IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P14 of 2015

BETWEEN:

PT BAYAN RESOURCES TBK
Appellant

and

BCBC SINGAPORE PTE LTD
First Respondent

KANGAROO RESOURCES LIMITED
Second Respondent

ATTORNEY-GENERAL OF WESTERN AUSTRALIA
Third Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. Queensland intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the First Respondent.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: STATUTORY PROVISIONS

4. Queensland adopts the First Respondent's statement of applicable legislative provisions.

PART V: ARGUMENT

5. Queensland supports the First Respondent's position in the appeal. To that end, the submissions that are developed below deal with the existence of an inherent power to grant Mareva relief in the circumstances of the present case, then briefly with the validity of Order 52A of the *Rules of Supreme Court 1971* (WA) ('**O52A**') as an exercise of State legislative power, and finally with the impact of the *Foreign Judgments Act 1991* (Cth) ('the Act') upon both of these sources of power.

6. To avoid repetition, Queensland does not deal with the other issues. It adopts the First Respondent's submissions in relation to the exercise of federal jurisdiction[1] and the question of whether O52A was authorised by the Act.[2]

A. Introduction

7. For centuries, common law courts have recognised and enforced the judgments of foreign courts[3], and so the administration of justice in a superior court has historically involved the recognition and enforcement of foreign judgments. This is not a novel or recent function.

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8. It would be wrong to proceed on the basis that until recently, the administration of justice in such courts stopped at the borders of its geographical jurisdiction, or was limited to matters which originated, or were determined within that jurisdiction.

9. The grant of Mareva relief – an evolving, *sui generis* remedy – should be seen in this context. In *Jackson v Sterling Industries Ltd*,[4] Toohey J said:[5]

> ... there is no reason to assume that the operation of the power [to grant a Mareva injunction] ... must be assessed by reference only to earlier decisions. Courts must respond to the situations of the time, as is apparent from the way in which the scope of Mareva injunctions has been extended ...

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> The factual situation arising in a given case may not previously have been considered by the courts. But notions such as the Mareva injunction will inevitably develop in response to particular circumstances and as their "doctrinal basis" receives further definition ...

10. It may be accepted that in cases such as the present, there are real issues that will be associated with the exercise of the discretion to grant such relief. But the exercise of the discretion is not in issue in this case.

11. The existence of a power to grant the relief in question should not be conflated with
30 concerns over the exercise of the discretion to do so. Such concerns can be overstated when they are considered prospectively. In *Knight v FP Special Assets Ltd*[6] this Court rejected the proposition that the mere prospect of abuse of a discretionary power should lead the court to find or impose limits on that power. The answer is that principles will develop to ensure that the discretion is not abused. So it will be in cases such as the present. In the more than 20 years that has followed the decision in *Knight*, the confidence reposed in Judges in exercising that exceptional power has proved justified.

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[1] First Respondent's submissions, [18]-[24] and [50].
[2] First Respondent's submissions, [25]-[33].
[3] *Mercedes Benz AG v Leiduck* [1996] AC 284 at 307A
[4] (1987) 162 CLR 612.
[5] (1987) 162 CLR 612 at 632-3.
[6] (1992) 174 CLR 178 at 185, 202-3, 205

B. The "inherent jurisdiction"

An evolving remedy

12. The development of the power to grant Mareva relief has been described as an "evolving process".[7] It is not a species of injunction.[8] Rather, it has been described as '*sui generis*' and 'a special exception to the general law'.[9] The latter is a description which the majority in *Cardile v LED Builders Pty Ltd* seemed to accept.[10]

13. The present case involves the recognition of a further aspect of superior courts' inherent, or implied, jurisdiction to grant Mareva orders – where the order is sought in aid of a prospective judgment to be obtained from a foreign court, which can, and probably will, be registered in Australia under the *Foreign Judgments Act 1991* (Cth).

14. Consistently with the observations of Toohey J above, this would recognise the modern reality described by Campbell J in *Davis v Turning Properties Pty Ltd*: [11]

> In circumstances where international commerce and international monetary transactions are a daily reality, and where money can be transferred overseas with sometimes as little as a click on a computer mouse, the administration of justice in this State includes the enforcement in this State of rights established elsewhere.

15. And it would address issues that arise from these modern day considerations, such as were identified by Lord Nicholls of Birkenhead, in *Mercedes Benz AG v Leiduck*:[12]

> The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.

The state of its evolution

16. The Mareva or freezing order has developed from an order that was originally of limited scope - being available only against a foreign defendant with moveable assets within the jurisdiction which, unless restrained, it was likely to remove[13] - to one that has, over time, extended such that:

> ... similar orders have been made against a foreign resident temporarily within the jurisdiction ... and against local residents ... A Mareva injunction has been granted after as well as before judgment ... and has, in some circumstances, been made available against a third party if that party is in possession or control of the defendant's property ... It has been held no longer necessary that there should be a risk of removal of assets

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[7] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403 [50]; [1999] HCA 18.
[8] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 399-401 [40]-[41].
[9] *Mercedes Benz AG v Leiduck* [1996] AC 284 at 301D, E.
[10] (1999) 198 CLR 380 at 396-397 [34].
[11] (2005) 222 ALR 676 at 686 [35] cited with approval in the Court of Appeal below: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2014) 288 FLR 299 at 329 [158]-[159]; [2014] WASCA 178.
[12] [1996] AC 284 at 305B.
[13] *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 617.

beyond the jurisdiction ... Recently orders have been made restraining defendants from leaving the jurisdiction when to do so may frustrate a Mareva injunction.[14]

17. Such relief also available against non-parties in certain circumstances even where they are not in possession or control of the defendant's property (see below), and ancillary orders can now be made, such as orders which require the defendant to disclose the nature and whereabouts of its assets.

18. In *Cardile v LED Builders Pty Ltd*,[15] the High Court recognised a superior court's power to grant a Mareva injunction against a party other than the defendant to the substantive proceeding, in certain circumstances. There are some important propositions that flow from this decision.

19. First, previous authorities had described the jurisdiction to grant a Mareva order as being 'the paradigm example of an order to prevent the frustration of a court's process'[16] and therefore one which was an incident of the court's exercise of the substantive jurisdiction between the plaintiff and the defendant.[17] However, in *Cardile* the majority said that in such cases:[18]

> The attention of the Court was directed to orders against parties to the proceedings and against whom final relief was sought. In that situation, the focus is the frustration of the court's process. If relief is available against non-parties, the focus must be the administration of justice.[19] (emphasis added)

20. These statements echo those made in *Riley McKay Pty Ltd v McKay*[20] that:

> The whole sense and purpose of the inherent powers ... are to ensure the effective administration of justice. The analysis of the 'Mareva' injunction which has occurred during the years of its growth show that it is designed to prevent conduct inimical to the administration of justice. The reported decisions show that a 'Mareva' injunction will be granted where necessary to ensure that justice is effectively administered. (emphasis added)

21. The majority in *Cardile* went on to say:

> In Australia, for many years, Mareva orders have been made in aid of the exercise of the specific remedies provided for execution against judgment debtors ... they preserve assets and assist and protect the use of methods of execution and do not substitute for them.[21] (emphasis added)

22. These statements are consistent with the proposition that the power to grant Mareva relief is not limited to circumstances where it can be demonstrated to be in aid of substantive proceedings being litigated in the court from which such relief is sought.

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[14] *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 633 (references omitted).
[15] (1999) 198 CLR 380.
[16] *Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 32 [35]; [1998] HCA 30, cited in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 400 [41] and in the Court of Appeal below: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2014) 288 FLR 299 at 320 [113].
[17] *Jackson v Sterling Industries* (1987) 162 CLR 612 at 622-3.
[18] (1999) 198 CLR 380 at 401 [43].
[19] (1999) 198 CLR 380 at 401 [42].
[20] [1982] 1 NSWLR 264 at 276.
[21] (1999) 198 CLR 380 at 401 [43].

Rather, the power to grant such relief exists, in the inherent or implied jurisdiction of the court, where it is necessary in the administration of justice. That will be the case where it is needed to prevent the frustration of the court's processes which are or will be set in motion; but that is not the limit of the power. The administration of justice is also served by such relief if it is sought in aid of the specific remedies provided for the execution of judgments. One such remedy – provided in respect of foreign judgments – is the *Foreign Judgments Act 1991* (Cth). A prevention of the frustration of the process provided for under that Act is no less a promotion of the effective administration of justice than the prevention of frustration of the process of a local court.

23. Secondly, in dealing with the basis upon which the Mareva relief might be granted against a non-party, the majority said:[22]

> What then is the principle to guide the courts in determining whether to grant Mareva relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word "may", be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which: (i) the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including "claims and expectancies", of the judgment debtor or potential judgment debtor; or (ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor. (emphasis added)

24. This reasoning, particularly the reference to processes available by the appointment of a liquidator or a trustee in bankruptcy, demonstrate that Mareva relief would be available against a party where:

    (a) there was no present cause of action available against that party;

    (b) any right to move against that party, by commencement of a proceeding, would only arise upon a prospective judgment (against the defendant) and perhaps some further steps (for example the appointment of a liquidator or trustee in bankruptcy);

    (c) as such, there was not, and might never be, a proceeding in the court granting the Mareva relief, against that non-party;

    (d) a firm undertaking to commence such proceedings could not be given – at most, the plaintiff could indicate that, upon obtaining judgment against the defendant, it intended to move against the non-party by particular processes, or by whatever means were available.

A logical and principled progression to application to the present case

25. Of course, in *Cardile* there had been commenced a proceeding for substantive relief in the court from which the Mareva relief was sought. In the present case, there is no such proceeding and will not be unless and until there is an application to register the judgment of the Singapore court. This distinction should not matter.

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[22] (1999) 198 CLR 380 at 405-406 [57] (reference omitted).

26. First, there is a cause of action – it is being litigated in Singapore. There is no justification for ignoring it; the judgment of the Singaporean court (if obtained) should eventually be recognised in Australia, and so there is no reason to ignore the process by which that judgment will be obtained.

27. Secondly, there is common law authority supporting the existence of a power to grant Mareva relief in support of a prospective foreign judgment.

28. There is the powerful dissent of Lord Nicholls of Birkenhead in *Mercedes Benz AG v Leiduck*.[23] In that case, there was statutory recognition of the Hong Kong court's power to grant a Mareva order[24] but no Hong Kong equivalent of s 25 of the *Civil Jurisdiction and Judgments Act 1982* (UK).[25] The appeal proceeded on the basis that no writ claiming substantive relief had ever been issued in Hong Kong.[26]

29. Lord Nicholls observed that Mareva relief is not granted in aid of the cause of action, but rather as relief appurtenant to a prospective money judgment. It is relief granted to facilitate the process of execution.[27] His Lordship went on to say:[28]

> Once it is borne in mind that a Mareva injunction is a protective measure in respect of a prospective enforcement process, then it can be seen there is a strong case for Mareva relief from the Hong Kong court being as much available in respect of an anticipated foreign judgment which would be recognised and enforceable in Hong Kong as it is in respect of an anticipated judgment of the Hong Kong court itself. Courts of many countries recognise and enforce judgments regularly obtained in other countries. The English court has done so for centuries. Courts are not so insular that they enforce only judgments obtained in proceedings conducted by themselves. If the Hong Kong court will make its enforcement process available in respect of a foreign judgment, then in principle that must surely encompass Mareva relief as well. In other words, as a form of interim relief given by the Hong Kong court to further the object of its enforcement process, Mareva relief should be available in all cases where the Hong Kong court will make its enforcement process available, whether the judgment being enforced is that of the Hong Kong court, or of a foreign court or, for that matter, is an arbitration award.
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> ...
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> Since Mareva relief is part of the court's armoury relating to the enforcement process what matters, so far as the existence of jurisdiction is concerned, is the anticipated money judgment and whether it will be enforceable by the Hong Kong court. In general, and with some well known exceptions, the cause of action which led to the judgment is irrelevant when a judgment creditor is seeking to enforce a foreign judgment. It must surely be likewise with a Mareva injunction. When a court is asked to grant a Mareva injunction, and a question arises about its jurisdiction to make the order, the answer is not to be found by looking for the cause of action on which the plaintiff is relying to obtain judgment. So far as jurisdiction is concerned, that would be to look in the wrong direction. Since Mareva relief is designed to prevent a defendant from frustrating

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[23] [1996] AC 284.
[24] [1996] AC 284 at 306B.
[25] Section 25 expressly conferred power to grant interim relief in support of substantive proceedings pending before the courts of another state party to the Brussels or Lugano Conventions on Jurisdiction and the Enforcement of Judgments: see [1996] AC 284 at 295C.
[26] [1996] AC 284 at 296D.
[27] [1996] AC 284 at 306E-F.
[28] [1996] AC 284 at 306H-307E.

enforcement of a judgment when obtained, the plaintiff's underlying cause of action entitling him to his judgment is not an apposite consideration, any more than it is when a judgment creditor applies to the court to enforce the judgment after it has been obtained. (emphasis added)

30. The majority decision turned entirely upon the question whether a writ claiming only Mareva relief could be validly served outside the jurisdiction under the relevant court rules. This question was answered in the negative. As to the question whether a Mareva order in support of a foreign proceeding could be granted their Lordships said:[29]

> The ... question therefore does not arise for decision and their Lordships prefer to express no conclusion upon it. They do however think it proper to make this observation. It may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no substantive proceedings are brought against him in the court, be it in Hong Kong or England, possessing such jurisdiction, an attempt will be made to obtain Mareva relief in support of a claim pursued in a foreign court. If the considerations fully explored in the dissenting judgment of Lord Nicholls of Birkenhead were then to prevail a situation would exist in which the availability of relief otherwise considered permissible and expedient would depend upon the susceptibility of the defendant to personal service.

31. In addition, in *Walsh v Deloitte & Touche Inc*,[30] the Privy Council held that a Bahamian court could grant Mareva relief against a person amenable to its jurisdiction in aid of pending proceedings in a Canadian Court. Lord Hoffman, delivering the advice of the Privy Council, said:[31]

> Secondly, Lord Grabiner [counsel for Walsh's estate] said that although the writ issued in The Bahamas made substantive claims, the Trustee [Deloitte & Touche Inc] had made it clear that after obtaining Mareva relief it intended to stay the action and proceed with the action in Ontario. There is no doubt that the court has jurisdiction to make an order in such circumstances: see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334. But Lord Grabiner said that, as a matter of discretion, the Bahamian court should not have made a world-wide order solely in aid of proceedings in Canada.
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> Their Lordships do not consider that any objection in principle can be made to the exercise of the jurisdiction in this way. It is commonplace that the most convenient forum may not be the place where it is desirable to obtain Mareva relief, either because the defendant resides there and is amenable to the enforcement jurisdiction of the local court, or because the assets are there and notice can be served upon persons (such as banks) who have them under control. As long ago as 1983, in the early days of the English Mareva jurisdiction, Vinelott J granted an order in aid of proceedings in Ireland: see *House of Spring Gardens Ltd v Waite* [1984] FSR 277 and more recently in *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 the Court of Appeal made a similar order in aid of proceedings in Switzerland. Their Lordships consider that such international judicial co-operation should be encouraged.

32. There are also the various Australian and common law cases referred to in the submissions of the First Respondent (at [47]), and Third Respondent (at [36]-[39]).

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[29] [1996] AC 284 at 304G.

[30] [2001] UKPC 58.

[31] [2001] UKPC 58 at [21]-[22]. See also at *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 402-403 [48].

33. Thirdly, it must be asked: what is the relevance or importance of a substantive proceeding in the local court, such as to make it an essential prerequisite to the power to grant Mareva relief? To put it another way: if the local court is required to recognise the foreign judgment, why should it not recognise the foreign process, at least sufficiently to provide a basis for a Mareva order?

34. Whilst a proceeding in the local court provides a principled basis for the existence of the power (namely to prevent the frustration of the court's process), where the prospective judgment will be registered and enforced in the jurisdiction, the administration of justice similarly provides a principled basis for the existence of power (as set out in [22] above). It is true that, if the substantive proceeding was in the local court, then the court would have control over both the Mareva order and the substantive proceeding, but there has been nothing identified that indicates why that would be an essentiality, such as to deny the existence of power in its absence. In *Mercedes Benz*, Lord Nicholls described it as 'odd' that a court would 'adopt the attitude of drawing back and declining to give any relief, whatever the circumstances, unless the court were seized of the whole dispute'.[32]

35. The local court will of course maintain control over the Mareva orders. To the extent that developments in the foreign proceedings might give rise to a need to alter, or discharge the Mareva orders, there is no danger that this will go by the wayside – the parties to the foreign proceedings are the same as the parties to the application for Mareva relief and so it can be readily assumed that any relevant changes in circumstances in the foreign proceedings will be swiftly raised with the local court by the affected party. For example, in *Walsh v Deloitte & Touche Inc*[33], the Privy Council seemed to accept that the Bahamian court could discharge the injunction for delay in the Canadian proceedings

36. Finally, the prospect of an application for Mareva relief in the Singaporean Court does not provide a basis for denying the existence of the power. In *Cardile*, the majority said:[34]

> Discretionary considerations generally also should carefully be weighed before an order is made. Has the applicant proceeded diligently and expeditiously? Has a money judgment been recovered in the proceedings? Are proceedings (for example civil conspiracy proceedings) available against the third party? Why, if some proceedings are available, have they not been taken? Why, if proceedings are available against the third party and have not been taken and the court is still minded to make a Mareva order, should not the grant of the relief be conditioned upon an undertaking by the applicant to commence, and ensure so far as is possible the expedition of, such proceedings? It is difficult to conceive of cases where such an undertaking would not be required. Questions of this kind may be just as relevant to the decision to grant Mareva relief as they are to a decision to dissolve it. These are matters to which courts should be alive. As will appear, they are matters which should have been considered by the Full Court in this case. (emphasis added)

37. The emphasised passage demonstrates that the majority considered that Mareva relief could be granted even where proceedings could be taken against the non-party. In those

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[32] [1996] AC 284 at 311D.
[33] [2001] UKPC 58 at [24]-[28].
[34] (1999) 198 CLR 380 at 404 [53].

circumstances, the availability of relief in a Singaporean Court is no more than a discretionary consideration.

38. Consequently, this court should recognise a power to grant Mareva relief, in the inherent or implied jurisdiction of a superior court, in circumstances where the relief is granted in aid of a prospective foreign judgment that is able to, and intended to, be registered and enforced under the *Foreign Judgments Act 1991*. The existence of a proceeding from which a judgment might result that can and will be enforced in the jurisdiction provides a principled basis for concluding that the grant of Mareva relief would be properly made on the basis of aiding the administration of justice within the jurisdiction (or preventing conduct inimical to it) by way of the enforcement of such (foreign) judgments.

C. The rules are a valid exercise of State legislative power

39. The conclusion that the inherent jurisdiction of the Supreme Court extends to the power to grant such relief leads also to the conclusion that O52A is *intra vires* the *Supreme Court Act 1935* (WA).[35]

D. The *Foreign Judgments Act 1991 (Cth)* does not displace the inherent jurisdiction

40. For a statute to displace, or remove a court's inherent jurisdiction, it must do so expressly or by necessary implication.[36] It is submitted that the same proposition must be accepted in respect of an implied jurisdiction of a superior court constituted by statute (for example a federal court).[37]

41. The *Foreign Judgments Act* deals with the circumstances in which an Australian court will recognise a judgment given by a foreign court. The recognition is effected by registering the judgment; this in turn allows it to be executed or enforced.

42. However, once the foreign judgment is recognised, and therefore registered, the *Foreign Judgments Act* does not deal with the manner in which it will be enforced or executed. No form of enforcement is prescribed, and there is no attempt to regulate the manner in which enforcement will take place. It is relatively clear that the Act works on the basis that, once the foreign judgment is recognised and registered, enforcement will occur by way of the existing processes available under the rules of court in the particular jurisdiction.

43. Thus, it cannot be said the *Foreign Judgments Act* purports to cover the field in respect of the method of execution of foreign judgments.

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[35] The Third Respondent's Submissions at [12], [13] are adopted.

[36] *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 61 [42] (French CJ); [2013] HCA 7; *R v Carroll* (2002) 213 CLR 635 at 678 [145] (McHugh J); [2002] HCA 55; *Cameron v Cole* (1944) 68 CLR 571 at 589 (Rich J); *Johnson v Director-General of Social Welfare (Vic)* (1976) 135 CLR 92 at 97 (Barwick CJ)/

[37] *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 at 257 (Mason CJ, Dawson, Toohey and Gaudron JJ).

44. Mareva relief is one step further removed, in that the authorities make it clear that such relief is not a method of execution, but rather is given in aid of execution.[38]

45. The *Foreign Judgments Act* says nothing about the method of execution for foreign judgments, and it says even less about the remedies which may be called upon in aid of such execution. In fact, it could be concluded that, the legislature having worked on the basis that the execution would be undertaken pursuant to the existing processes under the local court rules, it similarly presumed that existing remedies in aid of such execution would also be available.

10 46. Accordingly, it cannot be concluded that the *Foreign Judgments Act* displaces the inherent jurisdiction to grant Mareva relief. There is no express provision to this effect, and there is nothing about an Act that purports to regulate the circumstances in which foreign judgments will be recognised and given effect to, which necessarily implies that the court intended to displace or remove an existing inherent jurisdiction to grant remedies in aid of execution of such judgments. In fact, in the circumstances where the *Foreign Judgments Act* makes no provision for remedies in aid of execution, it is difficult to see why it would be intended to displace the inherent jurisdiction to grant such remedies.

20 **E. The Foreign Judgments Act does not render the court rules invalid**

47. Section 79(1) of the *Judiciary Act* (Cth) only operates to 'pick up' or apply State laws which are not inconsistent with a law of the Commonwealth under s 109 of the *Constitution*.[39]

48. The first task in any application of s 109 is to construe the federal law in question. Only when that task is performed is it appropriate to consider whether, upon its proper construction, the State law is inconsistent with the federal law.[40] A State law which is either 'directly' or 'indirectly' inconsistent with a law of the Commonwealth will, by virtue of s 109 of the *Constitution*, be invalid (inoperative)[41] to the extent of the 30 inconsistency. A direct inconsistency will also arise where the State law would 'alter, impair or detract from' the operation of the Commonwealth law,[42] in a 'significant and not trivial'[43] manner. An indirect inconsistency arises where the Commonwealth law evinces an intention to 'cover the field' of its operation, and completely, exhaustively or exclusively govern the relevant conduct or matters.[44] Where a Commonwealth law does not evince such an intention, a potential inconsistency may none the less arise where

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40 [38] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 401 [43]; *Mercedes Benz AG v Leiduck* [1996] AC 284 at 299B; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 44-45 [73].

[39] *Northern Territory v GPAO* (1999) 196 CLR 553; [1999] HCA 8. See also: *The Commonwealth v Mewett* (1997) 191 CLR 471; [1997] HCA 29; *Dao v Australia Postal Commission* (1987) 162 CLR 317 at 331-332; [1987] HCA 13; *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 63-64.

[40] *Momcilovic v R* (2011) 245 CLR 1 at 115 [258] (Gummow J).

[41] *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573.

[42] *Victoria v Commonwealth* (1937) 58 CLR 618 at 630.

[43] *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642-643, 651.

[44] *Ex parte McLean* (1930) 43 CLR 472 at 483.

steps taken under Commonwealth or State legislation create a direct conflict between the two laws' operation.[45]

49. Generally, Queensland adopts the construction of the *Foreign Judgments Act* urged by the First and Third Respondents. The Act does not attempt to cover the field in respect of the method of enforcement; it does not attempt to prescribe methods of enforcement, or even to regulate them. All the more, it cannot be seen as attempting to cover the field in respect of remedies that could be granted in aid of execution (particularly in circumstances where it does not prescribe any such remedies). There is therefore no inconsistency.

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50. It is difficult to see how orders described by the courts as 'the paradigm example of an order to prevent the frustration of a court's process',[46] aimed at enabling a court to 'protect its process from abuse in relation to the enforcement of orders'[47] and designed to ensure that 'justice is effectively administered'[48], could be said to alter, impair or detract from the operation of the Act in a significant and not trivial way.

51. In short, the Act does not expressly provide for freezing orders such that a direct inconsistency could arise with O52A, nor does it evince any intention to 'cover the field'. Such a construction in each case could only be reached by necessary implication. However, such conclusions would be in the teeth of s 17 of the Act which expressly provides for State and Territory superior courts to make rules of practice and procedure that are 'necessary or convenient' and not inconsistent with the Act for 'carrying out or giving effect to' the Act. This is unmistakable language evincing an intention not to cover the field. The only relevant inconsistency that could arise is a direct inconsistency, and none has been demonstrated.

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52. Further, s 17(2) provides that the section 'does not affect any power to make rules under any other law', reinforcing the Parliament's intention not to 'cover the field' so far as the making of rules of practice and procedure which may be applied to the Act, but which are not expressly authorised by s. 17(1)(a)-(e), is concerned.

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53. The Appellant contends that since a judgment in the nature of a Mareva order may be made the subject of a regulation under the Act and thereby given reciprocal recognition, Parliament could not have intended courts administering the Act to exercise such a power in the absence of such a regulation having been made.[49]

54. However, this view conflates the two very distinct aspects of the Act, namely: (a) a mechanism for identifying 'reciprocal' jurisdictions and judgments and (b) the enforcement of such judgments by registration. A freezing order supports the latter, and does not require prescription by regulation for the former purpose. The absence of specific mention of Mareva orders from the *Foreign Judgments Regulations* does not mean Parliament intended that Australian courts should be deprived of existing domestic jurisdiction.

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[45] *Commonwealth v Western Australia* (1999) 196 CLR 392.

[46] *Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32 [35].

[47] *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 619 (Wilson and Dawson JJ) cited in the Court of Appeal below: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2014) 288 FLR 299 at 319 [104].

[48] *Riley v McKay* (supra) at 276

[49] Appellant's submissions, [82], [84]-[86] and [97].

55. The Appellant contends that the Executive's negotiation of agreements with foreign countries, culminating in the enactment of legislation which includes the mutual recognition of Mareva orders, confirms the view that Parliament, under the Act, intended such orders to be available only once such express legislation has been passed.[50] However, the fact that agreement may be reached with individual countries cannot mean Parliament intended that the power courts otherwise might have to ensure that foreign judgments can be effectively enforced, is thereby removed. If that were so, foreign judgments already the subject of a regulation under the Act would be vulnerable to frustration until agreements about Mareva orders are reached with each relevant country.

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PART VI: ORAL ARGUMENT

56. Queensland estimates that it will require 20 minutes to present its oral argument.

Dated 6 May 2015.

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[50] Appellant's submissions, [26], [27], [88]-[95], and [99].