HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN: **AUSTRALIA PACIFIC AIRPORTS (LAUNCESTON) PTY LTD (ACN 081 578 903)**

Appellant

and

NORTHERN MIDLANDS COUNCIL

First Respondent

THE COMMONWEALTH OF AUSTRALIA

Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Issues

2. Three issues arise in this appeal.

3. ***First***, is the doctrine of privity of contract engaged where a third party to a contract (**Third Party**) seeks a declaration in respect of the interpretation or application of that contract?

4. ***Second***, when does a Third Party who has no contractual, statutory or equitable right to be established by the determination of the court have standing to seek declaratory relief in respect of the interpretation or application of a contract. In particular, is it sufficient that the determination of the court would substantially aid the Third Party in future negotiations?

5. ***Third***, is there a "matter" for the purposes of Chapter III of the Constitution (**Ch III**) where a Third Party seeks declaratory relief as to the interpretation or application of the contract and:

   (a) there is no dispute between the contracting parties as regards the meaning or effect of the contract; and/or

   (b) the Third Party has no right, duty or liability to be established by the determination of the court?

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

6. The Appellant (**APAL**) has given notice under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

7. The decisions below have the following citations:

   (a) *Clarence City Council v Commonwealth of Australia* [2019] FCA 1568 (O'Callaghan J) (**PJ**).

   (b) *Clarence City Council v Commonwealth of Australia* [2020] FCAFC 134; 382 ALR 273 (Jagot, Kerr and Anderson JJ) (**FC**).

Part V: Facts

8. The Second Respondent (**Commonwealth**) is the registered proprietor of an estate in fee simple in the land known as Launceston Airport (**Airport Site**) in the municipal area of Northern Midlands. The First Respondent (**Council**) administers that municipal area.

9. In the 1990s, the Commonwealth privatised Australia's federal airports and entered into long-term leases with various private airport operators pursuant to s 22 of the *Airports (Transitional) Act 1996* (Cth): FC [10], [18] (Joint Core Appeal Book (**AB**) 94, 97). Thus, on 28 May 1998 APAL and the Commonwealth entered into a Memorandum of Lease pursuant to which the Commonwealth granted APAL a lease of the Airport Site for a term of 50 years with a 49-year option to renew (**Lease**): Appellants' Joint Book of Further Materials (**AFM**) 57. The Lease commenced on 29 May 1998. The Council is not, and has never been, a party to the Lease.

10. The Airport Site is not amenable to Council rates or State land taxes by reason of ss 52(i) and 114 of the Constitution: FC [12] (AB 95). In lieu of Council rates, cl 26.2(a) of the Lease provides for an equivalent amount to be paid by APAL to the Council in respect of particular parts of the Airport Site and obliges APAL to use all reasonable endeavours to enter into an agreement with the Council to make such payments: FC [20] (AB 97-98); AFM 34. Clause 26.2(a) was introduced in federal airport leases to implement "competitive neutrality" between private operators at the airports and their actual or potential competitors off-site who are liable to pay Council rates: PJ [2]-[3] (AB 11); FC [12]-[13], [177] (AB 95, 156).

11. In respect of financial year (**FY**) 2014/15 to 2017/18 APAL made payments in lieu of rates to the Council in accordance with independent valuations of the Airport Site conducted by Herron Todd White (**HTW**), a firm of valuers specifically engaged by

the Commonwealth to determine the amounts payable by APAL to the Council under cl 26.2(a) (there being no agreement between the Council and APAL for those years). On 5 May 2017, the Minister for Infrastructure and Transport and the Acting Deputy Secretary of the Department of Infrastructure and Regional Development each separately informed APAL in writing that APAL would be considered compliant with its obligations under the Lease if it made payments to the Council in accordance with the valuation and methodology employed by HTW: AFM 92, 90. APAL acted accordingly.

12. The parties to the Lease are not in dispute about the operation of cl 26.2(a) or APAL's compliance with that provision: PJ [23]-[25] (AB 18); FC [31] (AB 100). Indeed, the Commonwealth (through HTW's engagement) determined the amount to be paid by APAL under cl 26.2(a) and has taken the position that: (a) APAL has paid the appropriately calculated amount for the relevant financial years; and (b) provided APAL pays rates in the future on the basis of a valuation and methodology consistent with that of HTW, then APAL will comply with cl 26.2(a): FC [31] (AB 100).

13. By an Amended Statement of Claim filed on 26 October 2018, the Council sought declaratory relief with respect to the proper construction of cl 26.2(a) and APAL's liability to make payments for FY 2014/15 to 2017/18: AFM 96. It also sought "consequential relief for the calculation of any shortfall" in the payment required to be made by APAL pursuant to cl 26.2(a) for that period: AFM 96. The Council concedes that it is not privy to the Lease and has no entitlement to sue on the Lease: FC [35] (AB 101-2). It asserts no statutory entitlement (PJ [35] AB 20); nor does it contend that it enjoys the benefit of any contractual promise held on trust: FC [35] (AB 101-2).

14. The primary judge held that the Council did not have standing to seek declaratory relief in respect of the proper construction of cl 26.2(a), on the basis that the parties to the Lease agreed that APAL had complied with its obligations and the only right or interest sought to be vindicated by the Council was an asserted entitlement to a benefit under a contract to which it is not a party: PJ [13]-[14], [59] (AB 13-4, 26).

15. The Court below (**Full Court**) unanimously upheld an appeal by the Council against the primary judgment and dismissed APAL's notice of contention.[1] The Full Court held that the primary judge had "erred in applying the doctrine of privity of contract" and

[1] It was unnecessary for the Court to determine the third ground of APAL's notice of contention: FC [192] (AB 160).

that this was "sufficient to demonstrate appealable error": FC [93]-[94] (AB 127-8). The Full Court held that there was a "matter" for the purpose of Ch III of the Constitution because the subject of the claims were the legally enforceable rights and liabilities of the contracting parties under cl 26.2 of the Lease, albeit that there was no dispute between, nor claim by, those parties: FC [141]-[142] (AB 144). Further, the Full Court held that the Council possessed a sufficient interest in the relief sought as that relief was of real commercial and practical interest to it: FC [183] (AB 157). The proceedings were remitted to the primary judge for final determination.

Part VI: Argument

A. Issue One: engagement of the doctrine of privity of contract

16. The Full Court erroneously held that the doctrine of privity of contract "relates to the circumstances in which a party may sue upon, and obtain an executory judgment in respect of, the contract" and that the doctrine is "not engage[d]" where a third party seeks a declaratory judgment: FC [90]-[91], [128] (AB 126-7, 139). The Court's reasoning in this respect exposes three key errors:

(a) *First*, it erroneously adopts an unduly narrow characterisation of the doctrine of privity of contract inconsistent with authority of this Court;

(b) *Second*, it wrongly assumes that a declaratory judgment cannot be enforced: FC [90], [140] (AB 126, 143); and

(c) *Third*, it proceeds from the circular premise that the Council's claim in this proceeding is not "based upon" the Lease so as to engage the doctrine of privity but is instead based on, or "derives from", the Court's statutory declaratory jurisdiction: FC [90] (AB 127).

The ambit of the doctrine of privity

17. It is "elementary" that the only persons entitled to the benefits or bound by the obligations of a contract are the parties to it.[2] That principle, the doctrine of privity of contract, has variously been characterised by this Court as "settled", "fundamental", "firmly established", "binding" and "incontrovertible".[3] The principle is derived at least from the decision in *Tweddle v Atkinson* (1861) 1 B. & S. 393 [121 ER 762] that

[2] *Wilson v Darling Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 80 (Kitto J) (***Wilson***).
[3] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 128, 131 (Brennan J), 141-2 (Deane J) (***Trident***); *Olsson v Dyson* (1969) 120 CLR 365 at 393 (Windeyer J); *Coulls v Bagot* (1967) 119 CLR 460 at 494 (Windeyer J) (***Coulls***).

"no stranger to the consideration can take advantage of a contract, although made for his benefit": at ER 764. In *Coulls v Bagot* (1967) 119 CLR 460 (***Coulls***), Barwick CJ described as "odd" the contrary proposition "that a person to whom no promise was made could himself in his own right enforce a promise made to another": at 478.

18. The character of the restriction which the doctrine of privity of contract requires has been expressed in varying terms, responding to the nature of the case in which the doctrine was being considered. Thus, it has been said to prevent a third party from:

(a) "suing or being sued" upon the contract;[4]

(b) "maintain[ing] an action at law" upon the contract;[5]

10 (c) taking advantage of the contract or obtaining its benefits;[6]

(d) compelling the performance of the contract;[7] and

(e) most frequently, "enforcing" the terms of the contract.[8]

19. Notwithstanding and inconsistently with this, the Full Court determined that the doctrine of privity of contract precludes only the "direct enforcement", by way of a "judgment capable of being judicially enforced by execution", of "obligations arising under the contract pursuant to a right of action derived from that contractual relationship": FC [90] (AB 126). The Full Court acknowledged "other statements in the key Australian decisions that adopt broader language to express the scope of the general rule": FC [83] (AB 123), but nonetheless declined to follow that authority. This was

20 despite the fact that the Full Court "readily accepted" that the Council in these proceedings seeks to validate an entitlement to the "benefits of a contract" or "rights in relation to a contract" in the sense contemplated by Kitto J in *Wilson v Darling Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 (***Wilson***) at 80 (quoted in *Trident*

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[4] *Wilson* at 67 (Fullagar J; Dixon CJ agreeing); *Trident* at 113-5 (Mason CJ and Wilson J), 132 (Brennan J), 151 (Deane J); *Coulls* at 478 (Barwick CJ), 494-5 (Windeyer J).

[5] *Trident* at 115 (Mason CJ and Wilson J); *Kowalski v Mitsubishi Motors Australia Staff Superannuation Fund Pty Ltd* [2018] SASCFC 44 at [62] (Nicholson J; Kourakis CJ and Hinton J agreeing); *Silver v Dome Resources NL* (2007) 62 ACSR 539 at [115] (Hamilton J) (appeal dismissed on other grounds).

[6] *Wilson* at 56-57 (Williams J, dissenting), 80 (Kitto J); *Trident* at 128-9 (Brennan J), 142 (Deane J), 176 (Gaudron J); *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 at 473 (Lord Reid); *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd* (2019) 100 NSWLR 432 at [59] (Leeming JA).

30 [7] *Trident* at 116 (Mason CJ and Wilson J); *Olsson v Dyson* (1969) 120 CLR 365 at 394 (Windeyer J).

[8] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853-5 (Viscount Haldane LC); *Hohler v Aston* [1920] 2 Ch 420 at 425 (Sargant J); *Wilson* at 56-7 (Williams J, dissenting); *Coulls* at 477-9 (Barwick CJ), 496-7, 503 (Windeyer J); *Beswick v Beswick* [1968] AC 58 at 86 (Lord Guest); *Trident* at 113-4, 122-3 (Mason CJ and Wilson J), 127, 132-3, 138 (Brennan J), 141-3, 151-2 (Deane J), 156 (Dawson J); *Newcastle Entertainment Security Pty Ltd v Simpson* (1999) Aust Torts Reports ¶81–528 at [98] (Beazley JA; Mason P and Sheller JA relevantly agreeing); *Kowalski v Mitsubishi Motors Australia Staff Superannuation Fund Pty Ltd* [2018] SASCFC 44 at [62] (Nicholson J; Kourakis CJ and Hinton J agreeing).

General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107 (***Trident***) by Brennan J at 129 and by Deane J at 142) and by Deane J in *Trident* at 142-3: FC [88] (AB 125).

20. In short, the Full Court accepted that the relief sought by the Council *prima facie* offends the privity doctrine as expounded by this Court but determined that to "read and apply" the respective remarks of Kitto J and Deane J "in this breadth would be to misstate the true scope of the doctrine of privity of contract": FC [88] (AB 125). In so finding, the Full Court erred. There is no basis to limit the doctrine of privity of contract so as to exclude applications for declaratory relief from its ambit, and to do so is inconsistent with authority of this Court as set out at [18] above as to the ambit of the doctrine.

The nature of declaratory relief

21. The rationale posited by the Full Court for the narrowed operation of the privity doctrine lies in an erroneous distinction drawn by the Full Court between the consequences of executory and declaratory judgments: FC [90], [140] (AB 126, 143). As regards the former, the Full Court identified that the "enforcer [of obligations arising under the contract] will obtain a judgment *capable of being judicially enforced by execution*" which "importantly for the present case … may be contrasted with a 'declaratory judgment'": FC [90] (AB 126; emphasis added). A declaratory judgment, in the view of the Full Court, does not bear that characteristic of being "capable of being judicially enforced by execution"; such a judgment is *not* "coercive" in character and cannot be "enforced by official action" as against the defendant if its terms are disregarded (ibid). That reasoning displays a fundamental misapprehension as regards the nature and consequences of a declaration of right.

22. Section 21 of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***) relevantly empowers the court, in relation to a matter in which it has original jurisdiction, to make "binding declarations of right". A binding declaration of right amounts to a final determination of the parties' rights and obligations and raises a *res judicata* and an issue estoppel as between parties in subsequent litigation.[9]

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[9] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [48] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* (2018) 98 NSWLR 889 at [34] (Barrett AJA; Meagher and Gleeson JJA agreeing) (***EB***).

23. Contrary to the reasoning of the Full Court (FC [90] AB 126), since the decision of this Court in *Royal Insurance Co Ltd v Mylius* (1926) 38 CLR 477 at 497 (Isaacs J; Knox CJ and Starke J agreeing) it has been acknowledged in Australia that every order for declaration of right carries with it liberty to apply so that, if the defendant acts contrary to the declaration, the court may enforce it.[10] Declaratory 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: *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* (2018) 98 NSWLR 889 at [39] (Barrett AJA; Meagher and Gleeson JJA agreeing) (***EB***). That compulsion is achieved through the grant of appropriate executory relief.[11] In that way, it is "beyond doubt" that the declaration enforces the underlying right whose existence is confirmed by the declaration by carrying with it an entitlement to obtain specific and coercive relief in further vindication of the right: *EB* at [39]. The remedy of declaration is enforceable "because of its inherent capacity to produce, through subsequent steps in the same proceedings, coercive relief precluding invasion of the right" so declared: *EB* at [40].

24. It follows that if the Council were to succeed in obtaining the declarations sought in this proceeding, it would be entitled to seek coercive relief compelling APAL to act in accordance with the terms of the declarations. To adopt the language used in the leading authorities as set out at [18] above, the Council would *ex hypothesi* be taking advantage of the Lease, obtaining its benefits, compelling its performance and enforcing its terms. There is no relevant distinction to be drawn between that consequence, and the consequence of an executory judgment granted to a party who sues "on" a contract. It is the very consequence that is proscribed by the doctrine of privity of contract. To hold otherwise would be to allow a third party to circumvent the doctrine of privity of contract by the simple expedient of invoking the court's declaratory jurisdiction (concerns acknowledged but not acted upon by the Full Court at FC [129], [144] (AB 139, 145)).

Section 21 of the FCA Act

[10] *EB* at [36] (Barrett AJA; Meagher and Gleeson JJA agreeing); *Radmanovich v Nedeljkovic* [2002] NSWSC 212 at [11] (Young CJ in Eq). See also *Fischer v Secretary of State for India* (1898) LR 26 IA 16, 29 (Lord Macnaghten).
[11] *Radmanovich v Nedeljkovic* [2002] NSWSC 212 at [11] (Young CJ in Eq); *Rosenberg v Fifteenth Eestin Nominees Pty Ltd (No 3)* [2011] VSC 66 at [31] (Habersberger J).

25. The third pillar of the Full Court's reasoning with respect to its novel and restricted re-characterisation of the doctrine of privity of contract is that a Third Party's entitlement to seek and obtain declaratory relief "derives from" the Court's statutory declaratory jurisdiction, namely s 21 of the *FCA Act*: FC [91] (AB 127), thus there is no incursion into the doctrine of privity of contract. According to the Full Court, for that reason, in so far as the grant of declaratory relief may be characterised as the authentication of a third party's entitlement to some benefit, that "benefit is not 'based on' the contract in the sense necessary to engage the doctrine of privity of contract": FC [91] (AB 127).

26. Contrary to that circular reasoning, s 21 of the *FCA Act* provides the source of the Court's *power* to grant declaratory relief[12] but does not in itself supply the underlying "right" (understood in a sense that is "wide and loose" and includes privileges, powers and immunities)[13] the existence of which is to be confirmed by a declaration of the court. As identified by the plurality in *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 (***CGU***) at [31], the "existence of jurisdiction is anterior to the existence of the power to grant particular relief". Justice Nettle in *CGU* further held that the question of jurisdiction to grant declaratory relief requires attention to the tripartite enquiry as to whether there is a matter, including the identification of "the right, duty or liability to be established": at [84]. The question whether there is an underlying right to be vindicated by the grant of declaratory relief, and the nature of that right, is not answered by reference to the Court's statutory power under s 21 of the *FCA Act*.

27. Consistent with this analysis, in *CGU* the plurality in this Court found that the third party liquidators' claim for declaratory relief as regards an insurer's liability to indemnify the defendants was "based upon" a statutory right of the liquidators to be paid in priority out of the proceeds of the insurance policy payable to the insured in respect of its liability to the liquidated company: *CGU* at [67]. For that reason, the liquidators' claim did "not depend upon any incursion upon principles of contract law or privity of contract" as they were "not claiming as a party to the insurance contract nor as persons otherwise entitled to the benefit of that contract": *CGU* at [67].

28. The nature of the relief sought by the Council here underscores the artificiality of the Full Court's approach. The Council seeks *inter alia* a "declaration that [APAL] is

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[12] E.g. *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [8]-[9] (Greenwood, Logan and Yates JJ).
[13] *Sankey v Whitlam* (1978) 142 CLR 1 at 23 (Gibbs ACJ).

obliged to make payments to the applicant pursuant to cl 26.2(a) … calculated in accordance with valuations made by the Valuer-General … and as notified by the [Council] in each rates notice issued by it to [APAL]": AFM 96. That relief is solely referable to APAL's contractual obligation vis-à-vis the Commonwealth under the Lease. The corresponding benefit to which the Council claims to be entitled in this proceeding is entirely "based on" cl 26.2(a). Thus, the Council's claim suffers from the very vice adverted to by the plurality in *CGU* at [67] in that the Council asserts no statutory (or other) entitlement or interest but instead claims simply as a person seeking the benefit of payments contemplated by the Lease.

29. The Full Court accepted that the Council is "not entitled to enforce any aspect of" the Lease by reason of the privity doctrine: FC [91] (AB 127). Yet that is precisely the effect of a grant of the declaratory relief sought by the Council. Indeed, in support of its conclusion that there was a matter for the purposes of Ch III the Full Court relied upon the fact that the "legally enforceable rights, duties and liabilities" of APAL and the Commonwealth under the Lease were "at the forefront of the dispute" in this proceeding and that the "heart of the subject matter of the controversy" was "the rights and liabilities attaching to the payment mechanism prescribed by cl 26.2": FC [142] (AB 144). That reasoning significantly undermines the Full Court's conclusion that the doctrine of privity of contract was not engaged.

30. Moreover, APAL would be precluded in any subsequent proceedings between APAL and the Commonwealth from contesting the proper construction and application of cl 26.2(a) by operation of an issue estoppel and/or *res judicata*.[14] In effect, a grant of declaratory relief will finally determine the contracting parties' rights and obligations under cl 26.2(a). To find, as the Full Court did, that the doctrine of privity of contract is not engaged in these circumstances bears a distinct air of unreality.

B. Issue Two: standing

Standing and privity of contract in a private law claim

31. The doctrine of standing is "a house of many rooms".[15] It would be an error to attribute to that doctrine "a fixed and constitutionally mandated content across the spectrum of

[14] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [48] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *EB* at [34] (Barrett AJA; Meagher and Gleeson JJA agreeing).
[15] *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [92] (McHugh J) (***Bateman's Bay***); *Truth About Motorways Pty Ltd v Macquarie Intrastructure Investment Management Ltd* (2000) 200 CLR 591 at [88]-[107], [122] (Gummow J) (***Truth About Motorways***).

Ch III".[16] Standing is relevant to, though not co-extensive with, the existence of a "matter" under Ch III[17] but the question of standing is shaped by the nature and subject-matter of the litigation.[18] The modern doctrine has its genesis in disputes over the competency of parties other than the Attorney-General to proceed without the Attorney-General's fiat to enforce statutory regimes or obligations of a public nature.[19] Thus, in proceedings to prevent the violation of a *public* right, an applicant has no standing unless he or she has a special interest in the subject matter of the action.[20]

32. By contrast, the Council's claim invites particular recourse to that area of the law that considers an applicant's standing to seek a declaratory remedy in respect of purely *private* rights[21] and, more specifically, the private contractual rights of co-defendants *inter se*. In that context, the question of standing requires attention to the doctrine of privity of contract and cannot be answered solely by reference to the test for standing as a matter of public law. As the primary judge correctly held (PJ [57], [59], [62] AB 25-7), Australian authority is largely to the effect that a non-party to a contract has no standing, save in exceptional circumstances, to obtain a declaration about the meaning and effect of a contract between others because that would be "contrary to the whole principle of privity": see *CGU* [95]-[96] *per* Nettle J.[22] The reliance by Nettle J in *CGU* at [96] upon the earlier cases of *Wilson* and *Coulls*, stands in stark contrast to the conclusion of the Full Court in this case that the doctrine of privity is not engaged where the relief sought is declaratory.

33. The analysis of the plurality in *CGU* at [67] was to broadly similar effect, attaching significance to the question whether the claim depended on "any incursion upon … privity of contract", albeit that this was considered in the context of the constitutional requirement of a "justiciable controversy" (and not standing) given the way the issues were framed before the Court: *CGU* at [33] & [59]. The analysis of the plurality in *CGU* in this regard is equally applicable to the separate question of standing, which

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[16] *Truth About Motorways* at [122] (Gummow J).
[17] *Kuczborski v The State of Queensland* (2014) 254 CLR 51 at [5] (French CJ) (***Kuczborski***).
[18] *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 36 (Gibbs CJ); *Bateman's Bay* at [92] (McHugh J).
[19] *Truth About Motorways* at [98], [103], [122]-[123] (Gummow J).
[20] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 36 (Gibbs CJ); *Taylor v Attorney-General (Cth)* (2019) 93 ALJR 1044 at [104]-[105] (Edelman J).
[21] *Bateman's Bay* at [92] (McHugh J); *Truth About Motorways* at [46] (Gaudron J).
[22] See eg *Rocla Pty Ltd v Plastream Pipe Technologies Pty Ltd* [2011] SASC 80 at [27]-[28] (Anderson J); Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (5th ed, 2014) at [19-215]. In the UK, see *Meadows Indemnity Co Ltd v Insurance Corporation of Ireland Plc* [1989] 2 Lloyd's Rep 298 at 309; *Federal-Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd* [2014] EWHC 2002 (Comm), [93]-[94], [100]; *Day v Barclays Bank Plc* [2018] EWHC 394 (QB) at [38]-[39], [42].

necessarily overlaps with the constitutional requirement of justiciable controversy as recognised by Gummow J in *Truth About Motorways Pty Ltd v Macquarie Intrastructure Investment Management Ltd* (2000) 200 CLR 591 at [122] (***Truth About Motorways***).

34. There may be circumstances in which a Third Party will have standing to seek a declaration as to the interpretation or application of a contract. These can be regarded as exceptional cases (as held by Nettle J in *CGU* at [96]), or in truth applications of other legal principles (as held by Brennan J in *Trident*). One such case is where the Third Party's claim is based on a statutory right to be paid in priority out of the proceeds of a policy of insurance against an insolvent defendant's liability to the plaintiff, such that the claim is not based upon the contract and there is no incursion into the doctrine of privity.[23] Another is where trust law or the law of agency may be engaged so as to enable relief to be granted without offending the privity doctrine.[24] Beyond that, however, as held by Mason CJ and Wilson J in *Trident* the "third party has no remedy".[25]

35. The primary judge had regard to the privity doctrine when assessing whether the Council had standing to seek declaratory relief in respect of cl 26.2(a), and properly considered that no exceptional circumstances applied so as to entitle the Council to the relief sought. The Full Court should have found no error in that approach.

Standing and the quality of the third party's interest

36. Even if, contrary to the submissions set out above, a Third Party may be found to have standing to seek declaratory relief as to the interpretation or application of a contract beyond those circumstances set out in [34] above, the Full Court adopted an erroneously low threshold for such entitlement. In this regard, it is significant that the Full Court at FC [153] AB 148 erroneously rejected any requirement that "exceptional circumstances" be shown before such intervention will be sanctioned: cf *CGU* at [95]-[96] *per* Nettle J.

37. The Full Court found that the question of standing (and whether a party is an "outsider" to the contract) depended upon a process of characterising the applicant's interest in the

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[23] *CGU* at [67], [96]; *Ashmere Cove Pty Ltd v Beekink (No 2)* (2007) 244 ALR 534 at [59] (French J) (aff'd on appeal: *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398).
[24] *Trident* at 135 (Brennan J).
[25] *Trident* at 121 (Mason CJ and Wilson J).

declaratory relief sought: FC [153] (AB 148-9). That turned on the legal, commercial or practical consequences that flow from the grant of such relief together with the strength of the applicant's connection to the contract: FC [153] AB 149. The "dominant focus" is identifying what the Third Party stands to gain: FC [148] (AB 146) and a Third Party will ordinarily possess a requisite interest where declaratory relief "would substantially aid the party in the course of future legal or commercial negotiations, whether or not those negotiations are closely proximate to the subject matter of the contract in question": FC [149] (AB 147). The Full Court identified support for this approach from *Aussie Airlines v Australian Airlines Ltd* (1996) 68 FCR 406 (***Aussie Airlines***) and *Edwards v Santos* (2011) 242 CLR 421 (***Edwards***).

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38. In *Aussie Airlines*, Qantas was contractually obliged to grant a sublease to a "Third Party Carrier" (as defined) pursuant to a lease with the FAC. Qantas and the FAC, the two contracting parties, were both parties to the litigation and were in dispute as to whether the applicant satisfied that definition. The FAC supported the applicant's interpretation of the lease and the grant of the declaratory relief sought by the applicant and had requested that Qantas give effect to its contractual obligation to commence negotiations with the applicant: at 411E-F, 420D. In these circumstances, Lockhart J (Spender and Cooper JJ agreeing), albeit recognising that privity of contract prevented a third party from suing at law on the contract: at 415A-B, held that the applicant had the requisite interest to support its right to obtain a declaration: at 415E. His Honour

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did not articulate whether this was by way of "exceptional circumstance", nor did his Honour make any finding that the doctrine of privity of contract did not apply in the circumstances (or analyse whether or how privity of contract did apply). In those circumstances, the jurisprudential basis for the conclusion as to standing notwithstanding the lack of privity is not clear. Had Lockhart J found that privity of contract had no relevance to the question of standing, it would be expected that some such statement to that effect would expressly have been made.

39. In any event, the conclusion in *Aussie Airlines* that the applicant had standing relied, *inter alia*, on the fact that without subleases, it would be "denied a right to carry on the business which it seeks to carry on" and for which purpose it was expressly

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incorporated: at 415F-G. The present is a very different case.

40. The decision in *Edwards* neither needed, nor sought, to address an applicant's *locus* to obtain relief in respect of a contract to which it is not a party. The plaintiffs in that case sought a declaration that the grant of a petroleum lease to the defendants under s 40 of the *Petroleum Act 1923* (Qld) would not fall within the terms of s 24IB of the *Native Title Act 1993* (Cth). Justice Heydon (with whom the plurality agreed) analysed the question of standing by reference *inter alia* to the public law test of whether the plaintiffs had an interest which was greater than that of other members of the public, albeit acknowledging (in that context) by way of example the approach taken in *Aussie Airlines*: at [37]-[38]. Justice Heydon found, in a public law context, that the plaintiffs had standing "because they have an interest in [the question of validity] which is greater than that of other members of the public": at [37].

41. Neither of these cases provides support for the approach of the Full Court to the question of standing in a private law context and the Full Court's conclusion significantly denudes the doctrine of privity of continuing practical relevance. Moreover, the approach adopted by the Full Court introduces highly undesirable uncertainty into the regulation and operation of the commercial and legal affairs of contracting parties. Those legal and commercial ramifications provide a further reason for rejecting the analysis of the Full Court as to what will suffice to confer standing on a Third Party.

42. Further, the facts here fall well short of those before the court in *Aussie Airlines* and *Edwards*. What the Council seeks is ultimately a windfall gain in circumstances where the constitutionally mandated starting point is that the Council is not entitled to recover Council rates from APAL and cl 26.2(a) was not included with the intention of benefitting the Council.

43. Nor, contrary to the conclusion of the Full Court, is standing conferred upon the Council by reason of either cl 26.2(a) including a step of notification by the Council and contemplating agreement being entered into between the Council and APAL: cf. FC [152], [178]-[181] (AB 148, 156-7), or on account of the declaration having some utility to the Council: cf FC [179] (AB 156). The finding of the Full Court that the Councils are "invitees, not invaders to the contractual relationship" under the Lease (FC [178] AB 156) imposes a specious gloss on, and serves to obscure rather than illuminate, the true legal position.

C. Issue Three: the requirements of a "matter"

Principles

44. It is a necessary condition of federal jurisdiction, in the sense of authority to exercise the judicial power of the Commonwealth, that there be "a justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy".[26] A "matter" in the sense required by Ch III refers to the subject matter for determination in a legal proceeding as distinct from the legal proceeding itself.[27] Whether there is a "matter" sufficient to attract federal jurisdiction is to be determined by reference to a tripartite inquiry:[28]

(a) *First*, the identification of the subject-matter for determination;

(b) *Second*, the identification of some immediate right, duty or liability to be established by the determination of the Court;[29] and

(c) *Third*, the identification of the controversy between the parties, for the quelling of which the judicial power of the Commonwealth is invoked.

45. The second requirement reinforces that the controversy the Court is being asked to determine is genuine, and not an advisory opinion divorced from a controversy.[30] In that respect, there can be no "matter" unless there is a remedy available at the suit of the person instituting the proceedings to enforce the substantive right, duty or liability in question.[31]

46. While the question of standing intersects with the existence of a "matter", an affirmative answer to one does not exhaust the inquiry into the other.[32]

Reasoning of the Court below

47. The Full Court determined the Council's standing together with the requirements of a "matter" and held that two broad factors must be considered: *first*, the existence and

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[26] *CGU* at [26], [30] (French CJ, Kiefel, Bell and Keane JJ); *Fencott v Muller* (1983) 152 CLR 570 at 603 (Mason, Murphy, Brennan and Deane JJ) (***Fencott***).
[27] *Palmer v Ayres* (2017) 259 CLR 478 at [26] (Kiefel, Keane, Nettle and Gordon JJ).
[28] *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [62] (Gaudron and Gummow JJ) (***Re McBain***); *CGU* at [84] (Nettle J).
[29] *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *CGU* at [26].
[30] *Palmer v Ayres* (2017) 259 CLR 478 at [27] (Kiefel, Keane, Nettle and Gordon JJ).
[31] *Truth About Motorways* at [48] (Gaudron J); *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at [31]-[32] (Gleeson and McHugh JJ) (***Abebe***).
[32] *Kuczborski* at [5] (French CJ); *Truth About Motorways* at [45] (Gaudron J).

quality of the controversy regarding the Council's claim to relief; and *second*, the quality of the Council's interest in the relief sought: FC [131] (AB 140).

48. As regards the former, the Full Court found that a justiciable controversy may exist even where the contracting parties are in agreement regarding the question of interpretation of the contract: FC [137] [143] (AB 142, 144). The Full Court also found that the rights, duties and liabilities of the Commonwealth and APAL under 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 and notwithstanding that the parties to the Lease did not initiate the proceedings: FC [141]-[142] (AB 144). The Court's reasoning in both respects reveals error.

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The absence of any relevant controversy

49. The Court below relied upon *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 (***Ashmere Cove***) as a purported illustration (and indeed, the only such illustration) of the proposition that there is "no requirement for a dispute to exist between the contracting parties" in order for a justiciable controversy to arise: FC [137]-[138] AB 142. However *Ashmere Cove* provides no support for the Full Court's conclusion.

50. In *Ashmere Cove*, the applicant investors had commenced proceedings against the responsible entity of a registered management scheme (**KMF**) and its former directors.

20 The investors were granted leave at first instance to join KMF's insurers as respondents to the proceedings under O 6, r 2 of the *Federal Court Rules 1979* (Cth). In circumstances where KMF's insurers had denied liability under the relevant insurance policy, the investors sought a declaration that the insurers were obliged to indemnify KMF in respect of the investors' claims. The insurers appealed against the joinder orders. In dismissing that appeal, the Full Court observed that "[t]he core of the justiciable controversy is the dispute between the Investors and KMF": at [51], [58]. That is, the "justiciable controversy" was effectively constituted by the underlying proceedings commenced by the investors against the insured, to which proceedings the investors sought to join the insurers – as was the position in *CGU*: *CGU* at [90]. That

30 "core" aspect of the controversy is entirely absent from the Council's claim in this proceeding.

51. The insurers in *Ashmere Cove* submitted orally before the Full Court that there was no longer any dispute between the contracting parties on the sole basis that "the liquidator's counsel, in opposing at first instance the grant of leave to the Investors to proceed against KMF, had adopted the arguments advanced by the Insurers in opposition to the joinder application": at [40], [60]. Significantly, the Court rejected that contention (at [61]), a finding entirely overlooked by the Full Court in the present proceeding. Nevertheless, the court in *Ashmere Cove* noted that "[e]ven if" the insurers' argument were correct, there "may" still be a single justiciable controversy involving the investors and the insurers: at [50], as the investors could secure the benefits of any indemnity by invoking ss 562, 601AG or 1321 of the *Corporations Act 2001* (Cth): at [52]-[53]. That circumstance bears no analogy to the Council's claim and provides a critical point of distinction with which the Full Court here failed to grapple.

52. There is thus no authority in support of the proposition that there is a controversy entitling a Third Party to seek declaratory relief as regards an insurer's liability to indemnify the insured in circumstances where the insurer has not denied liability to its insured under the relevant policy of insurance.[33] Conversely, in *CGU* the plurality found that a justiciable controversy existed by reason *inter alia* of the insurer's denial of liability under the policy: at [67]; see also [90] (Nettle J).

53. In the present case, it is common ground that not only is there no dispute as between APAL and the Commonwealth but indeed those parties are in positive agreement as to the proper construction and effect of cl 26.2(a) of the Lease, APAL's compliance with that provision for FY 2014/15 to 2017/18, and the basis upon which APAL is required to make payment thereunder going forward. It follows that there is no relevant controversy that exists independently of the Council's efforts to invoke the Court's declaratory jurisdiction in these proceedings.[34]

No relevant right, duty or liability

54. The Full Court held that the relevant rights, duties or liabilities to be established by the determination of the Court in this proceeding were the rights, duties and liabilities of

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[33] *Beneficial Finance Corp v Price Waterhouse* (1996) 68 SASR 19 at 56 (Lander J); *Bazem Pty Ltd v Bureau of Urban Architecture* [2010] NSWSC 978 at [33] (Gzell J) and the authorities cited therein (application for leave to appeal dismissed: [2011] NSWCA 81); cf. *Anjin No 13 Pty Ltd v Allianz Australia Insurance Ltd* (2009) 26 VR 148 at [79], [81]-[82] (Vickery J); *CE Heath v Pyramid Building Society* [1997] 2 VR 256; *CGU* at [67]; *Ashmere Cove Pty Ltd v Beekink (No 2)* (2007) 244 ALR 534 at [59] (French J) (aff'd *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398).

[34] *Fencott* at 603 (Mason, Murphy, Brennan and Deane JJ).

the Commonwealth and APAL under cl 26.2 of the Lease owed *inter se*: FC [142] (AB 144) about which there was no controversy as between those to or by whom the rights, duties and liabilities were owed or were exercisable. The Full Court erred in finding that those rights, duties or liabilities were sufficient to found the existence of a "matter".

55. There is no "universal" requirement for opposing parties to have correlative or reciprocal interests in the "right, duty or liability to be established" by the Court before a "matter" may arise.[35] For instance, in the prosecution of a federal offence the prosecutor and defendant do not have correlative interests but the proceeding nevertheless seeks to vindicate and enforce the defendant's duty or liability to observe the criminal law of the Commonwealth.[36] The prosecutor is in that context representative of the public interest.

56. However, in the context of private law rights and obligations, an applicant must assert or claim some right, duty or liability to be established by the Court in order for a "matter" cognisable in the exercise of federal jurisdiction to arise. As Gaudron J observed in *Truth About Motorways* in that context at [46]:

> *"a court could not make a final and binding adjudication with respect to private rights other than at the suit of a person who claimed that his or her right was infringed. Or there may be no justiciable controversy because there is no relief that the court can give to enforce the right, duty or obligation in question."*

57. Consistent with this, in *CGU* the plurality at [67] upheld the submission that the claim did not depend upon any incursion upon principles of contract law or privity of contract because the applicants were claiming not as parties to the contract or as persons "otherwise entitled to the benefit of that contract" but were relying upon the legal consequence created by s 562 of the *Corporations Act*. That analysis reinforces that some interest over and above a Third Party's expectation of benefit under a contract to which it is not a party is required for there to be a matter.

58. Whilst in *CGU* at [42] the plurality affirmed that the existence of a matter does not depend upon establishing a claim for vindication of "an existing legal right" against (in that case) the insurer, that was in a context where the interest of the plaintiff was in vindicating statutory rights under s 562 of the *Corporations Act* or under s 117 of the

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[35] *Re McBain* at [67] (Gaudron and Gummow JJ); *Truth About Motorways* at [105] (Gummow J); *CGU* at [91] (Nettle J).
[36] *Re McBain* at [67] (Gaudron and Gummow JJ).

Bankruptcy Act 1966 (Cth) and the plurality were there addressing an opposition to jurisdiction on the basis that the question was "hypothetical". Thus whether the relevant right had to be "existing" was of significance to the analysis. The analysis of Nettle J in *CGU* at [90] to the effect that the declaration need not be determinative of an issue that *directly* affected any property, legal right or obligation of the liquidators, was in the same context; that is, one in which the relevant plaintiff was seeking to vindicate a statutory right or entitlement the existence of which depended upon the question of the insurers' liability. His Honour's identification (at [99]) that it may be sufficient that a claimant will derive some benefit or advantage over and above that derived by an ordinary citizen, was carefully qualified by the introductory words "depending upon the circumstances" and falls well short of adoption of the approach in public law cases to private law generally.

59. Statements in the authorities which on their face tell against any requirement for an applicant to assert or claim any right, duty or liability each arise in the context of proceedings with respect to a public wrong,[37] where some public duty or obligation was put in issue by the applicant or some public interest otherwise sought to be vindicated. For instance, in *Croome v Tasmania* the applicant for declaratory relief as regards the invalidity of the State law in question sought to establish a privilege or immunity from the requirement to observe that law.[38] In *Truth About Motorways* the statute in question conferred standing upon the applicant to seek a declaration as to the operation or effect of any provision of that Act; the relevant injury was "that to the public interest in the observance of the requirements of the Act"[39] and there was "an immediate liability to be established against the respondent".[40] In *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, Gaudron and Gummow JJ described *Truth About Motorways* as "authority that the means available to the Parliament under s 76(ii) of the Constitution to enforce by new remedies compliance with legislative norms of conduct are not limited by a requirement for reciprocity or mutuality of right and liability between plaintiff and defendant" (at [65]; emphasis added).

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[37] E.g. *Truth About Motorways* at [20], [121], [123] (and corresponding statement at *CGU* at [26]); *Croome v Tasmania* 1997) 191 CLR 119 at 127 (***Croome***).
[38] *Croome* at 126-7; see also *Re McBain* at [69].
[39] *Truth About Motorways* at [121] (Gummow J).
[40] *Truth About Motorways* at [123] (Gummow J).

60. As reflected by the statement of Gaudron J at [56] above, that public law jurisprudence cannot be extrapolated into the private law setting where the only right, duty or liability to be established by the Court's determination is a contractual right or obligation which necessarily arises not because of any public duty or obligation but on account of a private voluntary agreement. There is, in such a case, no relevant wrong asserted and no legal remedy for that wrong available at the suit of the person claiming relief (for the reasons set out above).[41] By corollary, there is no "matter" which the Court has jurisdiction to determine.[42]

Part VII: Orders sought

61. APAL seeks the following orders:

(a) The appeal be allowed.

(b) Set aside orders 1 to 4 made by the Full Court of the Federal Court of Australia on 6 August 2020 and orders 1 to 3 made by the Full Court on 11 September 2020 and, *in lieu* thereof, order that:

i. The appeal is dismissed; and

ii. The Council pay APAL's costs of the appeal.

(c) The Council is to pay APAL's costs of the appeal in this Court.

Part VIII: Estimate of time

62. It is estimated that 2.5 hours will be required for the presentation of APAL's oral argument in chief.

Dated: 16 April 2021

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[41] *Abebe* at [31]-[32] (Gleeson CJ and McHugh J); *Truth About Motorways* at [48]-[49] (Gaudron J).
[42] Ibid.

Annexure A: List of Constitutional Provisions, Statutes and Statutory Instruments

Constitutional Provisions

Sections 52(i), 76(ii), 114.

Statutes

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

Bankruptcy Act 1966 (Cth), section 117.

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Corporations Act 2001 (Cth), sections 562, 601AG, 1321.

Federal Court of Australia Act 1976 (Cth), section 21.

Judiciary Act 1903 (Cth), section 78B.

Native Title Act 1993 (Cth), section 24IB.

Petroleum Act 1923 (Qld), section 40.

Statutory Instruments

Federal Court Rules 1979 (Cth), O6, r 2.

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