HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, GAGELER, NETTLE AND GORDON JJ

FIREBIRD GLOBAL MASTER FUND II LTD APPELLANT

AND

REPUBLIC OF NAURU & ANOR RESPONDENTS

Firebird Global Master Fund II Ltd v Republic of Nauru
[2015] HCA 43
2 December 2015
S29/2015

ORDER

1. *Vary paragraph (1)(ii) of the order of the Court of Appeal of the Supreme Court of New South Wales made on 23 October 2014 by deleting the order that the summons filed on 9 May 2012 be dismissed and, in lieu thereof, order that order 1 of the orders of Young AJA made on 3 October 2014 be set aside insofar as it orders that the registration of the foreign judgment be set aside.*

2. *Appeal otherwise dismissed.*

3. *The parties are to file written submissions as to costs on or before 9 December 2015.*

On appeal from the Supreme Court of New South Wales

Representation

T G R Parker SC with J A C Potts for the appellant (instructed by Clayton Utz Lawyers)

R A Dick SC with D J Barnett and N D Oreb for the first respondent (instructed by Ashurst Australia)

Submitting appearance for the second respondent

Intervener

J T Gleeson SC, Solicitor-General of the Commonwealth with N J Owens for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

CATCHWORDS

Firebird Global Master Fund II Ltd v Republic of Nauru

Public international law – Foreign State immunity – Immunity from jurisdiction – Proceedings for registration of a foreign judgment – Where appellant obtained judgment in Tokyo District Court against first respondent as guarantor of certain bonds – Where appellant obtained order from Supreme Court of New South Wales that the foreign judgment be registered under *Foreign Judgments Act* 1991 (Cth) – Whether first respondent entitled to foreign State immunity from jurisdiction under s 9 of *Foreign States Immunities Act* 1985 (Cth) – Whether exception in s 11(1) of *Foreign States Immunities Act* for proceedings concerning "commercial transactions" applies.

Public international law – Foreign State immunity – Immunity from execution – Where appellant obtained garnishee order against Australian bank where first respondent held bank accounts – Whether first respondent entitled to foreign State immunity from execution under s 30 of *Foreign States Immunities Act* – Whether property "in use" or "set aside" – Whether exception in s 32(1) of *Foreign States Immunities Act* for "commercial property" applies.

Statutory interpretation – Implied repeal – Where *Foreign States Immunities Act* provides for foreign State immunity from jurisdiction in certain proceedings and *Foreign Judgments Act* requires a foreign judgment be registered on satisfaction of applicable criteria – Whether the operations of the two statutes are inconsistent such that the earlier statute is impliedly repealed to the extent of inconsistency.

Procedure – Service – Registration of foreign judgments – Where judgment debtor in registration proceedings is a foreign State – Whether Pt III of *Foreign States Immunities Act* requires service of summons prior to registration order being made under *Foreign Judgments Act*.

Words and phrases – "commercial property", "commercial purposes", "commercial transactions", "concerns", "in use", "proceeding", "restrictive doctrine", "set aside".

Foreign Judgments Act 1991 (Cth), ss 6, 7, 17.
Foreign States Immunities Act 1985 (Cth), ss 9, 11(1), 11(3), 27(1), 30, 32(1), 32(3), 38, 41, Pt III.
Uniform Civil Procedure Rules 2005 (NSW), Pt 53.

1 FRENCH CJ AND KIEFEL J. The appellant, Firebird Global Master Fund II Ltd ("Firebird"), is the holder of bonds which were issued by the Republic of Nauru Finance Corporation (known as "RONFIN"), a statutory corporation established under the *Republic of Nauru Finance Corporation Act* 1972 (Nauru). RONFIN is no longer in existence[1]. Firebird obtained judgment in the Tokyo District Court in the sum of ¥1,300 million together with interest and costs[2] against the first respondent, the Republic of Nauru ("Nauru"), as guarantor for the bonds ("the foreign judgment").

2 Firebird subsequently obtained an order from the Supreme Court of New South Wales that the foreign judgment be registered under Pt 2 of the *Foreign Judgments Act* 1991 (Cth) ("the Foreign Judgments Act"). The summons for the order for registration was not served on Nauru. The order for registration stated the period within which Nauru could apply to have the registration of the foreign judgment set aside. Further orders were subsequently made granting leave to serve the notice of registration outside Australia and on the Secretary for Justice of the Republic of Nauru.

3 There was some delay in effecting service in Nauru. After the time within which Nauru was permitted to file an application to set the registration of the foreign judgment aside had expired, Firebird obtained a garnishee order against the Australian bank in which the accounts of Nauru were kept. Nauru filed motions seeking to set aside the registration of the foreign judgment and the garnishee order. The question whether Nauru could apply to set aside the registration order notwithstanding that the time for doing so had passed no longer remains in issue.

4 Principal amongst the issues raised by Nauru on those motions was its entitlement under the *Foreign States Immunities Act* 1985 (Cth) ("the Immunities Act") to foreign State immunity from the jurisdiction of Australian courts and from execution against its property. Those issues and the others raised on this appeal involve the interaction of the Immunities Act with the Foreign Judgments Act.

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1 It was abolished by the *Republic of Nauru Finance Corporation (Repeal) Act* 2009 (Nauru).

2 Equivalent to a total of approximately A$31 million at the time of the hearing before the primary judge, Young AJA: *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 289 FLR 373 at 377 [10].

The Immunities Act

5 Prior to the passing of the Immunities Act, the entitlement of foreign States to immunity from the jurisdiction of the courts of Australia was governed by the common law. In 1984[3] a report was prepared by the Australian Law Reform Commission ("the ALRC") following the reference to it of the subject of the law in Australia of foreign State immunity[4]. At the commencement of the summary of its report[5], the ALRC observed there had been a progressive reduction in the scope of foreign State immunity in other jurisdictions. It recommended that the Commonwealth legislate on the subject, as other countries had done. The Immunities Act was based upon draft legislation prepared by the ALRC. It is now the sole basis for foreign State immunity in Australian courts[6].

6 The ALRC explained[7] that the central argument behind the shift away from the absolute immunity of a foreign State from the jurisdiction of local courts was that when a foreign State acts in a "commercial" matter within the ordinary jurisdiction of local courts, it should be subject to that jurisdiction[8]. The ALRC recommended an exception to the general immunity of a foreign State in relation to "commercial transactions" and that the term should be defined objectively[9].

7 Section 9, which appears in Pt II ("Immunity from jurisdiction") of the Immunities Act, provides for the general immunity:

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3 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984).

4 Professor James Crawford was the Commissioner in Charge.

5 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at xv.

6 *Foreign States Immunities Act* 1985 (Cth), s 9; *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 245 [8]; [2012] HCA 33.

7 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 51 [90].

8 See also *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 244 [5].

9 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at xviii [17].

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

8 Section 11 concerns "commercial transactions". Sub-section (1) of s 11 provides:

"A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction."

9 "Commercial transaction" is defined by sub-s (3) of s 11:

"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:

(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."

10 The ALRC also recommended[10] that proceedings concerning certain other matters be the subject of exceptions to the general immunity from the jurisdiction of Australian courts. Included amongst these are proceedings concerning contracts of employment (s 12); personal injury and damage to property (s 13); intellectual property (s 15); membership of bodies corporate (s 16) and taxes (s 20). The proceedings the subject of these exceptions are also expressly required to have a territorial nexus with Australia. An exception from immunity in the case of the exercise by Australian courts of a supervisory jurisdiction over arbitrations and the enforcement of arbitral awards is also dealt with separately (s 17).

11 It might be thought that the argument supporting a restrictive immunity of the foreign State from jurisdiction should also apply to support a restrictive immunity from execution against its property. The ALRC, however, pointed out that, although the English courts appear to have treated the two immunities as

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10 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at xviii-xx [19]-[29].

subject to the same common law principles, most jurisdictions distinguish between them[11].

12 Separate provision is made for immunity from execution for the property of a foreign State in Pt IV ("Enforcement") of the Immunities Act. Section 30 provides:

> "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."

13 Section 32 provides:

> "(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.
>
> …
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> (3) For the purposes of this section:
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> (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."

14 Section 41, in Pt V, concerns the evidentiary effect of certificates given by certain foreign State diplomats as to the purposes for which the property of a foreign State is used at a point in time. This was the subject of a recommendation by the ALRC[12]. Section 41 provides:

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11 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 15-16 [19], 35 [66].

12 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 78 [127].

"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."

15 Sections 23 and 24, in Pt III ("Service and judgments"), provide for service of initiating process on a foreign State by agreement or through the diplomatic channel, respectively. "Initiating process" is defined in s 3(1) to mean "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." Where the diplomatic channel is used, certain documents are required to accompany the initiating process. Provision is made in s 24 for when service is deemed to have been effected by these methods and for the time from which the time for entering an appearance by a foreign State in proceedings is to run. Section 25 provides that purported service of an initiating process upon a foreign State in Australia undertaken otherwise than in accordance with s 23 or s 24 is ineffective.

16 Section 27(1) provides:

"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."

17 Section 38 provides that where a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to a foreign State is inconsistent with an immunity conferred by or under the Immunities Act, the court shall set aside the judgment, order or process.

18 The Immunities Act contains no express reference to proceedings for registration of foreign judgments.

The Foreign Judgments Act

19 At the time when the Immunities Act was passed, the registration of foreign judgments was effected through State and Territory legislation. Those systems were replaced by one under the Foreign Judgments Act, which operates nationally. The regime for registration and enforcement of foreign judgments established by that Act, however, relies upon the application of the ordinary processes of the courts of the Commonwealth, the States and the Territories[13]. Section 17(1) provides for the making of rules of court necessary to give effect to the Foreign Judgments Act.

20 Part 2 of the Foreign Judgments Act deals with the reciprocal enforcement of foreign money judgments that are final and conclusive. Regardless of whether such a judgment is registered, it is to be recognised in any Australian court as conclusive between the parties to it in all proceedings founded on the same cause of action (s 12(1)).

21 Section 6(1) of the Foreign Judgments Act provides that a judgment creditor may apply to the appropriate court to have a foreign judgment registered. Sub-section (3) provides:

> "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."

22 Sub-section (4) requires that the order for registration state the period within which an application may be made under s 7 to have the registration of the foreign judgment set aside. The court may extend that period (sub-s (5)). The provision in s 17(1) for the making of rules of court includes rules respecting service of the notice of the registration of a foreign judgment on the judgment debtor (par (c)) and for extending the period within which an application may be made to have the registration set aside (par (d)).

23 By s 6(7), a registered judgment has, for the purposes of enforcement, the same force and effect as if the judgment had been originally given in the court in which it is registered.

24 Section 7(1) provides that a party against whom a registered judgment is enforceable may seek to have the registration set aside by applying to the court in which the judgment was registered. One of the grounds upon which the

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13 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975 at 981 [30]; [2015] HCA 36.

registration of a judgment may be set aside is that the courts of the country from which the judgment was obtained (the "country of the original court") had no jurisdiction (s 7(2)(a)(iv)).

25 Section 7(4)(c) provides that the courts of the country of the original court are taken not to have had jurisdiction if the judgment debtor, who was a defendant in those proceedings, was a person who was entitled to immunity from the jurisdiction of those courts under the rules of public international law and did not submit to their jurisdiction. This is the only reference to foreign State immunity in the Foreign Judgments Act. General entitlement to immunity from the jurisdiction of the courts of foreign States is not stated as a ground for setting aside the registration of a foreign judgment.

The issues

26 In these proceedings the following issues arise:

Immunity from jurisdiction

27 (a) Firebird disputes Nauru's claim to immunity from jurisdiction under s 9 of the Immunities Act on the basis that the words "jurisdiction … in a proceeding" in s 9 do not refer to a proceeding for the registration of a foreign judgment under the Foreign Judgments Act.

(b) Firebird's alternative argument is that if the Immunities Act applies, the proceeding for registration "concerns a commercial transaction" within the meaning of the exception in s 11(1) of the Immunities Act and therefore the s 9 immunity does not extend to that proceeding.

Implied repeal

28 Alternatively, Firebird contends that there is an unavoidable inconsistency between the entitlement which Nauru claims to arise under s 38 of the Immunities Act, to have the registration proceedings set aside on the basis of the s 9 immunity, and the requirement of the Foreign Judgments Act that a judgment be registered. As a result, as the later Act, the Foreign Judgments Act must be taken to have repealed the Immunities Act to the extent of that inconsistency.

Service

29 Nauru relies on the requirements for service on a foreign State under ss 23-25 and 27, in Pt III of the Immunities Act, and s 27 in particular, as founding an order under s 38 setting aside the registration of the foreign judgment, on the basis that Firebird did not comply with these requirements.

Immunity from execution

30 In the event that the Immunities Act applies, Firebird argues that Nauru cannot rely upon the immunity from execution over its property given by s 30, because the relevant property, Nauru's bank accounts in Australia, is "commercial property" within the meaning of s 32(3).

The decisions below

31 The primary judge (Young AJA)[14] and the Court of Appeal of the Supreme Court of New South Wales (Bathurst CJ, Beazley P and Basten JA)[15] held that Nauru was entitled to the immunity recognised by s 9 of the Immunities Act and that the exception in s 11(1) did not apply to the proceedings for registration under the Foreign Judgments Act. Firebird's argument claiming there to be an inconsistency in the operation of the two statutes was rejected. The Court of Appeal agreed with Nauru's contention that service should have been effected upon Nauru before the foreign judgment was registered under the Foreign Judgments Act.

32 A majority of the Court of Appeal further held that the funds in all of the bank accounts were immune from execution under the garnishee order. Bathurst CJ (Beazley P agreeing) did so by reference to a certificate given by the head of Nauru's diplomatic mission in Australia ("the certificate"), tendered under s 41 of the Immunities Act, and by reference to evidence given by Nauru's Minister for Finance in the proceedings before the primary judge.

Immunity from jurisdiction: ss 9 and 11 of the Immunities Act

33 In the proceedings below and in submissions on this appeal the issue whether the immunity from jurisdiction recognised by s 9 extends to the proceedings under the Foreign Judgments Act was dealt with separately from that which follows if s 9 does apply; namely, whether the exception to that immunity provided by s 11 in proceedings concerning commercial transactions also applies. Whilst a statute must be read as a whole, the questions of construction raised by the two provisions are, for the most part, discrete. It is therefore convenient to continue to deal with them separately.

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14 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 289 FLR 373.

15 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497.

Section 9

34 Firebird's submissions that a proceeding for registration and enforcement of a foreign judgment is not a "proceeding" within the meaning of that term in s 9 of the Immunities Act would not appear to be supported by the ordinary meaning given to that term in a legal context or by its meaning within the context of the Immunities Act.

35 In *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission*[16], it was observed that "jurisdiction" is a generic term that is used in a variety of senses. In s 9, and elsewhere in the Immunities Act, the term is used to identify the amenability of a defendant to the process of Australian courts[17]. The notion expressed by the term "immunity" is that Australian courts are not to implead a foreign State, which is to say the courts will not by their process make the foreign State a party to a legal proceeding against that foreign State's will[18]. Given that s 9 is intended to provide an immunity from all proceedings brought against a foreign State, subject only to the exceptions for which provision is made elsewhere in the Immunities Act, there is no reason not to give the term "proceeding" its widest meaning.

36 The term "proceeding" is apt to refer to any application to a court in its civil jurisdiction for its intervention or action; that is, some method permitted by law for moving a court to do some act according to law[19]. In the context of s 9 and foreign State immunity, it may be understood to refer to a process by which the jurisdiction of an Australian court is invoked, in which a foreign State is named as a party and in which judicial power may be exercised against the foreign State and its interests.

37 Firebird concedes that the registration of a foreign judgment involves the exercise of judicial power[20]. Its argument seeks to differentiate registration

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16 (2012) 247 CLR 240 at 246 [14].

17 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 247 [17].

18 *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 490.

19 *Cheney v Spooner* (1929) 41 CLR 532 at 536-537, 538-539; [1929] HCA 12.

20 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 555 [32] per French CJ and Gageler J, 573 [104] per Hayne, Crennan, Kiefel and Bell JJ; [2013] HCA 5, which refers to the analogous case of registration and enforcement of foreign awards; see also *South Australia v Totani* (2010) 242 CLR 1 at 64 [136] per Gummow J; [2010] HCA 39.

proceedings from the proceedings to which it submits s 9 refers. It submits s 9 refers to a proceeding in which a foreign State is required to appear in an Australian court to answer a claim against it, as occurs when a cause of action is pleaded against it. The procedure for registration of a foreign judgment does not involve the assertion of a cause of action; rather, it recognises that the foreign State's rights and liabilities have already been determined by the relevant foreign judgment. In Firebird's submission, registration proceedings are no more than the invocation of post-judgment enforcement proceedings over the property of a judgment debtor.

38 In support of these submissions, Firebird points to the various exceptions to the s 9 general immunity that are created by ss 11-16 and ss 18-20, and the fact that each of those sections refers to proceedings in which a cause of action would be pleaded. Notably absent from Firebird's list is the proceedings to which s 17(2) refers – proceedings for the recognition and enforcement of arbitral awards, wherever made.

39 This aspect of Firebird's submissions may be dealt with shortly. The exceptions to which Firebird points – for example, claims concerning contracts of employment (s 12), or personal injury and damage to property (s 13) – may be expected to generate pleadings of a cause of action. It does not follow that the immunity provided by s 9 extends only to proceedings in which a cause of action is pleaded. The generality of the language of s 9 does not support such a construction.

40 Firebird relies on what was said in *Hunt v BP Exploration Co (Libya) Ltd*[21] concerning the procedure for registration of foreign judgments under the Queensland statute which was in force prior to the Foreign Judgments Act[22]. The procedure is similar to that later adopted in the Commonwealth Act. The Court observed that the registration procedure was designed to operate ex parte and does not depend upon compliance with rules relating to traditional actions in personam.

41 What was said in *BP Exploration* does not advance Firebird's argument. The fact that a statute permits steps to be taken ex parte, which is to say without notice to the party affected[23], does not detract from the characterisation of something as a proceeding. The description of the registration procedure does

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21 (1980) 144 CLR 565 at 573-574; [1980] HCA 7.

22 *Reciprocal Enforcement of Judgments Act* 1959 (Q).

23 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 348 [38], 372 [119]; [2009] HCA 49.

not otherwise assist the determination of whether the proceedings to which s 9 of the Immunities Act refers are only traditional actions. It assumes relevance only if Firebird is able to establish that this is the case, in which event it might be said proceedings for registration are not of this kind.

42 By applying for registration of the foreign judgment, as it was entitled to do under s 6(1) of the Foreign Judgments Act, Firebird invoked federal jurisdiction invested in the Supreme Court of New South Wales. Nauru was named as a party, as a judgment debtor, in those proceedings. Firebird invoked the judicial power of the Commonwealth, exercised by the Supreme Court of New South Wales, in order to obtain rights against Nauru and its property. The effect of registration of the foreign judgment was to make it enforceable as a judgment of the Supreme Court. Registration, if valid, created new rights in favour of Firebird against Nauru and its property, which were then enforceable[24]. It is therefore not correct to say that the registration proceedings are merely the invocation of enforcement proceedings. They are proceedings of a kind to which the immunity recognised by international law is referable.

43 True it is that Nauru was not called upon to answer the claim for registration and enforcement prior to the order for registration being made, although it could have defended the proceedings at the outset had it come to have knowledge of them. But the notice of the registration of the foreign judgment served upon Nauru required it to respond to Firebird's claim for registration and enforcement if Nauru wished to avoid execution over its property.

44 The construction contended for by Firebird suffers from the additional disadvantage that it does not give full effect to the jurisdictional immunity of a foreign State which is recognised by international law. Section 9 ought, so far as its language permits, to be construed in conformity with international law[25]. Especially is this so where the statute implements or codifies Australia's obligations under international law[26].

45 Whereas in Australia the procedure for recognition and enforcement of foreign judgments is largely governed by statute, in other countries, such as Canada, the courts themselves provide for those effects. The question of foreign

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24 *Foreign Judgments Act* 1991 (Cth), s 6(7).

25 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; [1908] HCA 95.

26 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*Malaysian Declaration Case*) (2011) 244 CLR 144 at 189-190 [90]-[91], 191-192 [96]-[98]; [2011] HCA 32.

State immunity is regarded as one necessary to be dealt with in those proceedings.

46 Section 3(2) of the *State Immunity Act* RSC 1985, c S-18 of Canada provides for immunity of foreign States from "any proceedings before a court". Foreign judgments are not themselves enforceable by statute. It was explained in *Kuwait Airways Corp v Iraq*[27] that the courts of Quebec may nevertheless declare a foreign judgment to be enforceable. In making that decision the court, "in a sense, naturalizes the foreign decision and permits it to be enforced". The Supreme Court of Canada held that the application for recognition involves a judicial demand that creates an adversarial relationship between the parties to it and is a "proceeding" to which foreign State immunity applies.

47 In countries which are signatories to the Brussels Convention[28] and later the Brussels I Regulation[29], a foreign judgment was until recently[30] rendered enforceable by a court on a request for exequatur[31]. Procedurally, a request for exequatur has in common with the registration procedure under the Foreign Judgments Act that the request to the court is made ex parte. If the request is acceded to, it is incumbent upon the party against whom the order is made authorising enforcement to appeal against it[32].

48 In *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*[33], it was explained of the proceeding for exequatur that, in granting or refusing it, the court exercises a jurisdictional power which results in a foreign

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27 [2010] 2 SCR 571 at 583-584 [20].

28 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968).

29 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2000).

30 10 January 2015, the date from which Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (2012) applied.

31 On the procedure for exequatur, see Kennett, *Enforcement of Judgments in Europe*, (2000) at 214-216.

32 Kennett, *Enforcement of Judgments in Europe*, (2000) at 215.

33 [2012] ICJ Reports 99 at 150 [125], 151-152 [128]-[130].

judgment being given effects corresponding to those of an order of the court itself. It follows that the court must ask itself whether the respondent foreign State enjoys immunity from jurisdiction.

49 An application for registration of a foreign judgment under the Foreign Judgments Act is a "proceeding" within the meaning of s 9. It follows that Nauru, as a foreign State, enjoys general immunity from the jurisdiction of the Supreme Court of New South Wales unless one of the exceptions referred to in the Immunities Act applies.

Section 11

i. The history of the exception for commercial transactions

50 The arguments on this appeal require something more to be said about the development and level of acceptance within the international community of a restrictive doctrine of immunity from jurisdiction, which provide the background to the enactment of s 11(1).

51 The rule of international law that the courts of a country will not implead a foreign State was said by Lord Atkin in *Compania Naviera Vascongado v SS Cristina* ("*The Cristina*")[34] to have become engrafted into English law, to be well established and to be beyond dispute. So stated, foreign State immunity from the jurisdiction of local courts appears to be absolute, but even at that time, differences of view had been expressed as to whether State-owned merchant ships were immune from the jurisdiction of courts of other countries[35]. In any event, a series of decisions of the English courts in the 1970s[36] reflected the growing, general trend towards favouring a restriction on immunity from jurisdiction in cases involving commercial transactions to which the foreign State was a party, a circumstance which was becoming increasingly more common.

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34 [1938] AC 485 at 490.

35 *The Parlement Belge* (1879) 4 PD 129 (although this decision was reversed on appeal: *The Parlement Belge* (1880) 5 PD 197); *The Porto Alexandre* [1920] P 30.

36 See, eg, *The Philippine Admiral* [1977] AC 373 at 403; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at 555; *Hispano Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277 at 279. See also the earlier statement in *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318 at 343.

The correctness of these decisions was confirmed by the House of Lords in 1981 in *I Congreso del Partido*[37].

52 *I Congreso del Partido* was a case in which a claim was brought against the government of the Republic of Cuba for breach of contract. Lord Wilberforce observed[38] that the more restrictive doctrine of immunity had arisen from the "willingness of states to enter into commercial, or other private law, transactions with individuals." His Lordship considered that there were two main foundations for the restriction on the principle of immunity: the first was that it was in the interests of justice to allow individuals to bring such transactions before the court; the second was that there was no challenge to, or enquiry into, any act of sovereignty or governmental act of the State by requiring a State to answer a claim based on transactions of this kind. A court determining whether immunity should be restricted would have regard to whether the claim is[39]:

> "fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

53 The ALRC considered that the decision in *I Congreso del Partido* clarified the position at common law[40]. The ALRC recommended[41] that the provisions of the *State Immunity Act* 1978 (UK) ("the 1978 UK Act") respecting the exception of proceedings concerning commercial transactions should generally be followed.

54 It has been said of the development of the restrictive doctrine in international law that "[t]he former practice of treating public loans as sovereign acts and hence immune gave way as loans were increasingly raised by States

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37 *Playa Larga (Owners of cargo lately laden on board) v I Congreso del Partido (Owners)* [1983] 1 AC 244 at 261-262.

38 *Playa Larga (Owners of cargo lately laden on board) v I Congreso del Partido (Owners)* [1983] 1 AC 244 at 262.

39 *Playa Larga (Owners of cargo lately laden on board) v I Congreso del Partido (Owners)* [1983] 1 AC 244 at 267.

40 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 14 [17].

41 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 51-52 [90].

using commercial markets"[42]. They are now generally held to be commercial transactions and not immune. Another commentator[43] observes that discernible judicial practice is now more or less uniform in the treatment of loan contracts and obligations of guarantee. The courts hold that the State does not enjoy immunity from proceedings in a foreign court in respect of those loan contracts and guarantees.

ii. Issues of construction

55 Section 3(1) of the 1978 UK Act provides that a State is not immune as respects proceedings "relating to" a commercial transaction entered into by the State. A "commercial transaction" is defined in wide terms by s 3(3) of that Act, as the same term also is in s 11(3) of the Immunities Act.

56 Nauru submits that the word "concerns", appearing in s 11(1) of the Immunities Act ("is not immune in a proceeding in so far as the proceeding concerns a commercial transaction"), like the words "relating to", identifies a connection, or relationship, between the proceeding and the relevant matter in respect of which the exception is created. "Concerns", it submits, requires a close relationship, or direct connection, between the proceedings and the transaction, and fastens upon the subject matter of the particular proceeding before the Australian court, here the proceeding for registration of the foreign judgment.

57 The approach taken by Firebird to the construction of s 11(1) places greater emphasis upon the provision's purpose in giving effect to the restriction on the general immunity. On this approach, a proceeding for registration of a foreign judgment can more generally be said to concern the commercial transaction which underlies the judgment sought to be registered.

58 It has never been disputed that the foreign judgment in this case was based upon a commercial transaction, namely the guarantee of the bonds. Such a transaction is clearly one which falls within the definition of "commercial transaction" in s 11(3). Bathurst CJ accepted that, on one construction, the registration proceedings could be said, as a matter of practical reality, to concern a commercial transaction, but preferred the construction that the registration proceedings did not "concern" liability under the bonds; rather they concerned

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42 Fox and Webb, *The Law of State Immunity*, 3rd ed (2013) at 402.

43 Wittich, "Article 2(1)(c) and (2) and (3)", in O'Keefe and Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary*, (2013) 54 at 64.

registration of the foreign judgment[44]. In his Honour's view[45], the focus of s 11(1) is upon the proceeding itself, not the transaction which underlies the proceeding. His Honour accepted that this involves a "narrower" construction of the word "concerns" in s 11(1)[46], one which might not accord with the position at international law[47].

59 His Honour considered that some, though limited, contextual support for this construction was provided by s 17(2) of the Immunities Act[48]. Section 17 has been referred to earlier in these reasons, but not in detail. It concerns agreements for arbitration and the enforcement of foreign arbitral awards. Section 17(1) provides that when a foreign State is 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 from the exercise of the supervisory jurisdiction of an Australian court in respect of the arbitration. It is s 17(2) to which Bathurst CJ referred. It relevantly provides:

> "Where:
>
> (a) … 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;
>
> 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."

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44 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 511-512 [69]-[70], 513 [79].

45 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 513 [78].

46 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 513 [79].

47 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 514 [89].

48 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 512 [73]-[74].

60 His Honour reasoned that if the word "concerns" in s 11(1) were given a broader meaning, one that is referable to the underlying transaction, s 17(2) would not be necessary, at least where the underlying transaction was a commercial transaction[49]. If proceedings were brought for the registration or enforcement of a foreign arbitral award to which the foreign State was a party, and the arbitration had concerned a commercial transaction, a broader construction of the exception in s 11(1) would mean the foreign State could claim no immunity. It would not be necessary to resort to s 17(2) for that conclusion to be reached.

61 Nauru goes further. It submits that a consistent application of a broader construction of the word "concerns" (or words "proceeding concerns") in the other exception provisions in the Immunities Act produces the result that there will be little, if any, work for s 17(2) to do. If regard is had to the underlying transaction in the proceedings to which those other provisions refer, s 17(2)(a) will not be triggered.

62 The scheme of the Immunities Act is to provide for a broad immunity in s 9 and then make specific provision for exceptions to it. These exceptions may overlap with each other, including s 17(2). In such a context, as Firebird submits, the potential for redundancy has little, if any, significance. Where one exception applies, the immunity will be lost.

63 In *NML Capital Ltd v Republic of Argentina*[50] (a decision discussed further below), the potential for overlap with the equivalent arbitration provision in the 1978 UK Act was considered by Lord Collins of Mapesbury (with whom Lord Walker of Gestingthorpe and Lord Clarke of Stone-cum-Ebony JJSC agreed) not to support a narrow construction of s 3 of that Act. As his Lordship pointed out, the overlap would not be complete and it would be "artificial and over-technical" to use a potential overlap to cut down the scope of the commercial transaction exception.

64 So far as concerns s 17(2), the potential overlap is brought about by particular provision being made for an exception to immunity with respect to arbitral proceedings based upon an agreement to arbitrate, while the other exception provisions relate to proceedings concerning particular subject matters. The ALRC explained[51] that the enforcement of arbitral awards was regarded as

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49 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 512 [74].

50 [2011] 2 AC 495 at 539 [112], 546 [150].

51 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 61-63 [104]-[107].

of sufficient importance to warrant separate and explicit treatment and that making separate provision was considered preferable to treating a foreign State as having waived immunity by entering into an agreement for arbitration. This explains the presence in the Immunities Act of s 17(2), but it does not require that other exceptions be read down in order to ensure that s 17(2) has a wider operation.

65 Nauru further submits that a broader meaning of the words "proceeding concerns" cannot consistently be applied to some of the exception provisions. Sections 12-16 contain a requirement of a territorial nexus between the subject matter of the proceedings and Australia. In Nauru's submission, this requirement of a territorial nexus makes sense when the focus is on the determination of the underlying cause of action, but not when the focus is on a regime for registration of foreign judgments. Those sections would not ordinarily apply to a foreign judgment relating to their subject matter because the Australian nexus would not be satisfied.

66 The correct scope of this last-mentioned assertion may be put to one side. The effect to which Nauru points is not one of lack of coherence. Section 11(1) has a different operation from ss 12-16. It does not have, and cannot be construed to have, the requirement of a territorial nexus for which the other sections provide. The different operation of the sections arises because of that requirement and because the purposes of ss 12-16 are different from that of s 11(1). The subject matter of these sections was regarded as appropriate for the jurisdiction of Australian courts so long as that nexus was present. Section 11(1), consistently with the restrictive doctrine it seeks to enforce, applies to commercial transactions of foreign States regardless of territorial nexus.

67 Nauru submits that s 17(2) is also useful to show that where the Immunities Act intends to direct attention not to the immediate subject matter but to the underlying transaction, a mechanism is provided by which the underlying transaction is to be examined. The same submission is put regarding s 19 and the provision it makes for the exception to immunity in the case of proceedings concerning a bill of exchange.

68 It may be accepted that ss 17(2) and 19 direct attention to an underlying transaction and that s 11(1) does not. The question is what is to be drawn from these observations so far as concerns the area of intended operation of s 11(1). It cannot be inferred, by reference to ss 17(2) and 19, that it was intended that s 11(1) is not to apply with respect to foreign judgments and the transactions which underlie them. At most, it may be inferred that attention was not directed, by those who drafted the Immunities Act, to proceedings for the registration of foreign judgments. The ALRC report makes no mention of such proceedings.

69 What was or was not in the minds of those drafting or enacting legislation is not relevant to the construction of s 11(1). If the meaning of the words chosen has a wider application than what may have been contemplated by the draftsperson, then the Court is bound to give effect to that meaning[52]. In interpreting a provision of an Act, the Court is required by s 15AA of the *Acts Interpretation Act* 1901 (Cth) to prefer that interpretation that would best achieve the purpose or object of the Act.

70 In the context of proceedings for registration of a foreign judgment to which s 9 applies, reading "[a] foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction" as referring to the commercial transaction on which that foreign judgment is based is not to give an unduly strained construction of s 11(1). It has the advantage over the narrower construction of s 11(1) of giving effect to the evident purpose of that provision.

71 The purpose of s 11(1) is to give effect to the restriction on the general immunity from jurisdiction. The view which prevailed in the international community at the time the Immunities Act was drafted was that the immunity should not be extended to cover commercial transactions.

iii. *NML Capital*

72 Reference has been made in these reasons to the decision of the Supreme Court of the United Kingdom in *NML Capital*, which considered provisions of the 1978 UK Act upon which sections of the Immunities Act presently under consideration were based.

73 There was a division of opinion between members of the Court in *NML Capital* as to whether the proceedings at common law on a foreign judgment debt could be said to relate to the underlying bond transaction. A majority of the Court held that s 31(1) of the *Civil Jurisdiction and Judgments Act* 1982 (UK) ("the 1982 Act"), which sought to give effect to the Brussels Convention[53], provided an alternative avenue for enforcement. Differences of view about the applicability of the 1978 UK Act were therefore not decisive of the outcome of that case.

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52 *Stingel v Clark* (2006) 226 CLR 442 at 458 [26]; [2006] HCA 37.

53 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968): see *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at 515 [44].

74 In the decision below in this case, Basten JA[54] considered that the construction of s 11(1) of the Immunities Act, at the time of its enactment, should conform to that adopted by the majority in *NML Capital* with respect to s 3(1) of the 1978 UK Act, because that Act had been the subject of careful consideration by the ALRC in its report[55]. Lord Mance JSC (who was in the majority) held[56] that proceedings "relating to ... a commercial transaction" within the meaning of s 3 of the 1978 UK Act did not extend to proceedings for the enforcement of a foreign judgment which itself related to a commercial transaction. Bathurst CJ said[57] that he did not rely upon the decision in *NML Capital*, but his Honour's reference to a narrower construction may be taken to refer to the effect of the construction favoured by Lord Mance.

75 Apart from some anomalies arising with respect to the other exceptions, which have already been dealt with in these reasons, two matters appear to have been influential to Lord Mance's reasoning. In his Lordship's view, those drafting the 1978 UK Act could not have contemplated that s 3(1) should apply to a foreign judgment against a foreign State because at the time the Act was passed *I Congreso del Partido* had not been decided and the law was therefore not settled on the question of restrictive immunity in England[58]. Secondly, the rules of court at that time provided no basis for service out of the jurisdiction and this therefore posed a practical difficulty[59]. These matters were considered by Lord Collins[60] to be relevant, but not conclusive, as to the meaning of s 3.

76 The report of the ALRC provides quite a different picture of the basis for s 11 of the Immunities Act. *I Congreso del Partido* had been decided and the ALRC considered that it had settled the existence of the restrictive doctrine of

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54 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 548 [296]-[297].

55 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 51-55 [90]-[93].

56 *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at 532 [86].

57 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 513 [80].

58 *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at 534 [91].

59 *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at 533-534 [90].

60 *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at 539 [114]-[115].

immunity, sufficiently so to warrant legislation. Further, provision had been made in Australia for service out of the jurisdiction for some time[61].

77 Lord Phillips of Worth Matravers PSC (with whom Lord Clarke agreed on this point), whilst acknowledging that there were some anomalies in applying the 1978 UK Act to foreign judgments, nevertheless considered that the question whether a foreign State is immune from a claim should, in accordance with the restrictive immunity, depend on the nature of the underlying transaction that has given rise to the claim, not the nature of the process by which the claimant is seeking to enforce the claim[62]. Lord Collins (with whom Lord Walker agreed) considered[63] that but for s 31(1) of the 1982 Act applying, it might have been desirable, as a matter of policy, to give s 3 of the 1978 UK Act a wider meaning.

iv. The construction of s 11(1)

78 The construction for which Nauru contends would have s 11(1) applying where a commercial transaction is itself the subject of the proceedings before an Australian court, but not where it was the subject of a foreign judgment which is sought to be enforced in an Australian court. On this approach, the effect to be given by an Australian court to the restriction on immunity would depend upon the nature of the proceedings before it, yet in both kinds of proceedings referred to above the Australian court is exercising its jurisdiction and powers with respect to the foreign State.

79 A construction of s 11(1) by which the proceedings for registration and enforcement of a foreign judgment are to be taken to be concerned with the commercial transaction upon which that judgment is based is consistent with the approach that was taken by the courts of countries which are signatories to the Brussels Convention, in dealing with applications for exequatur. In *Jurisdictional Immunities of the State*[64] it was said that, in deciding that application, and considering whether immunity applies, a court must ask itself whether, if it had itself been seised of "a dispute identical to that which was the subject of the foreign judgment", it would have been obliged under international

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61 See, eg, Supreme Court Rules 1970 (NSW), Pt 10, made under the *Supreme Court Act* 1970 (NSW). Other States and Territories made similar provision.

62 *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at 510-511 [26], 544 [139].

63 *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 at 539 [116].

64 [2012] ICJ Reports 99 at 151 [130].

law to accord immunity having regard to the nature of that case. This directs attention to the underlying commercial transaction involved in the dispute.

80 Consistently with the approach taken to the construction of s 9, where "proceeding" is given its widest meaning in order to give effect to the general immunity from the jurisdiction of Australian courts, a wider meaning should be given to "the proceeding concerns a commercial transaction" in order to give effect to the restriction on immunity which s 11(1) seeks to achieve. Such a construction of the two provisions gives effect to Australia's international obligations.

81 Section 11(1) should be taken to apply to proceedings for registration of a foreign judgment where that judgment is based upon a commercial transaction.

Implied repeal

82 Inconsistency is at the root of the principle of implied repeal[65]. The potential conflict between the Foreign Judgments Act and the Immunities Act is said by Firebird to arise because, on Nauru's argument, s 38 of the Immunities Act entitles Nauru to have the registration of the foreign judgment set aside as non-compliant with the Immunities Act, whereas s 6 of the Foreign Judgments Act requires a foreign judgment to be registered on the satisfaction of the applicable criteria. The result, it submits, is that the later Foreign Judgments Act must be taken to repeal the Immunities Act to the extent of the inconsistency.

83 Firebird submits that s 7(4)(c) of the Foreign Judgments Act points up this inconsistency, because that provision makes it clear that the legislature expressly contemplated that a judgment against a foreign State might be registered. Section 7(4)(c), read with s 7(2)(a)(iv), provides a ground for setting aside a registration of a judgment under s 7(1) where a person who was a defendant in the proceedings in the foreign country was not accorded immunity they were entitled to under the rules of public international law.

84 Assuming s 7(4)(c) applies to foreign States, it deals only with the question of immunity which arose in the foreign proceedings. It says nothing about the application of immunity in proceedings in Australia. The question of foreign State immunity from the jurisdiction of Australian courts remains one to be dealt with by reference to the Immunities Act.

85 The Immunities Act deals with the special and discrete topic of foreign State immunity in Australia. It provides for a general immunity and creates

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65 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 137-138 [18]; [2006] HCA 5.

exceptions to it, thereby defining the circumstances in which immunity will be accorded to a foreign State. That the Immunities Act is intended to deal comprehensively and specifically with the immunity of foreign States is confirmed by the opening words of s 9 ("[e]xcept as provided by or under this Act"). It is not to be supposed that a later general statute dealing with the subject of the enforcement of foreign judgments was intended to derogate from the Immunities Act provisions[66].

86 The two statutes deal with different subject matters and the overlap between them is only slight. As Basten JA observed[67]:

> "the Foreign Judgments Act is directed to the registration and enforcement of judgments given in courts of other countries, of which judgments involving a foreign state will be but a small subset … On the other hand, the Foreign States Immunities Act addresses the jurisdiction of Australian courts with respect to foreign states and their entities, of which proceedings for enforcement of foreign judgments will be but a small subset".

87 For a court to conclude that a later statute impliedly repeals an earlier statute the court must be satisfied that the two statutes are so inconsistent that they cannot stand or live together[68]. This will be so only if the provisions of the two statutes cannot be reconciled. The potential conflict to which Firebird points is resolved by reading the provisions of the Foreign Judgments Act to only apply where a defendant, including a foreign State defendant, is amenable to the jurisdiction of the courts exercising jurisdiction under that Act.

88 No inconsistency arises by reason of the procedures in respect of registration under the Foreign Judgments Act. In so far as service of initiating process on a foreign State should be effected by the means provided for in the Immunities Act, the Foreign Judgments Act can accommodate those means.

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66 See *Maybury v Plowman* (1913) 16 CLR 468 at 473-474; [1913] HCA 43.

67 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 540 [261].

68 *Goodwin v Phillips* (1908) 7 CLR 1 at 10; [1908] HCA 55; *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 [18]; *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 19-20 [48], 34 [100]; [2013] HCA 2.

Service under the Foreign Judgments Act on a foreign State

89 In the Court of Appeal it was observed[69] that the Foreign Judgments Act does not prohibit service prior to the registration of a foreign judgment. In *BP Exploration*[70] it was said that the scheme of the Foreign Judgments Act is to permit proceedings on a foreign judgment to be conducted, in the first place at least, ex parte, but this does not point up an inconsistency with the service provisions in the Immunities Act.

90 Where a foreign State is named as a judgment debtor in registration proceedings, an issue may well arise as to whether it is immune from, or amenable to, the jurisdiction of Australian courts. In these circumstances, it may be as well for a court seised of an application for registration to consider whether service should be effected before an order for registration is made, rather than requiring the foreign State to apply to set aside the registration of the judgment. It may also be preferable, if not more convenient, to use the process for service with respect to a foreign State which is provided for in Australia by Pt III of the Immunities Act, rather than those provided for by the rules of court.

91 This appeal is not concerned with matters such as these. The issue here is whether the procedure adopted for service on Nauru was prohibited, expressly or impliedly, by Pt III of the Immunities Act. Service was effected in accordance with the Uniform Civil Procedure Rules 2005 (NSW)[71], which provide for leave to serve outside Australia[72]. More importantly, service was effected after the order for registration was made.

92 In its notice of contention, Nauru contends that the Court of Appeal should have held that s 27 of the Immunities Act expressly prohibits the entry of a judgment against a foreign State in circumstances where the initiating process has not been served in accordance with the requirements in Pt III. However, s 27(1), which is set out earlier in these reasons, requires proof of service in accordance with Pt III only in the circumstance where a judgment in default of appearance is entered against a foreign State, which is not the case for ex parte proceedings.

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69 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 508 [49] per Bathurst CJ, 540 [261] per Basten JA.

70 (1980) 144 CLR 565 at 573.

71 Rule 53.6.

72 Uniform Civil Procedure Rules 2005 (NSW), rr 11.2, 11.5.

93 In its submissions, Nauru further argues for a construction of s 27(1) which would extend its application to the entry or registration of all judgments. In Nauru's submission, the scheme of Pt III of the Immunities Act is that a foreign State must be served with an initiating process prior to any judgment being entered or steps being taken to enforce a judgment.

94 The definition of "initiating process" is wide and would include a summons for registration of a foreign judgment. However, none of the other relevant provisions of Pt III lend support to Nauru's argument. Sections 23 and 24 are concerned with methods of service, not when it is to be effected. Section 25, which provides that service otherwise than in accordance with s 23 or s 24 is ineffective, is limited in its application to service in Australia. These provisions do not suggest that any extension of the requirements of s 27(1) is necessary to give effect to the purposes of Pt III.

95 Nothing in the ALRC report suggests that the prohibition in s 27(1) is to apply to judgments other than one entered in default of appearance. The rationale for Pt III was not only to facilitate service in Australia, it was to reduce the possibility of offence being caused to a foreign State. The likelihood of offence was considered to be greater where the foreign State had not agreed to the method of service and a default judgment was obtained against it. It was therefore proposed that methods of service which utilised the diplomatic channel and any method to which the foreign State had agreed be adopted[73].

96 No doubt there is a basis for an implication of a requirement in the Immunities Act that a foreign State be served in order that it can effectively assert its claim to immunity. Even so, it cannot be said that the procedures under the Foreign Judgments Act deny a foreign State such as Nauru that opportunity. The foreign judgment may have been registered, but that registration was liable to be set aside on the application of Nauru and upon Nauru's assertion of its immunity.

Immunity from execution against property

Background

97 It has been observed[74], speaking generally, that the transition from absolute immunity towards a restrictive doctrine has been slower to take hold in

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73 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 90-92 [148]-[150].

74 Crawford, *Brownlie's Principles of Public International Law*, 8th ed (2012) at 503; Reinisch, "European Court Practice Concerning State Immunity from Enforcement Measures", (2006) 17 *European Journal of International Law* 803 at 804.

the case of immunity from execution against foreign State property than for immunity from jurisdiction.

98 The decision of the German Federal Constitutional Court in the *Philippine Embassy Bank Account Case*[75] has been regarded[76] as stating the position at public international law with respect to bank accounts of a diplomatic mission which are used for defraying the expenses of the mission. It was held that immunity from the legal processes of execution should be accorded to that property, even though many of the day-to-day expenses would include the supply of goods or services to the mission[77] and so be "commercial" in that sense.

99 More recently, in *Jurisdictional Immunities of the State*[78], it was said that one condition that, if satisfied, permits execution against property belonging to a foreign State is that "the property in question must be in use for an activity not pursuing government non-commercial purposes".

100 A similar question to that which arose in the *Philippine Embassy Bank Account Case* arose in *Alcom Ltd v Republic of Colombia*[79], but it could not be answered by resort only to the requirements of public international law. It was necessary to give effect to the provisions of the 1978 UK Act concerning immunity from execution, albeit these provisions could be construed by reference to international law.

101 Section 13(4) of the 1978 UK Act permitted execution to be levied against "property which is for the time being in use or intended for use for commercial purposes". In *Alcom*[80], Lord Diplock observed that if the expression "commercial purposes" bore its ordinary meaning, the bank account of the diplomatic mission would fall outside the exception to immunity. However, a difficulty was created by an extended meaning being given to "commercial purposes" because it was linked[81] to the wide definition of "commercial

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75 (1977) 65 ILR 146.

76 *Alcom Ltd v Republic of Colombia* [1984] AC 580 at 599 per Lord Diplock.

77 *Philippine Embassy Bank Account Case* (1977) 65 ILR 146 at 158-159. See also *Alcom Ltd v Republic of Colombia* [1984] AC 580 at 603-604.

78 [2012] ICJ Reports 99 at 148 [118].

79 [1984] AC 580.

80 *Alcom Ltd v Republic of Colombia* [1984] AC 580 at 602-603.

81 By *State Immunity Act* 1978 (UK), s 17(1).

transaction" in s 3(3). The definition of "commercial transaction", relevant to an exception to jurisdictional immunity, was carried over into the "commercial purposes" exception to immunity from execution.

102 The difficulty which was presented by the 1978 UK Act in *Alcom* was addressed by the ALRC in its report. Speaking of the linkage effected by the 1978 UK Act between "commercial purposes" and "commercial transaction", the ALRC said[82]:

> "Part of the reason for treating execution as a distinct matter from jurisdiction is that the considerations governing the two matters are not entirely the same. The object of the definition of 'commercial' in the context of jurisdiction was to focus on the nature of a specific transaction. Moreover, in that context 'purpose' or 'motive' are usually said to be irrelevant. To attempt to use this definition in the context of execution, where 'purpose' is intended to be the key discriminator, is not a recipe for clarity."

103 The ALRC recommended that commercial purposes, in the context of execution against property, be defined independently of "commercial" in the context of jurisdiction[83]. This is the background to s 32(3) of the Immunities Act.

Section 32(3) enquiries

104 Section 32(3), when applied to bank accounts, asks whether the choses in action represented by them are "in use" by the foreign State or "apparently not in use". If they are in use, the party seeking execution must show that the use is "substantially for commercial purposes" (s 32(3)(a)). If the account is not in use, s 32(3)(b) deems it to be used for commercial purposes. In this circumstance the foreign State must rebut that presumption by showing that it has been "set aside" otherwise than for commercial purposes. It will be recalled that s 41 provides that a certificate given by the head of a foreign State's diplomatic mission that property was in use for specified purposes is admissible as evidence of those facts.

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82 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 76 [125] (footnotes omitted).

83 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 77 [125].

"In use" and "set aside"

105 Firebird submits that, of its nature, money in a bank account is not "in use". It submits that a bank account can only be said to be "in use" to earn interest, as in the case of a term deposit, to act as security or to be drawn upon. A credit balance is an inseverable item of property which cannot be characterised by past or intended future drawings.

106 Bathurst CJ held[84] that all of the accounts except for the term deposit account (also referred to as the "trust account") were in use. His Honour considered that the certificate as to the purposes for which the various accounts were in use told against Firebird's submission that they were not in use. His Honour also accepted the evidence of Nauru's Minister for Finance that it was not likely to have been the case that some of the accounts had not been drawn upon for some considerable period of time. The length of the periods of inactivity were insufficient, in his Honour's view, to detract from the evidence provided by the certificate and by the Minister for Finance.

107 Subject to what follows, there is no reason to doubt the correctness of this approach. The words "in use" are not to be taken to refer to particular uses to which bank accounts may be put for the benefit of the account holder. They are used to distinguish accounts in which monies may be idle, as where a foreign State sets funds aside. In such a case, the purpose of the accounts cannot be readily discerned from the use to which they are put and it would be a simple enough matter for a foreign State to assert that they were intended for future government purposes. For these reasons, s 32(3)(b) creates the presumption that they are being used for commercial purposes and requires the foreign State to show that they were set aside other than for those purposes.

108 Bathurst CJ accepted Firebird's submission that the funds in the term deposit account were not in use[85]. This finding is the subject of Nauru's notice of contention. The statement in the certificate, that the funds were held as the cash reserves of the government of Nauru to provide future government services, was taken by his Honour to mean that they were set aside. Firebird challenges this finding.

109 In Firebird's submission, for funds to be "set aside" something more is required than an intention as to how property is to be used. The ALRC clearly

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84 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 522 [171].

85 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 528 [205].

chose to depart from a test of intended use when drafting s 32(3). It is necessary that there be some formal action, which may be expected of a foreign State, such as an act of appropriation or other administrative act. There is no evidence that such a procedure had been undertaken.

110 It is correct to observe that s 32(3) contains no reference to an "intended use", in contrast to s 13(4) of the 1978 UK Act. The reference to "intended use" was considered by the ALRC to be vague and uncertain[86]. Hence s 32(3) is concerned with the fact of property being in use, not in use, or set aside, for a discernible non-commercial purpose. It contains no requirement that any formal act accompany the act of setting aside funds. Once funds are shown in fact to be set aside, the question of whether the funds are to be adjudged as immune from execution depends upon whether the foreign State's purpose with respect to them is commercial, or non-commercial and governmental.

111 Firebird identifies three accounts, referred to as the "aircraft leasing accounts", which had been used for loans to entities which ran the Nauruan commercial airline. The loans had been repaid. Firebird submits that the accounts were not in use because they had not been drawn upon sufficiently frequently and recently. In this regard, the evidence of the Minister for Finance appears to support Firebird's contention. It may also be said of these accounts that because the funds had been retained for some time after the loans had been repaid, they were also set aside. The critical enquiry with respect to them is also as to the purpose for which they are maintained.

"For commercial purposes"

112 The larger question concerning s 32(3) concerns the purposes for which the monies in the accounts were in use or were set aside.

113 The test for which Firebird contends has regard to the nature of the activity involving the accounts. Firebird submits that if the activity in question is properly characterised as commercial, the accounts are used for commercial purposes.

114 Nauru submits that Firebird's test conflates the form that the use of the property takes with the purpose for which it is "in use". A particular use of property may in form be a business, trading or commercial transaction, but the question of purpose is different. It looks to the reasons, objectively, why the property is in use in order to determine whether it is in use substantially for commercial purposes or, if not in use, is set aside for such purposes.

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86 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 78 [127].

115 Nauru's submissions should be accepted. In the context of s 32(3), the words "in use … for commercial purposes" and "set aside otherwise than for commercial purposes" direct attention to the reason why, objectively, the property is used or set aside. This is confirmed by what was said by the ALRC in the passage, set out above, concerning the need to disassociate the meaning to be given to "commercial property" of a foreign State, against which execution may be levied, and a "commercial transaction", which is the basis for loss of jurisdictional immunity.

116 The test for which Firebird contends has regard to the nature of the transactions conducted through the bank accounts, which is the very problem that was sought to be avoided by the separate and distinct definition of "commercial property" in s 32(3). In the course of argument, Firebird was obliged to concede that a transaction in the nature of a purchase of goods to be used in the running of a government will be for a government purpose, notwithstanding the commercial nature of the transaction.

117 The certificate tendered under s 41 in the present case identifies the source of the funds and what the monies in the accounts have been and are used for, from which an inference as to the purpose for which they are used or set aside may be drawn. With respect to some accounts, a purpose associated with government is identified.

118 So far as concerns the term deposit account, or trust account, the certificate states:

> "The funds in this account are derived from [Nauru] Government Revenue and are held by [Nauru] Government treasury as cash reserves to provide future Government Services."

119 Firebird's submissions concerning the term deposit account rely upon its transactional quality, being the fact that it was used to earn interest. There is no reason to doubt the statement in the certificate that the funds in that account are held as cash reserves against future needs for government services. The fact that they earn interest in the interim does not detract from this purpose. What are termed the "residual accounts" also relate to government purposes.

120 It is stated in the certificate with respect to each of the aircraft leasing accounts that:

> "The funds in this account were used by [Nauru] Government to provide government loans to Nauru Airlines for the procurement and maintenance of its aircraft. The government loans were provided on a non interest/non-profit basis and have been repaid."

121 Firebird also challenges the part of the certificate which relates to what is called a "fuel account". The certificate states:

> "The funds in this account are derived from payments received from customers purchasing fuel from the [Nauru] Government. The funds in this account are used by [Nauru] Government predominantly for the purpose of providing Government Services."

Consistently with its submissions in respect of the other accounts, Firebird submits that the purchase of fuel is a commercial transaction.

122 Bathurst CJ took into account[87] the particular circumstances of Nauru as relevant to explain the use to which the accounts were put and to place them in context. Relevant in this regard are the facts that Nauru is remote from other countries, is of a small geographical size and has a small population. This explains why the government of Nauru itself provides a wider range of services. A further relevant feature is that Nauru has no central bank. The accounts held in the Australian bank are effectively Nauru's source of revenue and are therefore more likely to be for government purposes.

123 The Minister for Finance further explained in his evidence that the government of Nauru is obliged to operate a national airline to provide passenger and charter services because private airlines will not provide air services to Nauru.

124 Regarding the funds in the "fuel account", the Minister for Finance explained that the Nauru government is obliged to buy and sell fuel on Nauru because no one else will. It would not be viable, commercially, for a business to do so. The fuel accounts are used to purchase fuel which is then sold on Nauru. The cost of fuel is calculated in such a way that the government could cover its costs, not to obtain profits. The "utilities account", similarly, is used to fund the provision of water and electricity to the population.

125 Evidence of this kind is relevant and necessary in order to understand that what might otherwise be thought to be a commercial enterprise is in fact no more than the provision of essential services to those resident in a foreign State by its government. It is to be expected that the circumstance of one foreign State may differ from another, especially when the foreign State in question has a small population and is remote. Contrary to Firebird's submissions, the acceptance of evidence of this kind does not involve a court in a difficult assessment about the state of development in a country.

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87 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 523-524 [176]-[177].

126 The "loan account" referred to by Firebird was used to provide loans to small businesses, on a non-profit basis. Bathurst CJ was satisfied that the funds were for a non-commercial purpose despite involving commercial transactions, because the policy behind the loans was to strengthen the economy of the country. There is no reason to doubt his Honour's conclusion.

127 The remaining account referred to by Firebird – the "phosphate compensation account" – has a dual use: to pay the salaries of government employees and to compensate land owners whose land has been used for mining operations. Bathurst CJ was satisfied that this did not involve a commercial purpose and no reason is shown to doubt the correctness of this finding.

Conclusion and orders

128 The proceedings for registration of the foreign judgment under the Foreign Judgments Act are proceedings to which s 9 of the Immunities Act applies so that Nauru is immune from the jurisdiction of Australian courts, subject to the exceptions for which the Immunities Act provides. The exception stated in s 11(1) of the Immunities Act applies to the proceedings for the registration of the foreign judgment in this case because they concerned a commercial transaction; namely, the guarantee upon which the foreign judgment was based. The immunity from jurisdiction is therefore lost. However, Nauru is immune from execution against its property represented by the bank accounts held in Australia because the purpose for which these accounts are in use, or for which the monies in them are set aside, are not commercial purposes.

129 The appeal should be dismissed, but, consistently with these reasons, the orders of the Courts below should reflect the fact that the Supreme Court of New South Wales had jurisdiction to register the foreign judgment.

130 Therefore, order 1(ii) of the Court of Appeal should be varied by deleting the order that the summons for registration of the foreign judgment filed on 9 May 2012 be dismissed and, in lieu thereof, order that order 1 of the orders of Young AJA should be set aside in so far as it ordered that the registration of the foreign judgment be set aside.

131 GAGELER J. The four principal issues in this appeal are identified by French CJ and Kiefel J as: immunity from jurisdiction; implied repeal; service; and immunity from execution. With the exception only of the issue of service, I agree with their resolution of each of those issues.

132 On the issue of service, I consider the better view to be that of Basten JA in the Court of Appeal of the Supreme Court of New South Wales[88]. It is that s 27(1) of the Immunities Act prevents a court from making an ex parte order for the registration of a foreign judgment against a foreign State.

133 State immunity was explained in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* to have emerged as a rule of customary international law by 1980[89], to derive from the principle of the sovereign equality of States[90], to require one State to accord immunity to another[91], and to be essentially procedural in nature in that it is "confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State"[92]. The rule of customary international law was specifically explained to apply to the determination of whether or not a court of one State may exercise jurisdiction to render enforceable in that State a judgment given by a court of a second State against a third State[93]. The rule was explained to require that the court[94]:

> "ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State".

The effect of the judgment of the Supreme Court of Canada in *Kuwait Airways Corp v Iraq*[95] was thereby endorsed. The effect of the judgment of the Supreme

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88 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 542 [269].

89 [2012] ICJ Reports 99 at 123 [56].

90 [2012] ICJ Reports 99 at 123 [57].

91 [2012] ICJ Reports 99 at 140 [93].

92 [2012] ICJ Reports 99 at 140 [93].

93 [2012] ICJ Reports 99 at 151-152 [128], [130].

94 [2012] ICJ Reports 99 at 152 [130].

95 [2010] 2 SCR 571.

Court of the United Kingdom in *NML Capital Ltd v Republic of Argentina*[96] was also endorsed. Despite that endorsement of the actual result in *NML Capital*, the explanation of the customary international law rule in *Jurisdictional Immunities of the State* has been noted to have corresponded more closely to the reasoning of the minority in *NML Capital*[97].

134 To the extent that there are competing constructions which are equally consistent with the purpose of the Immunities Act, a construction which conforms to customary international law as now explained in *Jurisdictional Immunities of the State* is to be preferred to a construction which would place Australia in breach of customary international law[98]. French CJ and Kiefel J demonstrate that preferred construction.

135 The preferred construction is first to construe "proceeding", in s 9 and elsewhere in Pt II of the Immunities Act, to extend to any application for the making of an order in civil jurisdiction, thereby extending the general immunity conferred by s 9 to an application for registration of a foreign judgment under s 6(1) of the Foreign Judgments Act. It is next to construe "concerns", in s 11(1) and elsewhere in Pt II of the Immunities Act, to look to the source of rights in issue in the proceeding; thereby excepting from the general immunity that is conferred by s 9 an application for registration of a foreign judgment where the rights determined by that foreign judgment arose out of a commercial transaction.

136 Neither party to the appeal, nor the Attorney-General of the Commonwealth, who intervenes by leave, argues that there has emerged a rule of customary international law which governs the international service of an initiating process on a State. The ALRC noted varying State practice in its 1984 report[99]. Service of process and the entry of default judgment have been made the subject of specific obligations in the United Nations Convention on

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96 [2011] 2 AC 495.

97 O'Keefe, "Decisions of British Courts during 2011 involving Questions of Public or Private International Law: (A) Public International Law", (2012) 82 *British Yearbook of International Law* 564 at 607.

98 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; [1995] HCA 20.

99 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 90-91 [147]-[148].

Jurisdictional Immunities of States and Their Property[100], but that Convention has not entered into force.

137 The construction of Pt II of the Immunities Act which is to be preferred because it conforms to customary international law nevertheless has consequences for the construction of Pt III. That is because the Immunities Act is structured on the assumption that an exercise of judicial power against a foreign State will occur only in a proceeding to which the foreign State is a party. Within the scheme of the Immunities Act, "judgment" in Pt III is naturally read as commensurate in scope with "proceeding" in Pt II. The term is sufficiently broad to encompass any order made by a court against a foreign State on any application made to that court in civil jurisdiction. In particular, the term is sufficiently broad to encompass an order for the registration of a foreign judgment under s 6(3) of the Foreign Judgments Act.

138 The further assumption which underlies the structure of the Immunities Act is that a foreign State will become a party to a proceeding only through service of initiating process on the foreign State in accordance with either of the methods of service for which provision is made in s 23 (which permits service by agreement) and s 24 (which permits service through the diplomatic channel). Consistently with that assumption, "initiating process" is defined in s 3(1) to mean "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", and s 26 provides that "[w]here 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".

139 The territorial focus of s 25, rendering ineffective service of an initiating process on a foreign State in Australia otherwise than in accordance with s 23 or s 24, is best explained on the basis that (other than where service is in accordance with an agreement pursuant to s 23) s 24 makes service through the diplomatic channel the exclusive method of service of the initiating process on a foreign State and treats that service as occurring outside Australia.

140 The ALRC twice stated in its 1984 report that service by agreement and service through the diplomatic channel were to be the only methods of service on a foreign State allowed under the Immunities Act[101]. The ALRC explained that "[w]here the foreign state has agreed upon a method of service that method will be followed" but recommended that "if recourse is had to the diplomatic channel

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100 2 December 2004, UN Doc A/RES/59/38 (Annex), Arts 22-23.

101 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 90-91 [148], 92 [150].

... a number of ancillary requirements be specified"[102]. The first of those ancillary requirements, which the ALRC explained under the heading "*All Service to be Service Out*", was that, although the Department of Foreign Affairs would be given the option to serve the foreign State through its diplomatic mission in Canberra, all documents presented to the Department for service comply with the rules of the issuing court for service outside the jurisdiction. It was explained that "[i]n most jurisdictions this will require the plaintiff to obtain leave to serve out, a requirement which will go far to eliminate vexatious and frivolous claims"[103]. The second of the ancillary requirements, which the ALRC explained under the heading "*Time-Limits*", was that a period of two months be allowed before the normal time limits specified in rules of court begin to run, on the basis that it seemed generally to be recognised that governments may need more time to respond to service of process than other defendants[104].

141 In conformity with those recommendations of the ALRC: s 24(5) makes clear that s 24 does not exclude the operation of any rule of court under which the leave of the court is required in relation to service of initiating process outside the jurisdiction; s 24(6) provides that service of initiating process under s 24 "shall be taken to have been effected outside the jurisdiction and in the foreign State concerned, wherever the service is actually effected"; and s 24(7) provides that the time for entering an appearance only begins to run at the expiration of two months after the date on which service of the initiating process was effected.

142 The ALRC described Pt III as extending "procedural immunities" to foreign States in addition to the "immunities from jurisdiction" conferred by Pt II[105]. That description was picked up in the explanatory memorandum to the Bill for the Immunities Act[106].

143 The scope of the procedural immunities extended to foreign States by Pt III would be severely limited were "default of appearance" in s 27(1) limited

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102 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 92 [151].

103 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 92 [151] (footnote omitted).

104 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 92 [151].

105 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 89, 136.

106 Australia, House of Representatives, Foreign States Immunities Bill 1985, Explanatory Memorandum at 16.

to failure of the foreign State to appear only as a result of some choice or neglect of the foreign State. Those procedural immunities would be even more limited were "judgment in default of appearance" confined to an order attracting the label of "default judgment" under an applicable rule of civil procedure.

144 Section 27(1) is rather to be understood as protective of a foreign State whenever a foreign State has for any reason not appeared in a proceeding. It is directed to ensuring in those circumstances that a court will not proceed to make an order against the foreign State unless the foreign State has been made a party to the proceeding as a result of service of an initiating process by a method allowed under Pt III of the Immunities Act and unless the immunity from jurisdiction conferred on the foreign State by Pt II is not infringed.

145 Section 27(1) so construed operates to prevent an Australian court from making any order against a foreign State in a proceeding in which the foreign State has not appeared unless two conditions are met. The first is that it is proved to the court that the foreign State has been served with the initiating process in accordance with either s 23 or s 24, and that the time for appearance following service has expired. The second is that the court is satisfied that the foreign State is not immune.

146 Those conditions do much to harmonise the relationship between the Immunities Act and the Foreign Judgments Act, given that a registered judgment has by operation of s 6(7)(a) of the Foreign Judgments Act the same force and effect for the purpose of enforcement as if it had been originally given in the registering court, and given the absence of any ground under s 7 of the Foreign Judgments Act requiring a court to set aside a registered judgment where the foreign State is immune from the jurisdiction of the registering court by force of s 9 of the Immunities Act. The harmonisation occurs as a result of immunity from jurisdiction being required to be addressed at the threshold, as a precondition to the making of an order for registration, after the foreign State has been served with notice of the application and has had an opportunity to appear.

147 For a court to make an order against a foreign State in contravention of s 27(1) of the Immunities Act is for that court to make an order inconsistent with the procedural immunity extended to the foreign State by that provision. On subsequent application by the foreign State under s 38 of the Immunities Act, the court is required to set such an order aside.

148 Here, there was a failure to serve notice of the application for registration of the foreign judgment on Nauru, in accordance with s 23 or s 24 of the Immunities Act or at all. The Supreme Court acted inconsistently with the procedural immunity conferred by s 27(1) of the Immunities Act in making the order for registration under s 6(3) of the Foreign Judgments Act ex parte. When Nauru subsequently applied under s 38 of the Immunities Act, the Supreme Court was required to set the order aside. The primary judge was correct to set aside

the order for registration on the ground that the application for the order for registration had not been served on Nauru, and the Court of Appeal was correct to dismiss the appeal from the primary judge insofar as Firebird challenged the making of the order on that ground.

149 The appeal should be dismissed with costs.

150 NETTLE AND GORDON JJ. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of New South Wales (Bathurst CJ, Beazley P and Basten JA)[107]. It concerns whether the first respondent, the Republic of Nauru ("Nauru"), is immune under the *Foreign States Immunities Act* 1985 (Cth) ("the *Immunities Act*") from the registration and execution in Australia under the *Foreign Judgments Act* 1991 (Cth) of a judgment of the Tokyo District Court for moneys found to be due to the appellant, Firebird Global Master Fund II Ltd ("Firebird"), under a guarantee by Nauru of the payment of Japanese bearer bonds issued by the Republic of Nauru Finance Corporation ("RONFIN").

151 The Court of Appeal held that Nauru is immune from the registration and execution of the judgment. It also held that Firebird was required to serve the initiating summons seeking orders for registration and enforcement of the Japanese judgment on Nauru in accordance with the *Immunities Act*.

152 The questions to which the appeal gives rise are:

(1) Does the exception to foreign state immunity for commercial transactions in s 11(1) of the *Immunities Act* apply to Firebird's application under the *Foreign Judgments Act* for registration of the Tokyo District Court judgment?

(2) Can the Tokyo District Court judgment be enforced against Nauru without Firebird having first served the initiating process on Nauru in accordance with Pt III of the *Immunities Act*?

(3) Does the exception to foreign state immunity for execution against commercial property in s 32 of the *Immunities Act* apply to the bank account deposits against which Firebird seeks to execute the judgment?

153 For the reasons which follow, those questions should be answered:

(1) Yes.

(2) Yes.

(3) No.

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107 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497.

The facts

154 Between 1988 and 1989, RONFIN borrowed a total of ¥9 billion in the form of Japanese bearer bonds. Payment of the bonds was guaranteed by Nauru. RONFIN defaulted on its repayment obligations and Nauru refused to meet its obligations as guarantor.

155 Firebird held ¥6.5 billion of the Japanese bearer bonds and brought proceedings in the Tokyo District Court against RONFIN and Nauru for payment of the amount due. Nauru unsuccessfully asserted sovereign immunity in the Tokyo proceedings and raised other defences which were only partially successful. Ultimately, in October 2011, Firebird obtained judgment from the Tokyo District Court against Nauru for ¥1.3 billion plus interest ("the Japanese judgment").

156 As it does not have a central bank, Nauru holds a large proportion of its money in Australia in accounts with the second respondent, Westpac Banking Corporation ("Westpac"). For this reason, Firebird sought to enforce the Japanese judgment in the Supreme Court of New South Wales by registering the Japanese judgment under the *Foreign Judgments Act*.

157 Part 53 of the Uniform Civil Procedure Rules 2005 (NSW) ("the UCPR") provides that an application for registration of a judgment under the *Foreign Judgments Act* is to be made by summons naming the judgment debtor as defendant[108]. The application may proceed without service of the summons on the defendant[109]. The Supreme Court may make a registration order on the papers[110] and only after that has been made must notice of registration be served on the defendant[111]. The defendant then has a set time in which to apply to set aside the order for registration and the judgment cannot be enforced until that time has expired without the order for registration having been set aside[112].

158 In accordance with that procedure, Firebird filed a summons in May 2012 and an order for registration was made by a Deputy Registrar of the Supreme Court of New South Wales in June 2012. In March 2013, a judge of the Supreme

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108 UCPR, r 53.2.

109 UCPR, r 53.2(3).

110 UCPR, r 53.2(4).

111 UCPR, r 53.6.

112 UCPR, rr 53.5, 53.7, 53.8; see also *Foreign Judgments Act*, s 6(3), (4), (10).

Court ordered that the order for registration could be served on the Secretary for Justice of Nauru. The order for registration was so served on 18 August 2014 and, after expiration of the time limit for an application to be made to set aside the order for registration, Firebird obtained a garnishee order against Westpac to attach to the accounts of Nauru for the amount due under the judgment.

159 Nauru then applied to set aside the order for registration and garnishee order under s 38 of the *Immunities Act* on the basis that it was entitled to immunity. The judge at first instance (Young AJA) set aside the order for registration and garnishee order on the basis that Nauru enjoyed immunity from suit and the service requirements of the *Immunities Act* had not been complied with when the registration order was made.

160 Firebird appealed to the Court of Appeal, but the appeal was dismissed. The Court of Appeal held that Nauru was entitled to immunity from suit and therefore to have the order for registration and garnishee order set aside under s 38 of the *Immunities Act*.

161 By special leave granted on 13 February 2015, Firebird now appeals to this Court.

Foreign Judgments Act

162 Part 2 of the *Foreign Judgments Act* provides for the registration and enforcement in Australia of judgments of foreign courts specified in the Foreign Judgments Regulations 1992 (Cth). The Regulations apply Pt 2 of the *Foreign Judgments Act* to judgments of the Tokyo District Court[113]. Firebird's application to the Supreme Court of New South Wales to have the Japanese judgment registered and enforced against Nauru was made under s 6 of the Act. Section 6(1) provides:

> "A judgment creditor under a judgment to which this Part applies may apply to the appropriate court at any time within 6 years after:
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> (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."

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113 Foreign Judgments Regulations, Schedule, item 16.

163 Section 6(4) of the *Foreign Judgments Act* stipulates that the court must state the "period within which an application may be made under section 7 to have the registration of the judgment set aside" and s 6(5) allows the court to extend that period.

164 Pursuant to s 6(6), a judgment is not to be registered if at the date of the application "it has been wholly satisfied" or "it could not be enforced in the country of the original court". Neither of those conditions applied to the Japanese judgment.

165 Section 7 of the *Foreign Judgments Act* is directed to setting aside the registration of a judgment. Section 7 relevantly provides:

> "(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 ... to have the registration of the judgment set aside.
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> (2) Where a judgment debtor duly applies to have the registration of the judgment set aside, the court:
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> (a) must set the registration of that judgment aside if it is satisfied:
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> (i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or
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> ...
>
> (iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
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> ...
>
> (4) In spite of subsection (3), the courts of the country of the original court are not taken to have had jurisdiction:
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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."

166 Section 17 of the *Foreign Judgments Act* provides that rules regulating the practice and procedure of a superior court and which are not inconsistent with the Act or any regulations may be made prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to the Act. It was not in dispute that this rule-making power authorises Pt 53 of the UCPR, which provides for various procedural matters including the commencement of proceedings and evidence in proceedings under the *Foreign Judgments Act* in New South Wales.

Foreign state immunity

167 Until 1975, the common law of England, and therefore probably the common law of Australia, was that the courts had no jurisdiction to entertain an action or other proceedings against a foreign state or the head of government or any department of the government of a foreign state; and an action or other proceeding against the property of any of those entities was regarded as an action or proceeding against the entity[114]. That "absolute" doctrine of sovereign immunity was founded on broad considerations of public policy, international law and comity[115] and protected a foreign state in proceedings directly against the state and also in indirect proceedings against the state's property[116]. If a foreign state had an interest in property situated in the jurisdiction, regardless of whether it was proprietary, possessory or of some other nature, an action affecting that interest would be stayed even though it was not brought against the foreign state. As Lord Atkin explained in *The Cristina*[117]:

> "[T]he courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."

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114 Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed (2012), vol 1 at 339-340.

115 *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 404 per Lord Reid.

116 See, eg, *Compania Naviera Vascongado v SS Cristina* ("*The Cristina*") [1938] AC 485 at 506-507 per Lord Wright (quoting *The Parlement Belge* (1880) 5 PD 197 at 214-215 per Brett LJ); see also at 490 per Lord Atkin.

117 [1938] AC 485 at 490.

In the same case, Lord Wright said[118]:

> "[T]he rule is not limited to ownership. It applies to cases where what [the foreign sovereign] has is a lesser interest, which may be not merely not proprietary but not even possessory."

168 As was noticed in the ninth edition of Dicey and Morris' *The Conflict of Laws*, which was published in 1973, the history of the doctrine of sovereign immunity in England up to that point had largely been one of "gradual extension combined with a restriction on the scope of the doctrine of waiver"[119]. But all of that was about to change.

169 Twenty-one years before, in *Sultan of Johore v Abubakar Tunku Aris Bendahar*[120], the Privy Council had observed that it was not finally established in England that a foreign sovereign could not be impleaded in any circumstances. In 1975, however, in *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd*[121], the Privy Council decisively rejected the absolute doctrine of foreign state immunity in relation to an action in rem and held that it was more consonant with justice in such a case to apply a "restrictive" doctrine of foreign state immunity. Just over one year later, in *Trendtex Trading Corporation v Central Bank of Nigeria*[122], which concerned an action based on a commercial letter of credit arising out of the purchase of cement, the English Court of Appeal held that, as a matter of contemporary international law, the restrictive theory of foreign state immunity should generally be applied.

170 The prospects of further development in the English common law of foreign state immunity were thereafter effectively brought to an end by the enactment of the *State Immunity Act* 1978 (UK) ("the SIA").

171 Three years later, however, in *I Congreso del Partido*[123], a 1981 decision concerning a transaction undertaken between 1973 and 1975 (before the SIA came into force), the House of Lords unconditionally adopted the restrictive

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118 [1938] AC 485 at 507.

119 Dicey and Morris, *The Conflict of Laws*, 9th ed (1973) at 143.

120 [1952] AC 318 at 343.

121 [1977] AC 373 at 397-403.

122 [1977] QB 529.

123 [1983] 1 AC 244.

doctrine of foreign state immunity as part of the common law of England applicable to transactions not covered by the SIA. Lord Wilberforce delivered the leading speech. After referring with evident approval to the decision in *Trendtex*, his Lordship continued[124]:

> "The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of 'par in parem' which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate.
>
> The relevant exception, or limitation, which has been engrafted upon the principle of immunity of states, under the so called 'restrictive theory,' arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations: (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions."

172 As Lord Wilberforce observed, in some cases the process of deciding upon the character of the relevant act presents no difficulty[125]. In other situations, "it may not be easy to decide whether the act complained of is within the area of non-immune activity or is an act of sovereignty wholly outside it"[126]. Based, however, on a number of American and European decisions, his Lordship concluded that[127]:

> "[I]n considering, under the 'restrictive' theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to

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124 [1983] 1 AC 244 at 262.

125 [1983] 1 AC 244 at 263-264.

126 [1983] 1 AC 244 at 264.

127 [1983] 1 AC 244 at 267; see also at 272 per Lord Diplock, 276 per Lord Edmund-Davies, 277 per Lord Keith of Kinkel, 278 per Lord Bridge of Harwich.

engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

The Australian Law Reform Commission report

173 As was noted in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission*[128], the *Immunities Act* was based on a comprehensive report by the Australian Law Reform Commission ("the ALRC") which traced the development of the common law doctrine of foreign state immunity from the former rule of absolute sovereign immunity to the now current restrictive view of foreign state immunity[129]. The report proposed Australian legislation on the topic which was designed to reflect the more restrictive view of the common law immunity that had been taken in other countries[130] and adopted in their legislation[131]. For present purposes, the ALRC report is significant because, although it cannot displace the clear meaning of the *Immunities Act*, it assists in ascertaining the legislative context and purpose and the particular mischief that the legislation is seeking to remedy[132].

Immunity from the jurisdiction of Australian courts

Immunities Act

174 Part II of the *Immunities Act* (ss 9-22), which is headed "Immunity from jurisdiction", is exhaustive of the common law and, in s 9, indicates that the *Immunities Act* provides the sole basis for foreign state immunity in Australian courts. Section 9 is, however, expressly subject to other provisions of the Act, of

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128 (2012) 247 CLR 240 at 245 [7]; [2012] HCA 33.

129 See Australia, House of Representatives, Foreign States Immunities Bill 1985, Explanatory Memorandum at 2; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 August 1985 at 141-143; Australia, Senate, *Parliamentary Debates* (Hansard), 8 October 1985 at 795-796.

130 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 129 [2].

131 See, eg, in the United States of America, the *Foreign Sovereign Immunities Act* of 1976, 28 USC §§1602-1611; and, in the United Kingdom, the SIA.

132 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; see also *Acts Interpretation Act* 1901 (Cth), s 15AB.

which the most important for present purposes is the exclusion by s 11(1) of the immunity in a proceeding *in so far as* the proceeding concerns a commercial transaction.

175 Section 9 of the *Immunities Act* provides that:

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

176 Section 11 is headed "Commercial transactions" and provides that:

> "(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:
>
> (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:
>
> (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."

177 As was concluded in *Garuda*[133], the phrase "in so far as" in s 11(1) indicates that the provision is capable of application to a proceeding which is

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133 (2012) 247 CLR 240 at 246 [11].

only partly concerned with a commercial transaction. But in *Garuda* it was unnecessary to consider what effect that had on the interaction between the *Immunities Act* and the *Foreign Judgments Act*.

The decision in NML

178 Section 11(1) of the *Immunities Act* is, to some extent, based on s 3(1) of the SIA[134]. The latter provides as follows:

> "A State is not immune as respects proceedings relating to—
>
> (a) a commercial transaction entered into by the State; or
>
> (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."

179 In *NML Capital Ltd v Republic of Argentina*[135], a majority of the Supreme Court of the United Kingdom concluded that s 3(1)(a) did not apply to a proceeding to enforce a foreign judgment under the *Civil Jurisdiction and Judgments Act* 1982 (UK). Lord Mance JSC delivered the principal judgment in favour of that interpretation. His Lordship reasoned, in substance, as follows:

> (1) At the time of enactment of the SIA, the rules of court provided no basis for obtaining leave for service out of the jurisdiction of a claim to enforce a foreign judgment or arbitral award. But s 12(7) of the SIA expressly maintained the need to obtain leave to serve out of the jurisdiction where required by the rules of court. The failure to provide for a means of obtaining leave to serve out of the jurisdiction in relation to the enforcement of a foreign judgment implied that, as originally enacted, the SIA was not intended to apply to proceedings for the enforcement of foreign judgments. Thus foreign state immunity in relation to such proceedings continued to be governed by the common law until identified provisions of the SIA were expressly applied to the enforcement of

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134 See Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 51-55 [90]-[93], 133; Australia, House of Representatives, Foreign States Immunities Bill 1985, Explanatory Memorandum at 2; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 August 1985 at 141-143; Australia, Senate, *Parliamentary Debates* (Hansard), 8 October 1985 at 795-796.

135 [2011] 2 AC 495.

foreign judgments by s 31 of the *Civil Jurisdiction and Judgments Act*[136].

(2) Section 3(1) was calculated to adopt a restrictive theory of foreign state immunity. But, at the time of enactment of s 3(1), the English common law of foreign state immunity was unsettled. It was not until 1981 that it was finally determined by the House of Lords in *I Congreso del Partido* that foreign states were not immune under English common law in respect of commercial transactions. The uncertainty as to the extent of foreign state immunity at common law at the time of enactment of s 3(1) of the SIA raised a question as to whether the drafters of the SIA appreciated or covered the full possibility allowed by international law. More specifically, it threw doubt on whether they intended s 3(1)(a) of the SIA to apply to proceedings to enforce a foreign judgment or whether the drafters intended to leave that matter over to be dealt with later, as ultimately it was, in the *Civil Jurisdiction and Judgments Act*[137].

(3) If the SIA had lifted foreign state immunity in respect of foreign judgments, it had done so in a very haphazard way. For example, under s 2, a foreign state was not immune as respects proceedings where it submitted to the jurisdiction of the courts in the United Kingdom but s 3 did not lift foreign state immunity in relation to the enforcement of foreign judgments where the foreign state had submitted to the jurisdiction of the foreign court. There were corresponding anomalies in ss 4-8. And there was no mention in the *Civil Jurisdiction and Judgments Act* of it being designed to replace such a haphazard relaxation of immunity with the comprehensive scheme provided for in the latter Act[138].

(4) Nor was it appropriate to ascribe an ambulatory meaning to "relating to a commercial transaction", such that even though it did not at first include the enforcement of a foreign judgment relating to a commercial transaction, it could be taken to have assumed that meaning once it was established at common law that the restrictive doctrine of foreign state immunity would henceforth be applied[139].

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136 [2011] 2 AC 495 at 533-534 [90]-[91].

137 [2011] 2 AC 495 at 534 [91].

138 [2011] 2 AC 495 at 534-535 [92]-[96].

139 [2011] 2 AC 495 at 535-536 [97].

The judgments below

180 The judgments given in the Court of Appeal were in large measure directed to a comparison of s 11 of the *Immunities Act* with s 3(1) of the SIA and to the applicability of the reasoning in *NML* to s 11.

181 Bathurst CJ, with whom Beazley P agreed, considered the broader and narrower constructions of s 3(1) of the SIA in *NML* and found that little assistance was to be gained from the extrinsic materials relevant to the *Immunities Act* because the ALRC report did not deal with the question of whether the commercial transaction exception to foreign state immunity applied to the proceedings or the underlying transaction. His Honour therefore approached the question by focusing on the text of the provision considered in the context of the *Immunities Act* as a whole. He considered that the words "proceeding concerns" suggest that what is being looked at is the issues raised by the proceedings themselves and that that was supported by the words "in so far". He also rejected the idea of s 11(1) being given an ambulatory meaning so as to pick up the common law's now changed approach to foreign state immunity. He concluded that[140]:

> "In circumstances where the legislation in its terms did not consider the question of registration of foreign judgments, where at the time it was passed the extent of the restriction on the immunity was uncertain and the words in question are narrower than the words 'relating to' in the [SIA], it does not seem to me appropriate to adopt an 'updated' construction. It is of significance in this regard that no amendment to the Immunities Act was made consequent upon the enactment of the Foreign Judgments Act."

182 Basten JA considered that it was significant that the ALRC's proposals made no reference to an intention to cover registration of foreign judgments and, in his Honour's view, that consideration, coupled with the ALRC's express recommendation of provision for immunity in relation to the exercise of supervisory jurisdiction in respect of arbitrations, weighed heavily against construing s 11(1) as an exception to immunity with respect to proceedings for the registration of a foreign judgment.

183 Like Bathurst CJ, Basten JA concluded that there were sound reasons not to apply an "updated construction" to s 11(1). His Honour stated that was in part "because the relationship between Australian and independent sovereign states is

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140 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 514 [86].

very much a matter for the Federal government to assess and determine, rather than for a state court exercising federal jurisdiction"[141].

The application of s 9

184 Firebird contended that an application for the registration of a foreign judgment under the *Foreign Judgments Act* was not a "proceeding" within the meaning of s 9 of the *Immunities Act*, and therefore that Nauru was not entitled to any immunity from that process.

185 That contention must be rejected. As was explained in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*[142], an application to a State Supreme Court for the registration of a foreign judgment under the *Foreign Judgments Act* is, from its inception, a proceeding in a matter within the federal jurisdiction of the Supreme Court. Since the evident purpose of s 9 of the *Immunities Act* is to provide comprehensively for immunity from all forms of jurisdiction in all forms of proceedings in Australian courts, it cannot seriously be doubted that s 9 affords immunity against the exercise by a State Supreme Court of federal jurisdiction in a proceeding for the registration of a foreign judgment under the *Foreign Judgments Act*.

The proper construction of s 11(1)

186 Nauru sought to uphold the Court of Appeal's construction of s 11(1) of the *Immunities Act* on the basis of what it submitted were close similarities between s 11(1) and s 3(1) of the SIA and therefore between this case and the decision in *NML*. But, despite the apparent similarities between s 11(1) of the *Immunities Act* and s 3(1) of the SIA, the starting point for the proper construction of s 11(1) of the *Immunities Act* is not the decision in *NML*. It is the words of s 11(1)[143]. And, according to the plain and ordinary meaning of the words of s 11(1), a proceeding for the registration of a foreign judgment for a money sum owed under a commercial transaction is a proceeding which "concerns" a commercial transaction.

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141 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 550 [307].

142 (2015) 89 ALJR 975 at 984-985 [51]-[54]; [2015] HCA 36.

143 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Momcilovic v The Queen* (2011) 245 CLR 1 at 175 [441] per Heydon J; [2011] HCA 34.

187 The fact that such a proceeding might also be described as one which concerns the registration of a foreign judgment does not detract from the semasiological propriety of describing it as a proceeding which concerns a commercial transaction. The connecting term "concerns" connotes a relationship between the proceeding and a commercial transaction. There is nothing in that term that suggests that a proceeding which concerns a commercial transaction must be one that bears only that single character.

188 Nauru submitted that the subject matter of the registration proceeding is the Japanese judgment rather than the underlying bond instruments. But that submission obscures the practical reality that, from the perspective of a party to a commercial transaction that is seeking to recover a debt owed to it by a foreign state, there is no distinction between initiating proceedings, the registration of the judgment in another country and the steps taken to enforce that judgment against property of the foreign state. Although the nature or legal form of the proceeding varies at each stage, in substance each stage is directed towards the same end of enforcing the claimant's rights arising from a commercial transaction. Thus, each stage of the proceeding can fairly be said to "concern" that commercial transaction.

189 The next step is to note that there is no indication elsewhere in the *Immunities Act* or beyond it of a statutory purpose of exempting proceedings for the registration of foreign judgments from the operation of s 11(1). The *Immunities Act* was enacted to give effect to the restrictive doctrine of foreign state immunity. In terms, it does so by denying immunity in relation to proceedings, whatever their nature, which concern a commercial transaction. There is nothing in that or otherwise implicative of an intention to exclude a proceeding for the registration of a foreign judgment from the class of proceedings to which immunity does not attach.

190 Thirdly, according to ordinary canons of statutory construction, an Act must be construed so far as possible to give the same meaning to the same words wherever those words appear in the statute[144]. It is clear that "proceeding" in s 9 includes a proceeding for the registration of a foreign judgment under the *Foreign Judgments Act*. Otherwise, there would be no provision for the immunity of foreign states from proceedings for the registration of foreign judgments. In the absence of a contrary indication, it is to be presumed that "proceeding" has the same meaning in s 11(1). So, where s 11(1) refers to a proceeding which concerns a commercial transaction, it is prima facie to be read

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144 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J; [1975] HCA 41.

as including a proceeding for the registration of a foreign judgment under the *Foreign Judgments Act* which concerns a commercial transaction.

191 It was submitted for Nauru that the fact that s 17 of the *Immunities Act* makes specific provision for proceedings for the supervision and enforcement of foreign arbitral awards, but does not make specific provision for immunity in relation to the registration of foreign judgments under the *Foreign Judgments Act*, implies a statutory purpose that s 11(1) not extend to the registration and enforcement of foreign judgments under the *Foreign Judgments Act*.

192 That argument is unconvincing. Although the bulk of arbitrations are concerned with commercial transactions, there are some which are concerned with matters other than commercial transactions[145]. The evident purpose of s 17 is to provide comprehensively for immunity in relation to proceedings for the supervision of arbitral proceedings and the enforcement of arbitral awards regardless of whether or not they concern commercial transactions. The exemption for proceedings which concern commercial transactions would not achieve that objective.

193 A further difficulty, as will be seen, is that s 17(2)(a) of the *Immunities Act* provides, inter alia, for exemption from immunity in relation to proceedings which concern a commercial transaction where, as a result of an agreement entered into under s 11(2)(a)(ii), the operation of s 11(1) has been excluded.

194 It was next contended on behalf of Nauru that, because the exceptions from immunity provided for in ss 12-16 of the *Immunities Act* all have some link to matters *in Australia*, it is unlikely that s 11(1) is directed to a proceeding to enforce a *foreign* judgment by registration under the *Foreign Judgments Act*.

195 In general terms, s 12 of the *Immunities Act* provides that a foreign state is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment made in Australia or to be performed wholly or partly in Australia. Section 13 provides that a foreign state is not immune in a proceeding in so far as the proceeding concerns death, personal injury or loss or damage to tangible property caused by an act done or omitted to be done in Australia. Section 14 provides that a foreign state is not immune in a proceeding in so far as the proceeding concerns a state's interest in, possession of or use of immovable property in Australia or its interest in property which arose by way of gift made in Australia. Section 15 provides that a foreign state is not immune in a proceeding in so far as the proceeding concerns the ownership,

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145 See, eg, *SD Myers Inc v Government of Canada* 40 ILM 1408 (2001); *Marvin Feldman v Mexico* 42 ILM 625 (2003).

registration or protection of intellectual property in Australia. Section 16 provides that a foreign state is not immune in a proceeding in so far as the proceeding concerns its membership, or a right or obligation that relates to its membership, of a body corporate, unincorporated body or partnership that has a member that is not a foreign state or the Commonwealth and is incorporated or established under the law of Australia or is controlled from or has its principal place of business in Australia. In summary, therefore, ss 12-16 apply where a proceeding concerns an act done or omitted to be done in Australia.

196 It was contended that, while that makes sense if s 11(1) is construed as limited to proceedings that are directly concerned with the subject matter of a dispute, it would make no sense if s 11(1) extended to a proceeding for the registration of a foreign judgment concerning the subject matter of a dispute. In Nauru's submission, that is a strong indicator that a proceeding for the enforcement of a foreign judgment which concerns a commercial transaction is not a proceeding which concerns a commercial transaction within the meaning of s 11(1).

197 As will be appreciated, that argument is based on some of the observations of Lord Mance JSC in *NML* which are summarised above[146]. With respect, however, it should be rejected. There is nothing surprising or anomalous about a foreign state being amenable to the jurisdiction of an Australian court under one of ss 12-16 in a proceeding under the *Foreign Judgments Act* to register a foreign judgment which concerns one of the matters the subject of ss 12-16.

198 As may be discerned from the ALRC report, the purpose of each of the exceptions to immunity provided for in ss 12-16 is to deal specifically with the different considerations which apply to different kinds of cases. So, in the case of employment contracts which are provided for in s 12, the basis of the exception to immunity is that, where a foreign state enters into an employment contract in Australia or which is to be performed in Australia, the interest of Australia in providing a local forum outweighs the interest of the foreign state in exclusive jurisdiction[147]. In the case of personal injuries and property claims dealt with in s 13, the basis of the exception to immunity is that, where a foreign state wrongfully causes death or injury or damage to tangible property in Australia, there is no merit in requiring the plaintiff to litigate in the defendant's national courts when Australian courts can provide the obvious and convenient

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146 See above at [179].

147 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 55-59 [94]-[100].

local remedy[148]. In the case of immovable property in Australia, which is dealt with in s 14, the basis of the exception to immunity is the generally accepted proposition of public international law that there should be no immunity in actions arising out of the ownership by a foreign state of immovable property in the forum[149]. In the case of intellectual property, notwithstanding that it was recognised that there would be a considerable degree of overlap between s 15 and one or other of the more general provisions, particularly the commercial transaction and property exemptions, s 15 was included to provide specific guidance to courts rather than leaving them to work out solutions on the basis of the more general provisions and because the overlap was not complete[150]. Similarly, in the case of s 16, although it was recognised that, in many cases concerning disputes which might arise out of a foreign state's participation in a body corporate, unincorporated association or partnership, the foreign state would be denied immunity under the commercial transaction exemption, it was considered preferable to include a specific provision to ensure that all relevant matters were covered and to provide greater precision[151].

199 Taken together, ss 12-16 thus reflect the idea that, although a foreign state is, generally speaking, immune to the jurisdiction of Australian courts, there are some acts and omissions and some forms of property which are so closely connected to Australia that it is appropriate that a foreign state be amenable to the jurisdiction of Australian courts in proceedings concerning such matters.

200 It is true that, if a proceeding concerning one or other of the matters the subject of ss 12-16 is taken to include a proceeding to register a foreign judgment concerning one or other of those matters, the basis on which the foreign court assumes jurisdiction to render the foreign judgment will very likely be something other than that the proceeding concerns an act or omission or some form of property which is so closely connected to Australia that it is appropriate that the foreign state be amenable to the jurisdiction of Australian courts.

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148 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 66-69 [113]-[115].

149 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 69-70 [116]-[118].

150 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 59-60 [101]-[103].

151 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 64-65 [110].

201 It is, however, not the function of the *Immunities Act* to regulate the susceptibility of a foreign state to the jurisdiction of the foreign court. As is recognised in s 7(4)(c) of the *Foreign Judgments Act*, Australian courts are concerned with whether the foreign state would have immunity according to the rules of public international law. And, if the foreign state is amenable to the jurisdiction of the foreign court according to the rules of public international law, it is then both logical and appropriate that the foreign state be amenable to the jurisdiction of an Australian court in a proceeding under the *Foreign Judgments Act* to enforce the foreign judgment, provided the judgment concerns one of the exceptions to immunity contemplated by ss 12-16 of the *Immunities Act*.

202 The same holds true for s 11(1). The exception to immunity provided for in s 11(1) in relation to a proceeding which concerns a commercial transaction rests on the basic principle that a foreign state should not be immune from the jurisdiction of Australian courts in a commercial matter within the ordinary jurisdiction of Australian courts. Logic dictates a similar approach in relation to a proceeding to register a foreign judgment concerning a commercial transaction. A judgment of a foreign court against a foreign state in a proceeding which concerns a commercial transaction may not be registered in Australia under the *Foreign Judgments Act* if the foreign state is immune under the rules of public international law from the jurisdiction of the foreign court[152]. But, if the foreign state is not immune from the jurisdiction of the foreign court under the rules of public international law, it is both logical and appropriate that the foreign state be amenable to the jurisdiction of an Australian court in a proceeding under the *Foreign Judgments Act* to register the foreign judgment, if the judgment concerns a commercial transaction within the meaning of s 11(1).

203 The Solicitor-General of the Commonwealth highlighted the fact that, under s 17(2)(a) of the *Immunities Act*, if a foreign state has contracted out of the s 11(1) exemption from immunity in relation to proceedings which concern a commercial transaction but has agreed to submit a dispute about the commercial transaction to arbitration, the foreign state is not immune from the jurisdiction of an Australian court in a proceeding for the enforcement of the arbitral award. The Solicitor-General submitted that that was inconsistent with interpreting s 11(1) such that a proceeding under the *Foreign Judgments Act* to register a foreign judgment concerning the commercial transaction is a proceeding which concerns a commercial transaction. He argued that, if a proceeding for the registration of a foreign judgment which concerns a commercial transaction is a proceeding to which s 11(1) applies, a proceeding for the enforcement of an arbitral award which concerns a commercial transaction would also be a

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152 *Foreign Judgments Act*, s 7(4)(c).

proceeding to which s 11(1) applies and, therefore, that there would be no need for the special provision for the enforcement of an arbitral award under s 17(2).

204 That argument should also be rejected. Plainly enough, if a proceeding to register a foreign judgment which concerns a commercial transaction is properly described as a proceeding to which s 11(1) applies, a proceeding for the enforcement of an arbitral award about a dispute which concerns a commercial transaction might properly be described as a proceeding to which s 11(1) applies. *Non constat*, however, that there is no need for s 17(2) in order to render such an award enforceable. In terms, s 17(2) operates only where a foreign state has contracted out of the operation of s 11(1) pursuant to s 11(2)(a)(ii) (with the consequence that the arbitral award cannot be enforced pursuant to s 11(1)). Were it not for s 17(2), there would be no means of enforcing the award.

205 It is also to be observed that, as appears from the ALRC report[153], s 17(1) was intended to reflect the wider view that, where a foreign state agrees to arbitration, it should be amenable to the supervisory jurisdiction of the court whether or not it would have been immune from the jurisdiction of the court in a proceeding concerning the underlying transaction; whereas s 17(2) is intended to reflect the idea that, in the case of a proceeding to enforce a foreign arbitral award, a foreign state should be immune notwithstanding that it agreed to the arbitration unless the foreign state would not be immune in a proceeding concerning the underlying transaction or event the subject of the award. In point of principle, that accords with the way that s 11(1) applies to a proceeding to enforce a foreign judgment where the foreign state would not be immune from the jurisdiction of an Australian court in a proceeding directly concerning the underlying transaction.

206 Nauru drew attention to s 21 of the *Immunities Act*, which provides that, if a foreign state is not immune in so far as a proceeding concerns a matter, the foreign state is not immune in any other proceeding arising out of or relating to the first-mentioned proceeding. Nauru contended that, if a proceeding to register a foreign judgment which concerns a commercial transaction fell within the meaning of s 11(1), it would follow more generally that any proceeding to enforce a judgment was a proceeding concerning the underlying transaction the subject of the judgment. Thus, it was submitted, s 21 would have no work to do.

207 That argument should similarly be rejected. Section 21 is directed generally to proceedings arising out of other proceedings from which a foreign state is not immune. The absence of immunity from the other proceedings will in

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153 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 61-63 [105]-[107].

each case depend on the nature of the other proceedings. For example, in the case of a proceeding for the enforcement of a foreign judgment which concerns a commercial transaction, the absence of immunity will be because the proceeding concerns a commercial transaction. By contrast, in the case of a proceeding to enforce a foreign arbitral award, where s 11(1) has been excluded by agreement under s 11(2)(a)(ii), the absence of immunity under s 17(2) will be because the foreign state agreed to submit the underlying dispute to arbitration. More precisely, lack of immunity under a provision like s 11(1) will rest on the fact that a proceeding concerns a matter but lack of immunity under a provision like s 17(2) will rest on agreement. Accordingly, while it may not have been necessary to have a provision like s 21 in cases arising under provisions like s 11(1), it plainly was necessary, or at least highly desirable, to have a provision like s 21 in cases arising under provisions like s 17(2). This being so, it would be drawing a very long bow to accept that the fact that s 21 applies generally to all cases implies that s 11(1) should not be construed according to its natural and ordinary meaning.

208 Next, with respect to the construction of s 11(1), it is to be recalled that, in following the reasoning of a majority in *NML*, the Court of Appeal took the view that s 11(1), as enacted, excludes registration of a foreign judgment from the scope of the exception and it does not have an ambulatory or "updated" operation sufficient to import subsequent public international law developments in the doctrine of foreign state immunity[154].

209 As will be apparent from the reasons already given, however, the text of s 11(1) should not be construed as excluding proceedings for the registration of foreign judgments under the *Foreign Judgments Act*. Hence, for present purposes, it is unnecessary to consider whether the provision has an ambulatory or "updated" operation sufficient to accommodate developments in the public international law doctrine of foreign state immunity from time to time.

210 Finally on this aspect of the matter, because the *Immunities Act* is capable of operating harmoniously with the *Foreign Judgments Act*[155], Firebird's submission that the *Foreign Judgments Act* impliedly repealed the *Immunities Act* must be rejected.

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154 See, eg, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Reports 99.

155 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 137-138 [18]; [2006] HCA 5.

The need for service in accordance with the *Immunities Act*

211 As was earlier recorded, the Court of Appeal held that Firebird was required to serve Nauru before applying to register the Japanese judgment under the *Foreign Judgments Act*[156].

212 Firebird challenged that conclusion on the basis that the only obligations of service imposed by the *Immunities Act* are under s 27 in relation to judgments in default of appearance and under s 28 in relation to the enforcement of default judgments. It was submitted that registration of a judgment under the *Foreign Judgments Act* should not be conceived of as a default judgment or a judgment entered in default of appearance within the meaning of Pt III of the *Immunities Act*. Firebird submitted that, apart from ss 27 and 28, the only function of Pt III is to provide an exclusive means of service in cases where service is required by some other statutory provision or rule of court dehors Pt III; and, it was said, that view of the matter is supported by parts of the ALRC report which show that the aim of Pt III was to provide a means of service which would eliminate the uncertainties and other problems which, until then, had attended other forms of service on foreign states[157].

213 There is force in those contentions. According to ordinary conceptions, an order for the registration of a foreign judgment under the *Foreign Judgments Act* is not a judgment in default of appearance or a default judgment. As was held in *Hunt v BP Exploration Co (Libya) Ltd*[158] with respect to the Queensland predecessor of the *Foreign Judgments Act*, an application for registration of a foreign judgment does not involve an action *in personam* or, therefore, necessitate service of the initiating process in or outside the jurisdiction. Instead, the *Foreign Judgments Act* contemplates that an application for registration of a foreign judgment will be made ex parte and that notice of registration will be given to the judgment debtor, who may then apply to set aside the registration under s 7.

214 The argument to the contrary, which found favour with the Court of Appeal, is based on s 3(1) of the *Immunities Act*, which defines "initiating process" as "an instrument (including a statement of claim, application,

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156 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 509 [57] per Bathurst CJ, 529 [210] per Beazley P, 542-543 [269]-[270] per Basten JA.

157 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 89-94 [146]-[153].

158 (1980) 144 CLR 565 at 573 per Stephen, Mason and Wilson JJ; [1980] HCA 7.

summons, writ, order or third party notice) by reference to which a person becomes a party to a proceeding", and s 3(6), which provides that "[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". Rule 53.2 of the UCPR provides that proceedings for registration of a judgment under Pt 2 of the *Foreign Judgments Act* are to be commenced in the Supreme Court by summons and that, in any such proceedings, the judgment creditor is to be the plaintiff and the judgment debtor is to be the defendant. Thus, it was said, although the UCPR contemplate that an application for registration of a foreign judgment will ordinarily proceed ex parte, the summons by which the proceeding for the registration of a foreign judgment is commenced in accordance with r 53.2 is an "initiating process" within the meaning of s 3(1) of the *Immunities Act* and, because registration of a foreign judgment gives the foreign judgment the same effect as a judgment of the registering court entered on the date of registration[159], the process for registration is sufficiently akin to a default judgment to be classed as a "like procedure" within the meaning of s 3(6).

215 That argument should be rejected for at least three reasons. First, there is no *default* involved in the registration of a foreign judgment. As was noted in *BP Exploration*, it is a designedly ex parte procedure. Secondly, s 6(4) of the *Foreign Judgments Act* provides that the Australian court must specify a period in which the judgment debtor may apply to set aside the order for registration, and, as was also noted in *BP Exploration*[160], it is implicit in s 6(4) that the Australian court will require service of the notice of the registration of judgment on the judgment debtor within that period. Thirdly, s 7(2) allows the judgment debtor to apply to set aside the order for registration on the ground that it is not a judgment to which Pt 2 of the *Foreign Judgments Act* applies, which among other things would include a case in which the judgment debtor is immune from the jurisdiction of the Australian court. Taking those considerations together, the scheme of the *Foreign Judgments Act* in its intersection with the *Immunities Act* presents as being that, despite any possibility of a judgment debtor being immune to the jurisdiction of an Australian court, the application for registration of a foreign judgment may proceed ex parte – as it would in the case of a judgment debtor who was not immune to the jurisdiction of the Australian court – with the issue of immunity being determined when and if the judgment debtor seeks to set aside the order for registration on the ground of immunity to the jurisdiction of the Australian court. Accordingly, the judgment the subject of registration would not be one to which the *Foreign Judgments Act* applies.

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

160 (1980) 144 CLR 565 at 573-575 per Stephen, Mason and Wilson JJ.

216 Of course, that does not mean that an Australian court cannot require service of the summons before proceeding to registration where that is considered to be expedient. The UCPR allow for that possibility[161] and, in any event, a court may so require if in doubt about the amenability of a judgment debtor to the court's jurisdiction. There may also be practical difficulties associated with some foreign states responding to a notice of the registration of a foreign judgment within the minimum 14-day requirement for such an application under the UCPR[162]. Thus, where a foreign state is a judgment debtor, a court would usually set a longer period for an application to be made to set aside the registration under s 6(4) of the *Foreign Judgments Act* and, similarly, there may be good reason to extend that period following an application under s 6(5) by a foreign state. The point remains, however, that the rules in this respect are facultative. They enable appropriate orders for service to be made according to the facts and circumstances of each case, rather than imposing an inevitable and ineluctable service requirement regardless of the facts and circumstances of the case.

Immunity from execution against property of foreign states

217 Part IV of the *Immunities Act* provides separately for immunity of the property of a foreign state from execution of a judgment, order or arbitral award. As appears from the ALRC report, that is so because, although the restrictive doctrine of immunity from jurisdiction reflects a plurality of principles embodied in the general exception to immunity concerning commercial transactions and the specific exceptions to immunity provided for in ss 12-17, the sole criterion of what property of a foreign state remains immune from execution is the distinction between property used for governmental, public or "sovereign" purposes and property used for private or commercial purposes[163].

218 As is also highlighted in the ALRC report, the criteria of commerciality for the purposes of the exception to immunity from jurisdiction differ from those of commerciality for the purposes of the exception to immunity from execution[164]. In the case of the exception to immunity from jurisdiction, the sense of what is "commercial" is to be discerned from the nature of the specific

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161 UCPR, r 53.2(3).

162 UCPR, r 53.5.

163 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 75 [124].

164 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 75-77 [125].

transaction[165], with the consequence that "purpose" or "motive" are largely beside the point. By contrast, in the case of the exception to immunity from execution, "purpose" is the principal consideration and "commercial purpose" is defined in s 3(5) as including "a trading, a business, a professional and an industrial *purpose*" (emphasis added).

219 Pursuant to s 30 of the *Immunities Act*, the property of a foreign state is immune from any process or order of an Australian court for the satisfaction or enforcement of a judgment "[e]xcept as provided by this Part". Section 32(1) creates a general exception to this immunity in relation to "commercial property" and s 32(3) provides that for the purposes of the 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."

220 Section 41 of the *Immunities Act* states that "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 ... 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". In this matter, such a certificate was given by the Consul-General for Nauru, Mrs Chitra Jeremiah ("the s 41 certificate"). Additionally, the Honourable David Adeang MP, Minister of Finance and Minister of Justice for Nauru swore an affidavit and gave oral evidence about the purposes of Nauru's bank accounts.

Comparison between the Immunities Act and the US, UK and Canadian approaches

221 In the United States, the *Foreign Sovereign Immunities Act* of 1976[166] allows for the execution of a judgment against foreign state property which "is or was used for the commercial activity upon which the claim is based"[167] and provides that the commercial character of an activity is to be determined by

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165 *Immunities Act*, s 11.

166 28 USC §§1602-1611.

167 28 USC §1610(a)(2).

reference to its "nature" rather than its "purpose"[168]. By contrast, under Pt IV of the *Immunities Act*, a foreign state's property is immune from execution unless it is used "substantially for commercial purposes"[169].

222 In so providing, Pt IV of the *Immunities Act* is designedly different from the way in which, in the United Kingdom, the SIA links the test for the immunity of a foreign state's property from enforcement to the definition of "commercial *transaction*" that applies to the immunity of a foreign state from jurisdiction[170]. As was emphasised in the ALRC report[171], Pt IV is thereby calculated to avoid the result in *Alcom Ltd v Republic of Colombia*[172], in which the English Court of Appeal held that, since all contracts for goods and services and all financial transactions, irrespective of purpose, were defined as commercial transactions, money held in a bank account to pay the running expenses of an embassy was money used for commercial purposes rather than for the governmental purpose of running the embassy. Admittedly, that decision was subsequently overturned by the House of Lords on the basis that, under the SIA, it was incumbent on the judgment creditor to prove that all of the moneys standing to the credit of the account were earmarked by the foreign state solely for being drawn upon to settle liabilities incurred in commercial transactions (subject only to *de minimis* exceptions)[173]. But the House of Lords did not demur to the proposition that moneys drawn to pay for the supply of goods and services to the mission would otherwise be used for commercial purposes.

223 It is different under the purpose-based approach which applies under Pt IV of the *Immunities Act*. In determining whether property is held by a foreign state for a commercial purpose, it is necessary to bear in mind the individual circumstances of the foreign state. What may properly be regarded as a commercial purpose in the context of one foreign state's circumstances may well

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168 28 USC §1603(d). See also *Republic of Argentina v Weltover Inc* 504 US 607 at 614 (1992); *Connecticut Bank of Commerce v Republic of Congo* 309 F 3d 240 at 259-260 (2002).

169 *Immunities Act*, s 32(3)(a).

170 SIA, ss 3(3), 17(1) (emphasis added).

171 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 76-77 [125].

172 [1983] 3 WLR 906 at 912-913 per Sir John Donaldson MR; [1984] 1 All ER 1 at 5-6.

173 *Alcom Ltd v Republic of Colombia* [1984] AC 580 at 604 per Lord Diplock.

be considered a governmental purpose in the context of another state's circumstances. That point was made by Steele J in *Carrato v United States of America*[174] in relation to the Canadian approach to the commercial activity exception to immunity from jurisdiction (which requires the court to consider both the nature of the act and also its purpose). As Steele J said: "acts that some persons might normally consider to be commercial are not so when they are done in the performance of a sovereign act of State"[175]. An activity can also be multi-faceted and so, for the purposes of the commercial activity test of immunity from jurisdiction, "it is necessary to consider which aspect of that activity is most relevant to the proceedings"[176]. Parity of reasoning dictates that the same is true of purpose.

224 In Canada, where the assessment of whether a transaction comes within the commercial transaction exception to immunity depends on purpose as well as the nature of the transaction, it is considered that, if a sovereign state employs a state-owned corporation to regulate or control a market, the question of immunity will turn on "whether the particular activities by the government shareholder/creator are ordinary aspects of its role"[177]. Likewise, under Pt IV of the *Immunities Act*, where immunity from execution turns on whether property is used for a commercial purpose, the question of immunity will depend on whether the activities for which the property is used are ordinary aspects of the governmental functions of the sovereign state.

The bank accounts of Nauru

225 The Court of Appeal held that all of the bank accounts which had been garnisheed were exempt from execution because they were either used for governmental purposes or not used but set aside for a non-commercial purpose,

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174 (1982) 141 DLR (3d) 456.

175 (1982) 141 DLR (3d) 456 at 459, applying *Democratic Republic of Congo v Venne* [1971] SCR 997. See also *Lorac Transport v The Ship "Atra"* (1984) 9 DLR (4th) 129.

176 *Dorais v Saudi Arabian General Investment Authority* 2013 QCCS 4498 at [31] per Collier JSC, referring to *Re Canada Labour Code* [1992] 2 SCR 50.

177 *Bombardier Inc v AS Estonian Air* (2013) 115 OR (3d) 183 at 195 [57] per EM Morgan J. See also the decision of the Ontario Court of Appeal which affirmed that decision: *Bombardier Inc v AS Estonian Air* (2014) 118 OR (3d) 702 at 704-705 [8]-[9], [13].

and therefore not used substantially for commercial purposes[178]. In many cases, Firebird does not now dispute that conclusion. Firebird does contend, however, that there are seven classes of accounts in relation to which the Court of Appeal was in error. Those accounts are described in the Notice of Appeal as: (1) the Airline Leasing Accounts, (2) the Phosphate Compensation Account, (3) the Fuel Accounts, (4) the Utilities Account, (5) the Loan Account, (6) the Residual Accounts, and (7) the Term Deposit. It is convenient to take them in turn.

The Airline Leasing Accounts

226 There are three Airline Leasing Accounts. They were described in the s 41 certificate as follows:

> "**[Account number] 034702 422780 (Yaren Aircraft Leasing Co)**
>
> The funds in this account were used by [the Nauru] Government to provide government loans to Nauru Airlines for the procurement and maintenance of its aircraft. The government loans were provided on a non interest/non-profit basis and have been repaid.
>
> ...
>
> **[Account number] 034002 858233 (Pacific Aircraft Leasing Company)**
>
> The funds in this account are used for the same purpose as the Yaren Aircraft Leasing Co Account ...
>
> **[Account number] 034002 858356 – Yaren Aircraft Leasing Co**
>
> This account is used for the same purpose as [Account 034702 422780]."

227 Mr Adeang gave oral evidence in chief that Nauru provided air services for Nauru through its wholly owned government corporation, Nauru Airlines, because no other operator was interested in providing air services to a country of only 10,000 people. He said that Nauru did not make money out of the airline, although ideally Nauru would like that to happen. He also said that "what moneys we do make we turn to the provision of the air services to make it a sustainable venture". In cross-examination, Mr Adeang added that the airline did not confine its activities to Nauru. It also engaged in chartering, had in the past entered into commercial contracts described as Norfolk Air and Heavy Lift

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178 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 515-529 [91]-[206] per Bathurst CJ, Beazley P agreeing at 529 [210]. Basten JA preferred not to decide the issue: at 552 [316].

contracts, and, at least as far as its charter business was concerned, was operating in a competitive market place.

228 The Court of Appeal concluded that the funds in the Airline Leasing Accounts were not in use for a commercial purpose. Bathurst CJ began with the observation that "commercial purposes" are not defined. In fact, as will be recalled, "commercial purpose" is defined in s 3(5) of the *Immunities Act* as including "a trading, a business, a professional and an industrial purpose". His Honour nevertheless reasoned, based on what was said by the Supreme Court of Canada in *Kuwait Airways Corp v Iraq*[179] and the Superior Court of Justice of Ontario in *Bombardier Inc v AS Estonian Air*[180], which concerned whether the Republic of Estonia's ownership of shares in AS Estonian Air was a "commercial activity", that the fact that money is expended or proposed to be expended on "what might be described as commercial transactions" is not necessarily determinative of its use for commercial purposes[181]. Hence, as his Honour said, where funds are to be used for the purpose of government administration, performance of a government's civic duties and functions to its citizens or the advancement of the community, "the fact that that object is achieved by entering into commercial transactions [does not mean] that the funds are used for commercial purposes"[182].

229 On that basis, Bathurst CJ concluded that, although Nauru Airlines engages in some commercial activities including flights on a charter basis, the funds in the Airline Leasing Accounts were not used for commercial purposes, because[183]:

> "[T]he primary purpose of the investment in Nauru was to provide aircraft services to what would otherwise have been an isolated community. In these circumstances it does not seem to me that the moneys in the bank account [are] used for purposes which, whether by loans or other investment, could be said to be for commercial purposes."

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179 [2010] 2 SCR 571.

180 (2013) 115 OR (3d) 183 at 193 [49].

181 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 522-523 [172].

182 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 522-523 [172]; *Carrato* (1982) 141 DLR (3d) 456 at 459 per Steele J.

183 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497 at 525 [186].

230 With respect, that conclusion was correct. As Bathurst CJ deduced, funding Nauru Airlines was part of Nauru's ordinary governmental functions of providing an otherwise isolated Nauruan community with aircraft services. The fact that the airline, as opposed to Nauru, may have engaged in commercial activities was beside the point. The purpose of the loans was not to generate profits but to ensure that the people of Nauru were provided with air transportation.

The Phosphate Compensation Account

231 There was only one Phosphate Compensation Account, which was described in the s 41 certificate as follows:

> "**[Account number] 034001 110549 – Rehabilitation Funds A**
>
> The funds in this account are derived from [Nauru] Government royalties received from the sale of phosphate mined on [Nauru]. The funds in this accounts [sic] are used for the purposes of:
>
> (a) paying compensation to landowners for the leasing of land to conduct the phosphate mining operations; and
>
> (b) environmental rehabilitation programs to restore land used for phosphate mining on [Nauru] and payment of salaries of those government employees involved in the rehabilitation programs."

Mr Adeang was not cross-examined on that aspect of the certificate.

232 As Bathurst CJ observed, bank account statements which were in evidence showed that from 25 August 2014 no withdrawals or deposits had been made from or into the account, other than interest. But that was hardly significant given that the accounts were frozen by order of the court for the bulk of that period. Bathurst CJ reasoned, however, that although the use of funds to conduct phosphate mining operations on Nauru might be conceived of as substantially for commercial purposes, the funds in this account were not used to facilitate phosphate mining but rather as part of a government policy to compensate landowners on whose land mining operations were conducted.

233 In his Honour's view, that objective, combined with the fact that the programme was carried out by government employees rather than a commercial entity, was a sufficient basis to conclude that the account was not used for commercial purposes but rather for sovereign purposes consistent with the current government policy of Nauru.

234 With respect, there is no reason to doubt that conclusion either. In the absence of cross-examination or other contrary evidence, it was open to find that

the compensation of landowners for damage done to their lands by phosphate mining operations from which Nauru derived royalties was well within the ordinary governmental functions of Nauru; and, therefore, that funds used for that purpose were used for a substantially governmental as opposed to commercial purpose.

The Fuel Accounts

235 There were two Fuel Accounts, which were described in the s 41 certificate as follows:

> "**[Account number] 034702 355848 (USD Ron Treasury Account)**
>
> The funds in this accounts [sic] are derived predominately from the issuing of fishing licences by [the Nauru] Fisheries and Marine Authority, a department of [the Nauru] Government. The fishing licences are paid for by licensees in USD. The funds are used by [the Nauru] Government to purchase fuel to supply to the population of [Nauru] and business[es] located on [Nauru]. The main customers for the fuel are the Nauru Utilit[ies] Corporation, a government ow[n]ed corporation, which operates the sole power plant on the island and Nauru Airlines, [Nauru's] national airline which is also a government ow[n]ed corporation and Transfield Services, the contractor who operates the Regional Processing Centres. The revenue derived by the government from the sale of the fuel does not cover the cost of the purchase of the fuel by the government.
>
> ...
>
> **[Account number] 034002 858305 (Japan NPGA)**
>
> The funds in this account are derived from funds provided by the Japanese Government by way of foreign aid and used by [Nauru] for the purpose of providing budget support to the [Nauru] Treasury in order to purchase fuel."

236 It may be noted that, in contradistinction to the airline operations, which were carried on by a wholly owned corporation of the Nauru Government, the evidence was that the fuel transactions were undertaken by the Nauru Government itself. In cross-examination, Mr Adeang said that the government purchased all of the fuel on the island and sold it at a commercial price calculated to cover the costs of providing the fuel. Nauru's customers included the Nauru Utilities Corporation, Nauru Airlines, and a number of petrol stations on the island, which bought fuel from the Nauru Government at a price which the Nauru Government calculated to cover its costs of purchasing and distributing the fuel.

237 Other things being equal, that might have made a difference. As defined, a "commercial purpose" includes both a "trading purpose" and a "business purpose"; and, based on some of Mr Adeang's evidence, it might be said that the Nauru Government was in the business of trading in petrol. To some extent at least, its activities were analogous to those of various Australian State-owned power corporations which used to, and in some cases still do, conduct the generation, distribution and sale of electricity as a monopoly supplier of electricity within the State. And it could hardly be doubted that such a State-owned power corporation carries on a business of trading in electricity, even if it does so ultimately on a not-for-profit basis of charging no more than is required to cover its costs and provide for necessary capital reinvestment.

238 As has been seen, however, in this area of the law it is necessary to bear in mind that what may properly be regarded as a commercial purpose in the context of one foreign state's circumstances may well be considered a governmental function in the context of another. And, as appears from Mr Adeang's evidence, and would seem likely in any event, the circumstances which apply in Nauru are in relevant respects very different from any Australian State. Governments of less developed countries are often involved in fuel subsidisation programmes. Critically, as the evidence established, Nauru is an island country of only 10,000 people, which no established or other oil company is prepared to service, and which therefore is dependent on its government to make the arrangements necessary to provide it with petroleum. Without the government's involvement, there would be no petroleum on Nauru and therefore no way of sustaining the nation's aviation and road transport, agriculture and basic electric power generation requirements.

239 In those circumstances, Bathurst CJ was correct to conclude that Nauru's activities in buying and selling petroleum were governmental activities and thus that the Fuel Accounts were for governmental functions as opposed to commercial purposes.

240 It might have been different if there had been any evidence of availability of petroleum supplies from other sources. For example, if there had been evidence of willingness on the part of oil companies to supply fuel in Nauru and of them being kept out of the market by the state-owned monopoly, one might suppose that Nauru's fuel supply activities would properly be viewed as commercial activities and that funds for those activities would properly be characterised as funds for commercial purposes. But there was no suggestion of that kind, and still less any evidence.

The Utilities Account

241 The Utilities Account was described in the s 41 certificate as follows:

> "**[Account number] 034002 858276 – RON Utilities Authority**
>
> The funds in this account are derived from revenue received from the [Nauru] Utilities Corporation, a government corporation [which is] used by [the Nauru] Government for the purpose of supplying electricity and water to the population of Nauru."

242 When cross-examined, Mr Adeang said that "the Government", by which in this case he evidently meant the Nauru Utilities Corporation, supplied electricity and water and charged for it, but that it did not necessarily cover its costs. Mr Adeang was not asked about the form in which the Nauru Government used funds in the account for the purposes of supplying electricity and water but, in the absence of evidence to the contrary, it should be inferred that it did so either by making loans to or by subscribing further capital in the Nauru Utilities Corporation.

243 Bathurst CJ stated that, for the same reasons as applied to the Fuel Accounts, he considered that the Utilities Account was not used for commercial purposes. With respect, that conclusion is correct. There is, however, a further reason in support of that conclusion. In contrast to the position which applied to fuel, where the Nauru Government was directly involved in the buying and selling of petrol, in the case of the Utilities Account the evidence was that the Nauru Government's only function was as shareholder or otherwise owner of the Nauru Utilities Corporation. It follows that, whether or not it could be said that the Nauru Utilities Corporation was carrying on business or trade, the position in relation to the Utilities Account was on all fours with the position in relation to the Airline Leasing Accounts.

244 In short, so far as can be told from the evidence, the only purpose for which the funds in the Utilities Account were used was to fund the Nauru Utilities Corporation, either by way of loan or by injection of capital. The purpose of the loans was not to generate profits but to ensure that the people of Nauru were provided with utilities. And, given the nature of Nauru and its system of government, the infusing of a state-owned not-for-profit utilities corporation with funds sufficient to provide power and water to the Nauruan

people may properly be regarded as a governmental function as opposed to a commercial activity[184].

The Loan Account

245 The Loan Account was described in the s 41 certificate as follows:

> "**[Account number] 034002 124483 (CIE – Nauru GEF Small GRA)**
>
> The funds in this account are derived from [Nauru] Government revenue and foreign state donors (predominantly Taiwan) and used by the [Nauru] Department of Commerce, Industry and Environment and used by the [Nauru] Government for the purpose of providing government loans to small business to assist in setting up businesses."

246 Mr Adeang deposed in his evidence in chief that Nauru did not make a profit out of the small business loans and that they were not a commercial venture:

> "It ... provides small micro-loans ... for those aspiring businessmen in the provision of growing backyard ... food crops, barbecue stalls [and other] small micro-businesses. We receive funds from ... Taiwan in particular but other aid donors as they arise."

247 Bathurst CJ concluded that, having regard to the particular circumstances of Nauru, the funds for the business loans did not have a commercial purpose. They were paid in pursuit of a governmental purpose of strengthening the economy.

248 With respect, there is no reason to doubt that conclusion either. The payments appear to have been essentially in the nature of social or economic advancement payments or allowances, for the purposes of advancing the recipients in business in a manner which is perceived to be for the improvement of Nauru generally. To draw a parallel with the Australian context, they present as no different in principle from sums which the Commonwealth Government may set aside to pay as Newstart allowance or one or other business incentive allowances which are available to promote and advance particular Australian industries.

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184 *Bombardier Inc v AS Estonian Air* (2014) 118 OR (3d) 702; *Kuwait Airways Corp v Iraq* [2010] 2 SCR 571.

The Residual Accounts

249 There are four Residual Accounts, described in the s 41 certificate as follows:

> "**[Account number] 034002 858364 (BusinessOne Account)**
>
> This account is used as the primary operating account for [Nauru]. Funds from the accounts are transferred into this account as required and then those funds are used by [the Nauru] Government to pay for:
>
> (a) the salaries of 1,200 public servants employed by [the Nauru] Government; and
>
> (b) services, equipment and supplies provided by the departments of [the Nauru] Government.
>
> ...
>
> **[Account number] 034001 189410 (Nauru Fisheries Saving)**
>
> The funds in this account are derived from [Nauru] Government revenue and used by [the Nauru] Government to fund the operations of the Nauru Fisheries and Marine Resources Authority, a governmental department.
>
> ...
>
> **[Account number] 034002 858268 – RON Fuel Account**
>
> The funds in this account are derived from payments received from customers purchasing fuel from the [Nauru] Government. The funds in this account are used by [the Nauru] Government predominantly for the purpose of providing Government Services.
>
> ...
>
> **[Account number] 034002 858073 – RON Treasury Account**
>
> The funds in this account are derived from [Nauru] Government revenue and are used by the [Nauru] Government for the provision of Government Services and the payment of salaries of [Nauru] Government employees."

250 Bathurst CJ concluded that the funds in the Nauru Fisheries Saving account were used to fund the operations of the Nauru Fisheries and Marine Resources Authority and that there was no evidence to suggest that the Authority, which was a Nauru government department, was engaged substantially in a

commercial venture; and that the same applied to the RON Fuel Account and the RON Treasury Account. His Honour further observed with respect to the BusinessOne Account that it appeared to be a clear example of funds being used by a sovereign state to perform its sovereign duty to its citizens, and that although a fee was paid for some government services, that did not lead to the loss of immunity.

251 There is no reason to doubt that reasoning or those conclusions. On the evidence, each of those accounts presents as a clear example of funds which were held for governmental non-commercial purposes.

The Term Deposit

252 The Term Deposit (also known as "the Trust Account") was described in the s 41 certificate as follows:

> "**[Account Number 034001 305071] Trust Account**
>
> The funds in this account are derived from [Nauru] Government Revenue and are held by [the Nauru] Government treasury as cash reserves to provide future Government Services."

Mr Adeang was not cross-examined on this account.

253 Bathurst CJ noted that, in contrast to the other accounts, the moneys in the Term Deposit were not in use and, accordingly, that it was necessary for the court to be satisfied that the funds had been set aside for a non-commercial purpose within the meaning of s 32(3)(b) of the *Immunities Act*. But, as his Honour said, there was no reason not to accept the correctness of the statement in the s 41 certificate that the funds were held as cash reserves to provide future government services and in that sense had been set aside so that the Nauru Government could perform its functions as they arise. Thus, in the absence of any evidence that the Nauru Government carried on any commercial activities with the cash reserves in the Term Deposit, it was to be concluded that the government services for which the funds were set aside were not commercial.

254 Counsel for Firebird attacked that part of his Honour's reasoning as in effect reversing the onus of proof. It was submitted that, because it appeared that the funds in the Term Deposit were not in use, it was incumbent on Nauru to adduce evidence sufficient to establish that the money was set aside otherwise than for commercial purposes within the meaning of s 32(3)(b); and that, by referring to the absence of evidence that the Nauru Government carried on any commercial activities with those moneys, Bathurst CJ had approached the provision as if it were incumbent on Firebird to prove that the moneys were set aside for commercial purposes.

255 That submission should be rejected. As has been seen, Bathurst CJ based his conclusion as to the nature of the funds in the Term Deposit on the evidence from the s 41 certificate that the funds were held ready for government purposes and in that sense were set aside for non-commercial purposes. Significantly, as was earlier noticed, Mr Adeang was not cross-examined on that evidence. In those circumstances, it was both logical and appropriate for Bathurst CJ to reason that, in the absence of any evidence that contradicted the certificate, it could be concluded that the funds were set aside in the way explained in the certificate. There was no reversal of the onus of proof in that approach. Nauru adduced evidence sufficient to establish that the funds were set aside in the relevant sense and, as Bathurst CJ said, in the absence of evidence to contradict the evidence adduced by Nauru, there was no reason not to accept Nauru's evidence[185].

Conclusion and order

256 For these reasons, we agree with the orders proposed by French CJ and Kiefel J.

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185 *Cross on Evidence*, 9th Aust ed (2013) at 266 [7015].