabilities.

70 Some rights, duties and liabilities are naturally possessed from birth. Other rights, duties and liabilities arise when things happen in the world. One of the things that happens in the world to give rise to rights, duties and liabilities is the making of court orders. The effect of a court order is usually to replace what the court has found to be a previously existing right, duty or liability with a new right, duty or liability "of a higher nature" which is generally supported by the enforcement mechanisms of the State⁶⁷.

71 Rights, duties and liabilities that once existed might cease to exist in the future: claim rights can be wholly exercised, duties can be discharged, and

64 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 167-168 [222]-[223].

65 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 256 [79]; 399 ALR 214 at 237.

66 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89 at 105 [44]; 398 ALR 404 at 416, quoting *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501.

67 See *Clayton v Bant* (2020) 272 CLR 1 at 25 [66], quoting *Drake v Mitchell* (1803) 3 East 251 at 258 [102 ER 594 at 596] and *King v Hoare* (1844) 13 M & W 494 at 504 [153 ER 206 at 210].

liabilities can be extinguished⁶⁸. This is as true of rights that existed prior to court orders as it is of the rights that are created by court orders. A claim right recognised and ordered by the court can be wholly exercised, a duty recognised and ordered by the court can be discharged, and a liability recognised and ordered by the court can be extinguished. Since rights, duties and liabilities can subsequently cease to exist, it necessarily follows that a controversy can cease to exist and, therefore, a matter that once existed can cease to exist⁶⁹.

A justiciable controversy and the need for a real dispute

72 It is not sufficient for a controversy that the court is asked to adjudicate upon rights, duties or liabilities. It is also generally necessary that, independently of the proceeding itself⁷⁰, there is a real dispute about those rights, duties or liabilities. In other words, the usual requirement of a dispute is that it must concern some concrete, or real-world, application of rights, duties or liabilities about which opposing parties disagree. Just as rights, duties or liabilities might cease to exist, there might also cease to be any concrete, or real-world, consequences of a previous dispute about rights, duties or liabilities. As Roberts CJ said for the Supreme Court of the United States in *Chafin v Chafin*⁷¹:

"[I]t is not enough that a dispute was very much alive when suit was filed'; the parties must 'continue to have a "personal stake" in the ultimate disposition of the lawsuit.

There is thus no case or controversy, and a suit becomes moot, 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'

73 In *Unions NSW v New South Wales* ("*Unions [No 3]*")⁷², the plaintiffs commenced proceedings which included a challenge to the validity of s 35 of the *Electoral Funding Act 2018* (NSW). At the time that their proceedings were

68 *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2022) 97 ALJR 1 at 18 [60]-[63]; 406 ALR 632 at 649-650.

69 See *Unions NSW v New South Wales* (2023) 97 ALJR 150 at 157-158 [19]; 407 ALR 277 at 283.

70 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266; *Fencott v Muller* (1983) 152 CLR 570 at 603-606; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-524 [24]; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at 967-968 [50]; 405 ALR 402 at 414.

71 (2013) 568 US 165 at 172 (citations omitted).

72 (2023) 97 ALJR 150; 407 ALR 277.

commenced, s 35 affected the future ability of the plaintiffs to campaign with another person, or other persons, at by-elections. But during the proceedings s 35 was repealed⁷³. There had been no past interference with the plaintiffs' rights and there was no real prospect of future interference. There was no remaining dispute and the plaintiffs had no standing to vindicate any interest⁷⁴. As I said in that case, the position in the United States and Australia in this respect was the same: "[t]he requisite personal interest that must exist at the commencement of the litigation [which is the foundation for standing] must continue throughout its existence"⁷⁵.

74 It was not enough in *Unions [No 3]* that the State of New South Wales might have had an interest in knowing whether its past legislation was valid. The interest of one party in the answer to a question does not make a dispute. If there are no past or future consequences of the issues for both parties then there is no longer a dispute. Hence, it is not sufficient that the resolution of the issue on the appeals to the Full Court of the Federal Court in this case might have had continuing significance to the Commonwealth parties. As Quick and Garran said of the view that an interested party cannot seek resolution of an issue by the court without any dispute⁷⁶:

"The argument from policy is very strong in support of this view. Ex parte interpretations of the law, without the thorough examination of interested parties and their counsel, are apt to be unsatisfactory and unauthoritative. It might indeed happen that the persons interested might be represented and heard upon a reference; but the practice would be, at least, open to serious abuse. The one advantage it would have—that of obtaining a prompt decision upon questions which are in doubt, but which no one is ready to litigate—is more than balanced by other considerations. The Judges would be liable to be hindered in the discharge of their appropriate duties by being employed, in a manner, as the law advisers of the Crown".

A justiciable controversy and the need for standing

75 The existence of a real dispute is different from the requirement of standing. A real dispute about rights exists independently of a legal proceeding. Standing

73 (2023) 97 ALJR 150 at 156 [10]; 407 ALR 277 at 280.

74 (2023) 97 ALJR 150 at 159 [25], 169 [84]; 407 ALR 277 at 285, 298.

75 (2023) 97 ALJR 150 at 163-164 [52]; 407 ALR 277 at 291, quoting *United States Parole Commission v Geraghty* (1980) 445 US 388 at 397. See also *Unions [No 3]* (2023) 97 ALJR 150 at 159-160 [25]-[28]; 407 ALR 277 at 285-286.

76 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 767.

does not. Hence, a "tendency" that has rightly been criticised is for "standing to be unhelpfully lumped together, even misidentified, with these rights"⁷⁷. Standing is instead the separate requirement that the applicant for relief is the correct person (with them or their representatives "standing" before the court) to agitate the dispute. In particular, the party asserting the right, duty or liability must have standing to enforce that right, duty or liability. In this sense, it is often said that standing is subsumed within the requirement of a matter⁷⁸.

76 Although there are limited exceptions⁷⁹, in private law the element of standing usually requires that the party asserting a right, duty or liability either holds or is subject to the right, duty or liability. In public law the element of standing is different. It usually requires that the right, duty or liability be asserted by a person with a sufficiently special interest in doing so⁸⁰. The Attorney-General could, however, authorise a relator proceeding so that an individual without any special interest could bring an action concerning the infringement of a public right⁸¹. Both the United States and Australia have also recognised that legislation can extend such relator proceedings so that an individual can bring the action as a "private Attorney-General"⁸².

Exceptional cases of a justiciable controversy without a real dispute

77 There are exceptional cases where this Court has recognised that justiciable controversies exist without any real dispute about rights, duties or liabilities. In *R v Davison*⁸³, Dixon CJ and McTiernan J gave a number of examples of orders in

77 Liau, *Standing in Private Law* (2023) at 33.

78 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 256-257 [79]; 399 ALR 214 at 237, and the cases cited there.

79 See, eg, *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 265-266 [122]-[123]; 399 ALR 214 at 249, and in particular the discussion therein of *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339.

80 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 257-261 [84]-[99]; 399 ALR 214 at 239-243.

81 *Taylor v Attorney-General (Cth)* (2019) 268 CLR 224 at 262 [105]; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 258 [87]; 399 ALR 214 at 239-240.

82 See *Associated Industries v Ickes* (1943) 134 F 2d 694 at 704; *Bennett v Spear* (1997) 520 US 154 at 165; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 632 [108], 634 [112].

83 (1954) 90 CLR 353 at 368.

such cases: the administration of assets or of trusts; the grant of probate of a will or letters of administration; the winding up of companies; the maintenance and guardianship of infants; the exercise of a power of sale by way of family arrangement; the consent to the marriage of a ward of court; and the administration of enemy property.

78 The reasons for these exceptions lie partly in their historical existence as circumstances which, whilst not exclusively a matter for judicial power, can also be "incidents in the exercise of strictly judicial powers"⁸⁴. But "[h]istory alone does not provide a sufficient basis for defining the exercise of a power as judicial power"⁸⁵. The exceptions are based also upon the involvement of the judicial process at a systemic level despite the absence of a real dispute about rights, duties or liabilities. Each exception is incidental to the strictly judicial power that would be exercised in resolving real disputes in that field. The exception assists to ensure the efficient functioning of dispute resolution in the particular area when real disputes arise.

79 The category of cases involving such systemic justifications for judicial power is not closed but the recognition of new exceptions has not been common. The most significant new exception was the decision of the majority of this Court in *Mellifont v Attorney-General (Q)*⁸⁶. Mr Mellifont had been charged with perjury in the District Court in Queensland. At the close of the evidence, the trial judge indicated that he intended to direct the jury to return a verdict of not guilty based on his Honour's view of an element of the offence concerning materiality. Before the trial judge directed the jury to that effect, the Crown entered a nolle prosequi and Mr Mellifont was discharged. The Attorney-General of the State of Queensland then relied on the referral provisions in s 669A of the *Criminal Code* (Qld) to refer the question of law concerning materiality to the Court of Criminal Appeal of Queensland. Those provisions permitted the referral of questions arising at the trials of persons who were acquitted of offences as well as those who were discharged after entry of a nolle prosequi.

80 The Court of Criminal Appeal answered the questions referred in a manner that supported the case put by the prosecutor⁸⁷. Mr Mellifont sought special leave

84 *R v Davison* (1954) 90 CLR 353 at 368, quoting *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151.

85 *Palmer v Ayres* (2017) 259 CLR 478 at 494 [37], citing *R v Davison* (1954) 90 CLR 353 at 366-369, 382 and *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48].

86 (1991) 173 CLR 289.

87 (1991) 173 CLR 289 at 299.

to appeal to this Court. A preliminary issue raised in this Court was whether the Court had jurisdiction to entertain the appeal under s 73 of the *Constitution*. Toohey J resolved that issue on the basis (explained below) that this Court's appellate power under s 73 of the *Constitution* does not require the existence of a "matter", and that it sufficed for jurisdiction that an appeal is involved and that the Court will exercise judicial power in resolving the appeal⁸⁸. Some judges subsequently explained the result in *Mellifont* in this way⁸⁹.

81 But in the joint judgment, Mason CJ, Deane, Dawson, Gaudron and McHugh JJ appeared to decide *Mellifont* on a broader basis. Their Honours considered that the appeal was not merely an exercise of judicial power to decide an appeal under s 73, but that it also involved a matter⁹⁰.

82 In oral argument in *Mellifont*, Deane J analogised the orders sought by the prosecution in answer to the referred questions of law with "declaratory relief that the acquittal was wrong"⁹¹. But there is little historical support for such declaratory powers in the Court of Chancery. The descriptions of the early criminal, or criminal-like, jurisdiction of the Court of Chancery, and later remnants of that jurisdiction that survived the rise and fall of the Court of Star Chamber, do not include any examples of declaratory relief concerning criminal offences either before or after the *Court of Chancery Procedure Act 1852*⁹².

83 The justification in the joint judgment in *Mellifont* for the recognition of the availability of declaratory-like orders within criminal jurisdiction without a real dispute was a purely systemic one. That is, their Honours distinguished between, on the one hand, an (invalid) proceeding that involved only "seeking and obtaining a review of the trial judge's ruling" in order to "secure a correct statement of the law so that it would be applied correctly in future cases" and, on the other hand, the procedure at issue in that case. The procedure in that case was said to be different because it occurred "in the context of the criminal law" and was a "standard procedure for correcting error of law in criminal proceedings without

88 (1991) 173 CLR 289 at 323-324. Compare at 317 per Brennan J.

89 See *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 409 [74].

90 (1991) 173 CLR 289 at 305.

91 (1991) 173 CLR 289 at 291.

92 15 & 16 Vict c 86. See Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846), vol 1, bk 4 at 684-688; Mack, "The Revival of Criminal Equity" (1903) 16 *Harvard Law Review* 389 at 390-391; Holdsworth, *A History of English Law*, 3rd ed (1922), vol 2 at 405-406. See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 236-237 [29].

exposing the accused to double jeopardy"⁹³. In other words, in a legal system that denies the Crown a power to appeal from an acquittal that is based on an error of law, there is a systemic need to vindicate the interest of the Crown.

84 The only systemic need in favour of a new exception advanced by the Commonwealth parties on the present appeals was the curious submission that, were the availability of appeal denied to the Commonwealth in those instances where there is no real dispute, the Commonwealth might use costs as a lever to maintain the possibility of an appeal. In other words, in a test case in which the Commonwealth would not otherwise have maintained any argument on appeal about costs, it might do so against a person with whom it no longer had any real dispute as an artifice to keep a notional appeal on foot.

85 Even assuming that the Commonwealth, as a model litigant, were nevertheless to behave in a manner that used costs orders only as an artifice to compel a person to remain in litigation before an appellate court, that could not be a sufficient systemic need to abolish the requirement for any dispute on appeal in any case in which the Commonwealth was an appellant.

86 The Commonwealth parties' submission on this central issue was, in any event, much broader. It was that a justiciable controversy does not *ever* require a real dispute when a case is in appellate jurisdiction.

"Appellate" jurisdiction is not a substitute for a real dispute

87 Article III §2 of the *Constitution of the United States* speaks of judicial power over various "Cases" and "Controversies". Nearly a century ago, in the Supreme Court of the United States in *Coleman v Miller*⁹⁴, Frankfurter J explained how the concepts of "Cases" and "Controversies" provide a further constitutional constraint upon the exercise of judicial power:

"The Constitution further explicitly indicated the limited area within which judicial action was to move—however far-reaching the consequences of action within that area—by extending 'judicial Power' only to 'Cases' and 'Controversies.' ... Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'"

93 (1991) 173 CLR 289 at 305.

94 (1939) 307 US 433 at 460.

88 In some circumstances, this long-established limit later came to be described by some courts as "mootness"⁹⁵. But, as Diamond⁹⁶ observed in 1946, the principle of mootness was much, much older, with roots in English decisions dating back to as early as 1736⁹⁷. That mootness principle applied throughout the trial and appeals process. As a matter of principle it would have been spurious to draw a distinction between cases that became moot during trial and those that became moot during appeal: "[f]rom the standpoint of the governing principles of law, there is little if any distinction between a case which is found to be moot at the commencement of the litigation and a case which becomes moot pending appeal"⁹⁸.

89 For these reasons, although it has occasionally been suggested that "reconsideration of [the Supreme Court's] mootness jurisprudence may be in order"⁹⁹ so as to convert the principle into one of discretion rather than jurisdiction, United States courts have consistently held that "the court is not empowered to decide moot questions"¹⁰⁰ and that mootness renders a decision "unreviewable"¹⁰¹. This "traditional, fundamental limitation[] upon the powers of common-law courts" is now well recognised in the United States as one that Art III §2 of the *Constitution of the United States* "adopts ... through [its] terms ('The judicial Power'; 'Cases'; 'Controversies')"¹⁰². The "limitation is more than a rule of decision; it is a constitutional requirement [from Art III §2 of the *Constitution of the United States*]"¹⁰³. Like the traditional, fundamental limitation that it reflects, the constitutional requirement "subsists through all stages of federal judicial

95 *Liner v Jafco Inc* (1964) 375 US 301 at 306, fn 3.

96 Then the Special Assistant to the Attorney-General of the United States.

97 Diamond, "Federal Jurisdiction to Decide Moot Cases" (1946) 94 *University of Pennsylvania Law Review* 125 at 125.

98 Diamond, "Federal Jurisdiction to Decide Moot Cases" (1946) 94 *University of Pennsylvania Law Review* 125 at 127.

99 *Honig v Doe* (1988) 484 US 305 at 329.

100 *California v San Pablo and Tulare Railroad Co* (1893) 149 US 308 at 314.

101 *United States v Munsingwear Inc* (1950) 340 US 36 at 41.

102 *Honig v Doe* (1988) 484 US 305 at 340.

103 Diamond, "Federal Jurisdiction to Decide Moot Cases" (1946) 94 *University of Pennsylvania Law Review* 125 at 125.

proceedings, trial and appellate"¹⁰⁴. In other words, even if a case or controversy had previously existed at trial, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed"¹⁰⁵. As the Supreme Court said, the case or controversy must "remain of operative importance to the parties as they come to this Court"¹⁰⁶.

90 Although the Australian *Constitution* preferred the concept of a "matter" to govern the jurisdiction of a court exercising federal jurisdiction, rather than that of a "case" or "controversy", it did not depart from this basic principle by creating a radically different distinction for the purpose of mootness between jurisdiction concerning matters at trial and jurisdiction concerning matters on appeal. Hence, although the content of a "matter" need not "equate precisely"¹⁰⁷ when compared with that of a "case" or "controversy", the usual need for a real dispute is at the core of both concepts. As Mason J said in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*¹⁰⁸, echoing Sir Harrison Moore¹⁰⁹, the terms "Cases" and "Controversies" imply "the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication", in the same way as connoted by "matters" in ss 75 and 76.

91 In a federal court, other than the High Court of Australia, the requirement for a controversy applies to litigation in original jurisdiction as well as litigation in

104 *Lewis v Continental Bank Corp* (1990) 494 US 472 at 477. See also *Securities and Exchange Commission v Medical Committee for Human Rights* (1972) 404 US 403 at 405; *DeFunis v Odegaard* (1974) 416 US 312 at 315, 319-320; *Preiser v Newkirk* (1975) 422 US 395 at 401; *Arizonans for Official English v Arizona* (1997) 520 US 43 at 67; *Chafin v Chafin* (2013) 568 US 165 at 172. See further Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 344-345; Chemerinsky, *Constitutional Law: Principles and Policies*, 7th ed (2023) at 129-130.

105 *Church of Scientology of California v United States* (1992) 506 US 9 at 12, quoting *Mills v Green* (1895) 159 US 651 at 653.

106 *Liner v Jafco Inc* (1964) 375 US 301 at 306, citing *Love v Griffith* (1924) 266 US 32.

107 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 610 [42]. See also at 650 [156], 670 [213]. Compare at 603 [21].

108 (1981) 148 CLR 457 at 508, quoting *In re Pacific Railway Commission* (1887) 32 F 241 at 255.

109 (1981) 148 CLR 457 at 508, citing Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 208-209.

appellate jurisdiction. Again, in this respect Australian constitutional law and United States constitutional law do not differ¹¹⁰. The words of s 77(i) of the *Constitution* were carefully chosen *not* to create different types of power to define jurisdiction according to whether the power was "original" or "appellate"¹¹¹. Section 77(i) simply empowers the Commonwealth Parliament, with respect to matters in s 75 or s 76, to define "the jurisdiction of any federal court other than the High Court". It does not distinguish between jurisdiction according to whether the jurisdiction is being invoked for the first time as original jurisdiction or the second time as an appeal.

92 It can be accepted that the content of a "matter" that arises on an appeal will not be the same as the "matter" that arose in original jurisdiction from which the appeal is brought. The legal controversy on appeal will be one step removed from that in original jurisdiction: the dispute will concern the legal orders that give effect to the resolution of the original controversy. Nevertheless, it is still necessary that the law conferring appellate jurisdiction is "[w]ith respect to [a matter]"¹¹². And, to reiterate, the usual requirement for a matter—that there be a dispute as to legal rights—is one that must be determined independently of the proceeding. But it is a basic logical error to conclude that the different content of a legal controversy on appeal means that no legal controversy is required on an appeal. That reasoning would treat s 77(i) as though it contained different principles for "original" jurisdiction and "appellate" jurisdiction.

The different position of High Court appeals: s 73 not s 77

93 The appellate jurisdiction of the High Court is in a different constitutional position from the appellate jurisdiction of another federal court. The appellate jurisdiction of a federal court under s 77(i) of the *Constitution* requires a matter, which usually means that the two elements concerning a justiciable controversy and federal subject matter must be established. But as Dixon CJ, McTiernan and Kitto JJ said in *Cockle v Isaksen*¹¹³, "[t]he appellate power conferred by s 73 is not concerned with 'matters'". Thus, if an order is made by the Supreme Court of any State, then an appeal will be within s 73 so long as it involves the exercise of

110 See *Unions [No 3]* (2023) 97 ALJR 150 at 163-164 [52]; 407 ALR 277 at 291.

111 *Cockle v Isaksen* (1957) 99 CLR 155 at 163, discussing *Ah Yick v Lehmert* (1905) 2 CLR 593 and *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529.

112 cf Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 182.

113 (1957) 99 CLR 155 at 163.

judicial power or power incidental to judicial power, irrespective of whether a matter exists.

94 The question of whether an appeal will involve judicial power or power incidental to judicial power can sometimes be difficult¹¹⁴. But in much the same way that Frankfurter J described the requirement of "Cases" or "Controversies" as one that is narrower than the question of judicial power¹¹⁵, so too the requirement of a matter is one that is narrower than whether judicial power exists.

95 The Commonwealth parties relied on the decision in *The Commonwealth v Helicopter Resources Pty Ltd*¹¹⁶ in support of a submission that the requirements for a matter in appellate jurisdiction were different from those in original jurisdiction. That case provides no support for such a submission. The jurisdiction of this Court in that case arose under s 73 of the *Constitution*, not s 77(i).

96 In *Helicopter Resources*, the Commonwealth had been the unsuccessful respondent to the appeal in the Full Court of the Federal Court. The Commonwealth therefore had standing to appeal to this Court in relation to the orders made against it¹¹⁷. But there was no submission on the appeal in *Helicopter Resources*, just as there was no submission on these appeals, that this Court lacked jurisdiction because it would not be exercising judicial power or power incidental to judicial power in deciding the appeal. If such a submission had been made, but not accepted, it would have been necessary to consider the extent of overlap between (i) the requirement in s 73 for the exercise of judicial power or power ancillary to judicial power, and (ii) the requirement in s 77(i) that a justiciable controversy before the Federal Court be with respect to a matter.

Conclusion

97 Since there was no matter before the Full Court of the Federal Court at the time of its delivery of its orders and reasons, those orders were made without jurisdiction. The reasons supporting those orders concerning the power to make home detention orders, parts of which were not supported by the Commonwealth parties in this Court, have no precedential effect.

¹¹⁴ See, eg, the differing views expressed in *Momcilovic v The Queen* (2011) 245 CLR 1.

¹¹⁵ See *Coleman v Miller* (1939) 307 US 433 at 460.

¹¹⁶ (2020) 270 CLR 523.

¹¹⁷ (2020) 270 CLR 523 at 540 [36].

35.

98 Orders should be made in the terms proposed by Kiefel CJ, Gordon and Steward JJ.

99 GLEESON J. These appeals challenge the jurisdiction of a full court of the Federal Court of Australia ("the Full Court") to allow appeals brought by the respondents ("the Commonwealth parties") from orders made in related proceedings by a judge exercising the original jurisdiction of the Federal Court. Finding error by the primary judge, the Full Court set aside the primary judge's orders that included: (a) a declaration that s 198AD(2) of the *Migration Act 1958* (Cth) applied to the appellant; (b) orders compelling the third respondent, the Secretary of the Department of Home Affairs, to perform, or cause to be performed, the duty under s 198AD(2) to take the appellant from Australia to a regional processing country as soon as reasonably practicable; and (c) orders for the detention of the appellant, pending the performance of the duty under s 198AD(2), at a residential address in Perth, Western Australia.

100 I gratefully adopt the factual and procedural background to these proceedings as set out in the reasons of Kiefel CJ, Gordon and Steward JJ.

101 Prior to the hearing of the appeals in the Full Court, the appellant (the respondent in the Full Court appeals) raised with the Commonwealth parties a contention that the appeals were futile and should not be entertained. The parties addressed the issue in their submissions to the Full Court as a question for the exercise of the Court's discretion to hear and determine the matter, rather than as a question of jurisdiction. Historically, it has been accepted that s 23 of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act") confers a discretionary power upon the Federal Court to stay such an appeal permanently because to proceed would be futile or involve the determination of issues that have become moot¹¹⁸. The existence of this power presupposes the jurisdiction of the Federal Court to hear and determine such an appeal. Consistent with this approach, the Full Court assumed its jurisdiction to hear and determine the Commonwealth parties' appeals against the primary judge's orders, and considered issues surrounding the practical effect of its orders as a matter of discretion rather than jurisdiction, as explained by Kiefel CJ, Gordon and Steward JJ¹¹⁹.

102 The Full Court allowed the Commonwealth parties' appeals, finding that the primary judge: (a) misconstrued s 198AD(2) of the *Migration Act*; (b) erred in finding that certain "home detention" arrangements could be characterised as "immigration detention" within para (a) of the definition of that term in s 5 of the

118 *Vanstone v Clark* (2005) 147 FCR 299 at 304-305 [7]. See also *Beitseen v Johnson* (1989) 29 IR 336; *La Roche v Cormack* (1991) 33 FCR 414; *Douglas v Tickner* (1994) 49 FCR 507; *Mayne Nickless Ltd v Transport Workers Union of Australia* [1998] FCA 984; *Bonan v Hadgkiss* (2007) 160 FCR 29 at 31-32 [8]-[11]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* (2020) 276 FCR 1 at 6-7 [19]-[24].

119 Reasons of Kiefel CJ, Gordon and Steward JJ at [26]-[29].

Migration Act; and (c) erred in characterising the detention arrangement orders that his Honour made as ancillary to mandamus and therefore supported by s 23 of the Federal Court Act.

103 The first issue on these appeals is whether the Full Court lacked jurisdiction to correct the errors, including legal errors, that it found had been made by the primary judge. The appellant argued that, once the orders under appeal to the Full Court "had no prospect of ever coming into effect", there was no longer a live controversy about any "immediate right, duty or liability" of the kind required by *In re Judiciary and Navigation Acts*¹²⁰, and that, as a corollary, there was no longer a "matter" within the meaning of Ch III of the *Constitution* upon which the Federal Court was authorised to adjudicate in the exercise of its judicial power. The question has significance both for the scope of the Commonwealth's legislative power to define and invest jurisdiction under s 77 of the *Constitution*, and for the scope of the judicial power of the Commonwealth.

104 The second and third issues (which necessarily only arise if the appellant were to fail on the first issue) are whether the Full Court erred in the exercise of its discretion to grant leave to appeal from interlocutory orders, being orders for "home detention" arrangements; and whether the Full Court's substantive decision on the grounds challenged by the appellant was correct, that is, whether the Full Court itself erred in its interpretation of para (a) of the definition of "immigration detention" in s 5 of the *Migration Act*, and in its conclusion that the primary judge's detention arrangement orders were beyond the power conferred by s 23 of the Federal Court Act, and/or by failing to find that the home detention orders were within the scope of the power conferred by s 22 of that Act.

105 For the following reasons, I disagree with the majority's conclusion that the Full Court lacked jurisdiction to hear the Commonwealth parties' appeals. As the appeals to this Court will be allowed, it is unnecessary for me to express any opinion about the second and third issues concerning the Full Court's grant of leave to appeal, and the correctness of the Full Court's substantive decision.

The nature of federal appellate jurisdiction

106 Federal jurisdiction is the authority to adjudicate derived from the *Constitution* and laws made under the *Constitution*¹²¹. The *Constitution* proceeds

120 (1921) 29 CLR 257 at 265.

121 *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 349 [24] and the cases cited at fn 22.

on the footing that all federal jurisdiction is either original or appellate¹²². It was established early in the High Court's history that the federal jurisdiction which the Commonwealth Parliament is authorised to confer by s 77 of the *Constitution* includes both original and appellate jurisdiction¹²³, and the distinction between these two forms of jurisdiction is maintained in the Federal Court Act¹²⁴.

107 Appellate jurisdiction "revises and corrects the proceedings in a cause already instituted, and does not create that cause"¹²⁵. Thus, in *Edwards v Santos Ltd*¹²⁶, Hayne J contrasted the case, which was brought in this Court's original jurisdiction, with a case brought in the Court's appellate jurisdiction. "[U]nlike the case in which this Court's appellate jurisdiction is engaged, the 'matter brought before the Court' [in *Edwards* was] distinct from the matter that was brought before the Federal Court."¹²⁷ Appellate jurisdiction implies that the relevant subject matter has already been instituted in and acted upon by some other court whose judgment or proceedings are to be revised¹²⁸.

108 As Leeming has identified, "the subject matter of appellate jurisdiction is the exercise of jurisdiction by another court"¹²⁹. Appellate jurisdiction is conferred "to set ... error right"¹³⁰. Describing general appellate jurisdiction from an inferior court to another court in *Ah Yick v Lehmert*, Griffith CJ stated that courts of appeal

122 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 275.

123 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603-604; *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 90; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 555; *Cockle v Isaksen* (1957) 99 CLR 155 at 163. See also Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 179-180.

124 Sections 19 and 24 respectively.

125 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 276, quoting Story, *Commentaries on the Constitution of the United States* (1833), vol 3 at 626-627 §1755.

126 (2011) 242 CLR 421.

127 (2011) 242 CLR 421 at 427 [13].

128 *Ruhani v Director of Police* (2005) 222 CLR 489 at 507 [38].

129 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 276. See also *Ah Yick v Lehmert* (1905) 2 CLR 593 at 601; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 529.

130 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 601.

39.

"can entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous"¹³¹. Appellate jurisdiction operates as a check upon the exercise of judicial power at first instance.

109 As with federal original jurisdiction, the primary function of the conferral of appellate jurisdiction is "not the declaration of legal principle but the resolution of a controversy about a legal right or legal liability"¹³². That is not to say that the role of appellate courts in the declaration of legal principle, including in the course of correcting legal error, is irrelevant as a justification for the exercise of appellate jurisdiction. Thus, French CJ stated in *Momcilovic v The Queen*¹³³:

"The answers given by an appellate court, in the exercise of a statutory jurisdiction, to referred questions arising out of particular proceedings may properly be viewed as an incident of the judicial process even if those answers do not affect the outcome of the proceedings. Where they correct error, they ensure that what has been said at first instance does not influence the outcome of subsequent similar cases. In deciding cases the courts are ... exercising powers conferred by public law and doing so in a way that is calculated 'to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.'"

The requirement of a "matter" for federal appellate jurisdiction

110 Section 77(i) of the *Constitution* provides that "[w]ith respect to any of the matters mentioned in the last two sections [ie, the heads of jurisdiction in ss 75 and 76] the Parliament may make laws ... defining the jurisdiction of any federal court other than the High Court". The concept of "matter" as picked up in s 77(i), and which has the same meaning when used throughout Ch III of the *Constitution*¹³⁴, was explained by Griffith CJ as the "widest term to denote controversies which might come before a Court of Justice"¹³⁵. It has been held to mean the "subject

131 (1905) 2 CLR 593 at 601.

132 *Clubb v Edwards* (2019) 267 CLR 171 at 217 [136]. See also *Fencott v Muller* (1983) 152 CLR 570 at 608-609.

133 (2011) 245 CLR 1 at 64 [87] (footnote omitted).

134 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

135 *South Australia v Victoria* (1911) 12 CLR 667 at 675. See also *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37.

matter for determination"¹³⁶ independent of the precise legal proceedings¹³⁷, and encompasses all claims within the scope of such a controversy, whether federal or non-federal in nature¹³⁸.

111 As Kiefel CJ, Gordon and Steward JJ observe¹³⁹, there are two key aspects to the concept of a "matter", which were confirmed by the plurality in *CGU Insurance Ltd v Blakeley*¹⁴⁰ and reiterated in *Hobart International Airport Pty Ltd v Clarence City Council*¹⁴¹. The first aspect concerns the subject matter of the dispute. For federal jurisdiction, the subject matter must be defined by reference to the heads of jurisdiction in either s 75 or s 76 of the *Constitution*¹⁴². This aspect of "matter" was not in contest in this case: the Commonwealth parties' appeals to the Full Court involved relevant subject matter, namely, a matter in which a writ of mandamus was sought against an officer of the Commonwealth and arising under laws made by the Commonwealth Parliament.

112 The second aspect, discussed below, concerns "the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy"¹⁴³. The identification of a "justiciable controversy" ensures that the court will not purport to exercise judicial power "divorced from any attempt to administer that law"¹⁴⁴.

113 However, the identification of a "matter" for federal appellate jurisdiction is distinctive. A justiciable controversy, and consequently a "matter", will have been the subject of the exercise of federal original jurisdiction by delivery of the judgment – with its necessary determination of rights and liabilities – that is under appeal. As Dixon CJ noted in *R v Spicer; Ex parte Truth and Sportsman Ltd* in

136 *Crouch* (1985) 159 CLR 22 at 37.

137 *Fencott* (1983) 152 CLR 570 at 603.

138 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 475; *Fencott* (1983) 152 CLR 570 at 603.

139 Reasons of Kiefel CJ, Gordon and Steward JJ at [31].

140 (2016) 259 CLR 339 at 351 [27].

141 (2022) 96 ALJR 234 at 245 [26]; 399 ALR 214 at 222.

142 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-525 [24]-[25]; cf *Collins* (1955) 92 CLR 529 at 541.

143 *CGU* (2016) 259 CLR 339 at 351 [27].

144 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

relation to the appellate jurisdiction of the Commonwealth Industrial Court, "[a]n appeal is not based on the description of the matter before the court, but on the description of the judgment, decree, order or sentence of the court appealed from"¹⁴⁵. This approach conforms with the language of both s 73 of the *Constitution* and s 24(1)(a) of the Federal Court Act. Similarly, in *Kable v Director of Public Prosecutions (NSW)*¹⁴⁶, Gummow J characterised an appeal from a State court to this Court as a proceeding "with respect to" a matter, namely, the matter that was the subject matter of the proceeding at first instance¹⁴⁷.

114 Thus, the question whether an appeal may lie to this Court from an answer given by an intermediate court "corresponds with the question whether the answer concludes the parties' rights and obligations"¹⁴⁸.

115 In *Cockle v Isaksen*¹⁴⁹, this Court found that its appellate jurisdiction under s 73 of the *Constitution* did not extend to appeals against a magistrate's dismissal of four informations for offences against the *Conciliation and Arbitration Act 1904* (Cth)¹⁵⁰, by virtue of the operation of s 113(3) of that Act, which provided that "[a]n appeal does not lie to the High Court from a judgment, decree, order or sentence from which an appeal may be brought to the Court under sub-section (1) of this section". In reaching this conclusion, the Court was required to consider whether s 113(3) fell within the scope of the legislative power conferred by s 77 of the *Constitution*. Dixon CJ, McTiernan and Kitto JJ contrasted s 77 with the High Court's appellate power conferred by s 73, which "is not concerned with 'matters' but with judgments decrees orders and sentences of the courts and the commission which it identifies"¹⁵¹. Accepting that s 77 had been decided to apply to appellate jurisdiction, their Honours held that "it necessarily followed that the appellate jurisdiction conferred under s 77(i) must be defined by reference to one or other or more of the matters set out in ss 75 and 76"¹⁵².

145 (1957) 98 CLR 48 at 53.

146 (1996) 189 CLR 51.

147 (1996) 189 CLR 51 at 143.

148 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 259.

149 (1957) 99 CLR 155.

150 As amended by the *Conciliation and Arbitration Act 1956* (Cth).

151 *Cockle* (1957) 99 CLR 155 at 163, see also at 165-166.

152 *Cockle* (1957) 99 CLR 155 at 164.

116 Their Honours next addressed whether the appellate jurisdiction conferred on the Commonwealth Industrial Court by s 113, which was understood as defined by reference to the matter involved in the appeal (being a matter arising under the *Conciliation and Arbitration Act*), fell within the scope of the exception from the High Court's appellate jurisdiction provided for in s 73 of the *Constitution*. Their Honours noted that the exception relates "directly to the judgment etc as something either actually inherent in it or alleged by the appellant to be inherent in it", and that it relates "rather to its legal basis than its operative effect as between the parties, its pecuniary significance, its finality or its interlocutory character"¹⁵³. Their Honours concluded¹⁵⁴:

"It is enough to say that [s 113(3)] fixes upon a description of judgment decree order or sentence of State courts exercising federal jurisdiction, it does not eat up or destroy the general rule laid down by the Constitution that appeals shall lie to this Court from judgments decrees orders and sentences of courts of a State exercising federal jurisdiction, and the description upon which it fixes, though it relates to the 'matter' involved in the appeal, goes to the basis or alleged basis of the judgment decree order or sentence and forms a ground of exception within the power of prescribing exceptions which the Parliament obtains under s 73."

117 It is implicit in this reasoning that the appellate jurisdiction of the Commonwealth Industrial Court, conferred under s 77 of the *Constitution*, arose on an appeal from a judgment, decree, order or sentence of, relevantly, a State court concerning a matter arising under the *Conciliation and Arbitration Act*. In that way, appellate jurisdiction was "defined by reference to one or other or more of the matters set out in ss 75 and 76"¹⁵⁵. There was no suggestion that anything more was required.

118 Lindell has observed that the principle apparently derived from *Cockle*, that it is the matter arising on the *appeal* and not the matter that had arisen in the original jurisdiction which must fall within ss 75 and 76, is at odds with later decisions which identify non-federal aspects of a single controversy, including in the original jurisdiction, as part of a single "matter"¹⁵⁶. Thus, the author notes that "[i]t is difficult to see why a conferral of appellate jurisdiction in respect of judgments determining the matters mentioned in ss 75 and 76 is not a law that has

153 *Cockle* (1957) 99 CLR 155 at 166.

154 *Cockle* (1957) 99 CLR 155 at 166.

155 *Cockle* (1957) 99 CLR 155 at 164.

156 Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 181-182, citing, inter alia, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

a close relevance or connection with those matters"¹⁵⁷. On that reasoning, the appellate jurisdiction of the Federal Court is engaged by an appeal from a relevant judgment or order deciding a "matter".

The requirement of a "justiciable controversy"

119 As identified above, the second aspect of a "matter" is the existence of a justiciable controversy. *CGU* illustrates a broad approach to the identification of a "justiciable controversy", as based on the "reality of the plaintiff's interest which was not to be confined by a requirement that the plaintiff demonstrate a claim for vindication of an existing legal right against the insurer"¹⁵⁸. Notwithstanding that the liquidators had no direct claim against the insurer, the insurer's denial of liability under the insurance policy owed to the company in liquidation, coupled with the liquidators' potential entitlement to the proceeds of any indemnity paid under the policy under relevant federal statutory provisions, was sufficient to constitute a justiciable controversy¹⁵⁹.

120 In understanding how a justiciable controversy may be identified for the purpose of federal appellate jurisdiction, it is relevant to refer back to the early decisions in *South Australia v Victoria*¹⁶⁰ and *In re Judiciary and Navigation Acts*¹⁶¹ which first explained this aspect of a matter¹⁶².

121 *South Australia v Victoria*¹⁶³ established that the original jurisdiction of the High Court under s 75 of the *Constitution* does not extend to the resolution of political controversies. Griffith CJ, with whom Barton J agreed, stated that "as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable"¹⁶⁴. In order for a matter between States to be justiciable, it must be "such that a controversy of like nature could arise between individual persons, and must be such that it can be

157 Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 182.

158 (2016) 259 CLR 339 at 357 [42].

159 *CGU* (2016) 259 CLR 339 at 362 [62], 363-364 [67]-[68].

160 (1911) 12 CLR 667.

161 (1921) 29 CLR 257.

162 See Burmester, "Limitations on Federal Adjudication", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System* (2000) 227 at 231-232.

163 (1911) 12 CLR 667.

164 *South Australia v Victoria* (1911) 12 CLR 667 at 675.

determined upon principles of law"¹⁶⁵. O'Connor J, agreeing with Griffith CJ's conclusions, explained that "matters" in the *Constitution* must be read as meaning "matters capable of judicial determination"¹⁶⁶. The test identified by O'Connor J for whether a claim is justiciable was whether the claim could "be sustained on any principle of law that can be invoked as applicable"¹⁶⁷, in reference to the requirement that inter-State disputes be determined on some recognised principle of law, as opposed to the position in the United States, where the Supreme Court was expressly granted the power to adjudicate on boundary disputes between States¹⁶⁸. Isaacs J similarly held that the term "matters" in s 75 of the *Constitution* is "confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties". To do otherwise would be to leave the Court "without any limits of jurisdiction" and invite judicial interference with political discretion¹⁶⁹.

122 The principle that political decisions are non-justiciable is related to, or overlaps with, principles that have historically restricted judicial review of exercises of royal prerogatives, such as those concerning war and the armed services¹⁷⁰, and governmental decisions about raising of revenue and the allocation of resources¹⁷¹. It has no bearing on the issue at hand, namely, whether mootness will preclude the existence of federal appellate jurisdiction.

123 In *In re Judiciary and Navigation Acts*¹⁷², the Court considered the constitutional validity of a law requiring the High Court to hear and determine questions referred to it by the Governor-General as to the validity of any Act or enactment of the Commonwealth Parliament. In explaining the meaning of

165 *South Australia v Victoria* (1911) 12 CLR 667 at 675.

166 *South Australia v Victoria* (1911) 12 CLR 667 at 708.

167 *South Australia v Victoria* (1911) 12 CLR 667 at 708, quoting *Dominion of Canada v Province of Ontario* [1910] AC 637 at 645 per Lord Loreburn.

168 *South Australia v Victoria* (1911) 12 CLR 667 at 708.

169 *South Australia v Victoria* (1911) 12 CLR 667 at 715.

170 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 219-220.

171 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 553-554 [6].

172 (1921) 29 CLR 257.

"matter" in Ch III, the majority concluded that there could be no matter within the meaning of s 76¹⁷³:

"unless there is some immediate right, duty or liability to be established by the determination of the Court ... [The Legislature] cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law ... [W]e can find nothing in Chapter III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved."

124 The issue was the Court's original jurisdiction: the majority explicitly noted that no question was raised about the Court's appellate jurisdiction¹⁷⁴. *In re Judiciary and Navigation Acts* has thus been held as authority for the principle that "justiciability" restrains the exercise of judicial power such that it does not extend to the provision of a "purely advisory opinion"¹⁷⁵. An "advisory opinion" has been explained as "an opinion 'rendered by the court at the request of the government or an interested party indicating how the court would rule on a matter should adversary litigation develop'", involving no parties and no issues as ordinarily understood¹⁷⁶. Although there is a history at common law of courts giving advisory opinions¹⁷⁷, under Australian law "the function of giving an academic advisory opinion to the executive government, dissociated from litigation actually in train, lies outside the exercise of judicial power"¹⁷⁸. Consistently with this, in *Abebe v The Commonwealth*, Gleeson CJ and McHugh J explained the concept of "matter" as "concerned with the rights, duties and liabilities of particular parties in concrete situations"¹⁷⁹.

173 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267.

174 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264.

175 *CGU* (2016) 259 CLR 339 at 350 [26]. See also *Palmer v Ayres* (2017) 259 CLR 478 at 491 [27].

176 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 323. See also *Re Barrow* (2017) 91 ALJR 1240 at 1242 [10]; 349 ALR 574 at 576, citing *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356 [48].

177 Holdsworth, *A History of English Law*, 3rd ed (1945), vol 4 at 75; Lee, "Deconstitutionalizing Justiciability: The Example of Mootness" (1992) 105 *Harvard Law Review* 603 at 639 fn 204.

178 *O'Toole* (1990) 171 CLR 232 at 244.

179 (1999) 197 CLR 510 at 525 [26].

125 There is no principled reason to equate an exercise of appellate jurisdiction with the provision of an advisory opinion. Appellate jurisdiction supervises the ruling of a court in earlier adversarial litigation. In this case, the Full Court's exercise of appellate jurisdiction involved the correction of error in the determination of rights, duties and liabilities of particular parties in a concrete situation, namely, the detention of the appellant by the Secretary pending his removal from Australia. *In re Judiciary and Navigation Acts* goes no further than stating the "basal understanding of the nature of the judicial function" that the High Court's jurisdiction, and by extension federal jurisdiction, does not extend to answering a question "divorced from the administration of the law"¹⁸⁰.

126 Apart from constraining the exercise of judicial power to determine political questions or give advisory opinions, the concept of "justiciability" has been invoked to delineate the authority of federal courts to determine claims for declaratory relief, particularly declarations concerning the validity or operation of laws, and exercises of governmental power. Thus, for example, it was held in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* that any member of the public had standing to seek a declaration in relation to the operation or effect of any provision of the former *Trade Practices Act 1974* (Cth) apart from certain excluded provisions¹⁸¹. That standing "created the potential for a justiciable controversy"¹⁸². The subject matter of an alleged violation by the respondent of a statutory norm of conduct, and the court's role in determining the existence of a duty or liability, was "justiciable in character"¹⁸³.

127 Subsequently, *Edwards* established that the jurisdiction to grant a declaration includes the power to declare that conduct which has not yet taken place will be a nullity in law¹⁸⁴. Although not using the language of justiciability, Heydon J (with whom the other Justices agreed on this point) noted that the question raised by the plaintiffs was "not hypothetical, but concrete and real; and the opinion they [sought was] not merely advisory"¹⁸⁵, given that the declaration

180 *Clubb* (2019) 267 CLR 171 at 216-217 [136].

181 (2000) 200 CLR 591 at 603 [20], 619 [68].

182 *Truth About Motorways* (2000) 200 CLR 591 at 602 [17].

183 *Truth About Motorways* (2000) 200 CLR 591 at 602 [17].

184 (2011) 242 CLR 421 at 435 [37].

185 *Edwards* (2011) 242 CLR 421 at 436-437 [39].

would advance the interests of native title claimants in negotiations concerning a petroleum licence which the parties were contractually obliged to conduct¹⁸⁶.

128 In *Hobart International Airport*, it was held that two local authorities had standing to seek declaratory relief about the operation of leases between the Commonwealth and third parties. Kiefel CJ, Keane and Gordon JJ observed that standing to seek relief "ordinarily provides the 'justiciable' aspect of the controversy"¹⁸⁷. Gageler J and I stated that¹⁸⁸:

"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 obligation. 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'. 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."

129 Proceedings may also involve a "matter" even when they are not determinative of the rights of the parties, provided the proceedings concern the determination of what their rights would have been if the law had been properly applied. *O'Toole v Charles David Pty Ltd* illustrates the point in the context of appellate jurisdiction, as it involved the determination of a stated case to answer legal questions which were not determinative of the rights of the parties¹⁸⁹.

Mootness and justiciable controversies

130 In an appeal, there has necessarily been a justiciable controversy between the parties at an earlier stage of the proceedings. In this case, the appellant commenced proceedings in the Federal Court to seek the Court's determination of a justiciable controversy about the application of s 198AD(2) of the *Migration Act* to him and the Commonwealth parties' associated obligations concerning his detention pending his removal from Australia. The primary judge found in favour of the appellant in each of the two related proceedings and made orders for the

¹⁸⁶ *Edwards* (2011) 242 CLR 421 at 436 [37].

¹⁸⁷ *Hobart International Airport* (2022) 96 ALJR 234 at 246 [31]; 399 ALR 214 at 223.

¹⁸⁸ *Hobart International Airport* (2022) 96 ALJR 234 at 249 [47]; 399 ALR 214 at 227 (footnotes omitted).

¹⁸⁹ (1990) 171 CLR 232 at 282-283.

appellant to be held in "residential detention" pending his removal from Australia. Shortly after the primary judge's orders were made, the then Minister for Home Affairs (now the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs), the first respondent to these appeals ("the Minister"), took action that had the effect of removing the possibility of any further dispute between herself and the appellant about the application of s 198AD(2) to the appellant's case, by making a determination under s 198AE that s 198AD did not apply to him. Considering the primary judge to have erred, the Commonwealth parties filed notices of appeal against the primary judge's orders.

131 The dispute between the parties at first instance was replaced by a dispute between the parties as to the correctness of the primary judgment (or at least a dispute raised by the Commonwealth parties to the same effect). Putting aside the question of costs and the fact that the orders were valid and binding until set aside¹⁹⁰, that dispute had no practical significance for the parties as between themselves given that the issue concerning the applicability of s 198AD(2) had been resolved by the Minister's determination. However, as the Full Court recognised, the proceedings raised "matters of general principle and wider application, of importance to [the Commonwealth parties] but in substance largely unrelated to any ongoing effect of the primary judge's orders for the [appellant]"¹⁹¹.

132 In United States jurisprudence on concepts of justiciability, which strongly influenced the drafting of the Australian *Constitution*¹⁹², the doctrine of "mootness" has been described as the "doctrine of standing in a time frame"¹⁹³. The general principle is that an actual controversy must exist at all stages of federal proceedings, at both trial and appellate levels¹⁹⁴. It is contested whether that

190 *New South Wales v Kable* (2013) 252 CLR 118 at 133 [32].

191 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AZC20* (2022) 290 FCR 149 at 154 [19].

192 See Buss, "Andrew Inglis Clark's Draft Constitution, Chapter III of the Australian Constitution, and the Assist from Article III of the Constitution of the United States" (2009) 33 *Melbourne University Law Review* 718; Burmester, "Limitations on Federal Adjudication", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System* (2000) 227 at 228.

193 Chemerinsky, *Federal Jurisdiction*, 8th ed (2021) at 143, quoting Monaghan, "Constitutional Adjudication: The Who and When" (1973) 82 *Yale Law Journal* 1363 at 1384.

194 See *United States Parole Commission v Geraghty* (1980) 445 US 388 at 397, quoting Monaghan, "Constitutional Adjudication: The Who and When" (1973) 82

doctrine is derived from the constitutional limitation of judicial power to the determination of cases and controversies, or from prudential considerations such as saving the court's institutional capital for cases "truly requiring decisions"¹⁹⁵. To the extent that the doctrine of mootness has constitutional foundations in Art III of the United States Constitution, these were not identified by the Supreme Court until 1964¹⁹⁶.

133 American commentators have identified the "flexible character" of the mootness doctrine, which is subject to various exceptions to allow courts to proceed to determine an otherwise factually "moot" matter, such as where an issue is found to be a wrong which is "capable of repetition yet evading review"¹⁹⁷. Recently, the Supreme Court has arguably relaxed the doctrine of mootness further to preserve its power to decide "major questions" concerning controversial political issues¹⁹⁸.

134 This discretionary approach is consistent with the recognised power of the Federal Court of Australia to either stay or proceed to hear a case on appeal where the underlying factual controversy has become "moot", as discussed above. A similar approach is evident in the United Kingdom, albeit in a context not affected by the stricter constitutional constraints of a "matter" requirement¹⁹⁹.

Yale Law Journal 1363 at 1384; Chemerinsky, *Federal Jurisdiction*, 8th ed (2021) at 143.

195 Chemerinsky, *Federal Jurisdiction*, 8th ed (2021) at 144; Lee, "Deconstitutionalizing Justiciability: The Example of Mootness" (1992) 105 *Harvard Law Review* 603.

196 *Liner v Jafco Inc* (1964) 375 US 301, cited in Lee, "Deconstitutionalizing Justiciability: The Example of Mootness" (1992) 105 *Harvard Law Review* 603 at 611-612.

197 Chemerinsky, *Federal Jurisdiction*, 8th ed (2021) at 145, 150-151. See also Hall, "The Partially Prudential Doctrine of Mootness" (2009) 77 *George Washington Law Review* 562.

198 Heppner, "Let the Right Ones In: The Supreme Court's Changing Approach to Justiciability" (2023) 61 *Duquesne Law Review* 79 at 90-92, citing *West Virginia v Environmental Protection Agency* (2022) 142 S Ct 2587.

199 See *R v Board of Visitors of Dartmoor Prison; Ex parte Smith* [1987] QB 106 at 115; *R v Secretary of State for the Home Department; Ex parte Salem* [1999] 1 AC 450 at 456; *MS (Pakistan) v Secretary of State for the Home Department* [2020] 1 WLR 1373 at 1378 [10]; [2020] 3 All ER 733 at 739.

135 The cessation of the practical significance of court proceedings has obvious implications for cases heard in the original jurisdiction, particularly where the substantive issue in the proceeding no longer has any apparent significance for the plaintiff or any other person. In *Unions NSW v New South Wales* ("*Unions [No 3]*"), this Court found that it ceased to have original jurisdiction to decide whether a law creating an offence was constitutionally invalid in its historical operation²⁰⁰. The impugned law was repealed shortly before the Court's scheduled hearing²⁰¹. The plaintiffs were not the subject of enforcement action for any past breach of the repealed law but claimed to have standing arising from their contention that their past compliance with the repealed law was unnecessary and their apprehension that the law might be re-enacted in the future²⁰². Recognising that the requirement of standing to seek declaratory relief was "subsumed within the constitutional requirement of a 'matter'"²⁰³, the Court found that the plaintiffs lost standing when the law was repealed²⁰⁴. As the plaintiffs were no longer restricted in their freedom of action or activities by the law, and had no expectation of being affected by that provision in future elections, the "only advantage that the plaintiffs would achieve from a declaration of invalidity would be the satisfaction of a statement by the Court validating their contentions of an historical wrong"²⁰⁵. On that basis, the Court no longer had jurisdiction to hear and determine the plaintiffs' claim with respect to the purported invalidity of the law.

136 However, the reasoning in *Unions [No 3]* does not readily map onto the Commonwealth parties' appeals to the Full Court in these proceedings. In contrast with the lack of ongoing significance of the issues raised in *Unions [No 3]* to the plaintiffs or any other person, the issues decided by the Full Court have continuing significance for the Commonwealth parties and others in relation to the duty in s 198AD(2) of the *Migration Act*, the meaning of "immigration detention" in that Act and the scope of the Federal Court's power in s 23 of the Federal Court Act. As earlier noted, the invocation of federal appellate jurisdiction does not require the identification of a matter distinct from the matter as instituted at first instance. The appeals were concerned with whether there was error in the exercise of original jurisdiction by the Federal Court, concerning subject matter defined by

200 (2023) 97 ALJR 150 at 159-160 [27]-[28]; 407 ALR 277 at 286.

201 *Unions [No 3]* (2023) 97 ALJR 150 at 156 [10]; 407 ALR 277 at 280.

202 *Unions [No 3]* (2023) 97 ALJR 150 at 159-160 [25]-[27]; 407 ALR 277 at 285-286.

203 *Unions [No 3]* (2023) 97 ALJR 150 at 157 [15]; 407 ALR 277 at 282.

204 *Unions [No 3]* (2023) 97 ALJR 150 at 159 [24]-[25]; 407 ALR 277 at 285.

205 *Unions [No 3]* (2023) 97 ALJR 150 at 159 [26]; 407 ALR 277 at 285, citing *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530.

reference to the heads of jurisdiction in either s 75 or s 76 of the *Constitution*, and in relation to a dispute that gave rise to a justiciable controversy concerning concrete rights and liabilities. In that way, the Federal Court's appellate jurisdiction was invoked with respect to a "matter".

The supervisory function of an appeal

137 The remaining question is whether the appeals were "divorced from any attempt to administer"²⁰⁶ the law so as to deny appellate jurisdiction to decide the appeals. Accepting the necessary connection between the exercise of the judicial function and the administration of the law²⁰⁷, that connection might readily be found in the Full Court's supervisory function over the exercise of original jurisdiction.

138 *Attorney-General (Cth) v Alinta Ltd*²⁰⁸ illustrates a broad approach to the identification of this Court's appellate jurisdiction, and the absence of any requirement that the "adequate adversarial nature of the dispute"²⁰⁹ be demonstrated by a continuing controversy between the parties. In *Alinta*, special leave to appeal to the High Court was granted from the Full Federal Court's declaration that s 657A(2)(b) of the *Corporations Act 2001* (Cth) was invalid, in the context of a dispute between two parties over a merger blocked by the Takeovers Panel. After the underlying commercial controversy between the parties was settled and the applicants sought to discontinue the proceedings, the Attorney-General for the Commonwealth (who had intervened in the Full Federal Court as of right) was the only party who retained an interest in contesting the declaration. Hayne J, with whom Gleeson CJ and Gummow J agreed, accepted that the Attorney-General had an interest in the continuing "constitutional controversy" which was "neither merely hypothetical nor moot"²¹⁰. Leave was granted to counsel to appear as amici curiae and submit arguments supporting the declaration of invalidity²¹¹.

139 In this case, the Commonwealth parties had a real, practical interest in correcting the alleged errors of the primary judge before the Full Court because of their precedential significance for existing disputes between the Commonwealth

²⁰⁶ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

²⁰⁷ *Clubb* (2019) 267 CLR 171 at 216-217 [136].

²⁰⁸ (2008) 233 CLR 542.

²⁰⁹ *CGU* (2016) 259 CLR 339 at 351 [27].

²¹⁰ *Alinta* (2008) 233 CLR 542 at 568 [67] (footnote omitted).

²¹¹ *Alinta* (2008) 233 CLR 542 at 550 [1].

and third parties and, potentially, for the continuing litigation between the Commonwealth parties and the appellant. At all times, the Minister had a constitutional responsibility to administer the relevant laws. The Minister's interest in the correction of error extended beyond the effect of the orders in this particular case, and included an interest in correcting an allegedly erroneous decision that would otherwise operate as a precedent. Unlike the position in *Alinta*, the appellant here, who had been a party to the original controversy, was willing to act as contradictor on the appeals. Further, there was no lack of concrete facts upon which the issues raised by the appeals were able to be decided.

140 In *O'Toole*, Deane, Gaudron and McHugh JJ expressed "serious doubts" about the unnecessary confinement of the appellate jurisdiction conferred by s 73 of the *Constitution* and noted that²¹²:

"it cannot be justified by the considerations relating to the integrity and independence of judicial functions and powers which underlie the decision in *In re Judiciary and Navigation Acts* and which preclude jurisdiction being conferred upon this Court to furnish to the Executive an advisory opinion divorced from the administration of justice in relation to an actual matter".

The observation applies equally in this case.

141 Shortly after *O'Toole*, in *Mellifont v Attorney-General (Q)*, a majority of this Court held that the Court's appellate jurisdiction under s 73 of the *Constitution* extended to an appeal from an opinion of the Queensland Court of Criminal Appeal on a point of law referred under s 669A of the *Criminal Code* (Qld)²¹³. The questions of law concerned the trial judge's rulings on the materiality of evidence, in circumstances where the prosecution had filed a *nolle prosequi* before the jury handed down its verdict. The plurality concluded that the Court of Criminal Appeal's decision on the reference "was made with respect to a 'matter' which was the subject-matter of the legal proceedings at first instance and was not divorced from the ordinary administration of the law"²¹⁴. In so doing, the plurality distinguished the decision from the declaration sought in *In re Judiciary and Navigation Acts*, which they described as "academic, in response to an abstract

²¹² (1990) 171 CLR 232 at 284-285.

²¹³ (1991) 173 CLR 289.

²¹⁴ *Mellifont* (1991) 173 CLR 289 at 305.

question, and hypothetical in the sense that it was unrelated to any actual controversy between parties"²¹⁵. Their Honours stated²¹⁶:

"The fundamental point ... is that s 669A(2) enables the Court of Criminal Appeal to correct an error of law at the trial. It is that characteristic of the proceedings that stamps them as an exercise of judicial power and the decision as a judgment or order within the meaning of s 73. Were it otherwise, the appellate jurisdiction of this Court would not extend to a review of decisions of courts of criminal appeal and full courts under s 669A(2) and similar provisions in other jurisdictions which have as their object the giving of authoritative decisions on questions of criminal law for the better administration of justice."

142 *Mellifont* was concerned with a specific referral procedure on questions of law in a criminal trial and whether answering such questions involved the exercise of judicial power. The case did not identify a separate question as to whether the exercise of the Court of Criminal Appeal's jurisdiction, or the subsequent invocation of this Court's appellate jurisdiction, was divorced from an attempt to administer the law. In *Director of Public Prosecutions (SA) v B*, Gaudron, Gummow and Hayne JJ confirmed that it was "central to the reasoning" of the majority in *Mellifont* that the Court of Criminal Appeal's decision was "a decision made with respect to a 'matter' which was the subject matter of the legal proceedings at first instance"²¹⁷. Their Honours noted that the majority in *Mellifont* expressly did not rely on the prospect of the prosecution filing a fresh indictment against the appellant in concluding that the Court of Criminal Appeal's answers were a judgment or order for the purpose of an appeal within the meaning of s 73²¹⁸.

143 *Mellifont* consequently demonstrates that there may be a "matter" for the purposes of appellate jurisdiction in the absence of an ongoing dispute between parties who will be affected by the order of the appellate court. The subject matter in *Mellifont* was plainly "justiciable in character", namely the alleged errors of law by the trial judge. There was no lack of concreteness and the State appeared as a contradictor.

215 *Mellifont* (1991) 173 CLR 289 at 305.

216 *Mellifont* (1991) 173 CLR 289 at 305.

217 (1998) 194 CLR 566 at 576 [10].

218 *B* (1998) 194 CLR 566 at 575-576 [9], citing *Mellifont* (1991) 173 CLR 289 at 306, 326.

144 In *Re McBain; Ex parte Australian Catholic Bishops Conference*, Gaudron and Gummow JJ further explained the import of *Mellifont* as follows²¹⁹:

"The decision of the Court of Criminal Appeal was held to involve the exercise of judicial power by that Court because the procedure was directed to correcting errors in a criminal trial. Thus, the decision fell within the words 'judgments, decrees, orders' in s 73 of the Constitution and this Court had jurisdiction to entertain an appeal from it."

145 As a matter of principle, the Full Court's decision in this case was no less an exercise of judicial power than the Court of Criminal Appeal's decision in *Mellifont* simply because its process was directed to correcting errors of a single judge of the Federal Court instead of errors in a criminal trial. Moreover, and unlike *Mellifont*, these appeals to the Full Court clearly were from orders that continued to bind the parties. Regardless of the efficacy of the primary judge's orders, they remained valid unless and until set aside and included a judicial command to a member of the executive government, underpinned by a declaration as to the relevant statutory provision regulating the appellant's status. As a matter of principle, the judicial act of setting aside orders of the primary judge is properly characterised as an act of administering the relevant law²²⁰ that follows upon the answers to questions that arise for consideration upon an appeal. In that way, the appeals to the Full Court involved a "matter" at all times and never called upon that Court to exercise judicial power divorced from the administration of the law.

Outstanding controversies before the Full Court

146 Even if it is not accepted that the subject matter of the proceedings below and the correction of error therein is sufficient to sustain a "matter" at the appellate level, there remained outstanding controversies for determination by the Full Court notwithstanding the Minister's determination.

Controversy about Federal Court's power to make home detention orders

147 The purpose of the "matter" requirement is to establish the suitability of proceedings as the object of the exercise of the judicial power of the Commonwealth. The characterisation of a dispute between parties as a "matter" may, in some circumstances, be described at different levels of generality. At a very high level of generality, the appellant and the Commonwealth parties were, and continue to be, in dispute about the circumstances of the appellant's detention

219 (2002) 209 CLR 372 at 409 [74].

220 cf *Commonwealth Scientific and Industrial Research Organisation v Perry* [No 2] (1988) 53 SASR 538 at 552, 557; *Coffs Harbour Environment Centre Inc v Minister for Planning* (1994) 84 LGERA 324 at 336.

by the Commonwealth. The appellant, who has now been in immigration detention for a decade, claims that the Secretary has failed in his duties to remove him from Australia and thereby to release the appellant from immigration detention. One aspect of that dispute concerns the power of the Federal Court to compel the Secretary to detain the appellant at an address stipulated by the Court, outside of an immigration detention facility²²¹.

148 The currency of that aspect of the dispute was sufficiently demonstrated by the appellant's claim in this Court to restore the primary judge's orders (which included the home detention orders, notwithstanding they would have no effect), together with his claim for home detention orders in relevantly identical terms in his extant proceedings seeking to compel the Secretary to comply with s 198 of the *Migration Act*. As the Full Court's judgment demonstrates, the question of power was capable of being decided by reference to the facts found by the primary judge.

Costs and appellate jurisdiction

149 Further, there was a live controversy before the Full Court²²² as to who should pay the costs of the proceeding before the primary judge and, consequently, the costs of the appeals.

150 As costs ordinarily follow the event in proceedings brought in the Federal Court, an appeal will typically involve a controversy as to who should pay the costs of the proceeding at first instance. An appeal seeking to set aside an order as to costs involves a real issue that may be determined by reference to the merits of the appeal, and that is or may form part of a "matter"²²³. In this case, at the hearing of the Full Court appeals on 8 February 2022, the Commonwealth parties' counsel undertook to seek instructions whether the Commonwealth parties would bear the costs of the appeals and would not seek to disturb the costs orders made in each proceeding below²²⁴. On 25 March 2022, the Commonwealth parties filed amended notices of appeal, each proposing an order that the Commonwealth parties pay the appellant's costs of the appeal, and noting that the Commonwealth parties did not seek to disturb the costs orders made by the primary judge.

151 If costs had been the only issue in the appeals, then a question may have arisen on the filing of the amended notices of appeal as to whether the Full Court

221 *AZC20* (2022) 290 FCR 149 at 165-170 [79]-[104].

222 *AZC20* (2022) 290 FCR 149 at 154 [18]-[20].

223 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 61-62 [19]-[21]; *Bonan* (2007) 160 FCR 29 at 32 [10].

224 *AZC20* (2022) 290 FCR 149 at 154 [20].

should have delivered its judgment on the substantive issues²²⁵. No doubt, the appellant would have been concerned to obtain the costs orders that the Commonwealth parties now sought in the appellant's favour. Putting aside the substantive questions, the Full Court would have retained jurisdiction to make orders concerning costs, and a "matter" would have subsisted.

Conclusion

152 I would dismiss the appeals insofar as the appellant contended that the Full Court lacked jurisdiction. As this is a minority view and the Full Court's orders will be set aside, it is unnecessary for me to say anything about the other issues raised in the appeals.

225 *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* (2021) 290 FCR 298 at 301-302 [3]-[11].

