

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW  
SOUTH WALES

BETWEEN:

**FIREBIRD GLOBAL MASTER FUND II LTD**

Appellant

and

**REPUBLIC OF NAURU**

First Respondent

**WESTPAC BANKING CORPORATION**

Second Respondent



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**APPELLANT'S SUBMISSIONS**

**Part I:**

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

**Part II:**

2. This appeal gives rise to the following issues.
3. First, whether an application to register a foreign judgment obtained against a foreign state can ever occur<sup>1</sup> under the *Foreign Judgments Act 1991 (Cth)* ("**Foreign Judgments Act**"), in light of the immunity conferred by s 9 of the *Foreign States Immunities Act 1985 (Cth)* ("**Immunities Act**").
4. Second, whether there is an implied requirement in the Immunities Act that before any order can be made against a foreign state, including an order for the registration of a

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<sup>1</sup> Other than in cases of voluntary submission by the foreign state.

foreign judgment under s 6 of the Foreign Judgments Act, the process commencing the application must first be served on the foreign state.

5. Third, the circumstances in which a term deposit or a bank account held in Australia by a foreign state is immune from the process of execution by reason of the immunity conferred by s 30 of the Immunities Act.

**Part III:**

6. The appellant certifies that it has considered whether a notice should be given under s 78B of the *Judiciary Act 1903 (Cth)*, and that no notice needs to be given.

**Part IV:**

- 10 7. The decision of the Court of Appeal below is not currently reported in the authorised reports, but the citations for other reports and the medium neutral citation are:

*Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497;  
(2014) 289 FLR 398; [2014] NSWCA 360.

8. The decision of the primary judge is not currently reported in the authorised reports, but the citation for the non-authorised report and the medium neutral citation are:

*Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 289 FLR 373;  
[2014] NSWSC 1358.

**Part V:**

- 20 9. In the late 1980s the Nauruan government borrowed a total of ¥9 billion in the form of Japanese bearer bonds. The bonds were issued through the Republic of Nauru Finance Corporation (“**RONFIN**”), and guaranteed by the first respondent, the Republic of Nauru (“**RON**”) itself. RONFIN defaulted on its repayment obligations and RON refuses to meet its obligations as guarantor.

10. The appellant (“**Firebird**”) holds bonds totalling ¥6.5 billion. Firebird brought proceedings in the Tokyo District Court against RON on its guarantee. RON unsuccessfully asserted sovereign immunity in the Japanese proceedings, and raised other defences on the merits, which were only partially successful. Firebird obtained judgment in the Japanese court in October 2011 for ¥1.3 billion plus interest (“**Japanese judgment**”).

11. The procedure for enforcing foreign judgments in the Supreme Court of NSW under the Foreign Judgments Act is laid down by Part 53 of the *Uniform Civil Procedure Rules 2005 (NSW)* (“UCPR”). An application is made by summons, supported by affidavit. The judgment debtor is named as the defendant (r 53.2(2)) but need not be served with the summons (r 53.2(3)) and the Supreme Court may make a registration order on the papers (r 53.2(4)), however, once a registration order has been made, notice of registration must be served, and without the leave of the Court no enforcement action can be taken until that has happened and the prescribed time for applying to set the registration aside has elapsed (rr 53.6, 53.8(2), 53.8(3)).
- 10 12. In accordance with this procedure, Firebird filed a summons for registration of the Japanese judgment in the Supreme Court in May 2012, and an order was made by a deputy registrar on the papers in June 2012 registering the judgment in the sum of approximately AUD32 million. In March 2013, pursuant to an application by Firebird, a Judge of the Supreme Court made orders permitting notice of the registration of the judgment to be served on the secretary for justice of RON.
13. On 18 August 2014, a process server served notice of the registration of the Japanese judgment by leaving the documents at the office of the secretary for justice in Nauru. RON took no action at that point. On 10 September 2014, after the prescribed period had expired, Firebird obtained from the Court a garnishee order against the second  
20 respondent (“Westpac”) which attached the accounts held by RON to the extent of the amount due under the Japanese judgment.
14. At first instance RON applied to set aside the garnishee order and (by subsequent amendment to its application) the order registering the Japanese judgment.
15. No point was taken in the proceedings below that Firebird had not complied with the relevant provisions of the Foreign Judgments Act and UCPR Part 53. RON put its application on the basis that it was entitled to relief under the Immunities Act, s 38, as a result of immunities conferred by that Act.
16. In total the garnishee order attached 30 accounts which are identified in the schedule to  
30 the notice of appeal. The proceedings below were conducted very urgently, and the only evidence as to the use of the bank accounts came from RON. That evidence consisted of bank statements produced by RON and a certificate under s 41, supplemented by oral evidence from the Nauruan Minister for Finance, Mr Adeang.

17. The appeal to this Court concerns only 13 of the accounts which were in issue below. Those 13 accounts are identified in parts 2, 3 and 4 of the schedule to the notice of appeal.<sup>2</sup> One of these accounts comprised a sum of \$5 million which was on a six month term deposit (**Term Deposit**); the others were all current accounts. The evidence as to the use of those accounts, to the extent relevant to the arguments in this appeal, is summarised later in these submissions (see [60]-[66]).

**Part VI:**

**Immunity from application for registration of foreign judgment (appeal grounds 1(a) and 2)**

- 10 18. The effect of the Court of Appeal's judgment is that any party who has obtained a foreign judgment against a foreign state cannot<sup>3</sup> register and enforce that judgment in Australia, even if the transaction underlying the foreign judgment is a commercial one. The Court of Appeal recognised that this might be said to be anomalous (CA [77]). The Court of Appeal also acknowledged (at [89]) that the effect of its decision is that the law in this country may now be out of step with the preferred view under international law. The outcome is particularly unsatisfactory because if the judgment creditor cannot register the judgment under the Foreign Judgments Act, it has no other recourse against the judgment debtor in this country because of the effect of s 10 of the Foreign Judgments Act.

- 20 19. Firebird submits that the better view is that such a judgment can be registered under the Foreign Judgments Act for the purpose of enforcement in Australian courts. That conclusion can be reached by any of three separate routes.

(i) *Immunities Act does not, as a matter of construction, apply (appeal ground 1(a))*

20. Firebird contends that the process of registering a foreign judgment against a foreign state does not involve the exercise of "*jurisdiction ... in a proceeding*" against the foreign state within the meaning of s 9 of the Immunities Act.

21. The Immunities Act was based on a report from the Australian Law Reform Commission (ALRC Report No 24, "*Foreign State Immunity*", 1984 ("ALRC")) but the report did not expressly address how the procedure for registration of foreign judgments would fit in. The question is whether the provisions relating to

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<sup>2</sup> For consistency, the numbering used in the schedule is also used in these submissions; according to that numbering the relevant accounts are numbered 18 to 30.

<sup>3</sup> Apart from a case involving voluntary submission by the foreign state.

“proceedings” and “judgments” in Parts II and III are to be understood as extending to that procedure.

22. The Court of Appeal dealt with this matter at [58]-[62] (see also Basten JA at [240]-[246]).<sup>4</sup> The Court proceeded on the basis that the s 9 immunity was from “the imposition of duties by the process of the Australian courts” (*PT Garuda Indonesia Ltd v ACCC* (2012) 247 CLR 240 at [17], last sentence) and reasoned that the application for registration of the Japanese judgment violated that immunity because registration would expose RON to execution against its property in the event that the judgment was not met (CA [62]). In effect, the Court of Appeal treated the exercise of “*jurisdiction ... in a proceeding*” as extending to an application for the making of orders or the issue of process against the property of a foreign state, equating that to the “imposition of duties” on that state. For his part, Basten JA equated the exercise of a “*jurisdiction ... in a proceeding*” to the invocation of any curial procedure seeking the exercise of judicial power (see at [240], [244]).
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23. It may be accepted that the registration of a judgment under the Foreign Judgments Act involves the exercise of judicial power. Firebird submits, however, that the concept of impleading a foreign state for the purposes of s 9 does not cover every situation where curial processes affecting the state’s property are invoked. Indeed, the separate regime for execution immunity in s 30 requires this. An application for execution process affecting the property of a foreign state cannot itself be the invocation of “*jurisdiction ... in a proceeding*” under s 9.
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24. In Firebird’s submission, the exercise of jurisdiction against a foreign state referred to in s 9 involves impleading that foreign state, in the sense that the foreign state is required to appear in an Australian court to answer a claim against it. The concept is exemplified by the former writ of summons procedure – a command of the Australian sovereign to a defendant, in this case, a foreign sovereign state, to appear and answer a claim. The particular aspect of judicial power being invoked is the power to determine what the rights and liabilities of the defendant are in relation to the transactions which are the subject of the claim. That process of impleading is to be distinguished from the

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<sup>4</sup> Although not referred to in the judgments below, in *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB), Stanley Burnton J (as he then was) held that an application under the UK foreign judgments registration legislation attracted immunity under the UK *State Immunity Act*. In *Svenska Petroleum Exploration AB v Lithuania* [2007] QB 886 at 930 [135] the Court of Appeal approved his Lordship’s analysis.

invocation of post-judgment enforcement proceedings concerning property of the judgment debtor.

25. If this is the correct distinction, an application to register a judgment under the Foreign Judgments Act falls outside the scope of s 9. The Foreign Judgments Act was enacted so as to rationalise the previous State legislation dealing with the reciprocal enforcement of foreign judgments.<sup>5</sup> That State legislation pre-dated the Immunities Act, and there are two features of it which are of particular significance for present purposes, and which have been carried forward into the Foreign Judgments Act.
- 10 26. First, in place of the old common law procedure of bringing an action in debt on the foreign judgment,<sup>6</sup> the State legislation adopted a new statutory procedure requiring that judgments satisfying certain criteria be registered on the application of the judgment creditor, and providing for the registration to be set aside on the application of the judgment debtor in certain limited circumstances.<sup>7</sup> In *Hunt v BP Exploration Co (Libya) Ltd* (1980) 144 CLR 565 at 573-574 this Court held that the new statutory procedure was designed to operate *ex parte* and did not depend upon compliance with the rules applying to traditional actions *in personam*, including the rules governing service of the originating process on the defendant.
- 20 27. The second relevant feature of the antecedent State legislation was that it expressly contemplated the registration of a foreign judgment against a foreign state, provided that the foreign court had jurisdiction under the rules of public international law.<sup>8</sup> For so long as the absolute theory of sovereign immunity held sway, this would be limited in practice to cases of voluntary submission; but once the restrictive theory of sovereign immunity took hold, the possibility of registering a foreign judgment arising out of a commercial transaction fell within what was contemplated by the antecedent and current legislation.

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<sup>5</sup> The prior state legislation included: *Foreign Judgments Act 1954 (ACT)*; *Foreign Judgments Act 1955 (NT)*; *Foreign Judgments Act 1962 (Vic)*; *Foreign Judgments Act 1963 (Tas)*; *Foreign Judgments Act 1963 (WA)*; and *Foreign Judgments Act 1973 (NSW)*.

<sup>6</sup> e.g. *RDCW Diamonds v Da Gloria* [2006] NSWSC 450 at [26] and [28]-[29].

<sup>7</sup> For example: *Foreign Judgments Act 1973 (NSW)* ss 6, 8 and 9; *Foreign Judgments Act 1962 (Vic)* ss 5, 7 and 8; see now: *Foreign Judgments Act*, ss 6, 7 and 9.

<sup>8</sup> For example: *Foreign Judgments Act 1973 (NSW)*, s 8(3)(c); *Foreign Judgments Act 1962 (Vic)*, s 7(4)(c); see now: *Foreign Judgments Act*, s 7(4)(c).

28. It is true that no question of sovereign immunity arose in *Hunt v BP* (CA [62]), but this Court's analysis of the nature of such proceedings was on point. That analysis showed that the registration process under the Foreign Judgments Act does not involve the assertion of a cause of action against the foreign state. Rather, the procedure recognises that the foreign state's rights and liabilities have already been determined by the foreign judgment, and the registration procedure is simply a preliminary step which allows for the curial enforcement of that judgment in Australia.
29. For these reasons, the s 9 immunity did not prevent Firebird from applying to register the Japanese judgment.

10 (ii) *Implied repeal by Foreign Judgments Act (appeal ground 1(a))*

30. As already noted, RON claimed to be entitled as of right to have the registration of the Japanese judgment set aside under the Immunities Act, s 38. This gave rise to a question of potential conflict with the provisions of the Foreign Judgment Act which required the Japanese judgment to be registered, and made no provision for it to be set aside on Immunities Act grounds.

31. Firebird's principal contention is that that conflict can be avoided by reading s 9 as Firebird contends above; however, if that is not possible, the Immunities Act would be taken, to the extent of any inconsistency, to have been impliedly repealed by the later Foreign Judgments Act: see for example *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 281, 285 and 286.

32. The Court of Appeal dealt with Firebird's inconsistency arguments in the context of service at [46]-[50] (see also Basten JA at [258]-[262]). The Court reasoned that there was no inconsistency because the Foreign Judgments Act did not prohibit service of Firebird's summons before proceeding to registration. The Court did not however deal separately with the question of inconsistency as it applies to registering and setting aside the registration of a foreign judgment. In Firebird's submission, there is an unavoidable inconsistency between requiring the court to register the judgment under the Foreign Judgments Act, s 6, (and keep it registered unless grounds are shown under s 7 to set it aside) on the one hand, and requiring the court to set aside the registration order under the Immunities Act, s 38, on the other. On the Court of Appeal's interpretation of the Immunities Act, the registration order should never have been made, and not only was it set aside but Firebird's summons was dismissed (CA [57]). This is flatly inconsistent with s 6.

33. The inconsistency is underlined by the Foreign Judgments Act, s 7(4)(c), which makes it clear that the legislature expressly contemplated that a judgment against a foreign state might be registered. The Court of Appeal referred to s 7(4)(c) but observed that it dealt only with immunity in foreign proceedings (CA [54]). In Firebird's submission, this misses the point. In enacting s 7(4)(c), the legislature chose to make a lack of immunity in the foreign proceedings the criterion for registration, yet on the Court of Appeal's approach the Japanese judgment is not registrable even though that criterion was satisfied. The Court of Appeal's judgment engrafts an overlay onto the Foreign Judgments Act effectively inserting additional grounds beyond those in s 7 upon which a registration may be set aside.

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34. The Parliament has repeatedly made subsequent legislation expressly subject to the Immunities Act where it wished to do so.<sup>9</sup> There is no such express provision in the Foreign Judgments Act, and this fortifies a conclusion that it was not intended that immunity under the Immunities Act would be a ground upon which to set aside registration.

35. The Court of Appeal ought to have held that there was implied repeal, such that the immunity under s 9 provided no basis for setting aside the registration of the Japanese judgment.

*(iii) Exception for commercial transactions (appeal ground 2)*

20 36. The immunity from jurisdiction in a "proceeding" in s 9 is subject to an exception in s 11(1) insofar as the proceeding "concerns a commercial transaction". The term "commercial transaction" is broadly defined in s 11(3); it includes a "transaction for or in respect of the provision of finance".

37. Firebird's third contention is that even if the application to register the Japanese judgment were a "proceeding" to which s 9 applied, any such "proceeding" fell within the exemption to immunity under s 11(1).

38. The exception in s 11(1) gives effect to what is known as the "restrictive theory" of sovereign immunity which had come to be accepted elsewhere in the common law world (both in legislation and court decisions) in preference for the earlier theory of

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<sup>9</sup> See: s 207, *Maritime Transport And Offshore Facilities Security Act 2003 (Cth)*; s 24(a)(iv), *Inspector Of Transport Security Act 2006 (Cth)*; s 131(1), *Aviation Transport Security Act 2004 (Cth)*; s 46A(8) and (9), *Competition and Consumer Act 2010 (Cth)*; and s 107, *Trans-Tasman Proceedings Act 2010 (Cth)*.

absolute immunity: see ALRC [11]-[34]. During the second reading speech the Attorney-General said (at 142):

*“Commercial transactions will not be immune. This includes all contracts for the supply of goods or services or for loans or guarantees. This will bring Australian law into line with the law of other major financial centres such as New York, London and Singapore. It is an essential step if Australia is to develop as an international banking centre conducting sovereign risk lending.”*

39. It is clear that if it had been possible to bring proceedings on the Japanese bonds in Australia, the “commercial transaction” exception would have applied and Firebird would have obtained a judgment in its favour. Yet the consequence of the Court of Appeal’s decision is that because the judgment obtained by Firebird was a foreign one, that judgment cannot be enforced in Australia. The term “*commercial transaction*” is not limited to transactions taking place in, or otherwise connected with, Australia and there is nothing in the theory of sovereign immunity underpinning the legislation which would justify different results depending on where the transaction was sued upon. The Court would avoid such a construction unless driven to it by clear statutory language.
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40. In deciding to the contrary, the Court of Appeal adopted what it termed the “narrow” view of the word “*concerns*” in s 11 (CA at [70] and [79]). In Firebird’s submission, the Court erred in doing so.
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41. In the ordinary use of language, the “*proceeding*” to register the Japanese judgment against RON “*concerns*” a commercial transaction, namely the bond issue which was the subject of the Japanese proceedings, in the sense that the registration is part of the process of enforcing RON’s liabilities under that transaction. More specifically, in the present case the “*proceeding*” to register the judgment “*concerns*” the bond issue because it was necessary in registering the judgment to establish under s 6 of the Foreign Judgments Act and the provisions of Pt 53 of the UCPR that the Japanese court had jurisdiction, and to do that Firebird had to show that the proceedings arose out of the bond issue and that that was a commercial transaction.
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42. The Court of Appeal acknowledged that the contextual support for the narrow construction was “limited” (CA [77]). In Firebird’s submission, there was no real textual or contextual support for that construction at all. The matters mentioned at CA

[72] and [75]-[76] are at most equivocal.<sup>10</sup> At CA [73]-[74] the Court drew attention to the existence of a specific exception to immunity in proceedings to enforce arbitral awards where the underlying dispute arose out of a commercial transaction (s 17(2)), and reasoned that this exception would be unnecessary if “concerns” in s 11(1) were read broadly. But the scheme of Part II is to create a broad immunity in s 9 and then make a number of specific provisions for exceptions to such immunity, which may overlap. In such a context, the potential for redundancy identified by the Court has no significance.<sup>11</sup> Indeed, the point made by the Court creates its own anomaly. It would mean that if a claim against a foreign state arising out of a commercial transaction were submitted to a foreign arbitrator there would be no immunity from enforcement of the award, but if the same dispute were taken to judgment in a foreign court then there would be.

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43. The Court of Appeal (at [78]) seems to have approached the matter on the basis that the Immunities Act should be considered against a background of an existing common law immunity; however, at the time the Act was passed, the common law had already adopted the restrictive theory of sovereign immunity: see ALRC at [17]-[19]; second reading speech for the *Foreign States Immunities Bill* (Hansard, Representatives, 21/8/1985, 141 at 141-142).

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44. Although the Court of Appeal eschewed reliance on foreign authorities (CA at [80]), its reasoning parallels that of the majority of the UK Supreme Court in *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 (CA [81]-[86]), but the UK statutory context is quite different: *cf.* at [97] and [114]-[116]. In particular, there is no need to adopt some sort of artificial “updating” construction of the Immunities Act (*cf.* CA [86]); all that is necessary is to read “concerns” in a way which recognises the particular features of a registration “proceeding”. If “concerns” is so read, in accordance with its natural meaning, the immunity exception applied to the registration of the Japanese judgment.

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<sup>10</sup> The textual considerations referred to at CA [72] were equally consistent with a broader view of the term “concerns”. The reference to s 21 of the Immunities Act at CA [75]-[76] was also not an indicator of the preferability of a narrow “view” of concerns, and contrary to what the Court said at [76], the section is not limited to circumstances where there has been no “claim” of immunity in the earlier proceedings, but arises wherever the operation of the Act has meant that the foreign state is not immune in the earlier proceeding. The provision still has ample work to do even if a broad view of “concerns” is taken.

<sup>11</sup> Four of the five members of the UK Supreme Court in *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 rejected the analogous argument under the UK legislation: [89]-[91] (Lord Mance); [112] (Lord Collins with whom Lord Walker agreed); and [150] (Lord Clarke).

45. The Application to register the Japanese judgment concerned a commercial transaction and the exception in s 11(1) applied.

**Service of application for registration of foreign judgment (appeal ground 1(b))**

46. The Court of Appeal held that Part III of the Immunities Act implicitly requires that a “judgment” shall not be “entered” against a foreign state unless “the proceedings” have been served on the state “in accordance with that Part” (CA [41]-[43]). Firebird’s originating summons had not been served and, for this reason alone, the Court thought that the registration order had to be set aside. Any such statutory implication was unjustified and erroneous.

10 47. The present case is an example of why such an implication is unnecessary. The only legitimate reason to imply a requirement to serve a foreign state is so that it can appear and assert its immunity, but in the present case, although the originating summons was not served, notice of registration was served, and RON had an opportunity to appear and assert immunity before any enforcement action was taken. In these circumstances, there is nothing to be said for an implication which would retrospectively invalidate the original registration order. The implication would apparently have an even stranger consequence in South Australia, where even though a judgment debtor is not named as a party to an Application under the Foreign Judgments Act at all (*Supreme Court Civil Rules 2006* (SA), r 346), any registration order against a foreign state would be  
20 invalidated unless the summons had nevertheless been served on that foreign state.

48. The Court of Appeal’s implication would also sweep away the deliberately limited wording of s 27, and effectively cause s 27 to apply across the board, regardless of whether or not the judgment in question is a judgment in default of appearance. Such distortion of the express provisions of the Act is a clear indication that the implication is unwarranted.

49. The Court of Appeal erred in concluding that there was such an implication.

**Immunity of the RON bank accounts from execution (appeal ground 3)**

30 50. The Immunities Act, s 30, makes property of a foreign state generally immune from any process or order for the satisfaction or enforcement of a judgment, order or arbitration award against it. This is subject to an exception in s 32(1) for “*commercial property*”. The term “*commercial property*” is relevantly defined in s 32(3)(a) as “*property in use by the foreign state ... substantially for commercial purposes*”. But s 32(3)(b) goes on

to provide that property which is “*apparently not in use*” is taken to be being used for “*commercial purposes*” unless the court is satisfied that it has been “*set aside otherwise than for commercial purposes*”. The term “*commercial purpose*” is defined by s 3(5) as including “*a trading, a business, a professional and an industrial purpose*”.

51. The starting point for the analysis required by s 32 is to ask whether or not each Westpac account was “*apparently not in use*”. If it was not, the onus was on RON to satisfy the court that: (a) the account had been “*set aside*” by RON; and (b) the setting aside was “*otherwise than for commercial purposes*”. On the other hand, if the account was “*in use*”, the question was whether it was in use “*substantially for commercial purposes*”. It is common ground that in that event the onus would lie on Firebird.

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52. The ALRC contemplated that these provisions would fall to be applied to bank accounts: see at [125]. At [127] the ALRC said:

*“Property Lying Idle. Any test which operates according to the use of property clearly has to incorporate wording which covers property that has no current use or is lying idle ... It is recommended in addition that the proposed legislation provide that, unless the contrary is shown, property which is apparently vacant or not in use shall be treated as in use for commercial purposes and therefore not immune. Under this provision there will be an inevitable borderline issue of how long the non-use needs to be in order to quality as ‘idle’. While this should present few problems with real property and with tangible personal property, it is less clear that such a provision would cope with bank accounts and similar funds. For it is plausible to argue that all such funds are idle. Money may be taken out of an account and used for something. But while in the account it is not used for anything if the account is non-interest bearing. If the deposit is earning interest it is in this respect used for a commercial purpose. But whether the earning of interest should be treated as the dominant purpose or merely an incidental purpose is one on which views could differ both in general and on particular facts. Consideration has been given as to whether there should be a further provision to deal with bank accounts and similar funds. However this would add further complexity to the drafting. It is thought that in practice the point will be able to be resolved without the aid of further provisions.”*

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53. Firebird seeks to challenge the Court of Appeal's conclusion that the Westpac accounts were immune from execution, so far as that conclusion applied to the thirteen accounts identified above. Firebird's contention involves three arguments.

(i) *Funds in commercial use for earning interest*

10 54. At the time that the garnishee order was made, the Term Deposit, which had been put in place in July 2014, was not due to mature until January 2015. There was no dispute that the Term Deposit was not "in use"- in the sense of being drawn on, and the Court of Appeal so found (CA [171], [205]). However, the Court did not consider whether the Term Deposit was in commercial use in some other way. In Firebird's submission, it plainly was. Although the paradigm case of using funds on deposit with a financial institution is to draw on them, other forms of use are possible. The investment of funds in a term deposit so as to earn interest for the term is one such use – and as the ALRC stated in the passage set out above, is a commercial use. The garnishee order should have been sustained so far as the Term Deposit was concerned for this reason alone.

(ii) *Funds not in use and not set aside:*

55. Firebird's second argument started with the point adverted to by the ALRC in the passage set out above, namely that the undrawn balance of a bank account, of its nature, is not relevantly "in use". This argument applied to all of the other 12 account balances, as well as the Term Deposit (if not in use for earning interest).

20 56. The Court of Appeal did not address this argument, which it should have held was correct. Leaving aside the "use" of a bank balance to earn interest or to function as security (neither of which is relevant here), a bank balance is "used" by drawing on it. The credit balance in a bank account at any particular time is a single inseverable item of property, and it is conceptually unsound to characterise that whole item of property by reference to past, or intended future drawings on part of that balance: cf. *Alcom Ltd v Republic of Colombia* [1984] 1 AC 580 at 604C-D; ALRC at [127]. Accordingly all of the account balances were "apparently not in use" for the purposes of s 32(3)(b).

30 57. If that argument were to be rejected, it would be necessary to consider whether the funds had been drawn on sufficiently frequently and recently to be regarded as being in use. The Court of Appeal did not expressly undertake this analysis. There were three accounts (described as "leasing" accounts) used for loans to the Nauruan government airline (accounts 19-21), but the loans had been repaid (CA [100]) and there had apparently been no subsequent activity on the accounts. In Firebird's submission, the

proper conclusion would be that on any view the funds left in these accounts were not in use.

58. To the extent that funds were not in use, it was then necessary to consider whether RON had established that those funds had been “*set aside*” for non-commercial purposes. RON’s evidence on this was that the current accounts were “used” to make particular types of payments (eg. CA [171]); and the Term Deposit was said to be “held as cash reserves ... to provide for future Government Services” (CA [163]).

10 59. The Court of Appeal treated this as sufficient to establish that the funds in question had been “*set aside*” (CA [171]) and did not expressly address what the term “*set aside*” required. In Firebird’s submission, it required something more. The evidence relied upon by the Court of Appeal amounted in substance to statements by officials of the Nauruan government as to how the accounts had in fact been “*used*” in the past, or were currently intended to be “*used*” in the future. But, in Firebird’s submission, the use of the term “*set aside*” connotes something more than mere intention on the part of the state as to how property is to be used in future.<sup>12</sup> Rather, it requires some formal action by the state requiring that the property be devoted to the specified purpose. In the case of money, that could be achieved, for example, by Parliamentary appropriation, or by administrative instruction. But no evidence of any such formal action relating to the accounts in question was led by RON. Apparently the accounts were not subject to any  
20 legal or administrative requirement that they be retained and applied for the purposes for which they had hitherto been “*used*”; the relevant officials of the Nauruan government “could use them freely” for any government purpose.<sup>13</sup> There was thus nothing to show that they had been “*set aside*”. RON’s case should have failed at this point.

(ii) *Funds used or set aside for government business activities*

60. If the previous argument were to be rejected for any of the accounts, it would become necessary to consider whether the nature of the payments made or contemplated from that account was commercial or non-commercial. Firebird presses this point only as regards accounts 19-26, which relate to what might be described as Nauruan government business activities, such as the sale of fuel, and the operation of the national  
30 airline.

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<sup>12</sup> Cf the UK *State Immunity Act*, s 13(4), which confers execution immunity on property which “*is for the time being in use or intended for use for commercial purposes*”: the ALRC clearly chose to depart from this when wording the Australian provision.

<sup>13</sup> Cf *United Arab Republic v X* (1961) 88 JDI 458 at 465.

61. In the area of immunity from suit, it is clearly established that the restrictive theory of sovereign immunity requires the courts to distinguish between foreign state activities *iure imperii* and *iure gestionis* and to do so objectively, i.e. according to the nature of the activity rather than the state's motivation, or political justification, for engaging in it: ALRC at [122]-[125]; *Republic of Argentina v Weltover Inc* 504 US 607 (1992) at 615-617. It is not hard to see why this is so. Otherwise the courts would be faced with allowing the scope of a particular state's immunity to vary according to the economic role of the government which currently prevails in the state in question, or being drawn into laying down their own rules as to what the appropriate economic role of government is, or should be.
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62. It may be accepted that the application of the restrictive theory of sovereign immunity in the area of immunity from execution does not give rise to exactly the same considerations as for immunity from suit (ALRC at [125]); however, the analogy remains close. In Firebird's submission, the courts must apply criteria which are similarly objective and focus on the way in which the property is used rather than the motivation or political justification for that use.
63. The Court of Appeal dealt with this issue at a general level at [172]-[178], before dealing individually with the relevant accounts. The Court did acknowledge that "subjective motive" was generally irrelevant (CA [172]) and that the accounts related to activities, such as the purchase and sale of fuel, which were not usually seen as sovereign functions (CA [176], [182]); however, the Court considered that, having regard to Nauru's particular circumstances such activities were not commercial in the relevant sense. The decisive factor so far as the fuel operations were concerned appears to have been that, although RON charged for the fuel it supplied to customers, it set its prices only to cover its costs (CA [144], [176], [182]-[183]); the Court also referred to Mr Adeang's evidence that the Nauruan government adopted this approach because it was uneconomic for commercial operators to do so (CA [98]). The Court of Appeal referred to similar evidence for the other activities in question (CA [101], [176]).
- 20
64. In Firebird's submission, the Court's reasoning in this regard departed from the objective approach required, and from the language of the Act. Property is either used for "*trading*", "*business*", "*industrial*", or like "*commercial*", purposes, or it is not. Considerations as to whether activities do, or are intended to, result in a profit, and if so, how much, cannot matter. To take an example, if property is used by a foreign state to run a factory – an industrial purpose – whether the state sold the products produced, or simply gave them away, could not affect the industrial (and therefore commercial)
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nature of the use of that property. Nor could the justification offered by Mr Adeang in his evidence affect the objective nature of the activities.

65. Close attention must be given to what the particular property is, and how it is used. In the case of the fuel accounts (accounts 23 and 24), the property consisted relevantly of funds in an account that was being “used”, or had been “set aside”, to pay for fuel purchased by RON. The purchase of fuel was undoubtedly a commercial transaction, whatever RON’s intentions may be as to how the fuel, once purchased, is to be used. Funds “used” or “set aside” to pay for those purchases must, in Firebird’s submission, have been funds “used” or “set aside” for a “*commercial purpose*”, namely to satisfy RON’s commercial obligations arising out of such transactions. That would be so irrespective of how the fuel was intended to be used, but if it be necessary to go further, the proper characterisation of RON’s intention was to sell the fuel to customers. That was a business or commercial purpose, irrespective of the price for which the fuel was to be sold. It is clear that in this area an intention to profit is not an essential requirement of operating a business: *Argentina v Weltover* at 616.

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66. Similar considerations apply to the other government business accounts, specifically:

(a) accounts 19-21 - accounts for repayment of loans used to purchase aircraft used in operating a commercial airline (note that the aircraft were not only used to provide an air service for passengers and freight to and from Nauru, but were also offered for charter on commercial terms elsewhere, albeit, apparently, with limited financial success: T 60.16-45);

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(b) account 22 – an account for payments to land-owners to allow phosphate mining for export (the evidence made it clear that these were commercially negotiated payments rather than some form of statutory compensation: see T 76.4-77.4);

(c) account 25 – an account for purchases of goods and services required to provide electricity and water (for payment) to companies and residents in Nauru; and

(d) account 26 – an account for loans to small businesses, repayable on commercial terms.

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67. The funds in those accounts were not immune from execution.

**Part VII:**

68. The applicable statutes and regulations are set out in the Schedule to this submission.

**Part VIII:**

69. The appellant seeks the following orders:

1. Appeal allowed.
2. Set aside the orders 1(ii) and 1(iii) made by the Supreme Court of New South Wales (Court of Appeal) on 23 October 2014 and in lieu thereof, order that:
  - (a) the appeal to the Court of Appeal be allowed;
  - (b) the orders made by the primary judge on 3 October 2014 be set aside, except insofar as those orders set aside the garnishee order against the Excluded Accounts (as identified in Part 1 of the Schedule to the Notice of Appeal), and in lieu thereof, order that:
    - (i) the first respondent's Notice of Motion (as amended) be otherwise dismissed;
    - (ii) the first respondent pay the appellant's and the second respondent's costs of the proceedings on the Notice of Motion;
  - (c) order that the first respondent pay the appellant's and the second respondent's costs of the proceedings in the Court of Appeal.
3. Order that the first respondent pay the appellant's and the second respondent's costs of the proceedings in this Court.

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**Part IX:**

70. The appellant estimates it will need three hours to present its oral arguments.

Dated 20 March 2015



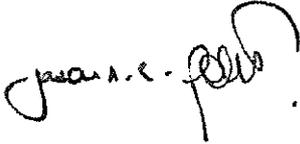
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**Counsel for the appellant**

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## ANNEXURE

### Part VII, Statutory and Regulatory Provisions

1. ***Foreign Judgments Act 1991 (Cth)*, (as at 11 October 2013, version C2013C00640 from ComLaw).**

The extracted provisions of this Act have not changed.

#### 3 Interpretation

- (1) In this Act, unless the contrary intention appears:

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...

***judgment*** means:

- (a) a final or interlocutory judgment or order given or made by a court in civil proceedings; or
- (b) a judgment or order given or made by a court in criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party; or
- (c) an award (other than an award given in a dispute of a kind referred to in paragraph 34(a) of the *International Arbitration Act 1974* or an award that may be enforced under subsection 35(2) of that Act) in proceedings on an arbitration conducted in, and under the law applying in, a country, being an award that has become enforceable in a court of that country in the same manner as a judgment or order given by that court.

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***judgment creditor***, in relation to a judgment, means the person in whose favour the judgment was given, (whether or not a sum of money is payable under the judgment) and includes a person in whom the rights under the judgment have become vested by succession, assignment or otherwise.

***judgment debtor***, in relation to a judgment, means the person against whom the judgment was given, (whether or not a sum of money is payable under the judgment) and includes a person against whom the judgment is enforceable under the law of the

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...

***original court***, in relation to a judgment, means the court by which the judgment was given.

...

***registered judgment*** means a judgment registered under section 6.

...

***registration*** means registration under Part 2.

***Rules of Court*** means rules duly made by the Supreme Court of a State or Territory or the Federal Court of Australia.

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## 6 Application for, and effect of, registration of foreign judgments

- (1) A judgment creditor under a judgment to which this Part applies may apply to the appropriate court at any time within 6 years after:
  - (a) the date of the judgment; or
  - (b) where there have been proceedings by way of appeal against the judgment, the date of the last judgment in those proceedings;to have the judgment registered in the court.
- (2) For the purposes of subsection (1), the appropriate court is:
  - 10 (a) if the judgment is a money judgment and was given in proceedings in which a matter for determination arises under the Commerce Act 1986 of New Zealand (other than proceedings in which a matter for determination arises under section 36A, 98H or 99A of that Act)—the Federal Court of Australia or the Supreme Court of a State or Territory; or
  - (b) if the judgment is not a money judgment and was given in such proceedings—the Federal Court of Australia; or
  - (c) in any other case—the Supreme Court of a State or Territory.
- (3) Subject to this Act and to proof of the matters prescribed by the applicable Rules of Court, if an application is made under this section, the Supreme Court of a State or Territory or the Federal Court of Australia is to order the judgment to be registered.
- 20 (4) The court's order must state the period within which an application may be made under section 7 to have the registration of the judgment set aside.
- (5) The court may, by order, extend the period within which such an application may be made.
- (6) A judgment is not to be registered if at the date of the application:
  - (a) it has been wholly satisfied; or
  - (b) it could not be enforced in the country of the original court.
- (7) Subject to sections 7 and 14:
  - 30 (a) a registered judgment has, for the purposes of enforcement, the same force and effect; and
  - (b) proceedings may be taken on a registered judgment; and
  - (c) the amount for which a judgment is registered carries interest; and
  - (d) the registering court has the same control over the enforcement of a registered judgment;as if the judgment had been originally given in the court in which it is registered and entered on the date of registration.
- (8) A judgment registered under this section in the Supreme Court of a State or Territory is registrable in the Supreme Court of any other State or Territory under Part 6 of the *Service and Execution of Process Act 1992* as if the judgment had been originally given in the first-mentioned Supreme Court and entered on the day of registration.
- 40 (9) Subsection (8) does not apply if an order has been made under section 8 that enforcement of the judgment be stayed.
- (10) Action is not to be taken to enforce a registered judgment:
  - (a) during the period fixed under subsection (4) (including any extensions of that period under subsection (5)) as the period during which a party may apply to have the registration of the judgment set aside; or

- (b) where such an application has been made, until after the application has been finally determined.
- (11) Subject to subsection (12), if the amount payable under a judgment that is to be registered is expressed in a currency other than Australian currency, the judgment is to be registered:
- 10 (a) if the judgment creditor has stated in the application that the judgment creditor wishes the judgment to be registered in the currency in which it is expressed—in that currency; or
- (b) in any other case—as if it were for an equivalent amount in Australian currency, based on the rate of exchange prevailing on the second business day (the *conversion day*) before the day on which the application for registration is made.
- (11A) For the purposes of paragraph (11)(b), the rate of exchange prevailing on the conversion day referred to in that paragraph is the average of the rates at which Australian dollars may be bought in the currency in which the judgment is expressed at:
- (a) 11 am; or
- (b) if another time is prescribed for the purposes of this subsection—that other time; on that day from 3 authorised foreign exchange dealers selected by the judgment creditor.
- 20 (11B) The reference in paragraph (11)(b) to a business day is a reference to a day on which the authorised foreign exchange dealers selected by the judgment creditor as mentioned in subsection (11A) publish rates at which Australian dollars may be bought in the currency in which the judgment is expressed.
- (12) If, on the day of the application for registration of a judgment, the judgment of the original court has been partly satisfied, the judgment is not to be registered in respect of the whole amount payable under the judgment of the original court, but only in respect of the balance remaining payable on that day.
- 30 (13) If, on an application to a court for the registration of a judgment, it appears to the court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that, if those provisions had been contained in separate judgments, those judgments could properly have been registered, the judgment may be registered in respect of those provisions, but not in respect of any other provisions contained in it.
- (14) Without affecting the operation of subsection (13), where, on an application to a court for the registration of a judgment, it appears to the court that:
- (a) the judgment is in respect of an amount of money payable in respect of both recoverable Papua New Guinea income tax and non-recoverable tax; and
- (b) the judgment could have been registered if it had been in respect of recoverable Papua New Guinea income tax only;
- 40 the judgment may be registered in respect of the amount less so much as relates to non-recoverable tax.
- (15) A judgment registered under this section is to be registered for:
- (a) the reasonable costs of and incidental to registration, including the cost of obtaining a certified copy of the judgment from the original court and the costs of obtaining from foreign exchange dealers evidence of the rates at which Australian dollars may be bought in the currency in which the judgment is expressed; and

- (b) where an amount of money is payable under the judgment—any interest which, by the law of the country of the original court, becomes due under the judgment up to the time of registration.

(16) In this section:

*authorised foreign exchange dealer* means a person authorised by a general authority issued by the Reserve Bank of Australia under regulation 38A of the Banking (Foreign Exchange) Regulations to buy and sell foreign currency.

## 7 Setting aside a registered judgment

- 10 (1) A party against whom a registered judgment is enforceable, or would be enforceable but for an order under section 8, may seek to have the registration of the judgment set aside by duly applying to the court in which the judgment was registered, or (where applicable) a court in which the judgment was registered under Part 6 of the *Service and Execution of Process Act 1992*, to have the registration of the judgment set aside.
- (2) Where a judgment debtor duly applies to have the registration of the judgment set aside, the court:
- (a) must set the registration of that judgment aside if it is satisfied:
    - (i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or
    - 20 (ii) that the judgment was registered for an amount greater than the amount payable under it at the date of registration; or
    - (iii) that the judgment was registered in contravention of this Act; or
    - (iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
    - (v) that the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear; or
    - 30 (vi) that the judgment was obtained by fraud; or
    - (vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court; or
    - (viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or
    - (ix) that the judgment has been discharged; or
    - (x) that the judgment has been wholly satisfied; or
    - (xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy; or
  - 40 (b) may set the registration of the judgment aside if it is satisfied that the matter in dispute in the proceedings in the original court had before the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.
- (3) For the purposes of subparagraph (2)(a)(iv) and subject to subsection (4), the courts of the country of the original court are taken to have had jurisdiction:

- (a) in the case of a judgment given in an action *in personam*:
- (i) if the judgment debtor voluntarily submitted to the jurisdiction of the original court; or
  - (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or
  - (iii) if the judgment debtor was a defendant in the original court and had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction of that court or of the courts of the country of that court; or
  - 10 (iv) if the judgment debtor was a defendant in the original court and, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court; or
  - (v) if the judgment debtor was a defendant in the original court and the proceedings in that court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court; or
  - (vi) if there is an amount of money payable in respect of New Zealand tax under the judgment; or
- 20 (b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was movable property—if the property in question was, at the time of the proceedings in the original, court situated in the country of that court; or
- (c) in the case of a judgment given in an action other than an action of the kind referred to in paragraph (a) or (b)—if the jurisdiction of the original court is recognised by the law in force in the State or Territory in which the judgment is registered.
- (4) In spite of subsection (3), the courts of the country of the original court are not taken to have had jurisdiction:
- 30 (a) if the subject matter of the proceedings was immovable property situated outside the country of the original court; or
- (b) except in the cases referred to in subparagraphs (3)(a)(i), (ii) and (iii) and paragraph (3)(c), if the bringing of the proceedings in the country of the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court; or
- (c) if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.
- 40 (5) For the purposes of subparagraph (3)(a)(i), a person does not voluntarily submit to the jurisdiction of a court by:
- (a) entering an appearance in proceedings in the court; or
  - (b) participating in proceedings in the court only to such extent as is necessary; for the purpose only of one or more of the following:
  - (c) protecting, or obtaining the release of:
    - (i) property seized, or threatened with seizure, in the proceedings; or
    - (ii) property subject to an order restraining its disposition or disposal;
  - (d) contesting the jurisdiction of the court;

- (e) inviting the court in its discretion not to exercise its jurisdiction in the proceedings.
- (6) Where the registration of a judgment is set aside on an application to a court in which the judgment was registered under Part IV of the *Service and Execution of Process Act 1901*, the applicant must:
  - (a) forthwith notify the Registrar of the court in which the judgment was registered under this Act of the order setting the judgment aside; and
  - (b) within 7 days lodge a certified copy of the order in that court.

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#### **10 Registrable judgments not to be otherwise enforceable**

- (1) 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.
- (2) Nothing in this section affects the enforcement, under the *International Arbitration Act 1974*, of an award.

#### **17 Rules of Court**

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- (1) The power of an authority to make rules regulating the practice and procedure of a superior court extends to making any rules, not inconsistent with this Act or with any regulations made under this Act, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Act, including the following:
  - (a) making provision with respect to the giving of security for costs by a person applying for registration of a judgment;
  - (b) prescribing the matters to be proved on an application for the registration of a judgment and for regulating the mode of proving those matters;
  - (c) providing for the service on the judgment debtor of notice of the registration of a judgment;
  - (d) making provision with respect to the extension of the period within which an application may be made to have the registration of a judgment set aside;
  - (e) relating to the method of determining a question arising under this Act as to:
    - (i) whether a judgment given in a country in relation to which this Part extends can be enforced in the country of the original court; or
    - (ii) what interest is payable under a judgment under the law of the original court.

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- (2) This section does not affect any power to make rules under any other law.

2. ***Foreign States Immunities Act 1985 (Cth) (as at 1 March 2010, version C2010C00145 from ComLaw)***

The extracted provisions of this Act have not changed.

### 3 Interpretation

- (1) In this Act, unless the contrary intention appears:

....

*court* includes a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions or powers.

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...

*diplomatic property* means property that, at the relevant time, is in use predominantly for the purpose of establishing or maintaining a diplomatic or consular mission, or a visiting mission, of a foreign State to Australia.

*foreign State* means a country the territory of which is outside Australia, being a country that is:

- (a) an independent sovereign state; or
- (b) a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state.

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*initiating process* means an instrument (including a statement of claim, application, summons, writ, order or third party notice) by reference to which a person becomes a party to a proceeding.

...

*military property* means:

- (a) a ship of war, a Government yacht, a patrol vessel, a police or customs vessel, a hospital ship, a defence force supply ship or an auxiliary vessel, being a ship or vessel that, at the relevant time, is operated by the foreign State concerned (whether pursuant to requisition or under a charter by demise or otherwise); or
- (b) property (not being a ship or vessel) that is:
  - (i) being used in connection with a military activity; or
  - (ii) under the control of a military authority or defence agency for military or defence purposes.

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...

*proceeding* means a proceeding in a court but does not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution.

*property* includes a chose in action.

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- (5) A reference in this Act to a commercial purpose includes a reference to a trading, a business, a professional and an industrial purpose.

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- (6) A reference in this Act to the entering of appearance or to the entry of judgment in default of appearance includes a reference to any like procedure.

## 9 General immunity from jurisdiction

Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

## 11 Commercial transactions

- (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.
- (2) Subsection (1) does not apply:
- 10 (a) if all the parties to the proceeding:
- (i) are foreign States or are the Commonwealth and one or more foreign States; or
- (ii) have otherwise agreed in writing; or
- (b) in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind.
- (3) In this section, *commercial transaction* means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:
- 20 (a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
- (c) a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange.

## 17 Arbitrations

- (1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration, including a proceeding:
- 30 (a) by way of a case stated for the opinion of a court;
- (b) to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or
- (c) to set aside the award.
- (2) Where:
- (a) apart from the operation of subparagraph 11(2)(a)(ii), subsection 12(4) or subsection 16(2), a foreign State would not be immune in a proceeding concerning a transaction or event; and
- (b) the foreign State is a party to an agreement to submit to arbitration a dispute about the transaction or event;
- 40 then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made.
- (3) Subsection (1) does not apply where the only parties to the agreement are any 2 or more of the following:

- (a) a foreign State;
- (b) the Commonwealth;
- (c) an organisation the members of which are only foreign States or the Commonwealth and one or more foreign States.

## 21 Related proceedings

Where, by virtue of the operation of the preceding provisions of this Part, a foreign State is not immune in a proceeding in so far as the proceeding concerns a matter, it is not immune in any other proceeding (including an appeal) that arises out of and relates to the first-mentioned proceeding in so far as that other proceeding concerns that matter.

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## 23 Service of initiating process by agreement

Service of initiating process on a foreign State or on a separate entity of a foreign State may be effected in accordance with an agreement (wherever made and whether made before or after the commencement of this Act) to which the State or entity is a party.

## 24 Service through the diplomatic channel

- (1) Initiating process that is to be served on a foreign State may be delivered to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.
- (2) The initiating process shall be accompanied by:
  - (a) a request in accordance with Form 1 in the Schedule;
  - (b) a statutory declaration of the plaintiff or applicant in the proceeding stating that the rules of court or other laws (if any) in respect of service outside the jurisdiction of the court concerned have been complied with; and
  - (c) if English is not an official language of the foreign State:
    - (i) a translation of the initiating process into an official language of the foreign State; and
    - (ii) a certificate in that language, signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the initiating process.
- (3) Where the process and documents are delivered to the equivalent department or organ of the foreign State in the foreign State, service shall be taken to have been effected when they are so delivered.
- (4) Where the process and documents are delivered to some other person on behalf of and with the authority of the foreign State, service shall be taken to have been effected when they are so delivered.
- (5) Subsections (1) to (4) (inclusive) do not exclude the operation of any rule of court or other law under which the leave of a court is required in relation to service of the initiating process outside the jurisdiction.
- (6) Service of initiating process under this section shall be taken to have been effected outside the jurisdiction and in the foreign State concerned, wherever the service is actually effected.

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- (7) The time for entering an appearance begins to run at the expiration of 2 months after the date on which service of the initiating process was effected.
- (8) This section does not apply to service of initiating process in a proceeding commenced as an action *in rem*.

## **25 Other service ineffective**

Purported service of an initiating process upon a foreign State in Australia otherwise than as allowed or provided by section 23 or 24 is ineffective.

## **26 Waiver of objection to service**

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Where a foreign State enters an appearance in a proceeding without making an objection in relation to the service of the initiating process, the provisions of this Act in relation to that service shall be taken to have been complied with.

## **27 Judgment in default of appearance**

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- (1) A judgment in default of appearance shall not be entered against a foreign State unless:
  - (a) it is proved that service of the initiating process was effected in accordance with this Act and that the time for appearance has expired; and
  - (b) the court is satisfied that, in the proceeding, the foreign State is not immune.
- (2) A judgment in default of appearance shall not be entered against a separate entity of a foreign State unless the court is satisfied that, in the proceeding, the separate entity is not immune.

## **28 Enforcement of default judgments**

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- (1) Subject to subsection (6), a judgment in default of appearance is not capable of being enforced against a foreign State until the expiration of 2 months after the date on which service of:
  - (a) a copy of the judgment, sealed with the seal of the court or, if there is no seal, certified by an officer of the court to be a true copy of the judgment; and
  - (b) if English is not an official language of the foreign State:
    - (i) a translation of the judgment into an official language of the foreign State; and
    - (ii) a certificate in that language, signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the judgment;has been effected in accordance with this section on the department or organ of the foreign State that is equivalent to the Department of Foreign Affairs.
- (2) Where a document is to be served as mentioned in subsection (1), the person in whose favour the judgment was given shall give it, together with a request in accordance with Form 2 in the Schedule, to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.
- (3) Where the document is delivered to the equivalent department or organ of the foreign State in the foreign State, service shall be taken to have been effected when it is so delivered.

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- (4) Where the document is delivered to some other person on behalf of and with the authority of the foreign State, service shall be taken to have been effected when it is so delivered.
  - (5) The time, if any, for applying to have the judgment set aside shall be at least 2 months after the date on which the document is delivered to or received on behalf of that department or organ of the foreign State.
  - (6) Where a judgment in default of appearance has been given by a court against a foreign State, the court may, on the application of the person in whose favour the judgment was given, permit, on such terms and conditions as it thinks fit, the judgment to be enforced in accordance with this Act against the foreign State before the expiration of the period mentioned in subsection (1).

### **29 Power to grant relief**

- (1) Subject to subsection (2), a court may make any order (including an order for interim or final relief) against a foreign State that it may otherwise lawfully make unless the order would be inconsistent with an immunity under this Act.
- (2) A court may not make an order that a foreign State employ a person or re-instate a person in employment.

### **30 Immunity from execution**

20 Except as provided by this Part, the property of a foreign State is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award or, in Admiralty proceedings, for the arrest, detention or sale of the property.

### **32 Execution against commercial property**

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- (1) Subject to the operation of any submission that is effective by reason of section 10, section 30 does not apply in relation to commercial property.
  - (2) Where a foreign State is not immune in a proceeding against or in connection with a ship or cargo, section 30 does not prevent the arrest, detention or sale of the ship or cargo if, at the time of the arrest or detention:
    - (a) the ship or cargo was commercial property; and
    - (b) in the case of a cargo that was then being carried by a ship belonging to the same or to some other foreign State—the ship was commercial property.
  - (3) For the purposes of this section:
    - (a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and
    - (b) property that is apparently vacant or apparently not in use shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.
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### 38 Power to set aside process etc.

Where, on the application of a foreign State or a separate entity of a foreign State, a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to the foreign State or entity is inconsistent with an immunity conferred by or under this Act, the court shall set aside the judgment, order or process so far as it is so inconsistent.

### 41 Certificate as to use

10 For the purposes of this Act, a certificate in writing given by the person for the time being performing the functions of the head of a foreign State's diplomatic mission in Australia to the effect that property specified in the certificate, being property:

- (a) in which the foreign State or a separate entity of the foreign State has an interest; or
- (b) that is in the possession or under the control of the foreign State or of a separate entity of the foreign State;

is or was at a specified time in use for purposes specified in the certificate is admissible as evidence of the facts stated in the certificate.

### 3. *Uniform Civil Procedure Rules 2005 (NSW) ("UCPR")*, Part 53:

20 The provisions of Part 53 have not changed.

### Part 53 Matters arising under the Foreign Judgments Act 1991 of the Commonwealth

#### 53.1 Definitions (cf SCR Part 59A, rule 1)

In this Part, *judgment*, *judgment creditor*, *judgment debtor* and *money judgment* have the same meanings as they have in the *Foreign Judgments Act 1991* of the Commonwealth.

#### 30 53.2 Commencement of proceedings (cf SCR Part 59A, rule 2)

- (1) Proceedings for registration of a judgment under Part 2 of the *Foreign Judgments Act 1991* of the Commonwealth are to be commenced in the Supreme Court.
- (2) In any such proceedings, the judgment creditor is to be the plaintiff and the judgment debtor is to be the defendant.
- (3) Unless the Supreme Court otherwise orders, the judgment creditor may proceed without service of the summons on the judgment debtor.
- 40 (4) If the judgment creditor adds to the summons a request that the application be granted under this rule, the Supreme Court may make the order in the absence of the public and without any attendance by or on behalf of the judgment creditor.

**53.3 Evidence** (cf SCR Part 59A, rule 3)

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- (1) The evidence in support of an application for registration of a judgment must include the following:
    - (a) the judgment or a verified or certified or otherwise duly authenticated copy of the judgment,
    - (b) if the judgment is not in English, a translation of the judgment into English, certified by a notary public or authenticated by evidence,
    - (c) evidence showing which, if some only, provisions of the judgment are the subject of the application,
    - (d) if it is a money judgment, evidence showing the amount originally payable under the judgment,
    - (e) evidence showing that the Supreme Court is the appropriate court under section 6 (1) of the *Foreign Judgments Act 1991* of the Commonwealth,
    - (f) evidence showing the name and trade or business, and the usual or last known residential or business addresses, of the judgment creditor and judgment debtor,
    - (g) evidence showing that the judgment creditor is entitled to enforce the judgment,
    - (h) evidence showing:
      - (i) that, at the date of the application, the judgment can be enforced by execution in the country of the original court, and
      - (ii) that, if the judgment were registered in the Supreme Court, the registration would not be liable to be set aside under section 7 of the *Foreign Judgments Act 1991* of the Commonwealth,
    - (i) if interest is payable by the law of the country of the original court on any money which is payable under the judgment, evidence showing:
      - (i) the rate of interest, and
      - (ii) the amount of interest which has become due under the judgment up to the time of application for registration, and
      - (iii) the daily amount of interest which, subject to any future payment on account of the judgment, will accrue after the date of the application,
    - (j) evidence showing the extent to which the judgment is unsatisfied,
    - (k) such other evidence as may be required having regard to any regulations made under the *Foreign Judgments Act 1991* of the Commonwealth.
  - (2) The evidence referred to in subrule (1) must relate to those provisions of the judgment that are the subject of the application.
  - (3) The evidence referred to in subrule (1) (g)–(j) may be evidence to the best of the information or belief of the deponent or witness giving the evidence.
  - (4) All amounts of money referred to in this rule must be expressed:

- (a) in the currency in which the judgment is expressed, and
- (b) if the judgment creditor has not made a statement under section 6 (11) (a) of the *Foreign Judgments Act 1991* of the Commonwealth, as an equivalent amount in Australian currency calculated in accordance with section 6 (11) (b), (11A) and (11B) of that Act.

**53.4 Security for costs** (cf SCR Part 59A, rule 4)

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For the purposes of proceedings under the *Foreign Judgments Act 1991* of the Commonwealth, the Supreme Court may make an order under rule 42.21 otherwise than on the application of the judgment debtor.

**53.5 Order for registration** (cf SCR Part 59A, rule 5)

- (1) The time fixed under section 6 (4) of the *Foreign Judgments Act 1991* of the Commonwealth must not, except in exceptional circumstances, be less than 14 days after service on the judgment debtor of notice of the registration.
- (2) An order for registration of a judgment must specify the extent to which the judgment may be enforced.

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**53.6 Notice of registration** (cf SCR Part 59A, rule 7)

- (1) Notice of registration of a judgment must be served on the judgment debtor.
- (2) Service of the notice must be personal unless:
  - (a) the judgment debtor has entered an appearance or is in default of appearance, or
  - (b) the Supreme Court otherwise orders.
- (3) The notice of registration must state:
  - (a) particulars of the judgment and of the order for registration, and
  - (b) the right of the judgment debtor to apply for an order:
    - (i) setting aside the registration, and
    - (ii) staying enforcement of the judgment, and
  - (c) the time within which the judgment debtor may apply for an order setting aside the registration.
- (4) If the summons has not been served on the judgment debtor, the notice of registration must also state the address for service of the judgment creditor.

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**53.7 Setting aside registration** (cf SCR Part 59A, rule 8)

- (1) Subject to subrule (2), the Supreme Court may, on the application of the judgment debtor, make an order setting aside the registration.
- (2) An application for such an order must be made within the time fixed under section 6(4) of the *Foreign Judgments Act 1991* of the Commonwealth or

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within such further period as may be allowed under section 6 (5) of that Act.

**53.8 Enforcement** (cf SCR Part 59A, rule 9)

- (1) Subject to this rule, on registration of a judgment, the judgment may, to the extent specified in the order for registration, be enforced as a judgment of the Supreme Court in the proceedings in which it is registered.
- (2) The judgment creditor must not take any step for enforcement of the judgment until an affidavit of service of the notice of registration is filed or the Supreme Court is otherwise satisfied that the requirements of these rules as to service of the notice of registration have been complied with.
- (3) Except by leave of the Supreme Court, the judgment creditor may not take any step for enforcement of the judgment:
  - (a) before the expiry of the time within which the judgment debtor may apply for an order setting aside registration, or
  - (b) if within that time the judgment debtor makes such an application, before the application is disposed of.

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4. ***Supreme Court Civil Rules 2006 (SA), r 346***

The provisions of Part 53 have not changed.

**346—*Foreign Judgments Act 1991 (Cth)***

- (1) In this rule—

*Act* means the *Foreign Judgments Act 1991 (Cth)*.
- (2) A party may seek the registration of a judgment under the Act by filing a summons in which no defendant is named.
- (3) The summons is to be accompanied by an affidavit exhibiting a copy of the judgment of the original court certified as such by the proper officer of that court and authenticated by its seal and, if it is not in the English language, a translation of the judgment certified by a Notary Public or authenticated by affidavit.
- (4) The summons is to be accompanied by an affidavit deposing—
  - (a) that no stay is in force in respect of any part of the judgment;
  - (b) to the amount that is then due and payable under the judgment and to the amount that remains unpaid as at the date of the application for registration;
  - (c) that the plaintiff is entitled to enforce the judgment;
  - (d) that there are no facts known to the plaintiff and the deponent on the basis of which the judgment debtor would be entitled to have the registration of the judgment set aside;

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(e) to the full name, title, trade, business or occupation and the last known place of abode or address of each judgment creditor and of each judgment debtor;

(f) if the sum payable under the judgment is expressed in a currency other than Australian currency, to the amount for which registration is sought in Australian currency and particularising the calculation of the conversion;

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(g) if the judgment relates to different matters of which only some could, if contained in separate judgments, have been registered, to the matters in respect of which the plaintiff seeks the registration of the judgment; and

(h) to the amount of interest that has become due under the judgment to the date of the application and the basis upon which such interest was payable under the law of the country of the original court.

(5) The costs of and incidental to the registration of the judgment, as fixed by the Registrar or as adjudicated, may be added to the amount for which the judgment is registered.

(6) The order of the Court for the registration of the judgment will state the period within which an application to set aside the registration may be made.

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(7) Notice of the registration of the judgment is to be served personally on each judgment debtor.

(8) (a) The Registrar will keep a register of judgments ordered to be registered under the Act;

(b) The Registrar may upon request issue a certified copy of the registered judgment.

(9) An application for re-registration of a judgment under section 9 of the Act is to be made by interlocutory application in the proceeding in which the judgment was registered.

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(10) Unless the Court otherwise directs, in any proceeding under the Act—

(a) evidence by affidavit may be by information and belief;

(b) an apparently genuine imprint of the seal of an original court need not be proved;

(c) the qualifications of a person who is a lawyer in the original court to give evidence of the law applicable in that court need not be proved.

5. ***Foreign Judgments Act 1973 (NSW) (now repealed), ss 6, 8 and 9***

**6 Application for, and effect of, registration of judgment**

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(1) A person, being a judgment creditor under a judgment to which this Part applies, may apply to the Supreme Court at any time:

(a) in the case where the judgment was given in a Commonwealth country before the coming into operation of the order directing that this Part shall apply to that country and that country was a country to which Part 2 of the *Administration of Justice Act 1924* applied immediately before the coming into operation of that order—within twelve months after the date of the

judgment or such longer period as may be allowed by the Supreme Court, or

- (b) in any other case—within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in the proceedings, to have the judgment registered in the Supreme Court, and on such an application the Supreme Court shall, subject to proof of the prescribed matters and to the provisions of this Act, order the judgment to be registered.

(2) A judgment shall not be registered if at the date of the application:

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- (a) it has been wholly satisfied, or
- (b) it could not be enforced by execution in the country of the original court.

(3) Subject to the provisions of this Act with respect to the setting aside of registration:

- (a) a registered judgment is, for the purposes of execution, of the same force and effect,
- (b) proceedings may be taken on a registered judgment,
- (c) the sum for which a judgment is registered shall carry interest, and
- (d) the Supreme Court shall have the same control over the execution of a registered judgment,

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as if the judgment had been a judgment originally given in the Supreme Court and entered on the date of registration.

(4) Execution shall not issue on a registered judgment:

- (a) if under this Part and the rules of court made for the purposes of this Act, it is competent for any party to make application to have the registration of the judgment set aside, or, where such an application is made, until after the application has been finally determined, or
- (b) if there is in force in the original court any order staying execution of the judgment in the original court.

(5) Where the sum payable under a judgment that is to be registered is expressed in a currency other than the currency of the Commonwealth of Australia, the judgment shall be registered as if it were a judgment for such sum in the currency of the Commonwealth of Australia as, on the basis of the rate of exchange prevailing at the date of the judgment of the original court, is equivalent to the sum so payable.

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(6) If at the date of the application for registration the judgment of the original court has been partly satisfied, the judgment shall not be registered in respect of the whole sum payable under the judgment of the original court, but only in respect of the balance remaining payable at that date.

(6A) Without affecting subsection (7), where, on an application for the registration of a judgment, it appears to the Supreme Court that:

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- (a) a judgment is in respect of a sum of money payable in respect of both recoverable tax and non-recoverable tax, and
- (b) the judgment could have been registered if it had been in respect of recoverable tax only,

the judgment may be registered in respect of the sum less so much as relates to non-recoverable tax, but may not be registered in respect of so much of the sum as relates to non-recoverable tax.

- (7) If, on an application for the registration of a judgment, it appears to the Supreme Court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that if those provisions had been contained in separate judgments those judgments could properly have been registered, the judgment may be registered in respect of the registrable provisions but not in respect of any other provisions contained therein.
- (8) In addition to the sum of money payable under the judgment of the original court, including any interest that by the law of the country of the original court becomes due under the judgment up to the time of registration, the judgment shall be registered for the reasonable costs of and incidental to registration, including the costs of obtaining a certified copy of the judgment from the original court.

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#### **8 Cases in which registered judgments must, or may, be set aside**

- (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment:

- (a) shall be set aside if the Supreme Court is satisfied:
- (i) that the judgment is not a judgment to which this Part applies or was registered in contravention of the provisions of this Act,
  - (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case,
  - (iii) that the judgment debtor did not (notwithstanding that process may have been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear,
  - (iv) that the judgment was obtained by fraud,
  - (v) that the enforcement of the judgment would be contrary to public policy in the State, or
  - (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made, and
- (b) may be set aside if the Supreme Court is satisfied that the matter in dispute in the proceedings in the original court has, before the date of judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

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- (2) For the purposes of this section, the courts of the country of the original court shall, subject to the provisions of subsection (3), be deemed to have had jurisdiction:

- (a) in the case of a judgment given in an action in personam:
- (i) if the judgment debtor voluntarily submitted to the jurisdiction of the original court,
  - (ii) if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court,
  - (iii) if the judgment debtor had before the commencement of the proceedings agreed, in respect of the subject-matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court,

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- (iv) if the judgment debtor was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court, or
- (v) if the judgment debtor had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place,
- 10 (b) in the case of a judgment given in an action of which the subject-matter was immovable property or in an action in rem of which the subject-matter was movable property, if the property in question was at the time of the proceedings in the original court situated in the country of that court, and
- (c) in the case of a judgment given in an action other than an action mentioned in paragraph (a) or (b), if the jurisdiction of the original court is recognised by the law of the State.
- (3) Notwithstanding anything in subsection (2), the courts of the country of the original court shall be deemed not to have had jurisdiction:
- (a) if the subject-matter of the proceedings was immovable property outside the country of the original court,
- 20 (b) except in the cases mentioned in subsection (2) (a)(i), (ii) and (iii) and in subsection (2)(c), if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute to which the proceedings related was to be settled otherwise than by proceedings in the courts of the country of that court, or
- (c) if the judgment debtor was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.
- (4) For the purposes of subsection (2) (a), a person does not voluntarily submit to the jurisdiction of a court by:
- 30 (a) entering an appearance in proceedings in the court, or
- (b) participating in proceedings in the court only to such extent as is reasonably necessary, for the purpose only of one or more of the following:
- (c) protecting, or obtaining the release of:
- (i) property seized, or threatened with seizure, in the proceedings, or
- (ii) property subject to an order restraining its disposition or disposal or in relation to which such an order is sought,
- (d) contesting the jurisdiction of the court,
- (e) inviting the court in its discretion not to exercise its jurisdiction in the proceedings.
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### **9 Power of Supreme Court on application to set aside registration**

- (1) If, on an application to set aside the registration of a judgment, the applicant satisfies the Supreme Court either that an appeal is pending, or that the applicant is entitled and intends to appeal, against the judgment, the Supreme Court, if it thinks fit, may, on such terms as it may think just, set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as

appears to the Supreme Court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by a competent tribunal.

- (2) Where the registration of a judgment is set aside under subsection (1), or solely for the reason that the judgment was not at the date of the application for registration enforceable by execution in the country of the original court, the setting aside of the registration does not prejudice a further application to register the judgment when the appeal has been disposed of or if and when the judgment becomes enforceable by execution in that country, as the case may be.
- (3) Where the registration of a judgment is set aside solely for the reason that the judgment, notwithstanding that it had at the date of the application for registration been partly satisfied, was registered for the whole sum payable thereunder, the Supreme Court shall, on the application of the judgment creditor, order judgment to be registered for the balance remaining payable at that date.

6. ***Foreign Judgments Act 1962 (Vic) (now repealed), ss 5, 7 and 8***

5. (1) A person, being a judgment creditor under a judgment to which this Part of this Act applies, may apply to the Supreme Court at any time-

- (a) in the case of a judgment given before the passing of this Act in the United Kingdom or in any other Commonwealth country (not including the Commonwealth of Australia) to which the repealed Division applied immediately before the passing of this Act, within twelve months from the date of the judgment or such longer period as may be allowed by the Supreme Court ;
- (b) in any other case, within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in the proceedings—

to have the judgment registered in the Supreme Court, and on any such application that Court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered :

Provided that a judgment shall not be registered if at the date of the application—

- (i) it has been wholly satisfied ; or
- (ii) it could not be enforced by execution in the country of the original Court.
- (2) Subject to the provisions of this Act with respect to the setting aside of registration—
- (a) a registered judgment shall, for the purposes of execution, be of the same force and effect;
- (b) proceedings may be taken on a registered judgment;
- (c) the sum for which a judgment is registered shall carry interest;
- (d) the Supreme Court shall have the same control over the execution of a registered judgment—

as if the judgment had been a judgment originally given in the Supreme Court and entered on the date of registration:

Provided that execution shall not issue on the judgment so long as, under this Part and the Rules of Court made thereunder, it is competent for any party to make

application to have the registration of the judgment set aside, or, where such an application is made, until after the application has been finally determined.

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- (3) Where the sum payable under a judgment which is to be registered is expressed in a currency other than the currency of the Commonwealth of Australia, the judgment shall be registered as if it were a judgment for such sum in the currency of the Commonwealth as, on the basis of the rate of exchange prevailing at the date of the judgment of the original Court, is equivalent to the sum so payable.
- (4) If at the date of the application for registration the judgment of the original Court has been partly satisfied, the judgment shall not be registered in respect of the whole sum payable under the judgment of the original Court, but only in respect of the balance remaining payable at that date.
- (5) If, on an application for the registration of a judgment, it appears to the Supreme Court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that if those provisions had been contained in separate judgments those judgments could properly have been registered, the judgment may be registered in respect of those provisions but not in respect of any other provisions contained therein.
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- (6) In addition to the sum of money payable under the judgment of the original Court, including any interest which by the law of the country of the original Court becomes due under the judgment up to the time of registration, the judgment shall be registered for the reasonable costs of and incidental to registration, including the costs of obtaining a certified copy of the judgment from the original Court.

7. (1) On an application in that behalf duly made by any cases in which party against whom a registered judgment may be enforced, the registration of the judgment shall be set aside if the Supreme Court is satisfied—

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- (a) that the judgment is not a judgment to which this Part applies or was registered in contravention of the foregoing provisions of this Act ;
- (b) that the Courts of the country of the original Court had no jurisdiction in the circumstances of the case ;
- (c) that the judgment debtor, being the defendant in the proceedings in the original Court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original Court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear ;
- (d) that the judgment was obtained by fraud ;
- (e) that the enforcement of the judgment would be contrary to public policy in Victoria ; or
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- (f) that the rights under the judgment are not vested in the person by whom the application for registration was made.

- (2) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment may be set aside if the Supreme Court is satisfied that the matter in dispute in the proceedings in the original Court had previously to the date of the judgment in the original Court been the subject of a final and conclusive judgment by a Court having jurisdiction in the matter.

(3) For the purposes of this section the Courts of the country of the original Court shall, subject to the provisions of sub-section (4) of this section, be deemed to have had jurisdiction—

(a) in the case of a judgment given in an action *in personam*—

(i) if the judgment debtor, being a defendant in the original Court, submitted to the jurisdiction of that Court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized or threatened with seizure, in the proceedings or of contesting the jurisdiction of that Court;

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(ii) if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original Court;

(iii) if the judgment debtor, being a defendant in the original Court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that Court or of the Courts of the country of that Court;

(iv) if the judgment debtor, being a defendant in the original Court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that Court; or

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(v) if the judgment debtor, being a defendant in the original Court, had an office or place of business in the country of that Court and the proceedings in that Court were in respect of a transaction effected through or at that office or place ;

(b) in the case of a judgment given in an action of which the subject-matter was immovable property or in an action *in rem* of which the subject-matter was movable property, if the property in question was at the time of the proceedings in the original Court situate in the country of that Court ; and

(c) in the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or paragraph (b) of this sub-section, if the jurisdiction of the original Court is recognized by the law of the State of Victoria.

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(4) Notwithstanding anything in sub-section (3) of this section, the Courts of the country of the original Court shall not be deemed to have had jurisdiction—

(a) if the subject-matter of the proceedings was immovable property outside the country of the original Court;

(b) except in the cases mentioned in sub-paragraphs (i), (ii) and (iii) of paragraph (a) and in paragraph (c) of sub-section (3) of this section, if the bringing of the proceedings in the original Court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the Courts of the country of that Court; or

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(c) if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the Courts of the country of the original Court and did not submit to the jurisdiction of that Court.

8. (1) If, on an application to set aside the registration of a judgment, the applicant satisfies the Supreme Court either that court on an appeal is pending, or that he is entitled and intends to appeal, against the judgment, the Court, if it thinks fit, may, on such terms as it may think just, either set aside the registration or adjourn the application to set aside the

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registration until after the expiration of such period as appears to the Supreme Court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by a competent tribunal.

(2) Where the registration of a judgment is set aside under sub-section (1) of this section, or solely for the reason that the judgment was not at the date of the application for registration enforceable by execution in the country of the original Court, the setting aside of the registration shall not prejudice a further application to register the judgment when the appeal has been disposed of or if and when the judgment becomes enforceable by execution in that country, as the case may be.

10 (3) Where the registration of a judgment is set aside solely for the reason that the judgment, notwithstanding that it had at the date of the application for registration been partly satisfied, was registered for the whole sum payable thereunder, the Supreme Court shall, on the application of the judgment creditor, order judgment to be registered for the balance remaining payable at that date.

7. ***Maritime Transport And Offshore Facilities Security Act 2003 (Cth), s 207***

20 This Act does not affect an immunity or privilege that is conferred by or under the Consular Privileges and Immunities Act 1972, the Defence (Visiting Forces) Act 1963, the Diplomatic Privileges and Immunities Act 1967, the Foreign States Immunities Act 1985 or any other Act.

8. ***Inspector Of Transport Security Act 2006 (Cth), s 24(a)(iv)***

This Act does not affect:

(a) a privilege or immunity that is conferred by or under:

...

(iv) the Foreign States Immunities Act 1985 ; or

...

9. ***Aviation Transport Security Act 2004 (Cth), s 131(1)***

30 Subject to this section, this Act does not affect an immunity or privilege that is conferred by or under the Consular Privileges and Immunities Act 1972 , the Defence (Visiting Forces) Act 1963 , the Diplomatic Privileges and Immunities Act 1967, the Foreign States Immunities Act 1985 or any other Act.

10. ***Competition and Consumer Act 2010 (Cth), s 46A(8) and (9)***

(8) It is the intention of the Parliament that this section, and the provisions of Parts I and XII so far as they relate to a contravention of this section, should apply to New Zealand and New Zealand Crown corporations to the same extent, and in the same way, as they respectively apply under section 2A to the Commonwealth and authorities of the Commonwealth.

(9) Subsection (8) has effect despite section 9 of the Foreign States Immunities Act 1985.

11. *Trans-Tasman Proceedings Act 2010 (Cth), s 107*

This Act is subject to the Foreign States Immunities Act 1985.