



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: H2/2021  
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#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
HOBART REGISTRY

BETWEEN: **HOBART INTERNATIONAL AIRPORT PTY LTD**  
Appellant  
and  
**CLARENCE CITY COUNCIL**  
First Respondent

10 **THE COMMONWEALTH OF AUSTRALIA**  
Second Respondent

### APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

#### Part I: Certification

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

#### Part II: Outline of propositions

2. Summary of relevant factual background: AS [1]-[15]. The administrative and mechanistic step of the Council providing a notice of the rate equivalent amount does not render the Council a participant nor suffice for standing.

#### 20 Preliminary submissions as to matter and standing

3. The legal concept of standing retains significance either as a necessary component of a matter or, in appropriate cases, as a discrete requirement: AS [31], [46] & [56]; *Kuczborski* (2014) 254 CLR 51 at [5]; *Truth About Motorways* (2000) 200 CLR 591 at 611 [45]-[46] & 637 [121]-[122]. Further, standing is “a house of many rooms” and its content is shaped by the nature and subject-matter of the litigation: AS [31], *Bateman’s Bay* (1998) 194 CLR 247 at 280 [92]; *Truth About Motorways* at 637 [122].
4. The “real” or “sufficient” interest test was developed (a) in the context of disputes between those whose rights were sought to be vindicated, as in *Russian Commercial and Industrial Bank* [1921] 2 AC 438 and *Forster v Jododex* (1972) 127 CLR 421 eg at 435 “where it is a question of defining the rights of two parties”; or (b) to identify standing to vindicate a public right or duty or with respect to a public wrong: AS [31]-[32], [59]-[60]; Reply to Commonwealth [15]; *Australian Conservation Foundation* (1980) 146 CLR 493 at 524, 526, 547; *Abebe* (1999) 197 CLR 510 at 555 [118]; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 681; *Bateman’s Bay* at 257-262, 280-281; *Truth About Motorways* at 612 [50] & 637 [121].

5. Standing in *Edwards v Santos Ltd* (2011) 242 CLR 21 at 435-436 [34] & [37] was based upon an allegedly erroneous exercise of a public law power to grant a petroleum authority (“*claiming that there is no power in the Minister*”): AS [40].
6. Where the only subject matter for determination is private contractual rights and obligations, the “real” or “sufficient” interest test requires that there be some present or contingent right or obligation to be vindicated by the application for declaratory relief: AS [59]-[60], albeit that there is no need to have an *existing* legal right nor for the parties’ rights/obligations to be correlative.

### **Errors in judgment of FFC**

- 10 7. The FFC erred in its analysis and findings: FFC [88], [90]-[93] (as to privity), [142]-[143] (as to controversy) and [147]-[149], [151], [183] (as to sufficient interest).

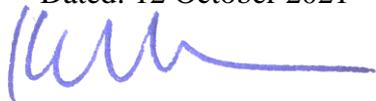
### **The doctrine of privity of contract**

8. The doctrine of privity of contract is engaged where a third party to a contract seeks declaratory relief in respect of the meaning or effect of that contract (AS [16]-[30]) and as found by the FFC, the Council seeks to “*validate an entitlement to ‘benefits ... of a contract’*”: FFC [88] AB 125. This is for the following reasons.
9. As a matter of principle, there is no proper basis to distinguish applications for declarations from other forms of relief: AS [20].
10. Jurisprudence in this Court stands against the conclusion that privity is not engaged  
20 where a third party seeks to take advantage of a contract, compel its performance or enforce its terms: AS [17]-[18], [27]; see in particular *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at [67], [92]-[96].
11. The distinction between executory and declaratory judgments does not support a conclusion that privity is not engaged as the declaratory relief sought here is a means of enforcing a contractual obligation. A declaration carries with it liberty to apply and the Court may enforce it: AS [21]-[24]; *Royal Insurance Co Ltd v Mylius* (1926) 38 CLR 477 at 497; *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* (2018) 98 NSWLR 889 at [35].
12. The Court’s statutory power to grant declaratory relief does not supply the  
30 underlying “right” to be vindicated, contrary to FFC [91] AB 127: AS [25]-[28].

### Matter and standing

13. There is no matter and the Council does not have standing as it has no legal right or interest, actual or contingent, to be vindicated and there is positive agreement between the contracting parties. The FFC erred in finding to the contrary.
14. The FFC's conclusion is inconsistent with *Abebe* at 527-528 [31]-[32]: AS [45].
15. The present case lacks the two factors essential to the finding of a matter and standing in *CGU* where there was in any event an extant controversy which was found to include the claims against the insurers, being that the contracting parties were in dispute as to their contractual rights and the liquidators sought a declaration to vindicate rights to priority under s 562 of the *Corporations Act 2001* (Cth) and s 117 of the *Bankruptcy Act 1986* (Cth): AS [52], [57]-[58]; *CGU* at 357 [42], 363 [64]-[67], 369-371 [90]-[96], 373 [102], 376 [109].
16. The FFC placed erroneous reliance upon *Truth About Motorways* at FFC [137] AB 142. Whilst mutuality of right and liability is not a universal requirement, that does not support the existence of a matter where the applicant has no legal right or duty to be vindicated and where there are no public rights or duties to be vindicated.
17. The FFC placed erroneous reliance upon *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398, *Aussie Airlines* (1996) 68 FCR 406 and *Edwards*: AS [37]-[42], [49]-[53]. In *Ashmere Cove* there was an extant controversy of which the dispute between the liquidator and the insurers formed part, the investors had contingent rights to be vindicated, and the Court relied on the dispute between insured and insurer: at 410 [51]-[54], 411 [61]. In *Aussie Airlines* there was a dispute between the contracting parties: at 411E-F & 420. Lockhart J found that the declaration went to Aussie Airlines' "right to carry on ... business" which was consistent with the lease "compelling" the grant of a sublease depending on Aussie Airlines' legal status: at 407G; see also Nettle J in *CGU* FN 120 p 373 "establishing the claimant's legal status or entitlement". As to *Edwards*, see [5] above.
18. The FFC's conclusion creates unacceptable uncertainty and lack of coherence: AS [36] & [43].

30 Dated: 12 October 2021



Kristina Stern



Louise Coleman