HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

HOBART REGISTRY

BETWEEN: HOBART INTERNATIONAL AIRPORT PTY LTD

Appellant

and

CLARENCE CITY COUNCIL

First Respondent

and

THE COMMONWEALTH OF AUSTRALIA

Second Respondent

SUBMISSIONS OF THE SECOND RESPONDENT

PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II CONCISE STATEMENT OF ISSUES

2. Two issues arise for determination.

   2.1. Is there a "matter" in federal jurisdiction notwithstanding the parties to the lease the subject of the proceeding are not in dispute and the third party seeking relief does not itself assert a right, duty or liability under the lease?

   2.2. Does the third party lack standing to seek declaratory relief concerning the interpretation of the lease, whether by reason of the privity of contract doctrine or otherwise?

PART III SECTION 78B NOTICES

3. The Commonwealth is satisfied that notice given by the Appellant complies with s 78B of the *Judiciary Act 1903* (Cth).

PART IV MATERIAL FACTS

4. The Second Respondent (the **Commonwealth**) does not dispute the facts in AS [8]-[12] subject to the qualifications and additions set out in RS [5]-[6].

PART V ARGUMENT

5. The leases in issue in this appeal and the related appeal (H2/2021) were made against the background of the privatisation of federal airports in the 1990s (FC [3], [10]). As part of this privatisation process, the *Airports Act 1996* (Cth) (***Airports Act***) and the *Airports (Transitional) Act 1996* (Cth) (***Transitional Act***) were enacted (FC [10]). The Commonwealth's role as owner of airport sites meant that the First Respondent in each appeal (the **Councils**) and those in a like position could not levy rates or charges in respect of the sites (FC [3], [12]). In order to address what was understood to be a competitive imbalance created by that circumstance as between tenants of the new operators of the airports and their competitors, to give effect to an existing policy of "competitive neutrality" (FC [12]-[13]), and to maintain long-standing Commonwealth policy and practice,[1] a contractual mechanism was devised to require payments to be made to the Councils (FC [3]). These proceedings concern the Councils' right to seek declaratory relief in relation to the construction of that contractual mechanism (which is found in clause 26.2(a) of the lease). As this context makes clear, while the Council is not a party to the lease, it is a long way from being a stranger to it. Nor is the proceeding accurately described as involving "purely private rights" (cf AS [32]).

6. For the reasons developed below, the Commonwealth submits the Council's proceeding satisfies the requirement in Ch III that there be a "matter", there being a justiciable dispute concerning the meaning of clause 26.2 of the lease. It is not to the point that the Council does not have enforceable rights under the lease, because *Truth About Motorways Pty Ltd*

[1] See, eg, Finance Direction 13.22 (as at 1 July 1980), made under the *Audit Act 1901* (Cth) ss 34A(1) and 72 and *Finance Regulation* reg 127A, which provided that payments equivalent to local council rates "may be made to local authorities in respect of property owned or leased by the Commonwealth". Further, as set out in FAC Policy Manual vol 8 (RFM p 60), in 1987 the then Minister for Transport and Communications wrote to the Federal Airports Corporation (FAC) that it was a long standing Government policy that the Commonwealth make payments equivalent to rates to local authorities in certain circumstances, and saying that it had always been the government's intention that this policy would continue to apply in relation to Federal Airports. The Manual records that the FAC subsequently agreed to continue making payments in lieu of rates for areas on airport which were used for commercial activities and for which the FAC received an annual rent, and that that policy remained unchanged as at October 1994.

v Macquarie Infrastructure Investment Management Ltd (***Truth About Motorways***)[2] establishes that a "matter" can exist even when the grant of relief will not affect the rights, duties or liabilities of the applicant (provided it will determine a party's rights, duties or liabilities). Of course, where the grant of relief will not affect the applicant's rights, duties or liabilities, it may be difficult for the applicant to establish a sufficient interest to give it standing to obtain that relief. But that is not a difficulty here, the Council plainly having a sufficient interest to obtain declaratory relief concerning the interpretation of clause 26.2(a). In those circumstances, the doctrine of privity of contract is not relevant, for that doctrine applies only to prevent a non-party to a contract from suing "on" or "upon" the contract.

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The matter requirement

7. Although framed by the Appellant as the third issue arising (AS [5]), the matter requirement is the central issue raised by this appeal. For that reason, it is appropriately addressed at the outset.

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8. Chapter III of the Constitution makes plain that federal jurisdiction can exist only in relation to "matters". A "matter" is a controversy about rights, duties or liabilities which will be quelled by the application of judicial power.[3] The word "matter" was used in Ch III to describe a "very wide variety of controversies".[4] It "was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice".[5] The 1898 Melbourne Convention was told that it was used because "[w]e want the very widest word we can procure in order to embrace everything which can possibly arise within the ambit"[6] of the heads of federal jurisdiction. The breadth of the word creates reason for considerable caution before extrapolating requirements from any particular area of law (such as the law of contract) into the constitutional conception of a "matter".

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2 (2000) 200 CLR 591.

3 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 (***Re McBain***) at [242]-[243] (Hayne J). See also, *Re McBain* at [61]-[62] (Gaudron and Gummow JJ); *Palmer v Ayres* (2017) 259 CLR 478 at [27] (Kiefel, Keane, Nettle and Gordon JJ); *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [29] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

4 *Truth About Motorways* (2000) 200 CLR 591 at [185] (Hayne J); see also [42] (Gaudron J), [100] and [104] (Gummow J), [209]-[210] (Callinan J).

5 *South Australia v Victoria* (1911) 12 CLR 667 at 675 (Griffith CJ).

6 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 31 January 1898, at p 319 (Josiah Symon QC, Chairman of the Judiciary Committee). See also Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at p 765.

9. The nature and scope of the controversy that constitutes a "matter" has a significant evaluative element.[7] As Mason, Murphy, Brennan and Deane JJ explained in *Fencott v Muller*: "What 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".[8] It also requires consideration of how the proceedings have been conducted, the framing of the issues in dispute in the pleadings and the relief sought.[9] Even where a dispute relates to the interpretation or effect of a contract, it should not be assumed that "the boundaries of the 'justiciable controversy' … are determined by the contractual relationship".[10]

10. The Appellant contends (AS [48]) that the Full Court erred in two ways in applying the matter requirement: *first*, in finding that a justiciable controversy may exist even where the contracting parties are in agreement regarding the interpretation of the contract; and *secondly*, in finding that the rights, duties and liabilities of the parties to the lease as between each other were sufficient to found the existence of a "matter" despite the absence of any right asserted by or to be vindicated by the Council.

No requirement that the contracting parties must be in dispute

11. As to the first asserted error, the Full Court rejected the Appellant's argument that there can be no "matter" in relation to a claim for declaratory relief concerning the interpretation of a contract unless the contracting parties are themselves in dispute: FC [137]-[138]. The Appellant's challenge to that holding seemingly rests not on an argument of principle, but on an asserted absence of authority to support the Full Court's approach (AS [49]-[52]). That criticism cannot be made good.

12. As the Full Court recognised,[11] in *Truth About Motorways* this Court held that the word "matter" in Ch III does not require the "immediate right, duty or liability to be established

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7 *Fencott v Muller* (1983) 152 CLR 570 (***Fencott***) at 608 (Mason, Murphy, Brennan and Deane JJ). The evaluative element in identifying a matter "is illustrated by, but not confined to" the delineation of the scope of accrued jurisdiction: *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 (***CGU***) at [30] (French CJ, Kiefel, Bell and Keane JJ).

8 *Fencott* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ), quoted with approval in *CGU* (2016) 259 CLR 339 at [30] (French CJ, Kiefel, Bell and Keane JJ); *Palmer v Ayres* (2017) 259 CLR 478 at [26] (Kiefel, Keane, Nettle and Gordon JJ). See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [139] (Gummow and Hayne JJ).

9 *Fencott* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ).

10 *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 (***Ashmere Cove***) at [49].

11 At FC [137], the Full Court referred specifically to *Truth About Motorways* (2000) 200 CLR 591 at [76], [77] and [122] (Gummow J), [183] (Hayne J) and [203]-[204] (Callinan J).

by the determination of the Court"[12] to be one in which the parties to a proceeding have correlative (or mutual or reciprocal) interests.[13] As Nettle J put it in *CGU*, in a passage also relied upon by the Full Court (FC [137]): "it is not a requirement of a 'matter' that the right, duty or liability exist as between opposing parties".[14] Indeed, Ch III does not require the grant of relief to affect the applicant's legal interests at all.[15] That conclusion was critical to the result in *Truth About Motorways*, for it was the reason the "matter" requirement does not prevent Parliament from empowering "any person" to bring a proceeding that will determine a right, duty or liability of some other person. Once that point is recognised, it is apparent that it is important to keep distinct the requirement that there be a matter (ie a controversy concerning an immediate right, duty or liability) and the applicant's interest in the resolution of that controversy. While the applicant must have a sufficient interest in the controversy to give the applicant standing with respect to the particular relief that is sought, that interest need not involve the same right, duty or liability as is the subject of the controversy (or, indeed, any legal rights at all: see FC [140]). To the extent that AS [44(c)], [53] contends that a matter requires a "controversy between the [contracting] parties", it cannot be reconciled with *Truth About Motorways*.

13. In addition to the High Court authorities, the Full Court correctly recognised that its rejection of the submission that a controversy as to the interpretation of a contract could not involve a "matter" unless the contracting parties themselves were in dispute was also supported by *Ashmere Cove* (FC [138]). In that case, insurers argued that there was no "matter" because there was no dispute between the parties to the insurance policy, and therefore that investors who were not party to the insurance contracts (but who stood to benefit if the insurance policy applied) could not succeed. The Full Federal Court did not accept that there was no dispute between the parties to the insurance policy as to whether it applied.[16] However, it also held that, even if there was no dispute between the parties

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

13 *Truth About Motorways* (2000) 200 CLR 591 at [76]-[77], [104]-[105], [122] (Gummow J), [183]-[185] (Hayne J), [203]-[204], [214] (Callinan J); see also *Re McBain* (2002) 209 CLR 372 at [67] (Gaudron and Gummow JJ).

14 *CGU* (2016) 259 CLR 339 at [85], citing *Re McBain* (2002) 209 CLR 372 at [67] (Gaudron and Gummow JJ).

15 *Truth About Motorways* (2000) 200 CLR 591 at [44] (Gaudron J), [211] (Callinan J). See also *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ); *Croome v Tasmania* (1997) 191 CLR 119 (***Croome***) at 124-126 (Brennan CJ, Dawson and Toohey JJ); *Re Culleton* (2017) 91 ALJR 302 at [25]-[27] (Gageler J).

16 *Ashmere Cove* (2008) 166 FCR 398 at [61].

to the insurance policy, there may nevertheless be a justiciable controversy.[17] That followed because the Court did not accept that "the boundaries of the 'justiciable controversy' … are determined by the contractual relationship".[18] The Court said that an "emphasis on the contractual relationship arising out of the Policy tends to obscure the fact that a single controversy is capable of embracing far more than a dispute between the parties to a particular contract".[19]

14. The Full Court was therefore correct to hold that a justiciable controversy could exist with respect to the interpretation of clause 26.2(a) of the lease notwithstanding that the parties to the lease were in agreement as to its interpretation (FC [137]-[138]).

The Full Court was correct in identifying the relevant right, duty or liability

15. As to the second asserted error, the Appellant contends that the Full Court erred in finding there was a relevant right, duty or liability sufficient to found the existence of a "matter" (AS [54]). In support of that argument, the Appellant seeks to draw a sharp distinction between controversies involving public law rights and obligations and those involving private law rights and obligations: AS [55]-[56]. It argues that, where a third party commences litigation in relation to a contract, the third party must have an interest "over and above" the expectation of a benefit under the contract for there to be a "matter" (AS [57]). Specifically, it asserts that the applicant in a private law case must itself assert or claim a right, duty or liability (AS [59]), such that if a third party raises a question about a private contract, there is "no relevant wrong asserted and no legal remedy for that wrong available at the suit of the person claiming relief" (AS [60]). That is said to have the result that there is no "matter".

16. Those submissions should be rejected. The reasoning in *Truth About Motorways* denies that the term "matter" has a different content depending on whether proceedings involve private or public rights. That is demonstrated not just by the Court's emphasis on the breadth of the term "matter", but also by the fact that the Court drew on examples from all areas of the law, including criminal law and public law, to illustrate that a matter can exist even when the applicant for relief does not have a direct or substantial interest in the rights, duties or liabilities that are to be determined. In particular, various Justices pointed

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17 *Ashmere Cove* (2008) 166 FCR 398 at [50].
18 *Ashmere Cove* (2008) 166 FCR 398 at [49].
19 *Ashmere Cove* (2008) 166 FCR 398 at [49].

out that criminal proceedings, and claims for habeas corpus or other writs than can be sought by a stranger, involve "matters", even though it cannot be said that the immediate right, duty or liability to be determined in such proceedings is owed to the person who commences the proceeding.[20] Those examples illustrate Gummow J's point that "it is necessary to keep clearly in view the range over which ss 75 and 76 of the Constitution operate … Not all 'matters' which attract the exercise of the judicial power of the Commonwealth involve the assertion by the plaintiff of a recognised private right against apprehended or actual violation by the defendant".[21] And, as Hayne J explained, once it is recognised that sometimes the word "matter" does not require an applicant for relief to have a direct or immediate interest in the rights, interests or liabilities to be determined by the exercise of judicial power, there is no satisfactory basis to imply such a requirement with respect to some proceedings but not others.[22]

17. That the "matter" requirement is the same for both public and private law is confirmed by Nettle J's reasons in *CGU*. In that case, while any claim by the liquidators upon the proceeds of a policy of insurance depended on s 562 of the *Corporations Act 2001* (Cth),[23] the declaration sought by the liquidator concerned a separate and anterior private law question – whether a liability to indemnify arose under insurance policies to which the liquidator was not a party.[24] Yet, despite that private law context, Nettle J held that "it is not a requirement of a 'matter' that the right, duty or liability exist as between opposing parties".[25]

18. In addition to being inconsistent with authority, the distinction between "public law" cases and "private law" cases that the Appellant seeks to introduce is not a stable or appropriate distinction for constitutional purposes. Proceedings involving private law rights can raise questions about public duties and obligations, and vice versa (cf AS [59]). These proceedings are a good example. Although they involve a lease, one of the parties to that lease is the Commonwealth; the lease was granted pursuant to statute (specifically, s 22 of the *Transitional Act*); and clause 26.2(a) was included in the lease in order to give effect to a governmental policy. All of those features give these proceedings a distinctly

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20 *Truth About Motorways* (2000) 200 CLR 591 at [44] (Gaudron J), [94]-[95], [122] (Gummow J), [183]-[184] (Hayne J), [203] (Callinan J). See also [2], [17], [20] (Gleeson CJ and McHugh J).

21 *Truth About Motorways* (2000) 200 CLR 591 at [104].

22 *Truth About Motorways* (2000) 200 CLR 591 at [184].

23 *CGU* (2016) 259 CLR 339 at [10]-[11] (French CJ, Kiefel, Bell and Keane JJ).

24 *CGU* (2016) 259 CLR 339 at [18]-[20] (French CJ, Kiefel, Bell and Keane JJ).

25 *CGU* (2016) 259 CLR 339 at [85].

public complexion. So, too, does the fact that the declaratory relief that is claimed is claimed by a local council, being a statutory creature of the State of Tasmania that has (inter alia) statutory duties and functions in relation to amounts received, or expected to be received, from the Appellant.[26] The Appellant's assertion that this proceeding involves "purely" private rights (AS [32]) is just that – an assertion.

19. The "matter" requirement is satisfied in this case. The subject matter of the proposed declaration is the "rights and liabilities attaching to the payment mechanism prescribed by cl 26.2" (FC [142]). The declaration will determine the obligations of the parties under that clause. Had one of the parties to the lease sought exactly the same declaration as was sought by the Council, that proceeding would plainly have involved a matter.[27] Once that is recognised, the conclusion that this proceeding involves a matter is inevitable, because the subject matter of the declaration in each case is the same. From the perspective of whether there is a "matter", *Truth About Motorways* establishes that it is not to the point that the applicant for declaratory relief (ie the Council) does not have any rights, duties or liabilities under the lease, because it is sufficient that the duties or liabilities of the parties to the lease will be determined by the exercise of judicial power. Of course, depending on the nature of the relief that is sought, the fact that the grant of relief will not affect any right, duty or liability of the applicant may have ramifications for the applicant's standing to seek that relief (that being the means to prevent third parties from meddling in the contractual relations of others). Nevertheless, it follows from the above analysis that the Full Court was correct to conclude that the fact that the rights, duties and liabilities of the parties to the lease would be resolved by the grant of declaratory relief was sufficient to satisfy the "matter" requirement (FC [142]).

Standing

20. It is often said that, within federal jurisdiction, questions of standing are "subsumed" within the constitutional requirement that there be a "matter".[28] But that is not to suggest that the requirements are interchangeable. To the contrary, as French CJ observed in *Kuczborski v Queensland*, "an affirmative answer to the question – is there a matter? –

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26 See, eg, *Local Government Act 1993* (Tas) s 82(2)(a).

27 *Palmer v Ayres* (2017) 259 CLR 478 at [26] (Kiefel, Keane, Nettle and Gordon JJ).

28 Eg *Croome* (1997) 191 CLR 119 at 132-133 (Gaudron, McHugh and Gummow JJ); *Truth About Motorways* (2000) 200 CLR 591 at [45] (Gaudron J) and [122] (Gummow J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [68] (Gummow, Hayne, Crennan and Bell JJ).

may not be sufficient to answer the question whether the plaintiff has standing".[29] As Gummow J explained more fully in *Truth About Motorways*:[30]

> The notion of "standing" is an implicit or explicit element in the term "matter" throughout Ch III, identifying the sufficiency of the connection between the moving party and the subject matter of the litigation. However, it would be an error to attribute to this notion a fixed and constitutionally mandated content across the spectrum of Ch III.

21. The content of the standing requirement varies depending on the relief that is sought.[31] Sometimes, as for example where the relief sought is habeas corpus or prohibition, there is no standing requirement, meaning that such writs can be sought by anyone.[32] By contrast, where the relief claimed is damages, that relief is available only upon proof of all the elements of a cause of action that give rise to the entitlement to damages, in which case "no distinct question of standing arises".[33] That is all Gaudron, Gummow and Kirby JJ meant in *Bateman's Bay* in stating that "[i]n private law there is, in general, no separation of standing from the elements in a cause of action".[34]

22. Standing requirements are at their most prominent when declaratory relief is sought, whether in public or private law.[35] The power of a superior court to grant declaratory relief (whether statutory[36] or inherent) is a discretionary power which it "is neither possible nor desirable to fetter".[37] The applicant for such relief does <u>not</u> need to have a cause of action in order to obtain it.[38] Further, such relief can issue even absent an

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29 *Kuczborski v Queensland* (2014) 254 CLR 51 at [5].

30 *Truth About Motorways* (2000) 200 CLR 591 at [122].

31 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 511 (Aickin J). This passage was quoted in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 (***Bateman's Bay***) at [47] (Gaudron, Gummow and Kirby JJ), [97] (McHugh J). Standing is a "a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies": *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [68] (Gummow, Hayne, Crennan and Bell JJ).

32 *Truth About Motorways* (2000) 200 CLR 591 at [2] (Gleeson CJ and McHugh J), [94]-[95] (Gummow J), [162] (Kirby J), [211] (Callinan J). See also *Bateman's Bay* (1998) 194 CLR 247 at [40] (Gaudron, Gummow and Kirby JJ).

33 *Truth About Motorways* (2000) 200 CLR 591 at [92] (Gummow J).

34 (1998) 194 CLR 247 at [43].

35 In private law, consider, for example, a plaintiff who is a party to a contract with the defendant. The plaintiff has no cause of action for breach of contract until the defendant commits a breach, but that does not mean that the plaintiff has no standing to obtain a declaration that the defendant will breach the contract if the defendant performs certain acts: *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) [19-200].

36 See *Federal Court of Australia Act 1976* (Cth) s 21.

37 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 (Mason CJ, Dawson, Toohey and Gaudron JJ), quoting *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 (***Forster***) at 437 (Gibbs J).

38 *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 at 572; *JN Taylor Holdings Ltd*

underlying dispute or legal relationship between the parties to a proceeding (as the cases discussed from [26] below demonstrate). As Sir Thomas Bingham MR (as he then was) put it, to insist on demonstration of a specific legal right would "confine the inherent jurisdiction of the court within an inappropriate straitjacket".[39]

23. It is sometimes said that, where a person has a sufficient interest to obtain declaratory relief, the person has a "right to a declaration and that right satisfies the requirement of some 'right, duty or liability to be established by the determination of the Court'".[40] However, if the subject-matter of the declaration sought is an immediate right, duty or liability (as in the present case, where the dispute concerns the Appellant's obligations under clause 26.2 of the lease[41]) then that analysis is unnecessary. That follows because, once it is recognised that a "matter" may exist even if the grant of relief will not affect the rights, duties or liabilities of the applicant for relief,[42] the declaration will be sought in respect of a "matter" whether or not the entitlement to claim declaratory relief is itself characterised as a "right" to be determined.[43] It is otherwise where statute creates an entitlement to claim declaratory relief "even though the subject matter of the relief is not an immediate right, duty or liability to be established",[44] because in such a case there would not be a "matter" unless the entitlement to declaratory relief is itself the "right" to be determined. But that is not this case.

24. The authorities establish that, provided a declaration is sought as the relief or part of the relief that will resolve a "matter", the availability of such relief turns principally upon

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(in liq) v Bond (1993) 59 SASR 432 at 435; *Martin v Taylor* [2000] FCA 1002 at [27]; *Ashmere Cove v Beekink (No 2)* (2007) 244 ALR 534.

39 *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 at 11C-D (recording the argument) and at 19 (Bingham MR); see also at 20G-H and 22B-C (Millet LJ). See also *Direct Factory Outlets Pty Ltd v Westfield Management Ltd* (2003) 132 FCR 428 at [15]; *Rosenthal v Sir Moses Montefiore Jewish Home* (Supreme Court of New South Wales, Young J, 26 July 1995) at 4; *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* (2012) 17 ANZ Insurance Cases 61-949; *Electricity Supply Association of Australia Ltd v Australian Competition and Consumer Commission* (2001) 113 FCR 230 at [128].

40 *Croome* (1997) 191 CLR 119 at 127 (Brennan CJ, Dawson and Toohey JJ). See also *CGU* (2016) 259 CLR 339 at [26] (French CJ, Kiefel, Bell and Keane JJ).

41 See FC [142].

42 *Truth About Motorways* (2000) 200 CLR 591 at [123], [125] (Gummow J)

43 *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) [19-200], [19-215]. As to the origins of s 21 of the *Federal Court of Australia Act 1976* (Cth) (traced to United Kingdom legislation in the 1850s) and its "reformist purpose", see *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [10]-[11] (Greenwood, Logan and Yates JJ).

44 *CGU* (2016) 259 CLR 339 at [26] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added); cf *Palmer v Ayres* (2017) 259 CLR 478 at [33]-[34] (Kiefel, Keane, Nettle and Gordon JJ).

whether the applicant has a "real"[45] or "sufficient" interest[46] in obtaining that relief. In addition, it is also necessary that there be a "proper contradictor" (ie "some one presently existing who has a true interest to oppose the declaration sought"[47]). However, as the Appellant plainly satisfies the "contradictor" requirement, it is not discussed further.

The "real or sufficient interest" test

25. The Full Court correctly applied the "real interest" test (FC [145]). The Appellant does not squarely deal with that test, but appears to contend that this test is applicable only when declaratory relief is sought in a "public law" context. That contention is mistaken. So much is apparent from the fact that Gibbs J's articulation of the "real interest" test in *Forster*[48] was founded upon a statement of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*.[49] That case concerned a purely commercial dispute, the parties being Russian and British banks, and the issue between them being whether a loan was repayable in sterling or roubles.[50] *Russian Commercial and Industrial Bank* has been relied upon in other decisions of this Court approving the "real interest" test, without any qualification as to the character of the proceeding to which it applies.[51] Further, the Appellant's proposed distinction sits poorly with this Court's observations that the same principles apply to "equitable type" remedies (which include declarations) in public and private law cases.[52]

26. An applicant for declaratory relief will clearly have a "real interest" where the relief

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45 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Forster* (1972) 127 CLR 421 at 437 (Gibbs J).

46 *Edwards v Santos Ltd* (2011) 242 CLR 421 at [36] (using both terms) (Heydon J, French CJ, Gummow, Crennan, Kiefel and Bell JJ agreeing); *Croome* (1997) 191 CLR 119 at 127 (Brennan CJ, Dawson and Toohey JJ).

47 *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [14], quoting *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438; *Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643 at 648-650 (Dawson J).

48 (1972) 127 CLR 421 at 437-438 (Gibbs J).

49 [1921] 2 AC 438 at 448 (***Russian Commercial and Industrial Bank***). See also *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 where, after referring to that statement (at 12), Bingham MR went on to hold that it was not necessary for a person to themselves claim a legal right in order to have standing to seek declaratory relief (at 19D-F). See to similar effect Millet LJ at 22B-C, (Kennedy LJ agreeing with both at 20A). The House of Lords dismissed a petition for leave to appeal from that decision (at 23).

50 [1921] 2 AC 438 at 446 (Lord Dunedin).

51 See, eg, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

52 *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 (***Smethurst***) at [98] (Kiefel CJ, Bell and Keane JJ); *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [58] (Gaudron J); see also *Smethurst* (2020) 94 ALJR 502 at [146] (Nettle J), discussing the power under s 32 of the *Judiciary Act 1903* (Cth) to grant injunctive relief.

pertains to declaring the existence of legally enforceable rights or liabilities of the applicant for relief (FC [146]-[147]). But it does not follow that this is the only circumstance in which a "real interest" will exist. The proposition that an applicant may have a real or sufficient interest to obtain declaratory relief even if the applicant does not have a legal interest that will be affected by the grant of that relief is strongly supported by the judgment of the Full Federal Court in *Aussie Airlines*,[53] which was approved by this Court in *Edwards v Santos Ltd*[54] and has been followed in other cases.[55]

27. In *Aussie Airlines*,[56] Lockhart J (with whom Spender and Cooper JJ agreed) applied the "real interest" test from *Forster* and *Russian Commercial and Industrial Bank* in circumstances that were closely analogous to those now in issue. Although the Appellant does not make it explicit,[57] its argument requires this Court to conclude that the standing question in *Aussie Airlines* was wrongly decided. For the following reasons, it was not. Aussie Airlines had sought declaratory relief in respect of the interpretation of leases to which it was not a party. The Full Court held that Aussie Airlines had standing to obtain that relief. Contrary to AS [38], the "jurisprudential basis for the conclusion as to standing" was quite clear. The Court did not approach the question of standing by asking whether the plaintiff came within an exception to the privity of contract doctrine (which the Court recognised would have been relevant had it been claimed that Aussie Airlines had rights under the leases).[58] Instead, having assumed that Aussie Airlines did not have enforceable rights under the lease,[59] the Court held, applying *Forster* and *Russian Commercial and Industrial Bank*,[60] that it was "plain" that Aussie Airlines had "the requisite interest to support its right to obtain the declaration sought".[61] It so held because the question concerning the interpretation of the lease was of "real practical importance

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53 *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 (***Aussie Airlines***).

54 (2011) 242 CLR 421 at [38]-[39] (Heydon J, French CJ, Gummow, Crennan, Kiefel and Bell JJ agreeing).

55 Notably, in *Ashmere Cove* (2008) 166 FCR 398 at [52] the Full Federal Court, after holding that there was a matter, referred with approval to *Aussie Airlines* and held that the investors had a "real interest" in the relief sought, such that they had standing to claim declaratory relief against the insurers. See also *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [13].

56 (1996) 68 FCR 406 at 414E.

57 The Appellant instead describes the jurisprudential basis for the standing decision as "not clear" (AS [38]) and then seeks to distinguish the facts (AS [39]).

58 (1996) 68 FCR 406 at 415A-C.

59 (1996) 68 FCR 406 at 414G-415D.

60 (1996) 68 FCR 406 at 414D.

61 (1996) 68 FCR 406 at 415E.

to Aussie Airlines. It is not a mere hypothetical question".[62]

28. In *Edwards v Santos Ltd*, Heydon J (with whom all other members of the Court relevantly agreed) summarised and approved the reasoning in *Aussie Airlines*.[63] His Honour's reasons make clear that standing was held to exist in that case not in order to allow the plaintiffs "to vindicate an enforceable right of their own", but because they had a sufficient interest to obtain declaratory relief "whether or not the plaintiffs have rights enforceable against the … defendants". That was so because the relief sought was of "real practical importance" to them, they had a "real commercial interest in the relief" and there was a proper contradictor.[64] The Appellant implicitly contends *Edwards v Santos Ltd* was wrong – again, without saying so.

29. In *CGU*, Nettle J summarised the test for standing to seek declaratory relief that emerged from *Aussie Airlines* and *Edwards v Santos Ltd*, and cited both cases with apparent approval.[65] In those circumstances, it is surprising that the Appellant claims support from Nettle J's reasoning in *CGU* for its assertion that, where private contractual rights are involved, "the question of standing requires attention to the doctrine of privity of contract" (AS [32]) and for its claim that the circumstances in which a third party will have standing to seek a declaration as to the interpretation or application of a contract are limited to "exceptional cases" or what are, in truth, applications of other legal principles (AS [34]). The passages that the Appellant cites from Nettle J's judgment in *CGU*[66] do not support the above submissions. Further, those passages in isolation do not fairly reflect his Honour's analysis. In particular, in the paragraphs that immediately follow those upon which the Appellant relies, Nettle J disapproves a judgment[67] in which declaratory relief was refused on the assumption (which Nettle J denied) "that it was a condition of the power to grant declaratory relief that the declaration be determinative of an issue which directly affected property, a legal right or an obligation of the claimant".[68]

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62 (1996) 68 FCR 406 at 415E-G. It is true that in *Aussie Airlines* the contracting parties were in dispute as to whether Aussie Airlines satisfied a particular definition in the head lease. However, that fact was not relied upon in establishing that Aussie Airlines had standing. It is not clear that the existence of the dispute *between the contracting parties* was thought relevant to the analysis. Cf *CGU* (2016) 259 CLR 339 at [102] fn 120, citing *Aussie Airlines* at 415.

63 (2011) 242 CLR 421 at [38].

64 (2011) 242 CLR 421 at [38]-[39], and see also [34].

65 (2016) 259 CLR 339 at [102] (n 108).

66 (2016) 259 CLR 339 at [95]-[96].

67 *Interchase Corporation Ltd (In Liq) v FAI General Insurance Co Ltd* [2000] 2 Qd R 301 at 317-321.

68 *CGU* (2016) 259 CLR 339 at [99].

His Honour added that, depending on the circumstances, "it is sufficient that a claimant will derive some benefit or advantage from the declaration over and above any benefit or advantage that might be derived by an ordinary citizen".[69]

30. The Appellant's reliance (AS [33]) on the plurality in *CGU*[70] is similarly misplaced. The plurality acknowledged that the claim for declaratory relief (which, again, was a declaration concerning the effect of a policy of insurance to which the liquidators were not party) did not involve "any incursion upon principles of contract law or privity of contract".[71] That was so because the liquidators had a sufficient interest to support the claim for declaratory relief. On the facts, that interest arose from the liquidator's statutory right to claim on the proceeds. Plainly enough, however, there are many other ways such an interest may arise, as *Aussie Airlines* and *Edwards v Santos Ltd* illustrate. The principles discussed in *CGU* therefore cannot properly be limited to cases where the third party's interest derives from statute.

The Council's interest

31. Applying the above authorities, the Full Court was correct to hold that the Council has a real or sufficient interest in the interpretation of clause 26.2(a), such that it has standing to obtain declaratory relief concerning the interpretation of that clause (FC [149], [152], [183]). The claim for such relief is not hypothetical, as the history of the disagreements between the Council and the Appellant makes clear.[72] The dispute has significant financial ramifications for the Council, because clause 26.2(a) obliges the Appellant to "promptly pay" to the Council the notified amount (FC [181]). As such, the Council has a real financial interest in the proper construction of that clause, notwithstanding that it does not have enforceable legal rights to receive payments under it (FC [182]).

32. Further, while the Council is not a party to the lease, it has a much greater interest in the interpretation of clause 26.2(a) than an ordinary citizen (FC [177]-[183]). Under clause 26.2(a) of the leases, the Council is an active participant in the process established for the making of the payments for which that clause provides. Pursuant to that process, the lessee is obliged to pay an amount "as may be notified" by the Council. Further, the lessee is obliged to use "all reasonable endeavours" to enter into an agreement with the

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69 *CGU* (2016) 259 CLR 339 at [99].
70 (2016) 259 CLR 339 at [67].
71 (2016) 259 CLR 339 at [67].
72 As to the history of the valuation disputes, see FC [25]-[32].

Council to make such payments. In those ways, the Council is drawn directly into the contractual mechanisms established by the leases. The proper construction of the words "trading or financial operations" is important to the Council, for the meaning of those words will bear upon its calculation of the quantum of the notifiable amount. Likewise, that issue will affect the Council's negotiating position and internal processes[73] as the lessee seeks to discharge its obligation to use all reasonable endeavours to enter an agreement for payment with the Council. As in *Edwards v Santos Ltd*, ultimate success in obtaining the declaration they have sought would advance their interests in the negotiations contemplated and required by clause 26.2(a).[74]

33. The Appellant seeks to diminish the Council's interest by describing it as a "windfall gain": AS [42]. That description is not an apt one. Indeed, the "windfall gain" here would have been the avoidance of payments to the Council on the part of the Appellant by reason of the Commonwealth's ownership of the airport sites and contrary to longstanding practice. Clause 26.2(a) was devised to avoid that outcome. It was necessary only because of the Commonwealth's role – its ownership of the airport sites meant the Councils could not levy rates and charges.[75]

The privity doctrine was not a bar

34. It follows from the submissions above that the Full Court was right to conclude that the Council's applications were not foreclosed by the doctrine of privity of contract (FC [93]). That doctrine would be relevant if declaratory relief is available only to a person who is entitled to sue on the contract. But that is not the law. Once it is recognised that a declaration concerning the interpretation of clause 26.2(a) of the lease will determine the duties of the Appellant under that clause – and for that reason involves a "matter" – then any person who has a real or sufficient interest in the interpretation of that clause can obtain declaratory relief to determine that question, even if that relief would not affect the legal rights of the applicant for such relief. It is the fact that the right, duty or liability that will be determined by an exercise of judicial power is not required to be the same as the interest that satisfies the standing requirement (which may not involve legal rights at

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73 Including pursuant to *Local Government Act 1993* (Tas) ss 23 and 82(2)(a).

74 *Edwards v Santos Ltd* (2011) 242 CLR 421 at [37].

75 FC [3].

all,[76] as commercial interests may be sufficient) that explains why the grant of declaratory relief is entirely consistent with the doctrine of privity of contract. As the Full Court put it, "the operation of that [declaratory] jurisdiction is not contingent upon the enforcement or justification by the applicant of any legally enforceable right" (FC [91]).

35. The Full Court gave extensive consideration to the privity doctrine (FC [76]-[91]). Its analysis commenced by recognising "the general rule that a person who is not a party to a contract can neither enforce that contract, nor incur any obligations pursuant to that contract": FC [77]. It cautioned, however, that it is necessary to pay more attention to its application in order to understand its "true operation": FC [80]. The Court then focused on three judgments of this Court – *Wilson v Darling Island Stevedoring & Lighterage Co Ltd*,[77] *Coulls v Bagot's Executor and Trustee Co Ltd*[78] and *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[79] – which make multiple references to a non-party being unable to sue "on" or "upon" the contract (FC [80]-[81]). The Full Court also referred to decisions of the House of Lords and the Privy Council using similar language (FC [82]).[80] On that basis, the Full Court observed "that the general rule underpinning the doctrine of privity of contract is regularly recited as imposing a restriction on a third party from suing 'on' or 'upon' a contract": FC [83]. While the Full Court acknowledged the existence of broader statements of the rule (FC [83]-[84]), it concluded that the rule was typically expressed as preventing non-parties to a contract suing "on" or "upon" the contract (FC [89]). That conclusion is correct.[81]

36. The Full Court correctly reasoned that, in seeking a declaration, a third party is not suing "on" or "upon" the contract. Those words contemplate reliance on a cause of action arising from the contract. Plainly a person who is not a party to a contract has no such cause of action. But declaratory relief does not depend on the existence of such a cause of action. That is illustrated by *Aussie Airlines* and *Ashmere Cove*. It is also illustrated by *CGU*, where neither the plurality nor Nettle J considered the privity doctrine to be a

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76 Eg *CGU* (2016) 259 CLR 339 at [67] (French CJ, Kiefel, Bell and Keane JJ), [99] (Nettle J). See also *The Manar* [1903] P 95.

77 (1956) 95 CLR 43.

78 (1967) 119 CLR 460.

79 (1988) 165 CLR 107 (***Trident***).

80 Referring to: *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847 at 853; *Vandepitte v Preferred Accident Insurance Co of New York* [1933] AC 70 at 79; and *Beswick v Beswick* [1968] AC 58 at 85, 92-93.

81 See, for example, the language used in *Trident* (1988) 165 CLR 107 at 113-114, 115, 122 (Mason CJ and Wilson J), 154-155 (Dawson J), 167, 172 (Toohey J), 173-174 (Gaudron J).

bar to the liquidators' claim,[82] despite the fact that the liquidators were not parties to the insurance contracts that were the subject of the claim for declaratory relief.[83]

37. The Appellant contends the Full Court adopted an "unduly narrow" characterisation of the privity of contract doctrine: AS [16(a)], [19]-[20]. However, the Appellant never clearly identifies the alleged error. While it says (AS [20]) that the Full Court's approach was inconsistent with the authorities set out in AS [18], that paragraph recognises that varying formulations have been used depending on the case at hand. The Appellant asserts that the most frequent formulation of the privity doctrine is that it prevents a third party from "enforcing" the terms of the contract. Its contention seems to be that the Full Court erred because it should have held that privity of contract is a restriction on "enforcing" – rather than suing "on" or "upon" – the contract. From that premise, the Appellant then contends that the Full Court erred in assuming that a declaratory judgment cannot be enforced (AS [16(b)]).

38. If that is the argument, it should be rejected. The Full Court correctly understood that the references in the authorities to suing "on" or "upon" a contract concerned the "direct enforcement of obligations arising under the contract pursuant to a right of action derived from that contractual relationship" (FC [90]). That is, it understood that "direct enforcement" results in a judgment capable of being judicially enforced by execution – ie an executory judgment (FC [90]). In contrasting such a judgment with a declaratory judgment, the Full Court drew upon a well-established distinction.[84] It correctly reasoned that "the third party's entitlement to seek and obtain declaratory relief does not derive from any cause of action arising pursuant to the contract, but instead derives from the relevant declaratory jurisdiction" (FC [91]).

39. In contending otherwise, the Appellant relies heavily on *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* (***EB***).[85] In *EB*, a question arose in the context of the primary judge's decision on costs about whether a declaration can be a means of "enforcing" an underlying right.[86] The question arose because s 226(2) of the *Strata Schemes Management Act 1996* (NSW) made specific provision for the awarding of costs in "any

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82 (2016) 259 CLR 339 at [67] (French CJ, Kiefel, Bell and Keane JJ), [96], [99], [102], [113] (Nettle J).

83 (2016) 259 CLR 339 at [67] (French CJ, Kiefel, Bell and Keane JJ).

84 FC [90], referring to *Zamir & Woolf: The Declaratory Judgment* (4th ed, 2011) at pp 1-2.

85 (2018) 98 NSWLR 889 (see AS [23]).

86 *EB* (2018) 98 NSWLR 889 at [4].

proceedings to enforce" rights or remedies referred to in s 226(1). In considering this issue, Barrett AJA (with whom Meagher and Gleeson JJA agreed) expressly recognised that "[a] plaintiff who has obtained a binding declaration of right cannot resort to any form of execution of the declaration".[87] The Court did state that a binding declaration of right is properly understood as a means of "enforcing" rights because it carries with it an entitlement "to obtain specific and coercive relief in further vindication of the right should the need to do so arise".[88] But the Appellant is incorrect to treat that passage as establishing that "[d]eclaratory relief alone entitles the successful plaintiff to further invoke the assistance of the court in order to compel the defendant to comply with its terms" (AS [23]). What the Court in *EB* was saying was that the right or obligation which is declared may, if necessary, be the subject of further coercive relief. If the Court has not declared the existence of a right or duty that is capable of enforcement at the suit of the applicant for declaratory relief, the grant of the declaration does not somehow create some new entitlement to obtain a coercive order that the law would not previously have recognised.[89] Accordingly, *EB* is not properly understood as supporting the proposition that each and every applicant who successfully obtains declaratory relief thereby obtains an entitlement to further coercive orders if necessary. While it will often be possible for a plaintiff who has obtained a declaration of right to obtain a further coercive order, that will not be the case unless the applicant for such an order has an independent entitlement to such relief on the basis of the legal position that has been declared to exist. Any other result would introduce incoherence into the law, because the real or sufficient interest that entitles a party to obtain declaratory relief may fall well short of the cause of action that would be needed to establish an entitlement to other forms of relief.

40. For example, a plaintiff with standing[90] may commence proceedings seeking a declaration that specific conduct on the part of a public authority was unlawful. If the conduct is not ongoing and did not cause any loss to the plaintiff, the plaintiff will be entitled to seek a declaration, but nothing more. In such a case, the declaration (if granted) is a pronouncement of a state of legal affairs, but there would be no other right that can be

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87 *EB* (2018) 98 NSWLR 889 at [35] (emphasis added).

88 *EB* (2018) 98 NSWLR 889 at [39] (emphasis added).

89 That is also the correct understanding of Isaac J's reasons in *Royal Insurance Co Ltd v Mylius* (1926) 38 CLR 477 at 497, on which the Appellant relies.

90 For example, a plaintiff who was the subject of governmental action and has a real interest in raising a question about its lawfulness but makes no other claim (for example, a damages claim) because they suffered no financial loss.

"enforced" by means of a further order of the court. Indeed, sometimes declaratory relief is granted precisely because there is no other right, duty or liability that can be enforced. *Plaintiff M61* was such a case.[91] The present case provides another example. Contrary to AS [24], if the Councils succeed and the declaratory relief they seek is granted, it does not follow that there is any other step that could be taken by the Councils to "enforce" the declaration in the (unlikely) event that the parties to the leases conduct themselves in a manner inconsistent with the declaration.[92] Such a step by the Councils *would* fall foul of the privity doctrine, because it would involve the Councils suing "on" the leases.

41. In light of the above, it is apparent that, even when the grant of declaratory relief is accompanied by an express or implied grant of liberty to apply, that does not transform a declaration into a thing that is capable of enforcement.[93] It is only where an existing right that is capable of enforcement has been declared to exist that liberty to apply may permit the party who successfully obtained declaratory relief to take further (consequential) steps to enforce that right, without any need to institute fresh proceedings.[94] Justice Barrett's reference to liberty to apply should be understood as nothing more than an explanation as to why, having made a declaration, the court is not *functus officio* and can therefore be approached to grant further relief if necessary (assuming the legal basis for such relief exists). *EB* does not hold that the grant of declaratory relief creates an entitlement to further relief that would not otherwise have existed on the legal position that has been declared to exist. Indeed, the possibility that no other relief will be sought (or available) is contemplated by s 21(2) of the *Federal Court of Australia Act 1976* (Cth), which states that "A suit is not open to objection on the ground that a declaratory order only is sought".

42. For the above reasons, the Full Court's approach does not involve any circumvention of privity of contract.[95] As the Full Court accepted (FC [129]), the absence of privity may support an inference that the applicant does not have a real or sufficient interest to seek a declaration as to the meaning or effect of a contract, but it is not conclusive that there is

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91 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [103], where declaratory relief was granted, even though the Court held that mandamus and certiorari were unavailable.

92 Consistently with the Full Court's reasons at [91].

93 Cf AS [23].

94 See the discussion of the liberty to apply mechanism in *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 88 (Lockhart, Morling and Gummow JJ). See also *Sino Iron Pty Ltd v Mineralogy Pty Ltd (No 3)* [2015] WASC 272 at [25]-[32], where it was held that in the circumstances of the case the enforcement of a contractual obligation the subject of a declaration was not amongst the "executive" orders which would be made pursuant to liberty to apply.

95 Cf AS [24].

no such interest. If a third party can establish a sufficient interest in the meaning or effect of a contract, then it is entirely consistent with the doctrine of privity to conclude that the third party can obtain declaratory relief in that respect, but no other remedy. That follows because, consistently with Deane J's reasons in *Trident*,[96] the privity doctrine has "nothing to say" where the applicant's rights or obligations arise by reason of another principle or statutory provision – here, the entitlement to seek declaratory relief (even absent any consequential relief) under s 21 of the *Federal Court of Australia Act 1976* (Cth).[97]

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Conclusion

43. This proceeding, in which the Council seeks declaratory relief concerning the Appellant's duty under clause 26.2 of the lease, satisfies the "matter" requirement for the purposes of Chapter III, because the subject-matter of the proceeding raises a justiciable issue as to the legal duties or liabilities of the Appellant. While the Council – as a non-party to the lease – would not be entitled to sue on or upon the lease, its real interest in the

20 interpretation of cl 26.2(a) is sufficient to give it standing to claim declaratory relief. Such relief can be granted consistently with the doctrine of privity of contract, that doctrine having nothing to say about claims that do not involve suing "on" or "upon" a contract.

44. For those reasons, the appeal should be dismissed.

PART VI ESTIMATE OF TIME FOR ORAL ARGUMENT

30 45. It is estimated that 1.25 hours will be required for the presentation of the Commonwealth's oral argument.

Dated: 14 May 2021

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96 *Trident* (1988) 165 CLR 107 at 142-143 (extracted by the Full Court at [86]).

97 In *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [9], the Full Federal Court said "Section 21 states a position which, at least in modern times, is regarded as prevailing in any event, having regard, so far as this Court is concerned, to its creation as a superior court of record and one of law and equity … and the general conferral of power, in relation to matters in which it has jurisdiction, to make orders of such kinds … as the Court thinks appropriate".

IN THE HIGH COURT OF AUSTRALIA

HOBART REGISTRY

BETWEEN: **HOBART INTERNATIONAL AIRPORT PTY LTD**

Appellant

and

CLARENCE CITY COUNCIL

First Respondent

and

THE COMMONWEALTH OF AUSTRALIA

Second Respondent

ANNEXURE TO THE SECOND RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Commonwealth sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

No	Description	Version	Provision(s)
Commonwealth provisions			
1.	*Airports Act 1996* (Cth)	As passed	Entire Act
2.	*Airports (Transitional) Act 1996* (Cth)	As passed	Entire Act
3.	Commonwealth Constitution	Current	ss 75, 76
4.	*Corporations Act 2001* (Cth)	Current	s 562
5.	*Federal Court of Australia Act 1976* (Cth)	Current	s 21
State and Territory provisions			
6.	*Local Government Act 1993* (Tas)	Current	s 82
7.	*Strata Schemes Management Act 1996* (NSW)	Current	s 226