



## Tell us what the matter is

Annabel Osborn Brodie reports on *Hobart International Airport Pty Ltd v Clarence City Council & Anor*; *Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council & Anor* [2022] HCA 5

The High Court has found that an ‘outsider’ to a contract may, in exceptional circumstances, have standing to seek declarations in relation to the meaning and effect of a contract between the contracting parties.

The decision turned on whether the case involved a ‘matter’ capable of determination by a court exercising federal jurisdiction in accordance with Ch III of the Constitution. This was satisfied because, firstly, the matter arose out of a contract which was made pursuant to federal legislation and, secondly, there was found to be a justiciable controversy. The latter question involved consideration of whether the party seeking declaratory relief had standing.

While the ‘outsider’ in this case was found to have a ‘sufficient’ or ‘real’ interest in the matter, the High Court cautioned that this decision is confined to its particular facts and should not be viewed as suggesting that a mere commercial interest in the interpretation of a contract would give a party standing to seek declaratory (or other) relief.



### Background

The proceedings concern two leases granted by the Commonwealth under the *Airports (Transitional) Act 1996* (Cth) to each of Hobart International Airport Pty Ltd; and Australia Pacific Airports (Launceston) Pty Ltd (collectively, the airports).

The sites of each of the leases (the

Hobart and Launceston airports) were Commonwealth land and not amenable to council rates or state land tax (s 114 of the *Constitution*). To address the competitive imbalance this might create between the airports and their competitors, the Commonwealth included a clause in the leases which allowed the relevant government bodies to obtain payments equivalent to and in lieu of the relevant rates and taxes:

1. Clause 26.1:

#### PAYMENT OF RATES AND LAND TAX AND TAXES

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

2. Clause 26.2:

#### EX GRATIA PAYMENT IN LIEU OF RATES AND LAND TAX

- (a) Where Rates are not payable under sub-clause 26.1 because

the Airport Site is owned by the Commonwealth, the Lessee must promptly pay to the relevant Governmental Authority such amount as may be notified to the Lessee by such Governmental Authority as being equivalent to the amount which would be payable for rates as if such rates were leviable or payable in respect of those parts of the Airport Site:

- (i) which are sub-leased to tenants; or
- (ii) on which trading or financial operations are undertaken including but not limited to retail outlets and concessions, car parks and valet car parks, golf courses and turf farms, but excluding runways, taxiways, aprons, roads, vacant land, buffer zones and grass verges, and land identified in the airport Master Plan for these purposes, unless these areas are occupied by the Commonwealth or an authority constituted under Commonwealth law which is excluded from paying rates by Commonwealth policy or law. The Lessee must use all reasonable endeavours to enter into an agreement with the relevant Governmental Authority, body or person to make such payments.

The relevant 'governmental authority' was Clarence City Council in respect of Hobart Airport' and Northern Midlands Council in respect of Launceston Airport (collectively, the councils). The councils were not parties to the leases between the Commonwealth and the airports. Between 1998 and 2013, the airports made the payments to the councils in accordance with clause 26.2(a) (ex-gratia payments).

### The dispute

In 2014, a dispute arose as to the calculation of the ex-gratia payments. The valuer-general of Tasmania undertook a re-evaluation of the Hobart and Launceston airports and essentially found the whole area of the airports was land on which 'trading or financial operations' were undertaken, resulting in a larger rateable area and much larger ex-gratia payments. The councils agreed with this approach. The airports objected, and eventually the Commonwealth sought an independent valuation which took a narrower view in identifying the

'trading or financial operations' areas at the respective airports. The Commonwealth and the airports agreed with this approach and the airports made ex-gratia payments in accordance with the independent valuation.

The Commonwealth and the airports (the parties to the leases) were in agreement that 'trading and financial operations' did not apply to the whole area of the airports while the councils contended that the whole of each of the airports were rateable.

The councils commenced proceedings in the Federal Court against the Commonwealth and the airports seeking, among other things, declaratory relief with respect to the proper construction of clause 26.2(a) and the airports' compliance with the obligations to make the ex-gratia payments (which the councils contended had not been met due to the incorrect calculation of the payments).

The primary judge dismissed the councils' applications on the basis the councils lacked standing.

The councils appealed to the Full Court of the Federal Court (Jagot, Kerr and Anderson JJ), arguing they had standing to seek the declaratory relief. The Full Court allowed the appeal and remitted the proceedings to the primary judge to determine whether the councils should be granted the declaratory relief.

### Appeal to the High Court

The airports, by grant of special leave, appealed to the High Court arguing that the proceedings did not involve a 'matter' for the purposes of Ch III of the Constitution. They contended that there was no justiciable controversy as the rights the subject of the proceedings were private contractual rights between the Commonwealth and the airports, and those two parties were not in dispute. Additionally, the doctrine of privity of contract meant the councils lacked standing. The councils filed notices of contention arguing that, if privity applies, then there were exceptional circumstances in this case or the court should confine the doctrine so it does not deny standing where the third party was a participant in the contract.

The High Court dismissed the appeals with costs.

### Reasons

The majority (Kiefel CJ, Keane, Gordon, Gageler and Gleeson JJ) found that there was a 'matter' for the purposes of Ch III of the Constitution. A matter has two elements: firstly, the subject matter itself, as defined by reference to the heads of jurisdiction set out in Ch III, and secondly, the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy. This was established

in this case because:

1. the subject matter falls within section 76(ii) of the Constitution because the relevant rights and obligations arise under the Commonwealth Law – the *Airports (Transitional) Act 1996* (Cth); and
2. there is a justiciable controversy, within the meaning of ss 75 and 76 of the Constitution, because the councils have standing for the purposes of seeking declaratory relief (see below), the airports are natural contradictors and the Federal Court could grant such relief, which would finally resolve the issues between the parties.

In relation to (2), the majority found the councils have standing to seek declaratory relief because they have a 'sufficient' and 'real' interest in the dispute. There was no majority view as to why the councils have a sufficient interest, as the reasons varied between the two plurality judgments. However, common themes included the following:

- the councils were active participants in the processes established by the contract, they had to notify the airports of the amounts for the ex-gratia payments and the airports had to use their best endeavours to negotiate with the councils, and therefore could not be described as real outsiders to the contract;
- the proper construction of clause 26.2(a), in particular the words 'trading or financial operations', is of real practical importance to the councils;
- the councils have a real commercial interest in the relief sought in that it will have a large impact on the amount of the ex-gratia payments and therefore the financial position of the councils.

The combination of abovementioned circumstances made this case exceptional, and privity did not prevent the councils having standing.

Edelman and Steward JJ (dissenting) essentially agreed with the principles set out by the majority but disagreed with the majority's application of the principles to the facts. They did not consider that the councils have standing in these proceedings to seek declarations concerning private contractual rights of the Commonwealth and the airports because the dispute did not meet the criteria of a 'matter' under Ch III, the operation of the doctrine of privity prevents it, and there were no exceptional circumstances. **BN**