IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M154 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN: **THE REPUBLIC OF NAURU**
Appellant

10 and

WET 040
Respondent

REPLY SUBMISSIONS OF THE AMICUS CURIAE

Part I: Internet Publication

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

Part II: Reply Issues

20 2. With leave of the Court these submissions respond to the Appellant's Reply submissions of 4 September 2018 that the High Court has jurisdiction to hear the Appellant's appeal even if the appeal had not been instituted, and service of its Summons to extend time had not taken place, prior to the termination of this Court's jurisdiction to hear and determine appeals under the *Nauru (High Court Appeals) Act 1976* (Cth) (**the Act**) on either 13 March 2018 or 15 May 2018 (**the termination date**).[1]

***Nunc pro tunc* Orders**

3. The Appellant relies on the High Court's inherent power to make orders *nunc pro tunc* that would have the effect of this Court granting the leave necessary to treat its appeal as having been instituted on 13 October 2017.

30 4. For the reasons set out in [16]-[23] of the Amicus' submissions, on the proper construction of the Act but, in particular, ss 5 and 6 of the Act and of Articles 5 and 6 of the Agreement, that submission impermissibly reads the unambiguous transitional provisions in Art 6(2) of

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[1] See [17] of the Amicus's Submissions of 22 August 2018 concerning the termination date (**the Amicus's submissions**).

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the Agreement as if they contain the sub-clause (c) referred to in [22] of the Amicus's submissions.

5. The further problem with the Appellant's Reply submissions is that they erroneously seek to treat the *nunc pro tunc* orders sought as being merely procedural orders that are not concerned with issues of substance or substantive rights.[2] But, the *nunc pro tunc* orders sought by the Appellant cannot, or ought not, be made in this case as to do so would extend or confer jurisdiction on this Court that it would not otherwise have.[3]

6. Further, where no appeal had been instituted within the requisite 14 day period, or instituted and served prior to the termination date, the Respondent had a vested right to the benefit of the judgment below, which was no longer subject to any right of appeal to the High Court under the Act.[4] It follows that the *nunc pro tunc* orders sought by the Appellant concern substantive issues and will adversely affect an accrued right of the Respondent and ought not to be made.[5]

7. The decision of this Court in *Wei v Minister for Immigration and Border Protection*[6] is distinguishable because s 486A of the *Migration Act 1959* (Cth) was found not to impose a condition precedent to the invocation of jurisdiction under s 75(v), but, rather, merely regulated its exercise with the consequence that the *nunc pro tunc* order sought in that case concerned procedural, rather than substantial issues. In contrast, as explained above, in the present case the *nunc pro tunc* order sought will have the consequence of the Appellant invoking the jurisdiction of this Court which would not otherwise be available and also of adversely affecting an accrued right of the Respondent.

8. The Appellant's reliance at [13] of its submissions on *Cladumar v Nauru Lands Committee* is also misplaced. That case concerned the different subject matter of this Court's power or jurisdiction to receive further evidence on an appeal, which was within its jurisdiction to hear and determine, and turned on whether that was precluded if the appeal in question was an appeal in the strict sense.

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[2] Cf. *John Pfeiffer Pty Ltd v Ragersen* (2000) 203 CLR 503 at 521 [25] and 543 [99].
[3] See *Re Keystone Knitting Mills Trade Mark* [1929] 1 Ch 92, *Parsons v Bunge* (1941) 64 CLR 421 at 427 and 434.
[4] See also [12] below.
[5] *Cf Clarke v Bailey* (1993) 30 NSWLR 556, 569 and 572. *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 561 and *John Pfeiffer Pty Ltd v Rogersen* (2000) 203 CLR 503 at 544 [100].
[6] (2015) 257 CLR 22 at 36-37 [41]-[42].

Service on the Respondent

9. The Appellant appears to concede at [17] of its submissions that no provision of the High Court Rules governs the service of its application to extend the time in which to commence an appeal but submits that the Rules "should be construed sensibly" to apply the same rules as would apply to service of a notice of appeal. But, for the reasons set out at [25]-[32] of the Amicus's submissions, that submission should be rejected as no valid service on the respondent has occurred under the Rules. But the answer to the Appellant's plea for a "sensible construction" of the Rules is that there is no need to strain the meaning of any of the relevant Rules because Rule 6.01-1 specifically provides for the Court to make orders in respect of procedural steps that are not prescribed by the Rules or where "there is any doubt about the manner or form of that procedure". The Amicus accepts that personal service out of the jurisdiction occurred on the Respondent on 7 October 2018. Although there may be some doubt as to whether that service required leave under the High Court and Federal Court Rules, for the purposes of these submissions the Amicus is prepared to assume that either that service was effective or leave would be granted to make it effective if the Court otherwise accepted the Appellant's submissions.

10. But, even if the personal service on 7 October 2018 was otherwise effective it was too late as service on the Respondent was required prior to the termination of this Court's jurisdiction on the termination date.

11. As was stated in *Laurie v Carroll*[7] service of the required process "is absolutely essential as the foundation of the court's jurisdiction".[8] This Court has jurisdiction in a civil action either because the defendant was served within the jurisdiction with the originating court process while within its territorial jurisdiction or because applicable long arm provisions have been invoked.[9] Put another way, a court has no jurisdiction over a respondent unless and until the originating process is served and the decisive moment when the Respondent must be within the jurisdiction was when service of the court's process occurred.[10] Since

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[7] (1957) 98 CLR 310 at 322-324.
[8] See also *Deveigne & Anor v Askar* (2007) 69 NSWLR 327 at [98] per McColl JA (with whom Hodgson and Giles JJA agreed).
[9] *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [2] per Gleeson CJ, Gaudron and Gummow JJ; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [25] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[10] *Andressen v Bendigo and Adelaide Bank Ltd* [2016] SASC 111 at [71] per Parker J, analysing the decision on this Court in Laurie v Carroll (The appeal of that judgment of Parker J was dismissed; [2018] SASFC 30).

service on the respondent (if any) occurred in this case after this Court lost its original jurisdiction under the Act, it cannot now invoke that jurisdiction. [11]

12. Further, the respondent has a vested right in respect of the judgment in his favour below and the Court cannot now regain that jurisdiction in this matter by the invocation of jurisdiction over the respondent after the termination date.

Conclusion

13. For the foregoing reasons it is submitted that this Court has no jurisdiction to make, alternatively it ought not to make, the orders sought by the Appellant to enable the appeal sought to be instituted by the Appellant to be heard and determined by this Court.

14. If the Amicus's submissions are not accepted and the leave sought it granted the Amicus submits that it should only be granted on terms that the hearing of the appeal be adjourned and the appellant agree to pay the respondent's taxed costs of the appeal in the event the respondent proposes to appear on the appeal by his legal representatives.[12]

Dated: 26 October 2018

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[11] The submission is not based on the service required by the Rules occurring *Cf. Whitehorse Hotels Pty Ltd v Lido Savoy Pty* (1974) 131 CLR 333 at 336. But, rather, it is based upon the invoking of the jurisdiction of the Court by service of the proceeding which must occur at a time when the Court has jurisdiction to hear and determine the proceeding.

[12] The submissions in this paragraph may change at the hearing in the event the respondent makes an informed decision in respect of his rights in relation to the appeal.