IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M154 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN: **THE REPUBLIC OF NAURU**
Appellant

and

WET 040
Respondent

AMICUS CURIAE'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

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

Part II: Issues

The High Court has no jurisdiction

2. By reason of s 5(1) of the *Nauru (High Court Appeals) Act 1976* (Cth) and Art 1A(b)(i) of the Agreement between Australia and Nauru the appeal sought to be instituted by Nauru to the High Court (**Nauru's appeal**) only lies where the Agreement provides for it to lie. As a consequence of Nauru's notice of termination on 12 December 2017, by reason of Arts 6(1) and 6(2)(a), as from the termination date of the Agreement (13 March or 15 May 2018)[1] the High Court ceased to have jurisdiction to hear and determine Nauru's appeal as it had not been "instituted" by the termination date. Nauru's appeal was not "instituted" because Nauru did not file the notice of appeal in the High Court within the time stipulated by the High Court Rules (as required by s 77T of the *Judiciary Act 1903* (Cth) and Pt 43 and Rules 42.01 and 42.03 of the High Court Rules), and the time for filing the notice of appeal had not been enlarged or abridged by the Court prior to the termination date.[2]

Five additional reasons for refusing *nunc pro tunc* orders

3. First, as from 13 October 2017 it was open to Nauru to duly serve and proceed with its

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[1] See [17] and Fn 18 to the Amicus's Submissions dated 22 August 2018 (**AS**).
[2] See *E Ryan & Sons Ltd v Rounsevell* (1909) 10 CLR 176, 178-9; *Singh v Karbowsky* (1914) 18 CLR 197, 200-201; *R v Owen and Farrington* (1933) 49 CLR 20, 24; *Vilenius v Heinegar* (1962) 36 ALJR 200, 201, and *Whitehouse Hotels Pty Ltd v Lido Savoy Pty Ltd* (1974) 131 CLR 333, 335-336.

Summons dated 13 October 2017 (at **AB 381**) to enlarge the time for it to file its notice of appeal without any need to seek the *nunc pro tunc* orders it now seeks. As from 12 December 2017, when Nauru gave notice of termination of the Agreement, it must be taken to have been aware that the High Court's jurisdiction to hear its appeal was to cease on 13 March 2018. But, without any explanation, Nauru took no step to proceed with its Summons until recently, well after 13 March 2018. Thus, the *nunc pro tunc* orders Nauru now seeks to enable its appeal to be instituted on 13 October 2017 (or prior to 13 March 2018) only became necessary as a result of the *laches* or neglect of Nauru in its failure to apply to the Court for the usual orders for enlargement of time prior to the termination date.[3]

4. Second, the *nunc pro tunc* orders sought by Nauru are not available as to make the orders is to impermissibly seek to found a jurisdiction in the Court which it does not otherwise have.[4]

5. Third, for the reasons outlined in AS at [25]-[32], Nauru's interlocutory application by Summons dated 13 October 2017 and the other documents that were required to be served on the Respondent under Rule 13.02.2 of the High Court Rules were not served in accordance with Pt 9, nor was any order sought for service under Rule 6.01.1. Since cessation of the High Court's jurisdiction as from the termination date, as Nauru's appeal did not fall within Art 6(2) of the Agreement, the Respondent was no longer amenable or answerable to the jurisdiction of the Court that existed in this matter prior to that date. To grant the leave sought would impermissibly seek to found a personal jurisdiction over the Respondent which the Court no longer had in respect of Nauru's appeal after the termination date.[5]

6. Fourth, the Respondent had a vested right to retain the judgment in his favour at least from the termination date[6] and, as a consequence, the orders sought are not merely procedural orders but, rather, are substantive orders that are prejudicial to that vested

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[3] See *Turner v London & South-West Railway Co* (1874) LR 17 Eq 561 at 566 per Sir Charles Hall, the Vice-Chancellor adopting *Chitty's Archibold's Practice* (10th Ed 1858, p 1052; 12th Ed p 1572); *Evans v Rees* (1840) 12 Add & E 167; 113 ER 774 at 777; *Bingham v England* (1996) 17 WAR 226 per Kennedy ACJ at 239F-G. See also *Hartley Poynton Ltd v Ali* (2005) 11 VR 568, 581-582 [25], 587 [38], 604 [70], 606 [72], 607 [76] and 609 [80].

[4] See *In re Keystone Knitting Mills' Trade Mark* [1929] 1 Ch 92, 101, 107, 108; *Parsons v Bunge* (1941) 64 CLR 421, 427, 434; *Jeffery v Jeffery* (1949) 78 CLR 570, 580; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114, 125 (Dawson J).

[5] See *Laurie v Carroll* (1957) 98 CLR 310, 322-323; *Gosper v Sawyer* (1985) 160 CLR 548, 557-558, 564; *Flaherty v Girgis* (1987) 162 CLR 574, 598-599; *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 570 [2], and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 521 [25].

[6] See the cases cited in Fn 2 above.

right.[7]

7. Finally, for the above reasons separately and cumulatively, there is no proper basis for the Court to exercise its inherent jurisdiction to remedy the current situation by making *nunc pro tunc* orders as to do so would not give "effect to the justice of the case".[8]

Relief

8. If any of the above issues is resolved against Nauru it would be appropriate for its Summons' dated 13 October 2017 and 4 October 2018 to be dismissed.
9. In the event each of the above issues is resolved in Nauru's favour the Amicus relies on [35(d)], [35(e)] and [37] of the AS and [14] of its amended reply submissions dated 2 November 2018 in relation to the orders that are appropriate.
10. The parties have agreed that there be no orders as to costs.

Dated: 7 November 2018

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[7] See the cases cited in Fn 2 above and *John Pfeiffer v Rogerson* (2000) 203 CLR 503, 543-544 [99]-[100].
[8] See *MAC v The Queen* (2012) 34 VR 193 at [11] per Nettle JA.