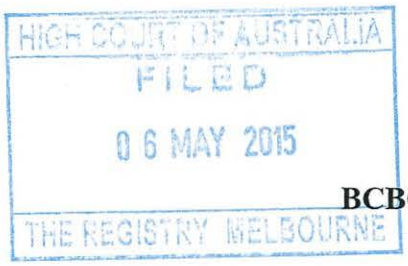
IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P14 of 2015

BETWEEN:



PT BAYAN RESOURCES TBK
Appellant

and

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BCBC SINGAPORE PTE LTD AND ORS
Respondents

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

PART I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

20 ### PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the first and third respondents.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The appellant has referred to the relevant legislative provisions in Pt VII of its submissions. The Attorney-General for Victoria also refers to s 16(1)(d)(i) of the *Supreme Court Act 1935* (WA) (***Supreme Court Act***) and s 109 of the Constitution.

PART V: ARGUMENT

30 **Summary of argument**

5. In summary, the Attorney-General for Victoria submits that:

   (a) The doctrinal basis of a Supreme Court's power to make a freezing order is its inherent power to preserve the efficacy of the execution that would lie against

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Filed on behalf of: Attorney General for the State of Victoria

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an actual or prospective judgment debtor as an incident of the Court's responsibility for the administration of justice. This may, in a proper case, extend to asset preservation orders for the preservation of the efficacy of the potential future exercise of the court's processes for the registration of an actual or prospective foreign judgment and the subsequent enforcement of the registered judgment. The Supreme Court of Western Australia therefore has inherent power to grant a freezing order to prevent the dissipation of assets in Australia that may be available to satisfy a prospective foreign judgment capable of being registered and enforced in Australia.

(b) Section 16(1)(d)(i) of the *Supreme Court Act* maintains the jurisdiction of the Supreme Court of Western Australia in terms that confirm its statutory jurisdiction is at least coextensive with the Court's inherent jurisdiction. Section 16(1)(d)(i) is therefore an alternative source of power to make a freezing order in the circumstances of this case.

(c) Because the Court has power to make a freezing order in its inherent jurisdiction and/or pursuant to s 16(1)(d)(i), including in the circumstances of this case, O 52A of the *Rules of the Supreme Court 1971* (WA) (***Supreme Court Rules***) is authorised by the rule-making power conferred by s 167(1)(a) of the *Supreme Court Act*.

(d) There is no inconsistency for the purposes of s 109 of the Constitution between the *Foreign Judgments Act 1991* (Cth) (***Foreign Judgments Act***) and either s 16(1)(d)(i) of the *Supreme Court Act* or O 52A of the *Supreme Court Rules*.

(e) If there were an inconsistency, it would be necessary to also consider whether the *Foreign Judgments Act* had displaced the Court's inherent power to make a freezing order in the circumstances of this case. The *Foreign Judgments Act* does not displace the inherent power.

6. No submissions are made in relation to whether O 52A is *ultra vires* s 17 of the *Foreign Judgments Act*.

Issues on the appeal

7. The notice of appeal and the statement of issues in the appellant's submissions frame the questions for the Court in this appeal in terms of the validity of O 52A, to the extent that it authorises the making of a freezing order in the circumstances of this case.[1] However, it should be noted that the writ of summons originally filed by the appellant in this Court sought both a declaration that O 52A was invalid in so far as it

[1] Appellant's submissions, para 2. It is noted that to the extent that the validity of O 52A is challenged on the basis of a s 109 inconsistency, the appellant's submissions are narrower than the grounds in the notice of appeal. While ground 2(c) of the notice of appeal alleges that the Court of Appeal erred in finding that O 52A was not *ultra vires* s 17 of the *Foreign Judgments Act* and s 167(1)(a) of the *Supreme Court Act*, the appellant's statement of issues does not refer to s 167(1)(a). The appellant confirms later in its submssions that it is not advancing a separate question as to whether O 52A is *ultra vires* the rule-making power in s 167(1)(a) of the *Supreme Court Act* on the basis that a majority in the Court of Appeal (McLure P and Buss JA) confirmed the view of Le Miere J at first instance that s 167(1)(a) "does not go any further than the inherent jurisdiction": appellant's submissions, para 17.

purported to authorise the making of the freezing order made by Pritchard J *and* a declaration that the Supreme Court had no inherent, implied or statutory jurisdiction to make such an order.

8. The courts below have approached the issues in slightly different ways in terms of both invalidity and power.

9. Le Miere J approached the issues in terms of, first, the Supreme Court's power to make the orders sought and, second, the validity of O 52A.[2] His Honour looked first to the inherent jurisdiction and concluded that "this court has an inherent jurisdiction to make a freezing order against a prospective judgment debtor where there is a sufficient prospect that a foreign court will give judgment in favour of the applicant and the judgment will be registered in or enforced by this court".[3]

10. His Honour next held that the powers conferred by s 16(1)(d)(i) of the *Supreme Court Act* were coextensive with its inherent powers and that s 16(1)(d)(i) was therefore "a further source of the power of the court to make a freezing order of the sort here being considered."[4]

11. His Honour turned to the question of the validity of O 52A when he addressed the submissions concerning the rule-making powers in s 167(1)(a) of the *Supreme Court Act* and s 17 of the *Foreign Judgments Act*. In relation to the former, his Honour held that, because the Court had inherent jurisdiction to make a freezing order in the circumstances in question, "O 52A, r 5(1)(b)(ii) is authorised by the rulemaking power in s 167(1)(a) of the *Supreme Court Act*."[5] In relation to the latter, his Honour held that the rule was authorised by s 17 of the Commonwealth Act.[6]

12. Le Miere J expressed his overall conclusions in terms of both power and validity. His Honour said:[7]

> "The court has jurisdiction to make the freezing orders. RSC, O 52A, r 5(1)(b)(ii), to the extent that it authorises the court to make freezing orders in aid of proceedings on a cause of action being tried in Singapore, is within the inherent jurisdiction of the court, and is authorised by the rule making power in s 167(1)(a) of the *Supreme Court Act* and s 17 of the *Foreign Judgments Act*."

13. In the Court of Appeal, McLure P described the ultimate issue in the appeal as the validity of O 52A r 5(1) in so far as it empowered the Court to make a freezing order in anticipation of an enforceable money judgment in foreign proceedings.[8] Nevertheless, her Honour's conclusion that the rule was valid depended upon the

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2 Le Miere J's conclusions are summarised by McLure P in the Court of Appeal: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2014) 288 FLR 299 (**CA**) at 303 [6].

3 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* (2013) 276 FLR 273 (**Le Miere J**) at 287 [44].

4 Le Miere J at 289 [48].

5 Le Miere J at 289 [50].

6 Le Miere J at 291 [60].

7 Le Miere J at 307 [121].

8 CA at 302 [1].

scope of the Court's inherent jurisdiction to make a freezing order.[9] On this point, her Honour agreed with Le Miere J and with Buss JA.[10]

14. Buss JA also approached the issues in the appeal in terms of the validity of O 52A.[11] As with McLure P, his Honour's conclusion that O 52A, to the extent that it applied to the circumstances of the present case, was "within the Supreme Court's inherent jurisdiction"[12] also depended upon his analysis of the Court's inherent power to grant *Mareva* relief.[13] His Honour held that that jurisdiction "extends to the making of a 'freestanding' freezing order in respect of a prospective foreign judgment under and subject to the provisions of O 52A."[14]

15. Murphy JA agreed with Buss JA, but also concluded that Le Miere J was correct to hold that s 16(1)(d)(i) of the *Supreme Court Act* "also gave the court power to make the freezing orders in question",[15] whereas Buss JA found it unnecessary to answer this question.[16]

16. The ultimate issue in this appeal is whether the Supreme Court has power within its inherent jurisdiction to make the freezing orders made by Le Miere J. The Attorney-General for Victoria submits that the Court has that inherent power. It follows that:

(a) first, s 16(1)(d)(i) of the *Supreme Court Act* is an independent source of power to make the freezing order because the power conferred on the Supreme Court by that section is coextensive with the Court's inherent power; and

(b) secondly, O 52A is authorised by the rule-making power conferred by s 167(1)(a) of the *Supreme Court Act*.

17. Order 52A, however, is not itself the source of the Supreme Court's power. The power to make a freezing order inheres in the Supreme Court independently of the rule. Subject to two qualifications, Buss JA correctly stated that O 52A "regulates and prescribes the procedure and practice (including matters incidental to or relating to such procedure or practice) to be followed in the Supreme Court where the Supreme Court's inherent jurisdiction to make a freezing order (including a freezing order in the circumstances in question) is sought to be invoked."[17]

(a) The first qualification is that the Supreme Court's power derives also from s 16(1)(d)(i) of the *Supreme Court Act*.

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9 CA at 307 [41], [43], 307-308 [48]-[49].

10 CA at 308 [49].

11 CA at 331 [166], 339 [213].

12 CA at 341 [224].

13 CA at 341-344 [225]-[242].

14 CA at 343 [239].

15 CA at 347 [263].

16 CA at 344 [245].

17 CA at 344 [247]. See also *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 268 [19], where Gleeson CJ, Gummow, Hayne and Crennan JJ observed that "[r]ules of Court in their various forms may be influenced by, and to differing degrees restate, the characteristics of the inherent power to stay for abuse of process". The same may be said of O 52A in relation to the inherent power to make freezing orders.

(b) The second qualification is that O 52A regulates the practice and procedure to be followed by the Supreme Court when making a freezing order (whether in the exercise of its inherent or its statutory power) in the circumstances covered by the criteria set out in O 52A r 5. However, r 6, which provides that O 52A does not diminish the inherent, implied or statutory power of the Supreme Court to make freezing orders, confirms that the Court retains its inherent power to make freezing orders in circumstances where, for example, the criteria in O 52A rr 5(4) and (5) are not satisfied or which otherwise fall outside those covered by the Order.

18. Accordingly, if O 52A were held to be inoperative by reason of s 109 of the Constitution to the extent that it authorised the making of a freezing order in the circumstances of this case, it would be necessary to go on to consider whether the inherent power remains available to the Court in order to give a complete answer to the ultimate question raised by the appellant's writ concerning the power of the Court to make the orders that it made.

The Supreme Court has inherent power to make a freezing order in aid of the enforcement in Australia of a prospective foreign judgment capable of registration when made

19. Orders of the kind now referred to as freezing orders are commonly made in cases in which the court is seized of the substantive controversy between the parties. As such, the power has at times been expressed as one derived from the inherent power of a superior court to prevent the frustration of its own processes once set in motion. However, as Toohey J said in *Jackson v Sterling Industries Ltd*:[18]

> "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: see Glass JA in *Ballabil Holdings Pty Ltd v Hospital Products Ltd.*[19]"

20. The following examination of the principal cases in which the scope and the doctrinal basis of the power of superior courts to make what are now called freezing orders have been developed establishes the following propositions, which compel the conclusion that the Supreme Court of Western Australia had power to make a freezing order in the circumstances of this case:

(a) First, the underlying basis of the power is a superior court's responsibility for the administration of justice.

(b) Secondly, and as a corollary of the first proposition, the power is not ancillary to the substantive controversy between the parties but is made in aid of the execution of an actual or prospective judgment.

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18 (1987) 162 CLR 612 at 633.

19 [1985] 1 NSWLR 155 at 164.

(c) Thirdly, it follows from the first two propositions that a superior court's inherent power to make freezing orders extends to enable it to do what is necessary to preserve the capacity for the effective exercise of the processes of execution that are provided by the law and ultimately enforceable by the Court. It is not confined to circumstances in which its processes have been (or are about to be) set in motion for the resolution of the substantive controversy.

The inherent power of the State Supreme Courts

21. The Supreme Courts of the Australian States possess an "inherent jurisdiction" by virtue of their status as superior courts of unlimited, or general, jurisdiction.[20] However, it is important to note, as Toohey J said in *Jackson v Sterling*,[21] that:

> "[t]he notion of inherent jurisdiction is ... capable of misleading for, when examined, it is invariably concerned with the power of a particular court to act in a particular way: see, eg, the analysis of judicial decisions in *Riley McKay Pty Ltd v McKay*.[22] In *Reg v Forbes; Ex parte Bevan*,[23] Menzies J said of inherent jurisdiction that it is 'the power which a court has simply because it is a court of a particular description'."

22. In their inherent jurisdiction, the State Supreme Courts have a "well of undefined powers"[24] available to them. The extent of those powers is limited only by reference to their basis and their purpose. As Dawson J said in *Grassby v The Queen*:[25]

> "it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power."

23. Accordingly, although the exercise of the inherent powers of the State Supreme Courts is often concerned with, and described in terms of, control of the court's processes and the need to prevent the court's own process from being abused in the context of cases in which such process has been engaged, the inherent powers are not so limited. Rather, because they derive ultimately from the general responsibility of such courts for the administration of justice, the inherent powers of the State Supreme Courts

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20 See *R v Forbes; ex parte Bevan* (1972) 127 CLR 1 at 7 (Menzies J), cited in cases including *Taylor v Taylor* (1979) 143 CLR 1 at 5-6 (Gibbs J) and *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J).

21 (1987) 162 CLR 612 at 630. See also at 638-640 where Gaudron J refers to the "inherent power" of a court; *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78] (Gaudron, Gummow and Hayne JJ); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64] (Gleeson CJ, Gaudron and Gummow JJ).

22 [1982] 1 NSWLR 264.

23 (1972) 127 CLR 1 at 7.

24 *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J). Mason, "The Inherent Jurisdiction of the Court" (1983) 57 ALJ 449, observed of inherent jurisdiction that "[i]ts ubiquitous nature precludes any exhaustive enumeration of the powers which are this exercised by the courts" and provided an extensive catalogue of past exercises of the inherent powers of superior courts.

25 (1989) 168 CLR 1 at 16. See also *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 451 [50] (Gaudron, Gummow and Callinan JJ); and *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36] (French CJ, with whom Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ agreed).

extend to, but do not exceed, what is "necessary to the effective exercise" of their jurisdiction.[26]

Development of the doctrinal basis of the inherent power of superior courts to make freezing orders as an incident of their responsibility for the administration of justice

24. The acceptance and development in Australia of the power of the State Supreme Courts to make what were originally referred to as *Mareva* injunctions has been based on this understanding of the nature of the inherent power. This is seen from as early as the decision of the New South Wales Court of Appeal to grant a "*Mareva* injunction" in *Riley McKay Pty Ltd v McKay*.[27] In relation to the scope of the Court's inherent powers and s 23 of the *Supreme Court Act 1970* (NSW), the Court said:[28]

> "The court exercises from time to time a great many powers which are not the subject of any explicit statutory provision or rule, the exercise being based generally on the court's inherent powers. As it seems to us, those powers are recognized and exercised because they are necessary for the administration of justice in New South Wales. On this view s 23 confirms the existence of the Court's inherent powers but does not increase them. However, the inherent jurisdiction could not exceed what is necessary for the administration of justice..."

25. The Court held that its jurisdiction to grant a "*Mareva* injunction" derived from s 23 of the *Supreme Court Act 1970* (NSW) or the Court's inherent power.[29] In that case, the risk to the effective administration of justice arose in the context of proceedings already on foot in the Court. Accordingly, the Court naturally identified the basis of its jurisdiction as being "the risk that the defendant will so deal with his assets that he will stultify and render ineffective any judgment given by the Court in the plaintiff's action, and thus impair the jurisdiction of the Court and render it impotent properly and effectively to administer justice in New South Wales."[30]

26. Yet the Court did not limit the scope of its power to make a "*Mareva* injunction" to such circumstances. The Court said:[31]

> "The whole sense and purpose of the inherent powers, as well as the powers which s 23 confers, are to ensure the effective administration of justice. The analysis of the 'Mareva' injunction which has occurred during the years of its growth show[s] 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."

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26 *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36] (French CJ, with whom Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ agreed).

27 [1982] 1 NSWLR 264.

28 [1982] 1 NSWLR 264 at 270.

29 [1982] 1 NSWLR 264 at 276.

30 [1982] 1 NSWLR 264 at 276.

31 [1982] 1 NSWLR 264 at 276.

27. Against this background, the Court considered it undesirable to formulate general tests or boundary lines "which might, in their very generality, preclude or distort the useful development of this new remedy" and expressly left open whether it was necessary for an applicant for a *Mareva* order to have a vested and accrued cause of action.[32]

28. In *Jackson v Sterling Industries Ltd*,[33] Deane J, with whom Mason CJ, Wilson and Dawson JJ agreed, held that the "general power" to grant a *Mareva* injunction should "now be accepted as an established part of the armoury of a court of law and equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction." The focus in this passage and in the judgments of other members of the Court upon the processes of the court is explained by the fact that the orders under appeal were made in the course of proceedings on foot in the Federal Court. Nevertheless, Deane J's expression of the nature of the power in the passage quoted above should not be understood in any narrow sense. His Honour did not limit the power to circumstances in which the court's jurisdiction has been invoked by the commencement of proceedings. Rather, the power was available to prevent the frustration of the court's process *in relation to* matters coming within its jurisdiction.[34]

29. Brennan J, Toohey J and Gaudron J all noted the potential for future development of the power. Gaudron J, in particular, analysed the basis of the power in broader terms.

(a) Brennan J, in a passage later quoted in the joint judgment in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*,[35] said:

> "A judicial power to make an interlocutory order in the nature of a *Mareva* injunction may be exercised according to the exigencies of the case and, the schemes which a debtor may devise for divesting himself of assets being legion, novelty of form is no objection to the validity of such an order."[36]

(b) Toohey J, who explicitly analysed the question as one of power rather than jurisdiction,[37] cautioned against the assumption "that the operation of the power … must be assessed by reference only to earlier decisions", as "[c]ourts must respond to the situations of the time, as is apparent from the way in which the scope of *Mareva* injunctions has been extended."[38]

(c) Gaudron J held that the power to make *Mareva* orders "ought to be recognized as an aspect of what would, statutory authority aside, commonly be identified as inherent power."[39] Her Honour emphasised the breadth of that power:[40]

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32 [1982] 1 NSWLR 264 at 276-277.

33 (1987) 162 CLR 612 at 623.

34 See also Gaudron J at (1987) 162 CLR 612 at 641.

35 (1998) 195 CLR 1 at 33 (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

36 (1987) 162 CLR 612 at 621.

37 (1987) 162 CLR 612 at 627-628, 630, 632-633.

38 (1987) 162 CLR 612 at 632-633.

39 (1987) 162 CLR 612 at 640.

40 (1987) 162 CLR 612 at 639.

> "In *Connelly v Director of Public Prosecutions*, Lord Morris[41] held that 'There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction'; and this power has not, traditionally, been restricted to defined and closed categories (*Tringali v Stewardson Stubbs & Collett Ltd*[42]) but may be exercised where the administration of justice demands it (*Cocker v Tempest; Ferris v Lambton*[43]). An asset preservation order of the Mareva variety, issued only where the court is satisfied that a defendant is deliberately disposing of his assets with the object of defeating or frustrating the ultimate judgment of the court, would be within the scope of such a power."

30. In *Cardile v LED Builders Pty Ltd*,[44] the High Court confirmed that *Mareva* orders were "made in aid of the exercise of the specific remedies provided for execution against judgment debtors"[45] and that the doctrinal basis of the power to make such orders against parties to proceedings and against whom final relief was sought was the power of the court to protect the integrity of those processes.[46] However, the orders under appeal in *Cardile* were directed to persons who were not parties to the proceeding (non-parties or third parties). Although it held that those orders were too broadly made, the Court confirmed that *Mareva* orders were available against non-parties in limited circumstances.

31. In their joint judgment, Gaudron, McHugh, Gummow and Callinan JJ said:[47]

> "The integrity of those processes extends to preserving the efficacy of the execution which would lie against the actual or prospective judgment debtor.[48] The protection of the administration of justice which this involves may, in a proper case, extend to asset preservation orders against third parties to the principal litigation. This appeal concerns the identification of such proper cases.
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> In *Jackson v Sterling Industries Ltd*,[49] Deane J referred to the armoury of a court of law and equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction. By this means, the risk of the stultification of the administration of justice is diminished."

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41 [1964] AC 1254 at 1301.

42 (1966) 66 SR (NSW) 335.

43 (1905) 22 WN (NSW) 56 at 57.

44 (1999) 198 CLR 380.

45 (1999) 198 CLR 380 at 401 [43] (Gaudron, McHugh, Gummow and Callinan JJ).

46 (1999) 198 CLR 380 at 393 [25], 401 [42]; see also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 243 [94] (Gummow and Hayne JJ).

47 (1999) 198 CLR 380 at 393 [25]-[26].

48 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623, 638.

49 (1987) 162 CLR 612 at 623, 638.

32. In cases where relief was sought against non-parties, their Honours said that "the focus must be the administration of justice."[50]

33. Having identified the doctrinal basis of the power in this way, their Honours held that "the term 'injunction' is an inappropriate identification of that area of legal discourse within which the *Mareva* order is to be placed"[51] and that the term "*Mareva* order" was to be preferred to "*Mareva* injunction".[52]

34. Their Honours then identified the limited circumstances in which such orders would be available against non-parties. In addition to the existence of the standard criteria as to the strength of the applicant's substantive claims and the risk of dissipation of assets and subject to discretionary considerations, the Court held that an applicant must establish that the non-party has a sufficient degree of control over assets of the actual or potential judgment debtor or that "*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"[53] (emphasis added). The prospective and contingent nature of the second alternative criterion is apparent.

35. *Cardile* thus confirms that the power of a superior court to preserve the efficacy of its processes for the execution of a judgment against an actual or prospective judgment debtor extends to the preservation of its power to exercise those processes against non-parties, even where those processes remain prospective and contingent upon the attainment of a judgment in favour of the party applying for the *Mareva* order. At the time the order is made, there are no processes on foot against the non-party and there may never be any processes set in motion against the non-party.

36. In the same way, the power of a superior court to preserve the efficacy of its processes for the execution of a judgment against an actual or prospective judgment debtor must extend to the execution of an actual or prospective foreign judgment that is capable of being registered or enforced in that court. As in the case of non-parties, prior to registration of the foreign judgment, the focus in such cases must be the administration of justice. The administration of justice comprehends the preservation of the efficacy of the potential future exercise of the court's processes. The fact that the court's processes for the registration of the foreign judgment and the subsequent enforcement of the registered judgment have not been set in motion is no bar to the exercise of the power to make a freezing order.

37. It was on this basis that Campbell J in *Davis v Turning Properties Pty Ltd*[54] held that the New South Wales Supreme Court had power to make a *Mareva* order in aid of the enforcement in Australia of a foreign judgment yet to be obtained. Following *Cardile*,

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50 (1999) 198 CLR 380 at 401 [42].

51 (1999) 198 CLR 380 at 393 [25].

52 (1999) 198 CLR 380 at 401 [42].

53 (1999) 198 CLR 380 at 405-406 [57].

54 (2005) 222 ALR 676.

his Honour held that the basis for such an order was the court's power to act in the administration of justice[55] and said that:[56]

> "The administration of justice in New South Wales is not confined to the orderly disposition of litigation which is begun here, tried here and ends here. 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."

10 38. The power to make a freezing order in anticipation of the registration in Australia of a prospective foreign judgment and the subsequent enforcement of the registered judgment was also recognised, but not exercised, in *Celtic Resources Holdings Plc v Arduina Holding BV*[57] and exercised in *Severstal Export GmH v Bhushan Steel Ltd.*[58]

39. What engages the power of the court in such a case is the existence of a sufficient threat to the exercise of its processes. The existence of such a threat is established by a curial determination about the likelihood that "some process, ultimately enforceable by the courts",[59] may be engaged for the purposes of enforcing that actual or prospective judgment debt and that this process is in danger of being frustrated.

40. So, in the ordinary case in which a freezing order is sought against a party to
20 proceedings already on foot in the court to which the application is made, the risk to the administration of justice arises from the potential for frustration of the court's processes of both adjudicating the substantive dispute and enforcing any judgment obtained. The risk is prospective and contingent. The existence of a risk sufficient to justify the exercise of the court's power depends upon:

(a) the satisfaction of criteria directed to the strength of the applicant's case (which goes to the likelihood of a judgment in favour of the applicant and the availability of remedies for its enforcement); and

(b) the risk of dissipation of the assets potentially available for execution (which goes to the likelihood of the court's processes being frustrated).

30 41. In other cases, the risk to the administration of justice sufficient to justify the exercise of the court's power to make a freezing order arises in other ways and is therefore dependent on the satisfaction of different or additional criteria. For example, in cases in which a freezing order is sought against a non-party, the existence of a sufficient risk to the administration of justice depends upon the additional criteria identified in *Cardile*.[60]

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55 (2005) 222 ALR 676 at 682 [22].

56 (2005) 222 ALR 676 at 686 [35].

57 (2006) 32 WAR 276 at 284 [51], 285 [56].

58 (2013) 84 NSWLR 141.

59 *Cardile* (1999) 198 CLR 380 at 405-406 [57] (Gaudron, McHugh, Gummow and Callinan JJ).

60 *Cardile* (1999) 198 CLR 380 at 405-406 [57] (Gaudron, McHugh, Gummow and Callinan JJ); *Supreme Court Rules*, O 52A r 5(5).

42. In cases in which a freezing order is sought against an actual or prospective judgment debtor of a foreign judgment, the existence of a sufficient risk to the administration of justice depends upon the additional criterion that there must be a sufficient prospect that the judgment will be registered in or enforced by the court.[61] That criterion may be satisfied after judgment has been given in the foreign proceedings but before registration of the judgment in Australia. But it may also be satisfied before judgment in the foreign proceedings. The degree of risk may be different, but that goes only to the exercise of the power to make the order, not its existence.

Asserted limitation on a State Supreme Court's power to make a freezing order

43. The appellant contends that the Supreme Court's power to make a freezing order is limited to circumstances where the applicant has either set the court's processes in motion, or can give an undertaking that it will do so promptly, for the resolution of the substantive controversy to be adjudicated by the Court.[62]

44. The appellant's concession that it is sufficient that an applicant can give an undertaking to commence proceedings undermines the asserted limitation. The existence of the Supreme Court's power to make orders of any kind cannot depend upon the ability and willingness of an applicant to give an undertaking to bring proceedings promptly. That can only be a discretionary consideration relevant to the exercise of the power, not its existence, and was treated as such in *Cardile*.[63] In any event, the submission should be rejected for the following reasons.

45. First, the asserted limitation is inconsistent with the doctrinal basis of the Court's inherent power to make a freezing order as it has been articulated in the authorities discussed above. The appellant submits that the power to make a freezing order is only "an ancillary one to maintain the effectiveness of the process dealing with the substantive controversy that is to be tried by the court"[64] (including a controversy involving the registration of a foreign judgment) and that its doctrinal basis is the need to prevent the abuse or frustration of its processes that have been set in motion (or which the applicant has undertaken to set in motion promptly).[65]

46. However, the authorities make clear that freezing orders are not a form of injunctive relief.[66] They are not ancillary to a substantive controversy. Freezing orders may be made even after a judgment has been given,[67] when the applicant's cause of action has

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61 O 52A r 5(2), (3).

62 Appellant's submissions, paras 23, 43-45, 66.

63 *Cardile* (1999) 198 CLR 380 at 404 [53] (Gaudron, McHugh, Gummow and Callinan JJ). See also *Pelechowski* (1999) 198 CLR 435 at 452 [53] (Gaudron, Gummow and Callinan JJ).

64 Appellant's submissions, para 43; see also paras 68, 80.

65 Appellant's submissions, paras 44, 53-55, 57, 59, 67.

66 *Cardile* (1999) 198 CLR 380 at 393 [25], 401 [42] (Gaudron, McHugh, Gummow and Callinan JJ); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 243 [94] (Gummow and Hayne JJ).

67 See *Pelechowksi* (1999) 198 CLR 435 at 452 [52] (Gaudron, Gummow and Callinan JJ), 458 [74] (McHugh J) (referring to *Faith Panton Property Plan Ltd v Hodgetts* [1981] 1 WLR 927; [1981] 2 All ER 877; *Babanaft International Co SA v Bassatne* [1990] Ch 13; and *Jackson v Sterling* (1987) 162 CLR 612 at 623 (Deane J)); and *Jackson v Sterling* (1987) 162 CLR 612 at 633 (Toohey J) (referring to *Stewart Chartering v C & O Managements SA* [1980] 1 WLR 460; [1980] 1 All ER 718 and *Orwell*

merged in judgment.[68] They are "made in aid of the exercise of the specific remedies provided for execution against judgment debtors."[69]

47. Secondly, because freezing orders are not a form of injunctive relief, there is no requirement that the proceedings in the court in which the order is sought seek to vindicate some legal or equitable right. In this respect, it is notable that the appellant's submissions do not refer to the fact that *Cardile* confirmed the availability of freezing orders against non-parties and that in such cases the focus must be the administration of justice. Those aspects of the decision in *Cardile* are fatal to the appellant's case. Where a freezing order is sought against a non-party, there is not, and may never be, a substantive proceeding on foot against the non-party. Rather, what attracts the power of the court to make the order in such cases is, as noted above, the satisfaction of an additional criterion that the third party has a sufficient degree of control over assets of the actual or potential judgment debtor or that "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..."[70]

48. Thirdly, the appellant's submission would impose greater restrictions on the availability of freezing orders in Australia than those imposed by the House of Lords in *The Siskina*[71] and later authorities. In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,[72] the House of Lords held that *Mareva* relief was available where the subject matter of the substantive controversy was subject to the jurisdiction of an English court even though, by reason of an agreement between the parties, the controversy was to be submitted to arbitration in another jurisdiction. Thus the power existed provided the English court had jurisdiction, even though its processes were not, and might never be, engaged.[73] In the present appeal, however, the appellant's submission requires not only the existence of a controversy within the jurisdiction of the Court but also that its processes for the determination of that controversy have

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Steel Ltd v Asphalt Ltd [1984] 1 WLR 1097; [1985] 3 All ER 747) and 637 (Gaudron J) (referring to *Stewart Chartering*).

68 *Pelechowski* (1999) 198 CLR 435 at 449 [45] (Gaudron, Gummow and Callinan JJ) (referring to *Austin v Mills* (1853) 9 Ex 288 [156 ER 123]).

69 *Cardile* (1999) 198 CLR 380 at 401 [43] (Gaudron, McHugh, Gummow and Callinan JJ). See also *Jackson v Sterling* (1987) 162 CLR 612 at 619 (Wilson and Dawson JJ) (the power exists "to enable a court to protect its processes from abuse in relation to the enforcement of its orders") and 621 (Brennan J) (the remedy was "incidental to the exercise by a court of its jurisdiction to enter judgment for a debt or damages and which is designed to prevent the defendant from divesting himself of his assets whereby enforcement of such judgment might be frustrated"); and *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 306 (Lord Nicholls, dissenting).

70 *Cardile* (1999) 198 CLR 380 at 405-406 [57] (Gaudron, McHugh, Gummow and Callinan JJ).

71 *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210. See the appellant's submissions, para 47.

72 [1993] AC 334 at 343 (Lord Browne-Wilkinson) and 360-363 (Lord Mustill, with whom Lords Keith, Goff, Jauncey and Browne-Wilkinson agreed).

73 Proceedings on the substantive controversy had, in fact, been commenced in the English courts, but the House of Lords granted a stay of those proceedings to prevent breach of the arbitration agreement. However, Lord Mustill confirmed, at [1993] AC 334 at 363, that *Mareva* relief would still have been available if the appellants had submitted their dispute to arbitration initially, rather than to the court. His Lordship said: "The power exists either in both cases or in neither and the appellants' breach of the arbitration agreement in bringing an action destined to be stayed cannot have conferred on the court a power to grant an injunction which it would not otherwise possess. The existence of a pending suit is thus an irrelevance."

been engaged (or are to be promptly engaged). Having regard to the different doctrinal basis of the power to make freezing orders in Australian law, there is no basis for such a limitation.

49. Fourthly, the appellant submits that no action is possible under the *Foreign Judgments Act* and therefore no jurisdiction exists in the Supreme Court prior to the existence of the foreign judgment.[74] But this is to conflate jurisdiction with power. The scope of the inherent powers of the Court is not limited to circumstances in which its jurisdiction has been engaged. For the reasons discussed above, the Court's inherent powers extend to making orders necessary to ensure the efficacy of the potential future invocation of that jurisdiction.

Conclusion: the Supreme Court had inherent power to make the freezing order

50. In summary:

(a) the State Supreme Courts have jurisdiction to register and enforce foreign judgments;

(b) in respect of foreign judgments to which Pt 2 of the *Foreign Judgments Act* applies, the jurisdiction to register such judgments now derives from that Act;

(c) upon registration, the registered judgments may then be enforced as if they had originally been made by the court in which they are registered;[75]

(d) the Supreme Courts must have such inherent power as is "necessary to the effective exercise"[76] of that jurisdiction;

(e) if assets in Australia that may be available to satisfy an actual or prospective foreign judgment debt are at risk of being removed or dissipated, the effective exercise of the court's processes for the registration of the foreign judgment and the subsequent enforcement of the registered judgment will be in danger of being frustrated;

(f) the power to make freezing orders, prior to judgment being given in the foreign proceedings and therefore necessarily prior to registration, is necessary to ensure the court's ability to properly and effectively exercise those processes if called on to do so in the future; and

(g) the administration of justice that this involves is a necessary incident of a State Supreme Court's jurisdiction.

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74 Appellant's submissions, paras 16, 44.

75 *Foreign Judgments Act*, s 6(7).

76 *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36] (French CJ, with whom Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ agreed).

***Supreme Court Act*, s 16(1)(d)(i)**

51. Le Miere J held that s 16(1)(d)(i) of the *Supreme Court Act* maintains the jurisdiction of the Supreme Court of Western Australia in terms which confirm that its jurisdiction is at least coextensive with the inherent jurisdiction that it possesses as a superior court of record.[77] This understanding of the scope of s 16(1)(d)(i) is consistent with earlier decisions equating the scope of analogous statutory grants of power to other Australian superior courts with the scope of those courts' inherent (or, in the case of the Federal Court, implied) powers.[78] It is not challenged by the appellant. Section 16(1)(d)(i) is therefore an alternative source of the Supreme Court's power to make a freezing order in the circumstances of this case.

***Supreme Court Act*, s 167(1)(a)**

52. Section 167(1)(a) of the *Supreme Court Act* supplies the power to make rules "for regulating and prescribing the procedure ... and the practice to be followed in the Supreme Court in all causes and matters whatsoever in or with respect to which the Court has for the time being jurisdiction ... and any matters incidental or relating to any such procedure or practice".

53. Le Miere J held that, because the Court had inherent jurisdiction to make a freezing order in the circumstances of this case, the power in s 167(1)(a) authorised the making of O 52A of the *Supreme Court Rules*.[79] The Court of Appeal came to the same conclusion.[80]

54. Further, because the Court also has statutory power derived from s 16(1)(d)(i) of the *Supreme Court Act* to make the freezing order, it follows, for that additional reason, that s 167(1)(a) authorised the making of O 52A.

55. Although s 167(1)(a) is referred to in the notice of appeal, there is no challenge to this conclusion in this Court.[81]

No section 109 inconsistency

56. If the Court concludes that O 52A, in so far as it applies to actual or prospective foreign judgments, is authorised by s 17(1) of the *Foreign Judgments Act*, there could be no inconsistency between the relevant rules and the Commonwealth Act for the purposes of s 109 of the Constitution.

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77 Le Miere J at 289 [48]. Neither McLure P nor Buss JA expressed a view on this point: see CA at 308 [49] (McLure P), 344 [245] (Buss JA). Murphy JA agreed with Le Miere J: CA at 347 [263].

78 See, eg, in relation to s 23 of the *Supreme Court Act 1970* (NSW): *Riley McKay Pty Ltd v McKay* (1982) 1 NSWLR 264 at 270 (approved by Wilson and Dawson JJ in *Jackson v Sterling* (1987) 162 CLR 612 at 617) and *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36]; and in relation to s 23 of the *Federal Court of Australia Act 1976* (Cth): *Jackson v Sterling* (1987) 162 CLR 612 at 619 (Wilson and Dawson JJ), 623-624 (Deane J), 639-640 (Gaudron J).

79 Le Miere J at 289 [50].

80 CA at 344-345 [246]-[248] (Buss JA, with whom Murphy JA agreed at 347 [263]).

81 Appellant's submissions, para 17. Further, as noted in footnote 1 above, the statement of issues in Pt II of the appellant's submissions makes no reference to s 167(1)(a).

57. If, however, O 52A is authorised only by s 167(1)(a) of the *Supreme Court Act*, the question of s 109 inconsistency would need to be addressed before any consideration of whether the relevant rules are picked up by s 79 of the *Judiciary Act 1903* (Cth) in proceedings in federal jurisdiction.[82] As O 52A does no more than regulate the practice and procedure for the exercise of the power, a question of s 109 inconsistency must also logically arise in relation to the statutory source of that power in s 16(1)(d)(i) of the *Supreme Court Act*.

58. For the reasons discussed below, there is no inconsistency. Order 52A therefore applies of its own force to an application for a freezing order under O 52A in which the Supreme Court is exercising State jurisdiction or, if the Court is exercising federal jurisdiction, as the appellant and the respondents contend in the circumstances of this case,[83] is picked up and applied by s 79.

59. The appellant submits that the *Foreign Judgments Act* is intended to be a complete statement of the law concerning the right to register a foreign judgment[84] and that O 52A is inconsistent with that scheme for two reasons. The first is that it allows freezing orders to be made in aid of non-money judgments, including freezing orders given by the High Court of Singapore, when such judgments may not be registered or enforced in Australia under the *Foreign Judgments Act*.[85] This contention may be put aside immediately. No freezing order has been made by the High Court of Singapore and the respondent's application for a freezing order to the Supreme Court of Western Australia was not an application to register any judgment made by the Singapore Court.[86]

60. The appellant's second submission is that there are no rights and duties under the *Foreign Judgments Act* until a foreign judgment is made and that the making of a freezing order in aid of a *prospective* foreign judgment therefore impairs, negates or detracts from the intended operation of the *Foreign Judgments Act*.[87] This submission should also be rejected.

61. Section 10(1) of the *Foreign Judgments Act* provides that:

> No proceedings for the recovery of an amount payable under a judgment to which this Part applies, other than proceedings by way of registration of the judgment, are to be entertained by a court having jurisdiction in Australia.

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82 *Northern Territory v GPAO* (1999) 196 CLR 553 at 576 [38], 586 [76] (Gleeson CJ and Gummow J); *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 271 [62]-[63] (Kirby J).

83 Appellant's submissions, para 41; First Respondent's submissions, paras 18-24; and Third Respondent's Submissions, paras 10, 61-68.

84 Appellant's submissions, para 83.

85 Appellant's submissions, paras 85-86.

86 In any event, where a statute confers power to make delegated legislation, inconsistency will only arise upon the exercise of that power: *Momcilovic v The Queen* (2011) 245 CLR 1 at 112-113 [247]-[249] (Gummow J, with whom French CJ and Bell J agreed on this point). Until such time as regulations are made in relation to the recognition of foreign non-money judgments under the *Foreign Judgments Act*, Pt 2 of the Act simply does not apply: *Foreign Judgments Act*, s 5(8)(c). Accordingly, even if the Supreme Court purported to make an order in aid of a foreign non-money judgment, there would not be any inconsistency between the *Foreign Judgments Act* and either s 16(1)(d)(i) or O 52A until regulations were made applying Pt 2 of the *Foreign Judgments Act* to foreign non-money judgments.

87 Appellant's submissions, para 87.

62. By this provision, the Act may establish an exclusive mechanism for the *registration* of foreign judgments to which Pt 2 of the Act applies. But it does not purport to create an exclusive mechanism for the *enforcement* of a judgment so registered. Rather, the Act points in the opposite direction. Section 6(7) of the Act gives a foreign judgment registered under the Act the same force and effect, for the purposes of enforcement, as if it had originally been made by the court in which it is registered, and makes no further provision in relation to enforcement. This is an express indication of the Commonwealth Parliament's intention that the enforcement of a registered judgment is to be achieved through the "the exercise of the specific remedies provided for execution against judgment debtors"[88] by the registering courts. These remedies include freezing orders which, as *Cardile* confirmed, are made in aid of those remedies.[89] Freezing orders made in aid of the enforcement of an actual or prospective foreign judgment do not, in any sense, impair, alter or detract from the operation of the *Foreign Judgments Act*.

The *Foreign Judgments Act* did not displace the Court's inherent power to make the freezing order

63. One further point should be noted. Even if s 16(1)(d)(i) and O 52A were inconsistent with the *Foreign Judgments Act* to the extent that they authorised the making of a freezing order in the circumstances of this case, that would not be the end of the matter.

64. As stated above, the Court's inherent power to make a freezing order exists independently of O 52A.[90] Accordingly, there would be a further question whether the *Foreign Judgments Act* had also displaced the inherent power of the Court to make a freezing order in such circumstances. This question is not the subject of the notice of appeal, but is implicit in the issue raised by the second of the two declarations sought by the appellant in its originating process in this Court, which concerns the Court's power to make the order,[91] and was adverted to by Buss JA at the conclusion of his Honour's judgment.[92]

65. Even if there may be some inherent powers of a State Supreme Court that cannot be curtailed by legislation,[93] a question that it is not necessary to answer on this appeal, nothing in the *Foreign Judgments Act* indicates an intention to curtail the inherent power of the superior courts of Australia to make freezing orders in aid of the execution of a prospective registered judgment.[94]

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88 *Cardile* (1999) 198 CLR 380 at 401 [43] (Gaudron, McHugh, Gummow and Callinan JJ).

89 Ibid.

90 See para 16, above.

91 See para 7, above.

92 CA at 347 [261].

93 Cf *Nicholas v The Queen* (1998) 193 CLR 173 at 275-276 [242]-[243] (Hayne J); *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38 at 61 [42] (French CJ).

94 See *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38 at 61 [42] (French CJ), referring to *Cameron v Cole* (1944) 68 CLR 571 at 589 (Rich J); and *Johnson v Director-General of Social Welfare*

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

66. Approximately 20 minutes is likely to be required for oral submissions.

Dated: 6 May 2015

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(Vic) (1976) 135 CLR 92 at 97 (Barwick CJ, Stephen and Mason JJ agreeing), which was referred to by Buss JA at 347 [261].