IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **NO P 14 OF 2015**

On Appeal From
the Supreme Court of Western Australia

BETWEEN: **PT BAYAN RESOURCES TBK**
First Appellant

AND: **BCBC SINGAPORE PTE LTD**
First Respondent

KANGAROO RESOURCES LIMITED
Second Respondent

ATTORNEY-GENERAL OF WESTERN AUSTRALIA
Third Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART IV CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. The applicable legislative provisions are those contained in Pt VII of the Appellant's (**PT Bayan**) Submissions (**AS**) and Pt V of the submissions of the first respondent (**BCBC**) and third respondent, together with ss 76 and 109 of
10 the Commonwealth Constitution and s 39 of the Judiciary Act.[1]

PART V ARGUMENT

Summary

4. The Commonwealth advances three propositions.

5. *First*, putting aside the operation of both s 109 of the Constitution and s 79 of the Judiciary Act, O 52A, r 5 of the *Rules of the Supreme Court 1971* (WA) (**WASC Rules**) and ss 6(2) and 16(1) of the *Supreme Court Act 1935* (WA) (**Supreme Court Act**) authorise the making of freezing orders in cases where the applicant relies on a sufficient prospect that a judgment will be registered under s 6(3) of the *Foreign Judgments Act 1991* (Cth) (**Foreign Judgments**
20 **Act**). This is so even if the making of a judgment in a foreign court is a prospect only and, aside from the freezing order application, there are no pending or imminent proceedings in the Supreme Court of Western Australia (**WASC**).

6. *Secondly*, the determination of the proceedings constituted by the freezing order application (CIV1562/2012) involved the exercise of federal jurisdiction. Those proceedings involved the determination of a justiciable controversy, being a disputed question as to BCBC's entitlement to a freezing order. That matter was within both s 76(ii) and s 76(i) of the Constitution.

   6.1. As to s 76(ii): a court exercises federal jurisdiction when it determines an application for a freezing order in which the applicant relies on a sufficient
30 prospect that a judgment will be registered under the Foreign Judgments Act. That is a matter arising under the Foreign Judgments Act.

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[1] Set out at Annexure A to these submissions.

6.2. As to s 76(i): the determination of the BCBC's freezing order application was a matter arising under the Constitution or involving its interpretation at least from the time that PT Bayan agitated Ch III and s 109 issues.

7. *Thirdly*, neither O 52A of the WASC Rules nor ss 6 and 16(1)(a) of the Supreme Court Act are inconsistent with the Foreign Judgments Act to the extent that they validly authorise the WASC to make freezing orders in cases of the present kind.

Proposition 1: the WASC has power to make freezing orders in circumstances of the present kind

10 8. The Commonwealth's submissions, in summary, are as follows.

8.1. The WASC has power to make freezing orders in aid of the prospective making of an order by it under s 6(3) of the Foreign Judgments Act.

8.2. It is not a precondition to the existence of that power that the WASC be immediately capable of exercising, and immediately likely to exercise, its power to make an order under s 6(3) of the Foreign Judgments Act.

8.3. The WASC's power derives from O 52A and ss 6 and 16(1) of the Supreme Court Act. The power is an incident of the WASC's broader power, given by ss 6 and 16(1), to protect the administration of justice.

8.4. That power can be described as an element of the WASC's 'inherent
20 jurisdiction' or 'inherent' or 'implied' powers. Those terms are labels for identifying a category of power. They are not substitutes for the proper identification of the source and content of that power.

8.5. Order 52A is validly made under s 167(1)(a) of the Supreme Court Act.

8.6. It is unnecessary to decide whether O 52A could also be supported under s 17(1) of the Foreign Judgments Act.

8.7. The Commonwealth does not make submissions on whether the WASC ought to have granted a freezing order in the present case.

9. Subject to statutory variation, the WASC has such power as is necessary to protect the administration of justice: see, eg, *Grassby v The Queen* (1989) 168
30 CLR 1 at 16 (Dawson J);[2] *Batistatos v Roads and Traffic Authority* (2006) 226 CLR 256 at 266 [12] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Dupas v The Queen* (2010) 241 CLR 237 at 243 [14] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506 at 534 [26] (French CJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 116 [38] (French CJ and Crennan J); *Lee v New South Wales Crime*

2 Mason CJ and Brennan J agreeing at 4, Deane J agreeing at 5, Toohey J agreeing at 21.

Commission (2013) 251 CLR 196 at 262 [164] (Kiefel J). See also *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at 754 [38] (Lamer CJ).[3]

10. The primary sources of that power are ss 6 and 16(1) of the Supreme Court Act and the Commonwealth Constitution. To understand why, it is necessary to have regard to several matters of history.

11. The Western Australian Supreme Court was established by the *Supreme Court Ordinance 1861* (24 Vic No 15) (**1861 Ordinance**). The 1861 Ordinance designated the Supreme Court as a 'Court of Record' and vested in it such jurisdiction as belonged to the Courts of Queen's Bench, Common Pleas and Exchequer at Westminster and such equitable jurisdiction as the Lord Chancellor of Great Britain had within the Realm of England.[4] The Supreme Court established by the 1861 Ordinance was continued by s 3 of the *Supreme Court Act 1880* (44 Vic No 10) (**1880 Act**). Section 5 of the 1880 Act vested the Supreme Court's subsisting jurisdiction in the Court constituted by the 1880 Act and continued it as a Court of Record.

12. Since the commencement of the Commonwealth Constitution, the Constitution has ensured the continued existence of the Supreme Courts of the states, including the Western Australian Supreme Court (*ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 592 [69] (Gleeson CJ, Gaudron and Gummow JJ)), and has protected those courts against alteration of their essential characteristics (*Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (***Kirk***)). At the same time, the Constitution constrained those courts' power, such that it is an error to describe them as courts of unlimited jurisdiction: *Kirk* at 583 [107].

13. As made in 1936,[5] s 6 of the *Supreme Court Act 1935* (WA) continued the then-existing Supreme Court of Western Australia. Section 7(1) of that Act designated it a 'superior court of record'. Section 16(1) of that Act as made was in relevantly identical terms to s 16(1) of the Supreme Court Act as it now is.

14. In light of this history, the continued existence of the WASC derives primarily from the Supreme Court Act and the Constitution. Equally, the WASC's power to do what is necessary to protect the administration of justice should be understood to derive primarily from its statutory designation as a superior court of record in s 7(1),[6] the statutory conferral of jurisdiction in s 16(1)[7] and any powers it derives from its constitutionally protected designation as the Supreme Court of the State. This is not to say that the 'common law' is irrelevant to the

[3] Delivering the judgment of Lamer CJ, La Forest, Sopinka, Gonthier and Cory JJ.

[4] By ss IV and V of the 1861 Ordinance.

[5] Royal Assent was given on 3 March 1936 (as recorded in WA Government Gazette, 3 April 1936 at 484).

[6] *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7 (Menzies J, with whom Barwick CJ at 5, Walsh J at 9 and Stephen J at 10, agreed) ('"Inherent jurisdiction" is the power which a court has simply because it is a court of a particular description'); I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23 at 27.

[7] See *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36] (French CJ, with whom the balance of the Court agreed).

scope of those powers sourced in statute and the Constitution. The content of the statutory phrase, 'superior court of record', the content of the jurisdiction vested by s 16(1) and the content of any power given by the Constitution may in part be determined by the common law. However, it is the statute and the Constitution from which the power primarily derives.

15. The WASC's power to protect the administration of justice can be described as an element of its 'inherent jurisdiction', its 'inherent power'[8] or its 'implied power'. The meaning of those terms, and particularly of 'inherent jurisdiction', can be 'elusive': *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J). Their use should not be taken to indicate that the relevant power is 'unlimited'; it is not. Relevantly, the power is always constrained by the purpose for which it exists: the administration of justice.

16. What is clear is that the WASC's inherent power to protect the administration of justice authorises the making of freezing orders: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393 [25], 401 [42] (Gaudron, McHugh, Gummow and Callinan JJ) (***Cardile***); *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639–40 (Gaudron J) (***Jackson***).

17. In the ordinary case, the power to make freezing orders is exercised in circumstances where the applicant asserts a right which is existing and has accrued, but before the court gives a final judgment in which that right merges. That ordinary case does not exhaust those in which the power can be exercised. The true limit is only that the freezing order be necessary for the administration of justice.[9] The 'administration of justice' so contemplated encompasses the future administration of justice. So much is implicit in the cases recognising that there is power to make freezing orders, to make *Anton Piller* orders and to restrain contempt—all in aid of future exercises of jurisdiction.

18. This is not to say that the inherent power to protect the future administration of justice is unlimited. Always, the exercise of that power is limited to what is necessary. That criterion should not be hedged about with implied limitations or qualifications. That is so not only because the power is a general power vested in a court[10] but also because it is of the nature of the power to protect the administration of justice that it be capable of evolving.[11] The position is no different where a court is exercising federal jurisdiction and the judicial power of the Commonwealth— for Commonwealth judicial power 'extends to every authority or capacity which is necessary or proper to render it effective': *R v*

[8] As in *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 451 [50] (Gaudron, Gummow and Callinan JJ).

[9] As to the criterion of 'necessity', see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 617 (Wilson and Dawson JJ).

[10] See *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420–1 (The Court).

[11] See, eg, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 63 [47] (French CJ).

Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 at 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

19. PT Bayan seeks to impose absolute, jurisdictional limitations on this power. The basic limitation for which PT Bayan contends appears to be that a court has no inherent power to grant a freezing order unless that order is in aid of extant or imminently pending proceedings in the court—even where it has otherwise been established that such an order is necessary for the administration of justice: AS at [43]–[45], [65]. This limitation should not be accepted. Where an applicant seeks a freezing order in aid of a contingent, prospective exercise of jurisdiction, that order will, in some cases, not be necessary to the protection of the administration of justice. But, in a proper case, the order will have the necessary connection. There can be no ex ante rule.

20. That the prospective judgment is contingent cannot be a reason for denying power. It is inherent to all freezing orders that they are made in advance of judgment and in advance of the conclusive determination of underlying rights.[12] The risk that the order will be unnecessary or unjust is accommodated by the need for a court to be satisfied of a sufficient prospect that judgment will be given and of a sufficient likelihood that the judgment will go unsatisfied without the freezing order. Pursuit of the object of the effective administration of justice is not so confined as to require a proceeding which is extant or imminently likely, as the categories of case to which we refer to in [31] below show. This is particularly so in the context of orders designed to protect against dissipation of assets in advance of a prospective judgment: the 'schemes which a debtor may devise for divesting himself of assets [are] legion': *Jackson* at 621 (Brennan J). This is also particularly so in the context of freezing orders in aid of orders under s 6(3) of the Foreign Judgments Act. Those orders are typically made very late in the course of a dispute. There is thus a very large window of opportunity, and ample incentive and facility, for the prospective judgment debtor to remove assets from Australia, and thereby 'cock a snook at the legal process of both countries': *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 306 (Nicholls LJ).

21. For similar reasons, there is no requirement that the right which would be vindicated in the prospective judgment be an accrued right. That is, there is no requirement that there be an accrued right to registration under s 6(3) of the Foreign Judgments Act. The right can be prospective. It can be noted that, in *Cardile*, the Court did not appear to consider it relevant that 'the causes of action, for the most part, [had] not even yet arisen': *Cardile* at 387 [7] (Gaudron, McHugh, Gummow and Callinan JJ), citing Emmett J in the first instance decision.[13] The reason why it is not determinative that the cause of action has not yet accrued is that the power extends to protecting the *future* administration of justice. To require the existence of an accrued final right also risks anachronism. As the High Court made clear in *Cardile*,[14] the power to make

[12] Note *Cardile* at 393 [25] (Gaudron, McHugh, Gummow and Callinan JJ), referring to execution which 'would lie' against the 'prospective judgment debtor'.

[13] *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 38 IPR 107 at 117–18.

[14] At 393 [25], 399–400 [41]–[42] (Gaudron, McHugh, Gummow and Callinan JJ), [80] (Kirby J).

freezing orders does not derive from the equitable jurisdiction to grant injunctions. It follows that there is no immediate translation of the equitable principle that an applicant for an interlocutory injunction must show sufficient colour of right to the final relief.[15]

22. Further, it is not a condition of the existence of the power that the applicant for the freezing order give an undertaking that substantive proceedings will be commenced: cf AS [22]–[23], [34], [45], [66]. In the ordinary case, such an undertaking is desirable because it helps avoid the futility and injustice that would arise if final relief were never sought and were never intended to be
10 sought. Accordingly, in the ordinary case, the existence of such an undertaking is an important 'discretionary consideration'[16] in favour of relief. The existence of such an undertaking is not, however, a condition of the existence of power. That is because the purposes of avoiding futility and injustice can be achieved by other means—relevantly the requirement for the court to be satisfied of a sufficient prospect that a judgment will be given in the foreign proceedings and registered in the court.

23. PT Bayan also appears to contend that, for reasons of comity or prudence, the WASC should not have inherent jurisdiction to make orders in aid of a foreign judgment. The contention seems to be that a foreign court is best placed to
20 determine whether a freezing order ought to lie in respect of its prospective judgments. This contention should not be accepted. It appears to proceed from the unsound premise that freezing orders of the present kind are exclusively in aid of the foreign judgment. At the very least, such freezing orders are *also* in aid of a prospective order under s 6(3) of the Foreign Judgments Act. There is no reason of comity or prudence why a court ought to be absolutely prevented from making orders in aid of its own prospective judgments.[17] For similar reasons, that a Singapore court might be able to grant a freezing order should not deny jurisdiction to do so in Australia. The effective administration of justice by an Australian court ought not to depend on the contingent and discretionary
30 decisions of a foreign court.

24. For these reasons, the WASC's inherent power extends to the making of freezing orders of the present kind. Section 167(1)(a) of the Supreme Court Act authorises the making of rules of court 'for regulating and prescribing the procedure ... and the practice to be followed ... and any matters incidental to or relating to any such procedure or practice' with respect to the exercise of the court's inherent power. Order 52A, r 5 was validly made in exercise of that power. In particular, O 52A, r 5 is sufficiently tailored to protecting the administration of justice. That tailoring is achieved by the rule's insistence that freezing orders can only be made where there is a 'good arguable case' on a

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15 As in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 217 [11] (Gleeson CJ).

16 The language used in *Cardile* at 404 [53] (Gaudron, McHugh, Gummow and Callinan JJ).

17 As the High Court said in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, when rejecting a claim that a prior application for a stay or dismissal in the foreign court was a necessary condition for granting an anti-suit injunction: 'The proposed rule serves no purpose in cases where an injunction is sought to protect the integrity of the ... the processes of the court concerned'. See at 396 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

prospective cause of action and a 'sufficient prospect' of the matters identified in r 5(3)(a) and (b), and where the 'Court is satisfied, having regard to all the circumstances' of the danger that the prospective judgment will be unsatisfied. Those terms, and the rule as a whole, bear legal meanings which are wholly within the scope of the rule-making power: *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 983 (Griffith CJ).

25. It is convenient to observe at this point that it is unnecessary to decide whether O 52A was *also* authorised by s 17(1) of the Foreign Judgments Act. That is because, to the extent that O 52A empowers freezing orders of the present
10 kind, it can only find support in s 167(1)(a) or s 17(1) if those orders are reasonably necessary to protect the administration of justice under the Foreign Judgments Act. Put another way, any rule-making power given by s 17(1) would be no greater than any power given by s 167(1)(a). To the extent the issue does arise, O 52A should be taken to be made under s 167(1)(a) but not s 17(1). That is so because the maker of O 52A intended to rely on power under s 167(1)(a). So much appears from the heading to the rules which introduced O 52A: 'Supreme Court Act 1935'.[18] Of course, that a rule-maker intends to rely on one source of power in making a rule does not entail that the rule must find validity in that power. This is particularly so where the correct or
20 available source of power is misidentified due to error: see, eg, *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at 76–7 [175]–[176] (Crennan and Kiefel JJ) (and the cases there cited). However where there is an express and efficacious invocation of a particular source of power that is properly available to support an action, the action should not be attributed to some other source of power. This is especially the case where the procedures to be followed, or the consequences of the exercise of the power, are different depending on the power's source: see Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 4th ed, 2012) at 196–9. In *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 203,
30 speaking of a statutory instrument that might (arguably) have been a regulation passed under one statute, or a by-law passed under another, Isaacs J questioned whether 'one and the same ordinance can be validly passed as both at the same time'. In this case, if O 52A is a State law, then it should have been laid before the Western Australian Parliament where it would have been subject to disallowance.[19] By contrast, if some part[20] of O 52A were made in the exercise of a power delegated by the Commonwealth Parliament, consideration may need to be given to the operation of the *Legislative Instruments Act 2003* (Cth) on the part of the order made under the Commonwealth law.

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18 See *Supreme Court Amendment Rules 2007* (WA) (WA Government Gazette, 21 February 2007, No 30, 531).

19 Under s 170 of the Supreme Court Act.

20 Plainly, the whole of O 52A could not be so made, given its subject matter travels far beyond that of the Foreign Judgments Act.

Proposition 2: the WASC was exercising federal jurisdiction

26. In hearing and determining BCBC's application for a freezing order, Le Miere J was exercising federal jurisdiction. In summary, the Commonwealth makes the following submissions:

    26.1. Le Miere J was determining a justiciable controversy as to BCBC's entitlement to a freezing order.

    26.2. That controversy arose under the Foreign Judgments Act.

    26.3. That controversy also arose under or involved the interpretation of the Constitution.

10 26.4. This being the relevant controversy, and being a controversy which the WASC plainly had jurisdiction to determine under s 39(2) of the Judiciary Act, it is unnecessary to decide whether there was also a controversy of the kind described in the submissions of BCBC at [18]–[24] and in those of the third respondent at [61].

27. As to the existence of the controversy. Order 52A and ss 6 and 16 of the Supreme Court Act perform dual functions. They confer power to make a freezing order and, in the same breath and subject to the exercise of the court's discretion, they create a right to such orders.

28. A controversy as to whether the WASC should make a freezing order under
20 O 52A or ss 6 and 16 is a 'matter' within the meaning of s 76 of the Commonwealth Constitution and s 39(2) of the Judiciary Act. It is a controversy as to whether there is or should be 'some right or privilege or protection given by law': *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). And, so far as the application is made under O 52A or s 16(1), it is a controversy of the kind considered by Dixon J in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 168–9, namely a controversy as to whether the applicant should 'obtain the benefit of the provision'. See also *Barrett* at 151–2 (Latham CJ).

30 29. There is no reason in principle why a controversy as to whether a freezing order should be made in aid of a prospective order to register a foreign judgment should not be capable of constituting a 'matter'. The very purpose of determining such a controversy is to protect the administration of the law and of justice. Of its nature, any decision on the dispute is not divorced from the administration of justice: see, eg, *Mellifont v Attorney-General (Qld)* (1991) 73 CLR 289 at 303, 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ) (***Mellifont***).

30. The matter so constituted is related to, but distinct from, any controversy as to whether a person has an accrued or future right under the Foreign Judgments
40 Act. That is, it is distinct from the matter referred to by the first and third

respondents at [18]–[24] and [61] of their respective submissions. The two matters are distinct because the rights sought to be enforced in each case have different sources: one is sourced in O 52A or ss 6 or s 16, and the other is sourced in the Foreign Judgments Act.

31. It can be noted that courts have long recognised a jurisdiction to protect the administration of justice separate from any particular proceedings in which that justice is to be administered. So, there is jurisdiction to restrain and punish scandalising the court in respect of publications which do 'not relate to any specific case either past or pending or any specific judge': *Chokolingo v Attorney-General of Trinidad & Tobago* [1981] 1 WLR 106 at 111 (Diplock LJ). See also *Re Colina; Ex parte Toohey* (1999) 200 CLR 386 at 390 [2] (Gleeson CJ and Gummow J). In these cases, the need for effective administration of justice enlivens the court's jurisdiction even in the absence of the court's processes otherwise having been set in motion at all. To similar effect, in *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, it was held at 360 that 'the Supreme Court has power to deal not only with contempts of itself but with contempts of any inferior court.' In other words, a Supreme Court's power to protect the administration of justice is not confined to proceedings in, or imminently in, that court.[21] Disputed questions as to the exercise of that jurisdiction constitute justiciable controversies and 'matters' for the purposes of Ch III. That is at least because they 'have as their object the giving of authoritative decisions ... for the better administration of justice': *Mellifont* at 305.

32. In determining that matter, Le Miere J was determining a matter arising under the Foreign Judgments Act. That is because an application for a freezing order, based on an asserted sufficient prospect that a foreign judgment will be registered under the Foreign Judgments Act, 'arises under' that Act.

33. The question of whether a matter 'arises under' a law directs attention to the legal and practical connection between the controversy and the relevant law. What is that connection in cases of the present kind? Three characteristics of the present case are relevant.

33.1. The power to give the remedy—the freezing order—arises because the remedy is necessary to protect a right given by Commonwealth law and an exercise of jurisdiction directly under that law. That flows from the nature of the power: it is a power that exists only so far as is necessary to

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[21] See also *A-G v Butterworth* [1963] 1 QB 696. In that case an officer of a union had given evidence in court proceedings, which evidence displeased certain of the members. Some months after judgment had been handed down he was called to answer for his conduct before a committee of the union. This was held to be contempt. At 728, Pearson LJ said:

> 'It was contended that the court's inherent jurisdiction to deal with contempt of court is limited to two classes of cases, namely, scandalizing the court, and those in which there is prejudice to pending proceedings, and that the jurisdiction does not extend to a case in which after the conclusion of the proceedings some person is victimized for what he did as witness or juror in those proceedings. In my judgment, however, such victimization, because it tends to deter persons from giving evidence in future proceedings, and giving that evidence frankly and fully and without fear of consequences, is an interference with the due administration of justice as a continuing process, and does constitute contempt...'

protect the administration of justice involved in the making of an order under the Foreign Judgments Act.

33.2. In determining the controversy, the court must determine whether there is a sufficient prospect that a right given by Commonwealth law will exist. This goes beyond mere interpretation of the Commonwealth law. It encompasses the determination of how Commonwealth law will apply to a given set of circumstances. In any case, it will be an essential part of the application for a freezing order that the applicant asserts a sufficient prospect to a right given by the Foreign Judgments Act.

10 33.3. The third characteristic is that, in a practical sense, the Foreign Judgments Act is a necessary condition for the existence of the controversy. It is the ultimate source and cause of the controversy. Without s 6(3) of the Foreign Judgments Act, there would be no controversy of the kind asserted by the applicant. Neither would there be any foundation for the order sought by the applicant.

34. In the Commonwealth's submission, these characteristics are sufficient to constitute the matter as one arising under Commonwealth law. That is so even though the right under the Commonwealth statute is prospective only. In the language of the decided cases:

20 34.1. the 'subject matter' of the asserted right to the freezing order 'exists as a result of the federal law': *LNC Industries Limited v BMW (Australia) Limited* (1983) 151 CLR 575 at 581–2 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) (***LNC Industries***);

34.2. the prospective right which forms the basis of the freezing order, namely the prospective right to registration under the Foreign Judgments Act, 'exist[s] only because of the operation of federal law': *Ruhani v Director of Police* (2005) 222 CLR 489 at 519–20 [74]–[75] (McHugh J) (***Ruhani***). See also *Ruhani* at 530 [116] (Gummow and Hayne JJ);

34.3. it is necessary in the litigation to determine whether s 6(3) of the Foreign
30 Judgments Act confers a prospective right which is in issue in the litigation: *Felton v Mulligan* (1971) 124 CLR 367 at 382 (Menzies J); and

34.4. the action for the freezing order 'would not exist were it not for the operation' of the Foreign Judgments Act: *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 52 [39] (McHugh, Gummow and Hayne JJ).

35. For these reasons, matters of the present kind arise under the Foreign Judgments Act. That is so even if the matter can also be characterised as arising under other statutes. As in other areas, 'matters' do not bear an exclusive constitutional character. A matter may contain within it a matter
40 answering the description of one or more heads of federal jurisdiction: *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 361 [14] (Gleeson CJ, Gaudron,

McHugh, Gummow, Hayne and Callinan JJ). For example, that the matter in *LNC Industries* could have been described as arising under the common law—which was the source of the right being enforced—did not prevent it from also being a matter arising under a law of the Commonwealth. Put another way, a matter can arise under Commonwealth law even though a law other than Commonwealth law—such as the common law or a state statute—supplies the relief sought.

36. The determination of BCBC's freezing order application also arose under or involved the interpretation of the Constitution.[22] That was so at least from the time[23] PT Bayan relied upon immunities derived from the Constitution, whether those immunities were said to derive from Ch III or s 109.[24]

37. For these reasons, the matter was one in which original jurisdiction can be conferred on the High Court under s 76(i) or (ii) of the Commonwealth Constitution; and the source of the WASC's jurisdiction to determine that matter was s 39(2) of the Judiciary Act.

Proposition 3: the State laws authorising the freezing order are not relevantly inconsistent with the Foreign Judgments Act

38. The relationship between, on the one hand, the Foreign Judgments Act and, on the other, O 52A and ss 6 and 16 is governed by s 109 of the Constitution and s 79(1) of the Judiciary Act.[25]

39. It is convenient to start by identifying the general principles governing the operation of s 109. The Constitution gives 'paramountcy' or 'supremacy' to the Commonwealth Parliament: *Ex parte McLean* (1930) 43 CLR 472 at 485 (Dixon J, Rich J agreeing at 480); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 154–5 (Knox CJ, Isaacs, Rich and Starke JJ). What is so given paramountcy is valid Commonwealth laws. That paramountcy is achieved by the Constitution rendering state laws inoperative to the extent that there is a 'real conflict' between them and Commonwealth laws: *Jemena Asset Management (3) Pty Ltd v Coinvest Pty Ltd* (2011) 244 CLR 508 at 525 [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) (***Jemena***). Such a conflict may arise either from the laws' legal operation or from their practical operation: *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 399–400 [202]–[206]

22 PT Bayan accepts this: AS at [41].

23 Whether a matter arises under the Constitution or under a Commonwealth law 'will often depend upon the course which proceedings take': *Felton v Mulligan* (1971) 124 CLR 367 at 384 (Menzies J).

24 As to immunities derived from s 109, see, eg, *Ex parte McLean* (1930) 43 CLR 472 at 482 (Dixon J, Rich J agreeing at 480).

25 If there be a common law power to grant freezing orders, that power is not touched by s 109 of the Constitution: *Master Education Services Pty Ltd v Ketchel* (2008) 236 CLR 101 at 108 [13] (Gummow ACJ, Kirby, Hayne, Crennan and Kiefel JJ). However, it will not be picked up and applied in federal jurisdiction if it is 'inconsistent with' the Constitution or the laws of the Commonwealth: Judiciary Act s 80. The Commonwealth's submissions concerning the consistency of the Foreign Judgments Act and O 52A and ss 6 and 16 apply to any s 80 inconsistency analysis.

(Gummow J) (***APLA***).[26] The relevant legal operation is disclosed by parliamentary 'intention', manifested in the laws' legal meaning which, in turn, is ascertained by courts applying 'rules of interpretation accepted by all arms of government in the system of representative democracy': *Zheng v Cai* (2009) 239 CLR 446 at 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). For that reason, the 'starting point' of the s 109 inquiry is the construction of the federal and state laws: *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 466–7 [54] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Where, as in the present case, it is suggested that there is an inconsistency between a Commonwealth statute and a state non-statutory instrument, inconsistency can be tested by comparing the statute directly with the instrument, rather than by comparing the Commonwealth statute with the statutory regulation-making power: *APLA* at 373–4 [105] (Gummow J).

40. If there is inconsistency between the Foreign Judgments Act and O 52A or ss 6 and 16, it would be 'operational' inconsistency of the kind described by Gaudron J in *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [54].[27] That is because O 52A and ss 6 and 16 are not 'self-executing' in the sense that they impair the Foreign Judgments Act in their necessary legal operation. Rather, they would only be capable of impairing the Foreign Judgments Act should the WASC choose to make a freezing order in aid of a prospective foreign judgment. Accordingly, any inconsistency in the present case would arise only if and when the WASC were to decide to exercise its power to make a freezing order: *Momcilovic v The Queen* (2011) 245 CLR 1 at 112 [248] (Gummow J).

41. Because the WASC was exercising federal jurisdiction, any power it had to make freezing orders was given to it by s 79(1) of the Judiciary Act. Section 79(1) would not give that power if there were a Commonwealth law which 'otherwise provided'. That would be so if the Commonwealth law was 'clearly intended to be the exclusive' law on that topic: *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 89 ALJR 401 at 403 [8] (French CJ, Hayne, Kiefel, Bell, Gageler and Kane JJ) (***Grant Samuel***). It would also be so if the Commonwealth law were 'complete upon its face', such that it 'left no room' for the picking up of state law: *R v Gee* (2003) 212 CLR 230 at 254 [62] (McHugh and Gummow JJ).[28]

42. A question arises as to the order in which s 109 of the Constitution and s 79(1) of the Judiciary Act fall to be applied. In the Commonwealth's submission, s 109 should always be applied first. Section 109 is a 'threshold issue':

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[26] Hayne J agreeing at 449 [375]. Where inconsistency is said to arise from the two laws' practical operation, questions of 'fact and degree' are involved: *APLA* at 400 [206] (Gummow J). Further, a merely 'de minimis' conflict is not a real conflict: *APLA* at 400 [206] (Gummow J).

[27] See also *Momcilovic v The Queen* (2011) 245 CLR 1 at 113 [249] (Gummow J).

[28] Citing *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). For the purposes of the present case, it is not necessary to decide whether, as was suggested by Gleeson CJ, Gummow and Hayne JJ in *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136 at 114 [17], 'covering the field' inconsistency does not apply to s 79. Contrast in the context of s 64, *Pollack v Commissioner of Taxation* (1991) 32 FCR 40 at 61 (Gummow J).

Northern Territory v GPAO (1999) 196 CLR 553 at 576 [38], 586 [76] (Gleeson CJ and Gummow J). See also *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 331 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).[29] Putting aside cases of 'operational inconsistency', s 109 applies first because s 109 applies anterior to any commencement or prosecution of a proceeding in a court, whereas s 79 begins to operate only where there is a court exercising federal jurisdiction in the present continuous sense: *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 271 [62]–[63] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). The same position applies in cases of operational inconsistency: see, eg, *AMS v AIF* (1999) 199 CLR 160 at 176 [37] (Gleeson CJ, McHugh and Gummow JJ). That is so for reasons of constitutional coherence: the same position should apply whether s 109 is applying to a self-executing norm or whether s 109 is applying to a broadly-framed power. Were it otherwise, s 109 could be avoided by circuitous devices. Understood in this way, to use language the High Court has applied to s 64, s 79 is not 'intended to manufacture a new kind of indirect inconsistency' by applying a state law which if it had been directly applicable would have been inconsistent with Commonwealth law: *Dao* at 331–2. See also *Pollack v Commissioner of Taxation* (1991) 32 FCR 40 at 62 (Gummow J).

43. Applying these principles, the Foreign Judgments Act is not inconsistent with and does not 'otherwise provide' from O 52A and ss 6 and 16 of the Supreme Court Act when the powers conferred by those provisions are exercised as they were in the present case. The Commonwealth points to the following matters.

44. *First*, the Foreign Judgments Act plainly does not use language—such as 'may only' or 'must not'—which indicates that the text of the Foreign Judgments Act is intended to be the only law on the topic of the effectuation of foreign judgments in Australia: contrast *Grant Samuel* at 405–6 [21]–[24] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ). Therefore, if there is to be inconsistency, it must arise either from some implied Commonwealth intention or from some sufficient practical inconsistency.

45. *Secondly*, while a state law which *furthers* a Commonwealth scheme could be inconsistent with that scheme, those cases will be uncommon. A state law is unlikely to pose a real conflict with Commonwealth law where the state law 'operates in a manner which is complementary to the operation of' Commonwealth law: *Jemena* at 529 [60]. Similarly, a state law is unlikely to pose a real conflict with Commonwealth law if the Commonwealth law is 'not only compatible with, but ... aided by the co-existence of' the relevant state powers: *The Kakariki* (1937) 58 CLR 618 at 630 (Dixon J). That is the case here. A freezing order is properly described as being 'in aid of'[30] the right to be vindicated in the prospective judgment—in this case, the right to register a judgment under the Foreign Judgments Act. A power which is in aid of a federal right should not lightly be held to conflict with that right. That is particularly so where the Commonwealth and state laws have harmonious objects. One

[29] In the context of s 64 of the *Judiciary Act*.

[30] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 405 [55] (Gaudron, McHugh, Gummow and Callinan JJ).

purpose of the Foreign Judgments Act, as articulated in the Second Reading Speech, is to ensure, in light of the 'increased mobility of persons and money across borders' that 'judgment[s] given in one country ... be [capable of being] enforced against assets in another country'.[31] Similarly, one purpose of freezing orders is to ensure that orders can be effectively enforced despite the mobility of persons and capital.

46. *Thirdly*, the Foreign Judgments Act is a statute enacted in the milieu of both the inherent jurisdiction of state courts and of state court rule-making powers. The Foreign Judgments Act contemplates, and permits, laws within that milieu,[32]
10 particularly where they are in aid of the Act itself. As a general proposition, a Commonwealth law should not, absent clear words, be taken to evince an intention to abrogate state courts' inherent jurisdiction: *Cameron v Cole* (1944) 68 CLR 571 at 589 (Rich J). Further, s 17(2) of the Foreign Judgments Act expressly contemplates the co-existence of state rule-making powers. The milieu so contemplated by the Foreign Judgments Act is not frozen in time at the date of its enactment. The Commonwealth Parliament should not be taken to have intended such a stultification of the means of protecting federal rights.

47. *Fourthly*, PT Bayan discerns an implied parliamentary intention from the fact that freezing orders are non-money orders of an injunctive nature, but
20 Singapore non-money orders have not been recognised under s 5(6) of the Foreign Judgments Act: AS at [84]–[86]. At best, the non-recognition of Singapore non-money judgments is neutral. It might just as easily disclose an intention that Australian law alone govern freezing orders, rather than Australian courts being compelled to register and effectuate such orders under s 6(4). More fundamentally, to observe that a freezing order made by the Singapore court would be a non-money judgment misses the point. An award of damages by the Singapore court in the pending proceedings would be a money judgment; and it is only that prospective money judgment on which BCBC relies.

30 48. *Fifthly*, PT Bayan also discerns an implied intention in the Foreign Judgments Act that there be no assistance in the enforcement of foreign judgments unless and until the foreign judgment has been awarded: AS at [81]. It discerns that intention from the fact that the Foreign Judgments Act only refers to existing judgments. The thesis underlying PT Bayan's submission appears to be that a Commonwealth scheme which refers only to existing rights conflicts with any law purporting to protect those rights in advance of their existence. That thesis gives more weight to a law's reference to existing rights than it can reasonably bear. The Foreign Judgments Act does not refer to prospective foreign judgments because it does not need to: the Act is not in terms concerned with
40 prospective foreign judgments. That the Act is not so concerned is not a reason for discerning inconsistency. To the contrary, it furnishes an occasion *for* the operation of complementary state laws.

31 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives (29 May 1991) 4219 (Michael Duffy, Attorney-General).

32 As was the case in *APLA*. See at 355 [44]–[45] (Gleeson CJ and Heydon J), 401 [209] (Gummow J, with whom Hayne J agreed at 449 [375]).

49. *Sixthly*, PT Bayan also discerns some kind of conflict arising from the terms of the *Trans-Tasman Proceedings Act 2010* (Cth) (**TTP Act**) and from a view PT Bayan attributes to the executive government of the Commonwealth.[33] These submissions are misguided. The TPP Act did not wreak any change to the legal meaning of the Foreign Judgments Act or the state laws at issue in this proceedings. It can be noted that s 26(3) of the TTP Act expressly preserves 'any other powers of the Australian court to give interim relief' in support of New Zealand proceedings. A fortiori, the views of the Executive Government do not alter the meaning of either the Foreign Judgments Act or the state laws in
10 issue. They do not change the operation of s 109.

PART VI ESTIMATED HOURS

It is estimated that 30 minutes will be required for the presentation of the oral argument of the intervener.

Dated: 6 May 2015

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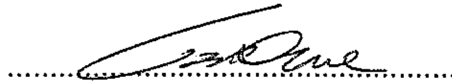

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[33] AS at [26]–[27], [88]–[91].

ANNEXURE A – CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

Commonwealth Constitution

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States.

109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Judiciary Act 1903 (Cth)

39 Federal jurisdiction of State Courts in other matters

(1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

(2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:

- (a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.

Special leave to appeal from decisions of State Courts though State law prohibits appeal

- (c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.