IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S29 of 2015**

BETWEEN: **FIREBIRD GLOBAL MASTER FUND II LTD**
Appellant

and

REPUBLIC OF NAURU
First Respondent

WESTPAC BANKING CORPORATION
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (SEEKING LEAVE TO INTERVENE)

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PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth of Australia (the **Attorney-General**) moves on the summons filed on 24 April 2015 and the affidavit of Cameron Robert Hutchins filed on 24 April 2015, and seeks leave to intervene in the appeal on the combined basis that:

   a. the Executive Power of the Commonwealth, under s 61 of the Constitution, incorporates the prerogatives of the Crown in the area of the dealings between the Commonwealth and foreign states;

   b. an important aspect of those dealings is to seek to ensure that foreign states in general, and not just the Republic of Nauru in particular, have the benefit of a principled, ample and correct construction of the reach of the *Foreign States Immunities Act* 1985 (Cth) (***Immunities Act***), including in its interaction with the subsequent *Foreign Judgments Act 1991* (Cth) (***Foreign Judgments Act***). This is both in the interests of those states and so that they in turn will accord the Commonwealth and its representatives, officers and agencies appropriate immunity when it or they are sought to be impleaded before the courts of foreign states.

   c. Further to (b), foreign state immunity is a rule of customary international law that Australia is obligated to uphold (see *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening), Judgment, ICJ Reports 2012*, p 99[1] (***Jurisdictional Immunities Case***) at [56] and [57]; see also *Compania Naviera Vascongado v Steamship 'Cristina'* [1938] AC 485 (***The Cristina***) at 490). The *Immunities Act* codifies domestically Australia's implementation of that rule. The Attorney-General seeks to put submissions on the proper construction of the Act, in part towards ensuring compliance with Australia's international obligations.

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[1] The Attorney-General notes that judgments of the International Court of Justice (**ICJ**) are technically binding only on the parties to the dispute and constitute "subsidiary means" of determining rules of international law under Art 38(1)(d) of the ICJ Statute, to be applied in disputes between states; in this case, the dispute concerned the scope of custom under Art 38(1)(b) of the Statute. However, the ICJ is the principal judicial organ of the United Nations and *par excellence* the organ by which public international law is applied. Its decisions therefore enjoy a high level of authority and prestige, and are generally highly persuasive. See R Kolb, *The International Court of Justice* (2013, Hart Publishing), pp 59, 67.

d. The Attorney-General has ministerial responsibility for both these two statutes and for these aspects of international law and the Commonwealth's dealings with foreign states;

e. Many of the arguments of the appellant, if accepted, would imperil the interests identified above and call for the Attorney-General to take steps to ensure the Court has the benefit of full counter-argument;

f. The issues are novel: the interaction of these two statutes was not considered by the Court in the previous leading authority in the area (see *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 (***PT Garuda***) at 252 [34]) or otherwise. The issues are also informed by substantial authority from foreign or international courts that is not fully dealt with in the parties' submissions.

g. While the submissions the Attorney-General wishes to make accord, in many respects, with those of Nauru, they seek, in the important respects summarized at [4] below, to provide a larger view of the matter before the Court than that put by either of the parties.

3. This intervention is consistent with principle. The identified interest of the Commonwealth is a legal one: see *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [2]-[3]. The prerogatives of the Crown, or similar statutory powers, in relation to foreign states are interests that may be protected by intervention: *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 (***Bradley***) at 400E, 401B and the authorities there cited (cited with approval in *Levy v Victoria* (1997) 189 CLR 579 (***Levy***) at 601 fn. 71). In the present case, the issue is analogous to that in *Bradley*. The existence, and extent, of the immunity from suit accorded by Australia to foreign states, under a statute implementing international law obligations, is central to the conduct of Australia's foreign relations and thus constitutes a legal interest of the Commonwealth that may be protected by intervention. Consistent with the observation of Kitto J in *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 182 the Commonwealth establishes that "the decision of the Court can have a bearing, or may have a bearing, upon [its] legislative or executive powers or other direct interests". It follows that, in these proceedings, the Attorney-General wishes "to maintain some particular right, power or immunity in which [the Commonwealth is] concerned, and not merely to intervene to contend for what [he] consider[s] to be a desirable state of the general law": *Australian Railways Union v*

Victorian Railways Commissioners (1930) 44 CLR 319 at 331, per Dixon J. Further the Commonwealth is able to assist the Court with a larger view of the matter than the parties have offered: cf. *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312; and *Levy* at 603.

4. The key matters raised within the appeal on which the Attorney-General seeks to offer a larger view than the parties are:

   a. On the question whether an attempt to register, under Part II of the *Foreign Judgments Act*, a judgment granted by a foreign court against a foreign state invokes "the jurisdiction of the courts of Australia in a proceeding" within s 9 of the *Immunities Act*, the parties are agreed that the registration procedure involves the exercise of judicial power under chapter III of the Constitution in a matter arising under a law of Parliament within s. 76(ii) of the Constitution (AS [23] and RS [14]). However, the proper characterization of that matter – including its bifurcated and potentially ex parte procedures – requires further elucidation, and assists in the conclusion that s. 9 of the *Immunities Act* is attracted in such a case – **see paras [11]-[22] below**;

   b. On the question whether the *Foreign Judgments Act* has effected an implied partial repeal of the *Immunities Act*, two aspects require elaboration beyond the submissions of the parties: first the role of the *Immunities Act* as a "code", and second, a closer understanding of the role of s. 7(4)(c) of the *Foreign Judgments Act* - **see paras [34]-[47] below**;

   c. As to each of the above two questions, and to the further questions whether a proceeding to register a foreign judgment can ever "concern a commercial transaction" within s. 11 of the *Immunities Act* and whether Part III of the *Immunities Act* requires service on the foreign state, additional submissions are appropriate as to: the rules of international law that underpin the statutory immunity in the *Immunities Act*; construing the *Immunities Act* in a way that accords with rules of international law, where that is open; the significance which the Court should place on principles of international law and the ICJ's decision in the *Jurisdictional Immunities Case*; and decisions on similar questions from courts in the US, UK and Canada – **see paras [23]-[28], [40]-[41], [47], [48]-[60] below**;

d. As to the question of the scope of the immunity from execution in Part IV of the *Immunities Act*, submissions are appropriate additional to those of the parties on the concept of property of the foreign state being "in use" and "for commercial purposes", particularly as illuminated by US and UK jurisprudence on analogous provisions – **see paras [61]-[68] below.**

Part III: APPLICABLE PROVISIONS

5. The statement of applicable legislation and regulations set out in Firebird's written submissions, as supplemented by the submissions of Nauru, is accurate and complete.

Part IV: SECTION 78B NOTICES

10 6. The parties are agreed that the appeal can proceed without need for s. 78B notices. The Attorney-General agrees: while some of the construction issues in the matter can usefully be considered through the prism of underlying constitutional principle (see especially paras [12]-[18], [31]-[42] and [47] herein), this does not tip the appeal over into the category where it squarely arises under the Constitution or involves its interpretation so as to trigger s. 78B.

Part V: SUBMISSIONS

7. In summary, the Attorney-General submits that:

a. an application to register a foreign judgment under Part II of the *Foreign Judgments Act* involves an exercise of judicial power in a matter which, once the
20 matter is properly understood, invokes "the jurisdiction of the courts of Australia in a proceeding" within the meaning of s. 9 of the *Immunities Act*;

b. the *Foreign Judgments Act* has not impliedly repealed the *Immunities Act* in any relevant respect, particularly once regard is had to the status of the *Immunities Act* as a code, and the proper role of s. 7(4)(c) within the *Foreign Judgments Act*;

c. a proceeding to register a foreign judgment under the *Foreign Judgments Act* can never "concern a commercial transaction" within the meaning of s. 11 of the *Immunities Act*;

d. service of the application for registration of the foreign judgment under the *Foreign Judgments Act* was required by Part III of the *Immunities Act*;

e. in construing the *Immunities Act*, regard may be had to the principles of international law that underpin the Act and, similarly, the decision of the ICJ in the *Jurisdictional Immunities Case*, which tend to support the above conclusions.

8. The Attorney-General also makes submissions about the proper legal test to be applied in determining if property is "in use", and "for commercial purposes" within the meaning of s. 32 of the *Immunities Act*, particularly as illuminated by the US and UK jurisprudence.

An application to register a foreign judgment involves "the jurisdiction of the courts of Australia in a proceeding"

9. Firebird's submission that an application to register a foreign judgment under the *Foreign Judgments Act* does not involve the exercise of the "jurisdiction of the courts of Australia in a proceeding" within the *Immunities Act* should be rejected: see generally Bathurst CJ at [58]-[62]; Basten JA at [240]-[246] as supplemented by the following analysis.

10. Four points should be made.

(i) Scope of the "matter"

11. *First,* critical to Firebird's submission is an acceptance that the invocation of the procedure under Part II of the *Foreign Judgments Act* involves the exercise of judicial power: AS [23]. So much is a necessary concession. To suggest to the contrary would involve the proposition that the Federal Court of Australia, or State or Territory Courts capable of exercising federal jurisdiction, had been conferred with non-judicial power in a manner which would infringe chapter III: cf. *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245.

12. Since the relevant court is conferred with judicial power under Part II of the *Foreign Judgments Act* in a matter, how then is that matter to be characterized? Firebird offers a cramped conception of the matter, one so narrow as to threaten undermining its initial correct concession. According to Firebird, the matter under the *Foreign Judgments Act* escapes the reach of a "proceeding" under the *Immunities Act* because it does not require the foreign state "to appear in an Australian court to answer a claim against it" (AS [24]). Instead, the matter involves no more than "the invocation of post-judgment enforcement proceedings concerning property of the judgment debtor" (AS [24] again). Or again, the registration "process ... does not involve the assertion of a cause of action against the foreign state. Rather the procedure recognizes that the foreign state's rights and liabilities

have already been determined by the foreign judgment, and the registration procedure is simply a preliminary step which allows for the curial enforcement of that judgment in Australia" (AS [28]). It is unclear precisely how Nauru characterises the matter, although it seems to place primary significance upon the first stage of the registration process (i.e., s. 6), treating the second stage (i.e., s. 7) as secondary: see RS [15].

13. The correct position is that the registration of a foreign judgment under the *Foreign Judgments Act* involves the creation of new rights against the judgment debtor: see s. 6(7) of the *Foreign Judgments Act*; cf. *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 555 [32] (see also the cases referred to by Bathurst CJ at [60]). Registration of a judgment involves the imposition of a duty on a foreign judgment debtor in the sense referred to by this Court in *PT Garuda* at [17] (i.e., the creation of a duty, enforceable in Australian courts, to satisfy the foreign judgment, pay interest upon it, etc.).

14. The proceedings by which those new rights and duties are created thus cannot be regarded merely as "post-judgment enforcement proceedings" (cf. AS [24]). So to characterize them overlooks the critical fact that registration proceedings *create* new rights that are then in turn enforced – they are not themselves an enforcement of a foreign judgment.

15. Furthermore, in any event, the creation of duties by reason of the registration of a foreign judgment depends on the outcome of the inquiries under *both* s. 6 *and* s. 7 of the *Foreign Judgments Act*. Those procedures cannot be viewed in isolation from one another.

16. The first such inquiry is (from the perspective of an applicant) relatively straight forward, involving an applicant establishing certain fundamental matters (e.g., the matters required to be established by ss. 5(4), 5(8), 6(3), and 6(6) of the *Foreign Judgments Act*). The second may involve a more detailed inquiry into the registrability of the foreign judgment under s. 7. But the existence of a bifurcated procedure cannot be allowed to distract from the existence of one overall inquiry. Indeed, to view s. 6 in isolation from s. 7 may suggest difficulties of a constitutional kind with the s. 6 procedure: cf. *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (***International Finance***) at 374-378 [126] – [135], per Hayne, Crennan and Kiefel JJ.

17. Overall, viewed in constitutional terms, the "matter" in respect of which jurisdiction is conferred on a court is whether all of the conditions are satisfied that would enable a

foreign judgment to be, and remain, registered as a judgment of an Australian court for the purposes of enabling subsequent enforcement proceedings in Australia.

18. The focus must be, therefore, on the underlying nature of the controversy to be decided, and not the procedural form by which that decision is reached. The invocation of the processes of an Australian court under the *Foreign Judgments Act* is the making of a claim against the judgment debtor, by reason of which, if successful, duties or obligations will be imposed upon the judgment debtor without its consent. That two steps may be involved does not change the analysis. The *whole* of the process forms the "matter" under the *Foreign Judgments Act* and in turn is what invokes the "jurisdiction of the Courts of Australia in a proceeding" under s. 9 of the *Immunities Act*.

(ii) Relevance of proceedings potentially being *ex parte*

19. *Second,* Firebird seeks to place significance on the possibility of an application pursuant to s. 6 of the *Foreign Judgments Act* being heard *ex parte* as somehow taking it outside the scope of s. 9 of the *Immunities Act*: (AS [26]).

20. Putting to one side, for the moment, the issue whether such a course is permissible where the judgment debtor is a foreign state, the fact that proceedings may be able to be commenced and conducted in their initial stage *ex parte* does not take them outside the concept of "the exercise of the jurisdiction of the courts of Australia in a proceeding" within s. 9 of the *Immunities Act.*

21. The relevant use of the phrase "ex parte" refers to "something done in judicial proceedings without notice to the *party* affected": *International Finance* at 348 [38], per French CJ (emphasis added). See also at [128], per Hayne, Crennan and Kiefel JJ. In other words, the fact that proceedings may occur at an initial stage without notice to an affected party for a variety of reasons (usually either urgency, or, as is the case with applications for *Mareva*, *Anton Piller* or asset preservation orders, because notice may result in the destruction of the subject matter designed to be protected by the application: *International Finance* at 348 [39], per French CJ) does not alter the fact that the person whose rights are being affected is a party to the proceedings. Proceeding *ex parte* is a matter of procedure, not substance.

22. The Court has observed that the use in s. 9 of the term "jurisdiction" refers to "the amenability of a defendant to the process of Australian courts": *PT Garuda* at 247 [17]. In *PT Garuda*, the Court went on to observe that, as a result, Australian courts may not

"by their process make the foreign State against its will a party to a legal proceeding", with the consequence that "the immunity may be understood as a freedom from liability to the imposition of duties by the process of Australian courts": *PT Garuda* at 247 [17]. Even if registration proceedings can be commenced *ex parte*, that still involves the judgment debtor being made a party to proceedings against its will.

(iii) Relevance of underlying international law principles

23. *Third,* it is an accepted principle of statutory construction that statutes should be interpreted and applied, so far as their language permits, so that they are in conformity and not in conflict with the comity of nations and established rules of international law: *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ***(Malaysian Declaration Case)*** (2011) 244 CLR 144 at [247]. That is especially pertinent in cases like the present, where the statute at issue implements, or codifies (from the common law) Australia's obligations under international law: see *Malaysian Declaration Case* at [66]-[67], [90]-[91].

24. Against that background, it should be recognized that the immunity conferred by s. 9 reflects the first of two propositions of international law to which the common law historically gave effect. First, that "the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings": *The Cristina* at 490, per Lord Atkin; see also *Jurisdictional Immunities Case* at [55] and [113]. And secondly, that courts "will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his": *The Cristina* at 490, per Lord Atkin; see also the *Jurisdictional Immunities Case* at [113].

25. Firebird is thus wrong to infer from the presence of s. 30 of the *Immunities Act* some limitation on the scope of s. 9 (see AS [23]). The two immunities are directed to different matters, and the scope of one does not inform or limit the content of the other: see *Jurisdictional Immunities Case* at [113], [124].

26. There is nothing in any formulation of the international or common law jurisdictional immunity to which s. 9 gives effect that would invite a narrow understanding of what constitutes an "impleading" (cf. AS [24]): the question is simply whether the foreign state has been made a party to legal proceedings against its will.

27. Whether a foreign sovereign is impleaded in that relevant (broad) sense is a question of substance: see, e.g., *The Parlement Belge* 5 PD 197 at 219; *Van Heyningen v Netherlands-Indies Government* [1949] St R Qd 54 at 60. Nevertheless, even if the matter is looked at purely in terms of form, in the case of the registration of a foreign judgment under the *Foreign Judgments Act* in the Supreme Court of New South Wales, *Uniform Civil Procedure Rules 2005* (NSW), Rule 53.2(2) provides that the judgment debtor is a defendant to the proceedings.[2] Being named as a defendant is a sufficient basis upon which to conclude that a judgment debtor is impleaded by Australian proceedings.

28. Nor can there be any doubt that, viewed as a matter of substance, an application to register a foreign judgment under the *Foreign Judgments Act* has the consequence of making the judgment debtor a party to proceedings against its will. In the closely related (but, as discussed below at [56], not identical) context of an application for *exequatur* proceedings under Italian law, the ICJ in the *Jurisdictional Immunities Case* observed (at [128]): "in granting or refusing *exequatur*, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment." Cf., too, *Kuwait Airways Corporation v Republic of Iraq* [2010] 2 SCR 571 (***Kuwait Airways***) at [20].

(iv) Varying usages of the term "proceeding"

29. *Fourthly*, the term "proceeding" is one of those words that, depending on context, is capable of carrying a broad or a narrow meaning. At its narrowest, it has been held to mean any invocation of the jurisdiction of a court by process other than a writ; the invocation of the jurisdiction of a court by writ being an "action": *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437 at 1446, per Lord Simon of Glaisdale. The wider, and more usual, understanding of a "proceeding" is that described by Starke J in *Cheney v Spooner* (1929) 41 CLR 532 at 538-9; namely, (in relation to civil proceedings) "any application by a suitor to a Court in its civil jurisdiction for its intervention or action" (see also at 536-7, per Isaacs and Gavan Duffy JJ; *McIvor v Watson* (1960) 103 CLR 658 at 664).

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[2] The power to make rules of court for the purposes of the *Foreign Judgments Act* is conferred by s. 17 of that Act. Rules so made apply either by reason of s. 17, and/or s. 79(1) of the *Judiciary Act* 1903 (Cth).

30. That is not to say, however, that even the broader definition encompasses every application to a Court. For example, there will be instances where a person is properly to be understood, not as commencing proceedings, but as taking a step preliminary to a proceeding (for example, by seeking leave to commence proceedings). Applications for special leave to appeal to this Court have traditionally been regarded in that way: see *Collins (alias Hass) v The Queen* (1975) 133 CLR 120 at 122; *Coulter v The Queen* (1988) 164 CLR 350 at 356.[3]

31. An application to register a foreign judgment, however, constitutes a "proceeding" in the broader sense, in that the foreign judgment creditor is not simply seeking leave to commence proceedings, but is in fact doing so. For the reasons given above, an application to register a foreign judgment is not merely an administrative or procedural step taken as a pre-condition to, or in contemplation of, the enforcement of the judgment (cf. AS [28]). Rather, it is an invocation of the judicial power of the Commonwealth to determine the registrability of the judgment in question (in accordance with the applicable statutory criteria), with the result that a new set of rights is to be created as between the parties to the foreign judgment. Cf. *Kuwait Airways* at [20].

32. Finally, there is further textual support that the *Immunities Act* does not use the term "proceeding" in the narrow sense propounded in *Herbert Berry*. So much is apparent from the expansive definition of "initiating process" in s. 3 (to which neither party has referred), especially when that definition is read with s. 2J of the *Acts Interpretation Act* 1901 (Cth)[4] (i.e., those provisions make clear that a "proceeding" may be commenced by process other than a writ). Nor is there any other reason to give it a restricted meaning.

33. *Overall*, therefore, for all of the above reasons, it is submitted that an application to register a foreign judgment under the *Foreign Judgments Act* involves the exercise of "the jurisdiction of the courts of Australia in a proceeding".

The Foreign Judgments Act does not impliedly repeal the Immunities Act

34. Firebird submits that there is an inconsistency between, on the one hand, the requirement of the *Foreign Judgments Act* to register a foreign judgment where the requirements of

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3 Note, however, that this traditional understanding does not preclude an application for special leave to appeal being properly regarded as a "cause" within the meaning of the *Judiciary Act* 1903 (Cth) to which s. 78B applies.

4 Section 2J was inserted into the *Acts Interpretation Act* by the *Acts Interpretation Act Amendment Act* (2011) (Cth), Sch. 1, cl. 4. Schedule 3, cl. 1 of that Act provides that "the amendments and repeals made by Schedule 1 apply, on and after the commencement of Schedule 1, in relation to Acts enacted before, on or after that commencement."

s. 6 are satisfied (and no basis for setting aside the registration is shown under s. 7), and, on the other, the requirement under s. 38 of the *Immunities Act* to set aside an order made inconsistently with the s. 9 immunity (AS [32]).

35. This submission must be assessed against the strict standard by reference to which asserted implied repeals are judged. As Barton J observed in *Goodwin v Phillips* (1908) 7 CLR 1 at 10, quoting *Hardcastle on Statutory Law* with approval:

> "*The court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the later imply the repeal of an express prior enactment, i.e., the repeal must, if not express, flow from necessary implication.*"

36. See also, e.g., *Hack v Minister for Lands (NSW)* (1906) 3 CLR 10 at 23; *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276; *Saraswati v R* (1991) 172 CLR 1 at 17.

37. Moreover, there are particular considerations that arise when, as Firebird contends in this case, an earlier *special* Act is said to have been impliedly repealed by a later *general* Act. The relevant principle was stated by Wood VC in *Fitzgerald v Champneys* 2 J&H 31 at 54, and quoted with approval by Barton ACJ in *Maybury v Plowman* (1913) 16 CLR 468 at 473-4:

> "*The reason in all these cases is clear. In passing the special Act, the legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstance of that special case; and, having so done, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated.*"

38. In any event, in this case, there is simply no inconsistency between the two Acts. They deal with different, and only very slightly overlapping, subject matters. That is, as Basten JA observed (at [261]):

> "*Thus, the Foreign Judgments Act is directed to the registration and enforcements of judgments given in courts of other countries, of which judgments involving a foreign State will be but a small subset .... On the other hand, the Foreign States Immunities Act addresses the jurisdiction of Australian courts with respect to foreign States and their entities, of which proceedings for enforcement of foreign judgments will be but a small subset ....*"

39. The terms of s. 9 ("Except as provided by or under this Act ...") make plain that it was intended to deal comprehensively and specifically with the immunity of foreign states from the exercise of jurisdiction by Australian courts. That statement is a sufficient

indication of Parliamentary intention that the particular provisions of the *Immunities Act* are to prevail over any other generally expressed creation of liabilities or obligations. It is, to that extent, a "code": cf. *Alcom Ltd v Republic of Columbia* [1984] 1 AC 580 (***Alcom***) at 600; Basten JA at [250].

40. Further, it must be recalled that the *Foreign Judgments Act* does not deal with the enforcement of all foreign judgments. Firebird presumably does not dispute that s. 9 of the *Immunities Act* applies to the enforcement of judgments otherwise than pursuant to the *Foreign Judgments Act*. Firebird's contention must be, therefore, that the *Foreign Judgments Act* was intended to create a limited exception to the otherwise comprehensive conferral of immunity on foreign states. There is no indication that Parliament intended, by the enactment of the *Foreign Judgments Act*, to create such a limited and unprincipled exception, indeed one that might arguably place Australia in breach of its customary international obligations. The *Foreign Judgments Act* should not be understood as operating to the exclusion of other relevant parts of Australian law, including the *Immunities Act*.

41. The absence of any conflict between the two Acts is reinforced by the observation of the ICJ, in the *Jurisdictional Immunities Case*, ([at 82]) that immunity from jurisdiction is "an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature." In other words, the question of immunity is necessarily to be decided *before* one comes to decide the question of whether a judgment meets the requirements for registration. The requirement to set aside in s. 38 provides a remedy for circumstances where that has failed to occur. But in the ordinary course, immunity would be decided at the earlier stage and the subsequent, and separate, question of the registration preconditions either would not arise (if immunity exists) or can be considered in the usual way (if there is no immunity). Thus, no inconsistency between the Acts arises.

42. There is an additional factor telling against an implied repeal in the circumstances of these two Acts: when the *Immunities Act* was enacted in 1985, registration of foreign judgments took place under State law. The relevant State Acts were in substantially similar terms to those now found in the *Foreign Judgments Act*. As Basten JA observed (at [250]), "[g]iven the subject matter of the [*Immunities Act*] and the source of federal constitutional power (being 'external affairs', *Constitution*, s. 51(xxix)) there would have been strong grounds for concluding that that Act was intended to cover the field with respect to the

circumstances in which a foreign sovereign State could be subject to the exercise of governmental power by Australian courts". In other words, the State Acts would have been inoperative pursuant to s. 109 of the *Constitution* had they purported to exclude the immunity conferred by the *Immunities Act*. The enactment of the *Foreign Judgments Act*, in near identical terms to the predecessor State Acts, could not have been intended to work a different result.

43. Section 7(4)(c) of the *Foreign Judgments Act* does not require any different conclusion. That section does not "make it clear that the legislature expressly contemplated that a judgment against a foreign state might be registered" (cf. AS [33]).

10 44. The word "person" in the equivalent provision to s. 7(4)(c) in the earlier State Acts, would naturally have been understood as referring to natural or corporate persons, and not foreign states (cf. *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [19]-[24]) for the simple reason that, at the time those Acts were passed, foreign states enjoyed an absolute immunity from the jurisdiction of Australian courts (including, therefore, in relation to registration of foreign judgments). Whether the re-enactment of such a provision in 1991 in the *Foreign Judgments Act* was intended to have some different effect may be doubted. But, on any view, the section would have real work to do other than in relation to foreign states. See *AIC Ltd v The Federal Government of Nigeria* [2003] EWHC 1357 at [34]; Basten JA at [229]. For example, though heads of state are
20 dealt with in the *Immunities Act* (see s. 36), other members of diplomatic missions are accorded immunity from suit[5], as are certain staff of specified international organizations[6]. Indeed, it may be noted that the immunity of such persons differs from, and may even be wider than the immunity of foreign states.[7] This consideration reinforces the inappropriateness of using the tail of this provision to wag the dog of the scope of the immunity of foreign states.

45. Even if the word "person" is construed so as now to include a foreign state, it does not follow that the immunity of foreign states is left to be dealt with solely by s. 7(4)(c) (cf. *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 (***NML Capital***) at [18], per Lord Phillips of Worth Matravers). As Bathurst CJ observed, "that subsection says

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5 Under the *Diplomatic Privileges and Immunities Act 1967*, ss. 7 and 11 (with the Schedule).

6 Under the *International Organisations (Privileges and Immunities) Act 1963*; e.g., s. 6 (with Schedule 2).

7 See, for example, Article 31(1) of the *Vienna Convention of Diplomatic Relations* at Schedule 1 of the *Diplomatic Privileges and Immunities Act*. See also H Fox, *The Law of State Immunity*, 2nd Ed. (2008, Oxford University Press), pp 705 and 707.

nothing about immunity in this country; it only deals with immunity in the country where the original judgment was obtained" (at [54]). See also the *Jurisdictional Immunities Case* at [127], [132], which confirms that the immunity of the foreign state from the jurisdiction of the foreign court asked to enter the original judgment is a distinct question from its immunity from the jurisdiction of the local court asked to register such judgment. Thus, the question of immunity from the process of Australian courts remains one dealt with by the *Immunities Act*. It follows that s. 7(4)(c) is, at most, an *additional*, and not an *alternative*, hurdle in the path of a person seeking to register a foreign judgment against a foreign state.

A proceeding to register a foreign judgment cannot "concern a commercial transaction".

46. The analysis of the nature of proceedings to register a foreign judgment set out above in connection with the submission that such proceedings constitute the exercise of the "jurisdiction of the courts of Australia in a proceeding" is also relevant to the question whether, in circumstances where the underlying judgment involved commercial transactions, the registration proceedings will inevitably "concern a commercial transaction".

47. For the reasons set out above, Firebird's attempt to characterize registration proceedings as "simply a preliminary step" (AS [28]) towards the curial enforcement of a foreign judgment in Australia ought to be rejected. In summary, that is because:

a. The subject matter of registration proceedings is governed by the provisions of the *Foreign Judgments Act*, and the criteria that it establishes before orders may be made pursuant to its terms. Those provisions and criteria are separate from, and unconnected with, the subject matter of the underlying proceedings.

b. The rights and obligations created by registration are new rights and obligations, depending for their force and effect solely upon the *Foreign Judgments Act*. It is those rights and obligations, and not the primary legal rights and obligations recognized by the foreign court, that are relevant in registration and subsequent enforcement actions.

48. The character of the underlying proceedings is thus irrelevant to any characterization of the registration proceedings. As Lord Mance JSC observed in *NML Capital* at 532 [85]:

> *"[A] claim on a cause of action commonly gives rise to quite different issues from those which arise from a claim based on a judgment given in respect of a cause of*

> *action. A claim on a cause of action normally involves establishing the facts constituting the cause of action. A suit based on a foreign judgment normally precludes re-investigation of the facts and law thereby decided. But it not infrequently directs attention to quite different matters, such as the foreign court's competence in English eyes to give the judgment, public policy, fraud or the observance of natural justice in the obtaining of the judgment.*"

49. The word "concerns" does not permit a blurring or blending of the two distinct proceedings. Their respective subject matters (i.e., that which each proceeding "concerns") are thus entirely distinct (cf. *Svenska Petroleum Exploration AB v Lithuania (No 2)* [2006] 2 CLC 797 at [137], noting Lord Phillips of Worth Matravers PSC in *NML Capital* at [26] and Lord Clarke of Stone-cum-Ebony at [140]).

50. The decision of the United Kingdom Supreme Court in *NML Capital* is instructive in this regard. Notwithstanding certain differences in the relevant statutory wording (which might favour a construction more favourable to Firebird's contention: see Basten JA at [280]), the Supreme Court held that, at the time the United Kingdom legislation was passed, an application to register a foreign judgment the subject matter of which was a commercial transaction did not "relate to" a commercial transaction: see Lord Mance JSC at [97] (with whom Lord Walker of Gestingthorpe JSC agreed); Lord Collins of Stone-cum-Ebony JSC at [114].[8] See also Lord Phillips of Worth Matravers PSC at [42].

51. That case also provides the answer to Firebird's submission that the reliance by the Court of Appeal on the fact that "the Immunities Act should be considered against a background of an existing common law immunity" is contradicted by the fact that "the common law had already adopted the restrictive theory of sovereign immunity" (AS [43]).

52. The Court of Appeal was not disputing as a general proposition that the "restrictive theory" of sovereign immunity had been adopted by the common law, at least in England, at the time the *Immunities Act* was passed. The whole question was whether that theory rendered foreign states immune from proceedings to register foreign judgments that concerned commercial transactions. The Court noted that the issue had never arisen prior to the enactment of the *State Immunity Act 1978* (UK), and referred to the conclusion of the United Kingdom Supreme Court in *NML Capital* that the *State Immunity Act* 1978

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[8] The Supreme Court of Canada took a different view in *Kuwait Airways*, in construing the Canadian *State Immunities Act* and the phrase "proceedings that relate to any commercial activity": at [22], [33]-[35]. However, as the Court of Appeal in this case stated (at [88] and [294]-[295]), the language of the *Immunities Act* – "concerns" – is narrower and should be construed accordingly.

(UK) "did not encompass applications to register foreign judgments when enacted" (see Basten JA at [282]). See also, generally, *NML Capital* at [91], per Lord Mance JSC.

53. The Court of Appeal, in other words, was observing that the position in Australia at the time the *Immunities Act* was passed was relevantly (i.e., in relation to the question whether proceedings on foreign judgments were encompassed by the commercial transactions exception) similar to that which had applied in the United Kingdom, and which informed the construction of the *State Immunity Act*: see Basten JA at [293].

54. The word "concerns" is narrower than "relates to" (see Basten JA at [294]), and emphasizes the subject matter of the proceedings in question, as opposed to extraneous matters that are connected or related in some way to a proceeding. Once the character of an application to register a judgment is properly understood, it therefore follows that an application to register a judgment does not "concern" the subject matter of the underlying judgment.

55. There is nothing surprising in the consequence that the commercial transaction exception has no work to do in the context of the enforcement of foreign judgments, whether at common law or under statute. Those proceedings have an entirely separate character to the underlying proceedings, for the reasons given above.

56. The *Jurisdictional Immunities Case* should not be understood as deciding differently.

    a. *First*, the complaint to which the relevant foreign judgments related involved actions taken by the German government that were found to be squarely governmental in nature: at [60]. The Court specifically stated that it was "not called upon to address the question of how international law treats the issue of State immunity in respect of *acta jure gestionis*" (at [60]).

    b. It follows, *secondly*, that the Court's comments at [130] should not be taken as laying down a rule for all cases. This is emphasized by the Court's comments at [132], where it accepted that findings on jurisdictional immunity might in some cases differ as between the proceedings before the original court and the later proceedings to register and enforce the judgment. Indeed, in the present case, Nauru submits (RS [34]) that it consented or submitted to the jurisdiction of the Japanese Court, rather than being subject to a finding of commerciality – precisely the circumstances contemplated by the ICJ at [132]. The point is highlighted by

the Court's references (without criticism) in [130] to *Kuwait Airways* and *NML Capital*, each of which took slightly different approaches to the issue.

c. *Thirdly*, the *Jurisdictional Immunities Case* concerned a request for *exequatur* under Italian law. *Exequatur* is a procedure allowing for the direct enforcement of a foreign judgment in Italy (see at [128]). In those circumstances, it may make sense to ask, as the International Court of Justice did at [130], "whether the respondent State enjoys immunity from jurisdiction – having regard to the nature of the case in which that judgment was given – before the courts of the State in which *exequatur* proceedings have been instituted".

d. *Fourthly*, the *Jurisdictional Immunities Case* should be understood as establishing a *minimum* content of the immunity. That is to say, the ICJ held that the scope of the immunity in *exequatur* proceedings is not *less* than the scope of the immunity that would have been afforded had the underlying proceedings been brought in that jurisdiction. The Court did not say that the scope of the immunity in *exequatur* proceedings may not be *wider*; indeed, it expressly acknowledged the possibility of a differential immunity at the two stages (see at [132]).

57. Having regard to all of the above, the situation confronting an Australian court upon an application for registration of a foreign judgment under the *Foreign Judgments Act* is distinct and the answer to the question of immunity in registration proceedings is not foreclosed by any existing authority. Ultimately, the question is one of statutory construction of the *Immunities Act*, and that question should be answered in favour of Nauru for the reasons given above.

Service of the application for registration of the foreign judgment was required.

58. As Basten JA observed, the "critical question is whether Pt III of the [*Immunities Act*] assumes a requirement under court rules for service of an initiating process on the party sought to be affected by the orders and merely regulates the manner of service, or whether it imposes, at least implicitly, a requirement for service of initiating process, to be carried out in the manner prescribed" (at [251]). In relation to this issue, the Attorney-General adopts the submissions of Nauru, and seeks only to emphasise the following matters:

a. The *Immunities Act* affirms a general principle of international law (i.e., that one state will not seek to exercise "imperium" over another independent sovereign state), and identifies specific areas in which there is to be derogation from that

principle (see Basten at [258]). As Basten JA observed, "the hypothesis that an Australian court is entitled to exercise jurisdiction over a foreign State without notice to it would itself constitute a derogation from the fundamental principle" (at [258]). Consistently with these observations, the ICJ noted in the *Jurisdictional Immunities Case* that foreign state immunity is a matter of substantive law, not comity (at [53]), and derives from the fundamental principle of the sovereign equality of states, from which exceptions to immunity represent a departure (at [57]).

b. Beyond the explicit textual indicators in the *Immunities Act* to which Nauru points (see RS [38]-[40]; see also clause 25 of the Foreign States Immunities Bill 1985 referring to the methods of service under the Bill as "exclusive"), it is important to bear in mind that service is required to make the grant of immunity otherwise conferred by the *Immunities Act* efficacious: a foreign state must be given appropriate notice to allow it to assert its immunity, either generally or in the specific context of an exception relied upon by the other party. See Bathurst CJ at [42]; Basten JA at [258].

Immunity from execution

59. The Attorney-General seeks to make submissions as to the appropriate legal principles to apply in deciding whether property – specifically, in this case, funds in bank accounts – falls within the commercial property exception set out in s. 32 of the *Immunities Act*, but does not seek to put submissions on whether Nauru's bank accounts in this matter are immune from execution.

60. The starting point is that property of a state is immune from execution: s 30 of the *Immunities Act*. To fall within an exception to that immunity, the party seeking execution must show that property against which execution is sought is either (i) "in use ... substantially for a commercial purpose"; or (ii) "apparently not in use". If property can be shown to be "not in use", it creates a "rebuttable presumption" that the property is commercial and subject to execution: Explanatory Memorandum to the Foreign States Immunity Bill 1985, clause 32. In such a case, it is then for the foreign state to show that the property has been "set aside otherwise than for commercial purposes".

61. The answer to the question of whether property is "in use" or not therefore determines the further enquiries and the party on which the onus falls in showing the purposes of the

property. If property is "in use", then it is for the non-state party to show that the use is "substantially" for a commercial purpose (allowing for some mixed purposes; see the ALRC Report at [126]). If the non-state party can show that property is not in use, then it is deemed to be commercial unless the state can satisfy the Court that the property has been "set aside" for *wholly* non-commercial purposes.

When are funds "in use"?

62. The difficulty in the present case arises from the nature of funds in bank accounts as property. On the dichotomy erected by s 32(3), property of a state is, at any given moment, in use (being "put into service" or "carrying out" an activity, to borrow from US jurisprudence: *Connecticut Bank of Commerce v Republic of Congo* 309 F 3d 240 (5th Cir. 2002) (***Connecticut Bank***) at 254 [37]-[39]) or not in use (idle). But on a narrow view, funds are only "in use" whenever they are being drawn upon to complete a transaction and so unless in a high transaction account would be "not in use" almost all of the time (see ALRC Report at [127]; a similar problem was noted by Lord Diplock in *Alcom* at 602G).

63. In the Attorney-General's submission, however, regard must be had to the particular facts and circumstances of any given case and any given account. This might include (without wishing to suggest limits) evidence as to the nature of the account (eg regular transaction account, or term deposit account, etc); evidence of transactions; length of time funds are idle; the nature of earnings on the account (such as interest); other financial, political and/or other actions ultimately relating to the funds; and so on. A flexible approach, allowing consideration of all such evidence, would better accord with the statutory text and allow for the fulfilment of the statutory purposes. Blanket propositions are, in contrast, unhelpful. If funds in an account were always (or prima facie) immune, then states might avoid execution even where those funds were properly described as in use for a commercial purpose. And if funds in such an account were only immune if regularly or frequently drawn on, then property properly regarded as in use by government would be open to execution (cf ALRC report at [123], [125]-[127]).

64. The appellant's construction at AS [56], that funds in an account not being drawn must always be regarded as not in use, should therefore not be preferred. Rather, the inquiry should be more detailed and focused on the facts and circumstances that can be evidenced in relation to the particular account and funds in question.

The purposes of the deployment of the funds

65. Once it has been determined whether property is "in use", the enquiry turns to the particular *purpose* of the deployment of the property. Either the non-state party will have to persuade the court that property in use is being used for "substantially commercial" purposes (s 32(3)(a)), thus allowing for partly non-commercial purposes or purposes not wholly pertaining to government, without relinquishing the immunity (cf *Alcom* at 604C-D; ALRC Report at [126]); or the state will have to satisfy the Court that the funds have been "set aside" for a non-commercial purpose (s 32(3)(b)), recalling the reference of Lord Diplock in *Alcom* (at 602H) to the state "earmarking" a balance for particular uses.

66. In either case, the focus remains, as the Court of Appeal noted, on the particular ultimate *purpose* of the deployment of the funds in question. In that regard, the Attorney-General adopts the submissions of principle by Nauru found within paragraphs [47]-[50] and [62]-[68]. Some assistance may also be gained from the comments of the Canadian Supreme Court in *Kuwait Airways* at [31] in relation to exceptions based on commercial activity, although in that case the Court was concerned with immunity from jurisdiction rather than execution. The Court said that an examination of the "nature" of an act must take account of the "entire context" including the act's purpose. That followed because it was impossible to distil a "'once-and-for-all' characterization of the activity in question, entirely divorced from its purpose". (See also *Connecticut Bank* at 251 [19]-[22]; 253-254 [35]-[36]; 258-259 [45]-[46], discussing the phrase "used for a commercial activity" and emphasising that the enquiry focusses on how money is spent or to be spent.)

PART VI: ORAL ARGUMENT ESTIMATE

67. The Commonwealth estimates that it will require 30 minutes for the presentation of its submissions.

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