RUHANI.. ..... APPELLANT;

AND

DIRECTOR OF POLICE.. ..... RESPONDENT.

[2005] HCA 42

HC of A
2004-2005

Nov 10;
Dec 9
2004

Aug 31
2005

Gleeson CJ,
McHugh,
Gummow,
Kirby,
Hayne,
Callinan and
Heydon JJ

Constitutional Law (Cth) — Judicial power of Commonwealth — High Court — Original jurisdiction — Appellate jurisdiction — Conferral of jurisdiction to hear and determine appeals from Supreme Court of Nauru — Validity — Commonwealth Constitution, ss 73, 75(i), 76(ii) — Nauru (High Court Appeals) Act 1976 (Cth), ss 4, 5.

Constitutional Law (Cth) — Powers of Commonwealth Parliament — External affairs — Relations of Commonwealth with Pacific islands — Law conferring jurisdiction on High Court to hear appeals from Supreme Court of Nauru — Commonwealth Constitution, s 51(xxix), (xxx) — Nauru (High Court Appeals) Act 1976 (Cth), ss 4, 5.

Practice and Procedure — Motion for joinder — No appearance by Commonwealth in proceedings concerning validity of Commonwealth legislation.

An Afghan national who was rescued at sea was taken by Royal Australian Navy ship to Nauru. His application for refugee status in Australia was rejected by the Commonwealth Department of Immigration and Multicultural and Indigenous Affairs. In Nauru he was placed in a camp and issued with a special purpose visa restricting his place of residence and movement. He was refused a writ of habeas corpus in the Supreme Court of Nauru in proceedings in which he claimed that he was held at the camp against his will by or on behalf of the Director of Police of Nauru. He appealed from the decision of the Supreme Court to the High Court under s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) which provided for "appeals" from the Supreme Court of Nauru to the High Court in accordance with the terms of an agreement in 1976 between the Commonwealth of Australia and the Republic of Nauru. The Director of Police objected to the competency of the High Court to hear the appeal on the grounds that the Act invalidly purported to confer appellate jurisdiction on the High Court that fell outside the exhaustive definition of the Court's appellate jurisdiction by s 73 of the *Commonwealth Constitution* and that, to the extent that the Act purported to confer original jurisdiction on the High Court, it fell outside the exhaustive definition of the Court's original jurisdiction in ss 75 and 76. The Commonwealth did not appear to uphold the validity of Act. The appellant applied for the joinder of the Commonwealth and the Republic of Nauru.

Held, by Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ, Callinan and Heydon JJ dissenting, that the *Nauru (High Court Appeals) Act* was a valid enactment conferring jurisdiction on the High Court.

Per Gleeson CJ, McHugh, Gummow and Hayne JJ, Kirby J contra. Although the Act uses terminology consistent with the exercise of appellate jurisdiction, it is a valid enactment conferring original jurisdiction in respect of a "matter" within s 76(ii) of the *Constitution*.

R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett (1945) 70 CLR 141; *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353; *Hooper v Hooper* (1955) 91 CLR 529; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; and *Abebe v The Commonwealth* (1999) 197 CLR 510, considered.

Held, further, by Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ, Kirby J dissenting, that there were no grounds for adding either the Commonwealth or the Republic of Nauru as a party.

OBJECTION to competency.

Mohammed Arif Ruhani, an Afghani national, and 318 other asylum seekers were rescued in the Indian Ocean by the Norwegian vessel MV "Tampa". The MV "Tampa" was then intercepted by a vessel of the Royal Australian Navy which transported Ruhani and the others to the Republic of Nauru, arriving there on 21 December 2001. The Commonwealth Department of Immigration and Multicultural and Indigenous Affairs rejected an application by Ruhani for refugee status. He was housed in camp "Topside" pursuant to intergovernmental arrangements between the Commonwealth and the Republic of Nauru, later expressed in a Memorandum of Understanding. On 7 January 2002, the Principal Immigration Officer of Nauru issued Ruhani with a special purpose visa for entry and stay in Nauru on humanitarian grounds, renewable every six months, the issue and extension of which Ruhani had neither applied for nor consented to. He applied to the Supreme Court of Nauru for a writ of habeas corpus, alleging that he was held against his will by or on behalf of the Director of Police of Nauru. Connell CJ granted an order nisi directed to the Director of Police. Connell CJ subsequently dismissed the application for habeas corpus and ordered that the order nisi be discharged. By a notice of appeal filed in the High Court, Ruhani "appealed" from the judgment and order of the Supreme Court. The *Nauru (High Court Appeals) Act 1976* (Cth) (the Act) gave effect to an agreement made in 1976 between the Commonwealth and the Republic of Nauru providing for the exercise of appellate jurisdiction by the High Court from the Supreme Court of Nauru. Sections 5(1), (2) and 8 of the Act provided for a right to institute proceedings in the High Court in certain instances, conferred jurisdiction on the Court to hear and determine such proceedings, and conferred power to grant remedies. The Director of Police filed a motion of objection of competency to the proceedings.

P J Hanks QC (with him *S J Lee* and *S P Donaghue*), for the respondent. [KIRBY J. A foreign country is before the High Court saying that legislation enacted by the Commonwealth Parliament and that foreign country is invalid and provides no basis for the jurisdiction of this Court. GUMMOW J. The 1976 treaty contains in Art 6 a provision for termination by your client. That has not been utilised. You could resolve this objection tomorrow by moving under the treaty.] That would only resolve it one way. We wish to have doubts about the conferral of jurisdiction on this Court resolved. As a matter of construction, the jurisdiction that Parliament purported to confer by the Act is appellate. "An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below… The function of a Court of appeal is to correct the errors of the Court appealed from, and to give such judgment as that Court itself ought to have made, or [when the merits of the case have not been disposed of] to put the case in train for obtaining it." (1) In relation to Art III, s 2 of the *United States Constitution*, Story observed that "The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create the cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject matter has already been instituted in and acted upon by some other Court, whose judgment or proceedings are to be revised." (2) Those passages have often been recited with approval by this Court. They encapsulate the function that ss 5 and 8 of the Act purport to confer. It is appellate. [GUMMOW J. From earliest times, the word "appeal" has had a chameleon-like quality in federal jurisdictions.] In the present case it is fixed. We have an appeal from a court. [HAYNE J. It is not from a court within the Australian constitutional structure.] This legislation proceeds on an assumption that the Supreme Court of Nauru is within an appellate structure that the Act creates. While that Court is not within the Australian curial scheme, it is a superior court of record. The clearest indication of the nature of the jurisdiction that is purportedly invested is s 8 of the Act, which provides that the High Court in the exercise of its appellate jurisdiction under s 5 may affirm, reverse or modify the judgment, decree, order or sentence appealed from. Not only does s 8 refer to "appellate jurisdiction", but the words "judgment, decree, order or sentence", describing the matters from which appeals may be brought, are identical to those in s 73 of the *Constitution* concerning the appellate jurisdiction of the High Court. Further, each of Art 57 of the *Nauru Constitution* and ss 44 and 45 of the *Appeals Act 1972* (Nauru) refers to appeals from the Supreme Court of Nauru to the High Court, and the notice of appeal is expressed as invoking appellate jurisdiction. It is framed as an appeal from an

(1) *Attorney-General v Sillem* (1864) 10 HLC 704 at 724.
(2) *Commentaries on the Constitution*, 5th ed (1891), § 1761, drawing from Marshall CJ in *Marbury v Madison* (1803) 5 US (1 Cranch) 137 at 175.

order of the Supreme Court of Nauru, not as an invocation of original jurisdiction. The susceptibility of Australian superior courts to orders made in the original jurisdiction of this Court has no relevance to the Supreme Court of Nauru which has been vested with the widest jurisdiction. Hence orders of that Court may be set aside only on appeal, not in the exercise of original jurisdiction. [He referred to *Re Macks; Ex parte Saint* (3).]

The judicial power of the Commonwealth, original or appellate, is limited to what is prescribed by Ch III of the *Constitution*. Chapter III impliedly prohibits Parliament from adding to the appellate jurisdiction of the Court, subject to the possible effect of s 122 (4). The exhaustive nature of s 73, and of Ch III, flows from the structure of Ch III, which "first grants the power and then delimits the scope of its operation" (5). The fact that s 73 exhaustively prescribes the appellate jurisdiction of the High Court has been recognised since Federation (6). To the extent that the appellant contends that s 73 is not an exhaustive statement of the appellate jurisdiction, he relies on the relationship between ss 73 and 122. But the cases relating to that relationship provide no support for the proposition that s 51(xxxi) and/or (xxx), read with (xxxix), support the Act. Rather, they deny that proposition, since any judicial power conferred by legislation supported by those sub-sections can only be "the judicial power of the Commonwealth", and s 73 is an exhaustive statement of the appellate aspect of "the judicial power of the Commonwealth" (7). No head in s 51 can support legislation that purports to confer additional jurisdiction on the High Court.

If the Act is construed as purporting to confer original jurisdiction, it is invalid. The original jurisdiction that can be conferred on the High Court is exhaustively stated in ss 75 and 76. If and to the extent the Act purports to vest original jurisdiction, it will be valid only if the jurisdiction falls within any class of "matter" identified in ss 75 and 76. A "matter" is not a legal proceeding, but the subject matter of the justiciable controversy that requires determination (8). A matter will "arise under" a treaty only if the rights or duties in controversy owe their existence to the treaty (9). The "matter" here does not "arise under" a treaty. Any right to be released and any duty to release the appellant is derived entirely from the domestic law of Nauru. The appellant seeks to characterise the "matter" as "the resolution of an appeal from the Supreme Court of Nauru". That submission impermissibly treats the "matter" as the legal proceeding itself rather

(3) (2000) 204 CLR 158.
(4) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.
(5) *In re Judiciary and Navigation Acts* (1921) 20 CLR 257 at 264.
(6) *Hannah v Dalgano* (1903) 1 CLR 1.
(7) *Porter v The King; Ex parte Yee* (1926) 37 CLR 432.
(8) *In re Judiciary and Navigation Acts* (1921) 20 CLR 257 at 265.
(9) *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154.

than the controversy about the rights and obligations that the appeal seeks to resolve. The "appeal" is incompetent and should be dismissed. [McHUGH J. Could it not be a determination of the rights, liabilities and privileges of Nauruans by reference to Nauruan law, and thus be an exercise of original jurisdiction? That is, federal law operates by reference to Nauruan law that is the factum which gives rise to these federal rights.] The Act is not a source of the rights the appellant seeks to vindicate. It merely purports to confer jurisdiction. Enforcement can only be under Nauruan law. Where there is no scope for enforcement, a decision is merely in the nature of an advisory opinion. [He also referred to *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (10); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* (11); *The Commonwealth v Brisbane Milling Co Ltd* (12); *Collins v Charles Marshall Pty Ltd* (13); *Spratt v Hermes* (14); *LNC Industries Ltd v BMW (Australia) Ltd* (15); *Hembury v Chief of General Staff* (16); *Gould v Brown* (17); *Re East; Ex parte Nguyen* (18); *Northern Territory v GPAO* (19); *Re Wakim; Ex parte McNally* (20); and *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (21).]

G Griffith QC and *K L Walker* (with them *L G De Ferrari*), for the appellant.

G Griffith QC. The jurisdiction for which the Act provides is original. It is conferred under s 76(ii) in a matter arising under a law made by the Parliament pursuant to s 51(xxix) and/or (xxx). Alternatively, the "appeal" to this Court is a matter arising under a treaty and falls within the jurisdiction conferred by s 75(i). Terminology is not determinative. An Act may confer original jurisdiction on a federal court notwithstanding that it uses the terminology of appeal (22). Whenever a matter arising under Commonwealth law is brought for the first time before a court exercising the judicial power of the Commonwealth, it will be exercising original jurisdiction (23). The cases holding that so-called

(10) (1910) 11 CLR 1.
(11) (1913) 18 CLR 54.
(12) (1916) 21 CLR 559.
(13) (1955) 92 CLR 529.
(14) (1965) 114 CLR 226.
(15) (1983) 151 CLR 575.
(16) (1998) 193 CLR 641.
(17) (1998) 193 CLR 346.
(18) (1998) 196 CLR 354.
(19) (1999) 196 CLR 553.
(20) (1999) 198 CLR 511.
(21) (1999) 200 CLR 322.
(22) *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652.
(23) *Watson v Federal Commissioner of Taxation* (1963) 87 CLR 353 at 370-371.

"appeals" are exercises of original jurisdiction are not limited to situations involving review of administrative decisions. *Hembury v Chief of General Staff* (24) involved an "appeal" to the Federal Court from a decision of the Defence Force Disciplinary Tribunal. That Tribunal exercises judicial power, though not the judicial power of the Commonwealth (25). Gummow and Callinan JJ said that the provision conferring jurisdiction on the Federal Court to hear "appeals" from that Tribunal constituted a conferral of original jurisdiction. Further, the exercise of original jurisdiction is not limited to situations involving the first exercise of judicial power. Rather, original jurisdiction is exercised the first time a court exercises the judicial power of the Commonwealth (26). Although the Supreme Court of Nauru exercised judicial power in determining the habeas corpus application, it was not the judicial power of the Commonwealth. The status of the Supreme Court under Nauruan law is irrelevant to the nature of the jurisdiction conferred on this Court by Parliament. Nor does it matter that, viewed from Nauru, the proceedings are an appeal from a decision of the Supreme Court to the High Court of Australia. Foreign law cannot determine the content of Australian constitutional requirements (27). An exercise of original jurisdiction can often bear a close similarity to the appellate function. In *Pasini v United Mexican States* (28), the Court considering the nature of a review by the Federal Court of a decision by a magistrate under the *Extradition Act 1988* (Cth), held that the Federal Court, in that exercise of original jurisdiction, was "required to determine whether that decision was right or wrong and, if wrong, what decision should have been made by the magistrate, thereby determining the rights and liabilities of the parties to the judicial proceedings and, thus, exercising judicial power" (29). The Act validly confers original jurisdiction under s 76(ii). For a "matter" to arise under a law made by Parliament, the rights or duties in issue must owe their existence to federal law or depend on it for enforcement (30). It is unnecessary for the form of relief to depend on federal law. [McHUGH J. The enforcement of these rights and liabilities depends on Nauruan law in the end. That is a point of distinction from *Pasini*.] First, s 46 of the Nauruan Act provides that this Court's decision is substituted for all purposes for the decision of the Supreme Court. Secondly, there was never any objection to this Court's making orders with respect to matters which can only be enforced out of the jurisdiction. Reliance is commonly placed on mutual enforcement and recognition provisions. In their absence, the judgment is unenforceable

(24) (1998) 193 CLR 641.
(25) *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 648, 654, 673.
(26) *Minister for the Navy v Rae* (1945) 70 CLR 339 at 340-341.
(27) *Sykes v Cleary* (1992) 176 CLR 77.
(28) (2002) 209 CLR 246.
(29) *Pasini v United Mexican States* (2002) 209 CLR 246 at 255.
(30) *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141.

but the fact that the res is outside the jurisdiction does not inhibit this Court from exercising jurisdiction. The Act is plainly a law made by Parliament and it creates substantive rights and duties under federal law. When this Court exercises jurisdiction under the Act it is determining rights and duties that owe existence to federal law. In particular, as a matter of federal law, the Act gives a right to have the correctness of the judgment or order of the Supreme Court reviewed, by reference to the law of Nauru and the facts that gave rise to the proceedings. Parliament may enact a law by reference to a law other than Commonwealth law (31). The Act operates in such a manner. It adopts Nauruan law, thereby giving it the force of federal law. The proceedings involve a determination of the appellant's right under federal law, namely the Act, to a determination of the correctness of the decision of the Supreme Court of Nauru, and in deciding that question the content of the law to be applied will be the Nauruan law that has been adopted by the Act. The Act implements a treaty, the 1976 agreement. It is thus an exercise of power under s 51(xxix) of the *Constitution*. Further, because the Act adopts Nauruan law for the purposes of resolving a dispute that occurred in the territory of Nauru, it is a law with respect to things geographically external to Australia and thus valid under the external affairs power (32) Alternatively, the Act operates in relation to Nauru, one of the islands of the Pacific. Hence it is valid under s 51(xxx).

If the jurisdiction conferred is appellate, s 73 is not exhaustive of this Court's appellate jurisdiction and the Act is a valid conferral of appellate jurisdiction pursuant to s 51(xxix) or (xxx). Appeals from Territory courts provide the clearest example of jurisdiction conferred on this Court outside s 73 of the *Constitution* (33). It would be wrong to conclude, and nothing in the *Constitution* requires the conclusion, that the only appellate jurisdiction of this Court outside s 73 is from Territory courts.

K L Walker. If the Act does not adopt Nauruan law so as to create substantive rights and obligations under federal law, this Court has original jurisdiction by virtue of s 75(i) of the *Constitution*, since the rights and duties of the parties under Nauruan law fall to be determined by the Court by the operation of the 1976 agreement, a treaty. [GUMMOW J. The treaties to which s 75(i) refers were probably imperial treaties that might bind the Commonwealth.] At p 320 of the extract from the Federation Convention Debates, Mr Symon says that some day it may be within the scope of the Commonwealth to deal with matters of treaty and asks rhetorically why it should be necessary to amend the *Constitution* in the future in order to give the express power to do so. The discussion is brief but it shows that the framers of

(31) *Hooper v Hooper* (1955) 91 CLR 529.
(32) *Polyukhovic v The Commonwealth* (1991) 172 CLR 501.
(33) *Northern Territory v GPAO* (1999) 196 CLR 553.

the *Constitution* chose deliberately to adopt s 75(i) in case it could do some work. [GUMMOW J. One of the problems of your argument is that it provides a new gateway trigger for jurisdiction of this Court to be purely executive, not legislative, activity.] The conferral of jurisdiction by entry into a treaty by the Executive is not a problem. Section 75(i) provides for it. The Court should abandon the doctrine of incorporation, which requires treaties to be implemented by domestic legislation (34). There are some treaties, such as peace treaties, that affect private rights and duties without the need for implementing legislation. The 1976 agreement is one of them. [GUMMOW J. What is the "matter" within s 75(i)? What is the right or duty involved?] The right is that of the appellant not to be unlawfully detained. The duty is the duty of the respondent not to detain him unlawfully as a matter of Nauruan law. Since the 1976 agreement provides for the effective enforcement of the rights and duties of the parties, they also arise directly under that treaty. Bringing the matter before this Court by allowing the invocation of its jurisdiction under s 75(i), the matter also arises indirectly under the treaty.

[They also referred to *In re Judiciary and Navigation Acts* (35); *Porter v The King; Ex parte Yee* (36); *Collins v Charles Marshall Pty Ltd* (37); *R v Kirby; Ex parte Boilermakers' Society of Australia* (38); *Western Australia v The Commonwealth (the Native Title Case)* (39); and *Australian Securities and Investment Commission v Edensor Nominees Pty Ltd* (40).]

P J Hanks QC, in reply.

9 December 2004

GLEESON CJ. An objection to the competency of the Court to hear this appeal was heard on 10 November 2004 by a Court constituted by McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ and myself. At least a majority of the Court is of the view that the objection to competency should be disallowed.

The order of the Court is the objection to the competency of the appeal is disallowed. We will publish our reasons for that order at a future date. All questions of costs are reserved. I publish that order.

Cur adv vult

31 August 2005

(34) *Walker v Baird* [1892] AC 491.
(35) (1921) 20 CLR 257.
(36) (1926) 37 CLR 432.
(37) (1955) 92 CLR 529.
(38) (1956) 94 CLR 254.
(39) (1995) 183 CLR 373.
(40) (2001) 204 CLR 599.

The following written reasons for judgment were published:—

1 GLEESON CJ. Section 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) (the Nauru Act) confers, or purports to confer, upon this Court jurisdiction to hear and determine appeals from the Supreme Court of Nauru in accordance with the terms of an Agreement between the Commonwealth of Australia and the Republic of Nauru. The historical background to the Agreement, and to the legislation, is explained in the reasons of other members of the Court. The appellant was unsuccessful in proceedings for habeas corpus brought by him against the respondent in the Supreme Court of Nauru. He appealed to this Court. An objection to the competency of the appeal was filed by the respondent. It was heard as a preliminary issue. The ground of objection was that s 5 of the Nauru Act is invalid. On 9 December 2004, the Court disallowed the objection to competency. The following are my reasons for joining in that order.

2 The essential ground of invalidity asserted by the respondent was that s 5 of the Nauru Act purports to confer on this Court a form of judicial power that is extraneous to Ch III of the *Constitution*. The jurisdiction purportedly conferred is not jurisdiction to hear and determine an appeal of a kind referred to in s 73 of the *Constitution*. That is agreed. Nor, so it is submitted, is it original jurisdiction of a kind identified in s 75 or s 76. That is disputed. In particular, the appellant contends that what is involved is a conferral of original jurisdiction in a matter arising under a law made by the Parliament, within the meaning of s 76(ii).

3 As an alternative to the s 76(ii) argument, the appellant also contended that, even if the jurisdiction conferred by the Nauru Act is not original jurisdiction of the kind referred to in s 75 or s 76, for the reason that it is appellate and not original in character, s 73 is not an exhaustive statement of the Parliament's power to confer appellate jurisdiction on this Court, and the Nauru Act validly confers appellate jurisdiction in the exercise of the legislative power given by s 51(xxix) (external affairs) and s 51(xxx) (relations with Pacific islands). This alternative argument, if it arose, would face the formidable obstacle of a long line of authority in this Court to the effect that Ch III of the *Constitution* (which, for present purposes, means ss 73, 75 and 76) "is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested." (41) The possibility that the powers conferred upon the Parliament by s 51 to make laws with respect to specified subjects might have included power to create courts with appropriate jurisdiction, beyond the kinds of jurisdiction referred to in Ch III, was rejected by Dixon CJ, McTiernan, Fullagar

(41) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

and Kitto JJ in *R v Kirby; Ex parte Boilermakers' Society of Australia* (42). They said:

> "Had there been no Ch III in the *Constitution* it may be supposed that some at least of the legislative powers [conferred by s 51] would have been construed as extending to the creation of courts with jurisdictions appropriate to the subject matter of the power. This could hardly have been otherwise with the powers in respect of bankruptcy and insolvency (s 51(xvii)) and with respect to divorce and matrimonial causes (s 51(xxii)). The legislature would then have been under no limitations as to the tribunals to be set up or the tenure of the judicial officers by whom they might be constituted. But the existence in the *Constitution* of Ch III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss 71-80."

4 If the powers conferred by s 51(xxix) and (xxx) extend to the conferral of a jurisdiction on this Court beyond jurisdiction of the kind envisaged in ss 73, 75 and 76, then it is difficult to see why they would not extend to the creation of a court of a kind altogether different from Ch III courts, and to the conferral of judicial power on such a court. If the powers given by s 51 extend to a power to confer jurisdiction, original or appellate, of a kind not envisaged by ss 71-80 (relevantly, ss 73, 75 and 76), then there seems no reason why they would be limited to power to confer such jurisdiction on a Ch III court. Section 122, concerning Territories, has been held at least to some extent to stand apart from this constitutional scheme, and the defence power has been held to extend to the creation of courts-martial, but it is difficult to apply the reasoning in support of those qualifications, if it be proper so to describe them, to the powers presently in question.

5 The reason given for the received doctrine on this subject is that the affirmative words of Ch III granting power to create courts, confer the judicial power of the Commonwealth, and provide for the exercise of jurisdiction, carry a negative implication and "forbid the doing of the thing otherwise" (43). That is "a proposition which has been repeatedly affirmed and acted upon by this Court" (44). The discernment of such a negative implication in Art III of the *United States Constitution*, upon which Ch III was modelled, was fundamental to the reasoning of the Supreme Court of the United States in *Marbury v Madison* (45). In that case Marshall CJ, speaking with reference to Art III's assignment of original and appellate jurisdiction, said (46):

> "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all."

(42) (1956) 94 CLR 254 at 269.
(43) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.
(44) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.
(45) (1803) 5 US 87.
(46) (1803) 5 US 87 at 109.

6 It is unnecessary to examine in greater detail the appellant's alternative argument. In my view, the appellant is correct in submitting that the power necessary to sustain the legislation is found in s 76(ii).

7 Chapter III does not use the expression "appellate jurisdiction". That, however, is an expression that is commonly and conveniently used to describe the jurisdiction, conferred by s 73, to hear and determine appeals from certain specified courts within the Australian judicature. The present proceedings do not involve an appeal from any of those courts. The question is not whether, in some other context, or apart from any context, it would be more appropriate to describe the proceedings as appellate than to describe them as original. The question is whether, in the context of Ch III of the *Constitution*, it is appropriate to describe the jurisdiction conferred on this Court by the Nauru Act as original jurisdiction. The immediate context is s 76(ii), which refers to laws conferring original jurisdiction on the High Court in any matter arising under any laws made by the Parliament. The wider context is Ch III, and the constitutional scheme which has been referred to above in connection with the appellant's alternative argument.

8 In answering the question, the first step is to identify the matter arising under a law made by the Parliament. The relevant law made by the Parliament is the Nauru Act. That is a law which, in its effect upon the rights and obligations of the parties, operates by reference to a law other than Commonwealth law. The content of the law to be applied by a court in the exercise of federal jurisdiction may be derived from some other law system. This happens, for example, when State law is "picked up" as "surrogate federal law" by reason of the operation of s 79 of the *Judiciary Act 1903* (Cth) (47). An otherwise valid law of the Parliament may pick up the law of Nauru as the law to be applied in determining rights and liabilities in issue in an exercise of federal jurisdiction. Furthermore, such a law may, in the one provision, both create a right and provide a remedy (48).

9 The circumstance that the proceedings in which this Court is empowered to review the decision of the Supreme Court of Nauru, and, if appropriate, set aside that decision and make consequential orders, are described as an appeal, (a description which, from the point of view of the parties, is perfectly apt), does not determine the nature of the jurisdiction from the point of view of the Australian judicature for the purposes of Ch III of the *Constitution*. It is not uncommon for proceedings in a federal court, which involve a review of the decision of another decision maker, which are described in legislation as an appeal, and which from the point of view of the parties have the

(47) *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 142-143 [12].

(48) *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141; *Hooper v Hooper* (1955) 91 CLR 529 at 535-536.

characteristics of an appeal, to involve, from the point of view of the Australian judicature, an exercise of original jurisdiction (49).

10 The power conferred upon this Court by the Nauru Act is a power to affirm, reverse or modify the judgment, decree, order or sentence of the Supreme Court of Nauru and to make such orders as should have been made or to remit the case for re-determination. That conferral of power by Australian legislation is made pursuant to the Agreement between the Commonwealth of Australia and the Republic of Nauru. In the present case, the litigation is against an officer of the Republic of Nauru, and questions of enforcement of any orders made by this Court involve relations between the two governments. There is no warrant for any assumption that such orders would be ineffective. There is a matter, that is to say, a controversy between the parties to the proceedings as to their respective rights and liabilities. It arises under a law made by the Parliament in the manner already described. Until the jurisdiction created by s 5 was invoked, the controversy did not involve any Australian law, and it had nothing to do with any part of the Australian judicature. In so far as the controversy can now be said to arise under a law made by the Parliament, it does so only because the jurisdiction of an Australian court is invoked for the first time. So far as the Australian judicature is concerned, this is a new matter. In the context of Ch III of the *Constitution*, the jurisdiction invoked is original jurisdiction.

11 For those reasons I joined in the order disallowing the objection to competency. For the reasons given by Gummow and Hayne JJ, I agree in the orders they propose respecting the motion for joinder and the costs of that motion and the objection to competency.

12 McHUGH J. The ultimate issue in this proceeding was whether the *Nauru (High Court Appeals) Act 1976* (Cth) was a valid enactment of the Parliament of the Commonwealth giving this Court jurisdiction to hear and determine an appeal by the appellant against an order of the Supreme Court of Nauru.

13 The issue arose because the respondent, the Director of Police for Nauru, objected to the competency of an appeal lodged in this Court by the appellant, Mr Mohammad Arif Ruhani. On 9 December 2004, this Court disallowed the Director's notice of objection to competency. I joined in the order disallowing the objection to competency and now give my reasons for doing so.

14 In my opinion, the *Nauru (High Court Appeals) Act 1976* (the Nauru Appeals Act) is a valid enactment of the federal Parliament and confers original jurisdiction on this Court to determine the "appeal". It is a law validly made under s 76(ii) of the *Constitution* which empowers the Parliament to "make laws conferring original jurisdiction on the High

(49) *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353 at 370-371; *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 657; *Hembury v Chief of General Staff* (1998) 193 CLR 641.

Court in any matter … arising under any laws made by the Parliament". Accordingly, the appeal by Mr Ruhani was competent.

Statement of the case

15 Mr Ruhani is an Afghan national. By proceedings commenced in the Supreme Court of Nauru in April 2004, he sought the issue of a writ of habeas corpus directed to the Director of Police. He alleged that he was being held against his will by or on behalf of the Director of Police. In the Supreme Court of Nauru, Connell CJ granted an order nisi directing the Director to show cause why the order nisi should not be made absolute. After a hearing, Connell CJ dismissed the application for a writ of habeas corpus and ordered that the order nisi be discharged.

16 By a notice of appeal filed in this Court, Mr Ruhani appeals from the judgment and order of the Supreme Court of Nauru.

The material facts

17 Mr Ruhani was brought to the Republic of Nauru on 21 December 2001 by Australian sea transport. The Australian Department of Immigration and Multicultural and Indigenous Affairs rejected his application for refugee status.

18 Under a Memorandum of Understanding between Australia and Nauru (50), accommodation for Mr Ruhani and other asylum seekers was established on Nauru at two facilities: Topside and Former State House. Since February 2003 or earlier, Mr Ruhani has been detained in Topside Camp on Nauru. He neither applied for nor consented to the issue of a Nauruan visa for himself. Nor did he authorise any person to apply for a Nauruan visa on his behalf. Nevertheless, he was granted a Nauruan special purpose visa on 7 January 2002, which was subsequently extended at the request of the Australian Government. The International Organization for Migration (the IOM) manages the facility where Mr Ruhani is detained and provides assistance in obtaining passports and travel documents to asylum seekers who elect to return to their country of origin. Mr Ruhani has not elected to return to his country of origin and has not requested assistance in applying for passports or travel documents from the IOM.

Parties' submissions before this Court

19 The Director objected to the competency of this Court to hear Mr Ruhani's "appeal" from the Supreme Court of Nauru. He contends that the Nauru Appeals Act is invalid because it purports to confer on this Court judicial power that is not part of the judicial power of the Commonwealth. The Director submitted that:

1. The Nauru Appeals Act purports to confer appellate jurisdiction on this Court.

(50) Memorandum of Understanding between Australia and Nauru for co-operation in the management of Asylum-seekers and related issues, dated 9 December 2002 and extended 25 February 2004.

2. Section 73 of the *Constitution* exhaustively defines the appellate jurisdiction of this Court (apart from possible supplementation under s 122 in relation to appeals from Territory courts), and does not authorise the appeal conferred by the Nauru Appeals Act.
3. The Nauru Appeals Act is not supported by any head of legislative power capable of conferring additional jurisdiction on this Court.
4. Alternatively, if the Nauru Appeals Act confers original jurisdiction on this Court, the Act is invalid. That is because the original jurisdiction of this Court is exhaustively defined by ss 75 and 76 of the *Constitution* and proceedings under the Nauru Appeals Act do not fall within those sections.

20 Counsel for the Director conceded that there was at least one s 76(ii) "matter" arising under the Nauru Appeals Act, namely, the question of whether this Court can rule on the objection to competency. And there was another "matter": the appeal involved the interpretation of the *Constitution* (51). As a result, the Director did not dispute that this Court has jurisdiction to determine the objection to competency. But he contended that the Court had no jurisdiction to determine the merits of the appeal.

21 Counsel for Mr Ruhani contended that this Court has jurisdiction to hear the "appeal" on any one of three bases:

1. original jurisdiction under s 76(ii) "in any matter … arising under any laws made by the Parliament". The source of the relevant law is either the external affairs power (s 51(xxix)) or the power of the Parliament to make laws with respect to the relations of the Commonwealth with the islands of the Pacific (s 51(xxx));
2. original jurisdiction under s 75(i) "[i]n all matters … arising under any treaty"; and
3. appellate jurisdiction under the Nauru Appeals Act, which is authorised by the power conferred under either s 51(xxix) or s 51(xxx), and the exercise of which is unfettered by the operation of s 73.

Background to the Nauru Appeals Act

22 Historical relations between Nauru and Australia and the constitutional arrangements in Nauru with respect to the exercise of judicial power explain the enactment of the Nauru Appeals Act. An agreement made in 1976 between Nauru and Australia (52) (the 1976 Agreement) and the Nauru Appeals Act, which gave domestic effect in Australia to that Agreement, were products of an association between the two countries that extended back to the time of the First World War. This relationship gave rise to the unique provisions of the Act that purport to

(51) *Constitution*, s 76(i).
(52) [1977] *Australian Treaty Series*, No 11.

confer jurisdiction on this Court to hear "appeals" from decisions of the Supreme Court of Nauru.

23 Germany annexed Nauru in 1888, following an agreement between the British and German Governments in 1886 that divided the Western Pacific into spheres of British and German influence (53). Australian troops occupied and administered Nauru during the First World War (54). The Versailles Conference in 1919 agreed to grant a mandate over Nauru to Governments of the British Empire. The effect of Art 22 of the Covenant of the League of Nations was to grant the mandate on 17 December 1920 to the sovereign of the United Kingdom, Australia and New Zealand. On 2 July 1919, the three nations concluded an agreement that provided for the administration of Nauru by an Administrator (the 1919 Agreement) (55). Article 1 of the 1919 Agreement operated to vest the administration of Nauru in the Administrator and provided:

> "The Administrator shall have power to make ordinances for the peace, order and good government of the Island, subject to the terms of this Agreement, and particularly … to establish and appoint courts and magistrates with civil and criminal jurisdiction."

24 The *Nauru Island Agreement Act 1919* (Cth) was enacted to give effect to the Agreement. Exercising a power that Art 1 of the 1919 Agreement vested in the Australian Government, the Government appointed the first Administrator and all subsequent Administrators. Exercising the power conferred by Art 1 of the 1919 Agreement, the Administrator made the *Judiciary Ordinance 1922*. That Ordinance established a Central Court and a District Court.

25 In 1947, Nauru was placed under the United Nations Trusteeship System, which succeeded the League of Nations Mandate System. Between 1947 and 1968, the Republic of Nauru was a United Nations Trust Territory. The Trusteeship Agreement for Nauru replaced the Nauru Mandate. Under the Trusteeship Agreement, the Governments of Australia, New Zealand and the United Kingdom undertook to jointly administer the Territory of Nauru. The administration of Nauru continued under an Administrator appointed by Australia.

26 The *Judiciary Ordinance 1957* (the 1957 Ordinance) repealed all previous Ordinances and established a Court of Appeal as a superior court of record, a Central Court as a superior court of record, and a District Court. Under the 1957 Ordinance, appeals lay from the District Court to the Central Court, and from the Central Court to the Court of Appeal. The Court of Appeal consisted of a single judge who was or had been a Justice of this Court or of the Supreme Court of an Australian State or Territory.

(53) Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case", *Harvard International Law Journal*, vol 34 (1993) 445, at p 450.

(54) Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case", *Harvard International Law Journal*, vol 34 (1993) 445, at p 450.

(55) Schedule to the *Nauru Island Agreement Act 1919* (Cth).

27 In 1965 an agreement was reached between the Governments of the United Kingdom, Australia and New Zealand in respect of the administration of the Trust Territory (the 1965 Agreement) (56). That Agreement provided for the establishment of legislative, executive and judicial branches of government. Under Art 5(1), a Central Court and a Court of Appeal were established "to replace the existing Central Court and Court of Appeal." Under Art 5(4), an appeal lay from a judgment of the Court of Appeal to this Court by leave of this Court.

28 The *Nauru Act 1965* (Cth), which commenced on 18 December 1965, gave effect to the 1965 Agreement, as required under Art 6. Sections 47 and 49 of the *Nauru Act 1965* established the Court of Appeal of the Island of Nauru and the Central Court of the Island of Nauru, respectively. Section 53 provided for the continued existence of the District Court of the Island of Nauru. Section 54 provided that appeals from the Court of Appeal of the Island of Nauru were to lie to this Court, upon leave of the High Court. In the Second Reading Speech for the Nauru Bill 1965 (Cth) the Minister for Territories advised the House of Representatives that the provision for an appeal to this Court from decisions of the Court of Appeal was a new provision (57).

29 The United Nations General Assembly Resolution of 19 December 1967 resolved that the Trusteeship was to be terminated upon the accession of Nauru to independence on 31 January 1968 (58). The *Nauru Independence Act 1967* (Cth) (the 1967 Act) repealed the *Nauru Act 1965* and all Acts that extended to Nauru as a Territory of the Commonwealth as from 31 January 1968 (59). The 1967 Act also provided that as from 31 January 1968, Australia was not to exercise any powers of legislation, administration or jurisdiction in and over Nauru (60).

30 The arrangements for appeals to this Court from the Court of Appeal ceased upon the commencement of the 1967 Act. Thus, only between 18 December 1965 and 30 January 1968 did appeals to this Court lie from the Court of Appeal.

31 However, the Constitution of Nauru permits appeals from the Supreme Court of Nauru to a court of another country. Article 57(2) of the *Constitution* provides: "Parliament may provide that an appeal lies as prescribed by law from a judgment, decree, order or sentence of the Supreme Court to a court of another country."

32 On 6 September 1976, Australia and Nauru concluded the 1976 Agreement, which provided for appeals to the High Court of Australia from the Supreme Court of Nauru in certain circumstances. As the

(56) [1965] *Australian Treaty Series*, No 20.
(57) Australia, House of Representatives; *Parliamentary Debates* (Hansard); 2 December 1965, p 3501.
(58) Resolution 2347 (XXII).
(59) The 1967 Act, s 4(1).
(60) The 1967 Act, s 4(2).

recitals to the 1976 Agreement state, the Agreement sought to continue arrangements that had been in place between 18 December 1965 and 30 January 1968, prior to Nauru's independence:

> "Recalling that, immediately before Nauru became independent, the High Court of Australia was empowered, after leave of the High Court had first been obtained, to hear and determine appeals from all judgments, decrees, orders and sentences of the Court of Appeal of the Island of Nauru, other than judgments, decrees or orders given or made by consent."

The Nauru Appeals Act

33 The Nauru Appeals Act gives effect to the 1976 Agreement (the Agreement is appended in the Schedule) (s 4). In the Second Reading Speech, the Attorney-General, the Hon R J Ellicott QC, said the source of constitutional power for the Act was the external affairs power (s 51(xxix)) or the power of the Parliament to make laws with respect to the relationship between Australia and the islands of the Pacific (s 51(xxx)) (61). The Attorney-General recalled that under the legislation in force when Nauru was a Trust Territory an appeal lay by leave to this Court from the judgments, orders and decrees of the Nauru Court of Appeal. He told the House that (62):

> "In the course of negotiations that preceded the independence of Nauru, the Nauruan leaders expressed a wish that provision be made for appeals to the High Court from certain judgments of the Supreme Court of Nauru that was to be established under that constitution.
>
> The Government is happy to accede to the desire of the Nauruan leaders and so to enter into the arrangements necessary for a suitable scheme for appeals to the High Court …
>
> The Bill represents a novel and significant step in that for the first time the High Court will function as a final court of appeal from the Supreme Court of another independent sovereign country …
>
> We have had, of course, to consider the source of constitutional power to enable the Parliament to enact the legislation and to confer the jurisdiction on the High Court. The High Court has held that it may have conferred on it appellate jurisdiction other than from the State courts, so long as there is a proper source of power for the Parliament to enact the legislation conferring the jurisdiction. A line of decisions [summarised by Menzies J in *Capital TV and Appliances Pty Ltd v Falconer* (63)] has established that the High Court may hear appeals from Territory courts … In the present case, I believe that the external affairs power provides a sufficient

(61) Australia, House of Representatives; *Parliamentary Debates* (Hansard); 7 October 1976, p 1647.
(62) Australia, House of Representatives; *Parliamentary Debates* (Hansard); 7 October 1976, p 1647.
(63) (1971) 125 CLR 591 at 604.

constitutional basis for the Bill. Reference might also be made to the power of the Parliament to make laws with respect to the relations of the Commonwealth with the islands of the Pacific."

34 Section 5 of the Nauru Appeals Act provides for "appeals" from the Supreme Court of Nauru to the High Court: "Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the [1976] Agreement provides that such appeals are to lie." Articles 1 and 2 of the 1976 Agreement set out the cases where "appeals" may and may not be brought to this Court.

35 Sections 37 and 44 of the *Appeals Act 1972* (Nauru), as amended by the *Appeals (Amendment) Act 1974* (Nauru), permit a person to appeal to this Court in certain criminal and civil matters respectively. Those sections also confer jurisdiction on this Court to hear and determine those appeals. Some appeals lie to this Court as of right but, in other cases, leave to appeal is required. Section 51 of the *Appeals Act 1972* (Nauru) provides for judgments and orders of this Court to have force and effect in Nauru as if they were judgments and orders of the Supreme Court of Nauru and to be given effect in Nauru accordingly.

36 Only two reported cases have arisen out of the jurisdiction conferred by the Nauru Act on this Court (64). Both concerned criminal matters. Three criminal appeals were lodged in 1998 but were later discontinued (65). Until this case, this Court had not directly considered the validity of the Nauru Appeals Act. In *Amoe v Director of Public Prosecutions (Nauru)* (66) and *Director of Public Prosecutions (Nauru) v Fowler* (67), the Court did not refer to the issue of validity.

37 Under the terms of the 1976 Agreement, there is an appeal to this Court *as of right* from the exercise of original jurisdiction by the Supreme Court of Nauru, even though the Supreme Court may itself have appellate jurisdiction (68). In addition, a trial judge of the Supreme Court of Nauru may grant leave to appeal to this Court in relation to interlocutory civil judgments in the original jurisdiction of the Supreme Court of Nauru (69). There is no equivalent right of appeal in relation to domestic appeals (70).

(64) *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627; *Amoe v Director of Public Prosecutions (Nauru)* (1991) 66 ALJR 29; 103 ALR 595.

(65) Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001), para [19.13].

(66) (1991) 66 ALJR 29; 103 ALR 595.

(67) (1984) 154 CLR 627.

(68) 1976 Agreement, Art 1A(a) and (b)(i).

(69) 1976 Agreement, Art 1A(b)(ii).

(70) Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001), para [19.15].

Jurisdiction conferred on this Court by the Nauru Appeals Act

38 The outcome of this application turns on the characterisation of the jurisdiction that the Nauru Appeals Act purports to confer on this Court. The description of the proceeding as an "appeal" is not decisive. A classic description of an appeal is "the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below" (71). Appellate jurisdiction, therefore, implies that the subject matter has already been instituted in and acted upon by some other court whose judgment or proceedings are to be revised (72). However, the description of an appeal that I have quoted appears to assume that the court below lies within the same curial system as the appellate court. And the implication to which I have referred is also inconclusive, because it does not address the situation where the "other court" lies outside the Australian curial system.

39 Characterisation of the jurisdiction conferred on the Court by the Nauru Appeals Act is critical because it conditions the source of legislative power that supports the conferral of such jurisdiction. The problem is unique: on no other occasion has jurisdiction been conferred on this Court to hear "appeals" from a superior court of record of an independent sovereign nation. In this case, the problem of characterisation is a difficult one because the Nauru Appeals Act uses terminology that is consistent with the exercise of appellate jurisdiction, yet deals with proceedings that, when they come before this Court, represent the first engagement of the judicial power of the Commonwealth.

40 The literal meaning of many provisions of the Nauru Appeals Act suggests that the proceeding in this Court is an appeal in the true sense. The Nauru Appeals Act in s 5 speaks of "Appeals to [the] High Court" and provides that "[a]ppeals lie to the High Court of Australia from the Supreme Court of Nauru" in certain cases and that this Court "has jurisdiction to hear and determine appeals" in those cases (73). Section 7 of the Act prescribes the quorum for the exercise of the "jurisdiction of the High Court to hear and determine an appeal or an application for leave to appeal under section 5". Section 8 provides for the form of judgment to be given by this Court "in the exercise of its appellate jurisdiction under section 5". The Act also provides that in the case of an appeal, where there is a difference of opinion and there is no majority of the one opinion, "the decision appealed from shall be affirmed" (74).

41 The literal meaning of various provisions of the Nauru Appeals Act suggests therefore that the jurisdiction exercised by this Court is

(71) *Eastman v The Queen* (2000) 203 CLR 1 at 33 [104] per McHugh J, citing *Attorney-General v Sillem* (1864) 10 HL Cas 704 at 724.

(72) See Story, *Commentaries on the Constitution*, 5th ed (1891), vol 2, para [1761]; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 174.

(73) Nauru Appeals Act, s 5(1) and (2).

(74) Nauru Appeals Act, s 9(b)(ii).

appellate. However, the terminology used is not conclusive. The substance of the enactment determines whether this Court is being invested with original or appellate jurisdiction. In the old Taxation Board of Review "appeals", for example, this Court held that the "appeal" involved the exercise of the Court's original jurisdiction despite the legislation referring to an "appeal" (75). So it is necessary to examine the substantive provisions of the Nauru Appeals Act to determine whether the jurisdiction is appellate or original.

42 The powers of the Court, when exercising jurisdiction under s 5(2) of the Nauru Appeals Act, are consistent with the exercise of appellate jurisdiction. Examples are the powers of the Court under s 8 of the Nauru Appeals Act to "affirm, reverse or modify the judgment, decree, order or sentence appealed from and [to] give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court." These powers are similar to the power conferred on this Court in the exercise of its appellate jurisdiction by s 37 of the *Judiciary Act 1903* (Cth), which provides for this Court to "affirm reverse or modify the judgment appealed from, and [to] give such judgment as ought to have been given in the first instance". Moreover, the power conferred by s 37 is different from that conferred on this Court in the exercise of its original jurisdiction by s 31 of the *Judiciary Act*. Section 31 provides for this Court to "make and pronounce all such judgments as are necessary for doing complete justice in any cause or matter pending before it".

43 However, the difference between the powers conferred by ss 31 and 37 of the *Judiciary Act* is not a conclusive indicator that the Court exercises appellate jurisdiction when it uses the power of disposition conferred by the Nauru Appeals Act. The power conferred by s 8 is analogous to the powers of a court exercising original jurisdiction when it undertakes first-instance judicial review of an administrative decision. One such power is the power of remittal for re-determination in accordance with the directions of this Court. Further, this Court has held that s 196(1) of the 1951 consolidation of the *Income Tax Assessment Act 1936* (Cth) (which was then entitled the *Income Tax and Social Services Contribution Assessment Act*) invoked the original jurisdiction of this Court, not its appellate jurisdiction (76). Section 199(1) referred, in the context of the s 196 "appeal" from the Board of Review, to the power of the Court "by such order [to] confirm, reduce, increase or vary the assessment." This suggests that the powers conferred by s 8 are consistent with the exercise by this

(75) See, eg, *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353 at 371.
(76) See, eg, *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353 at 371.

Court of original jurisdiction. They are not a conclusive indication that the Court is exercising appellate jurisdiction.

44 The resolution of an "appeal" where the Justices sitting as a Full Court are divided in opinion as to the decision — "the decision appealed from shall be affirmed" (77) — also points to the exercise of appellate rather than original jurisdiction. It contemplates that judgment may be given notwithstanding the absence of a majority of opinion. Nevertheless, this factor is also not conclusive. In some instances, despite the absence of a majority of opinion, this Court may give judgment in the exercise of its original jurisdiction. Section 23(2)(b) of the *Judiciary Act* provides that, when this Court sits as the Full Court in any case other than an appeal from a court listed in s 23(2)(a) (which arguably contemplates the exercise of original jurisdiction), if the Justices are divided in opinion as to the decision to be given on any question, and the Court is equally divided in opinion, "the opinion of the Chief Justice, or if he or she is absent the opinion of the Senior Justice present", prevails.

45 Another matter consistent with the Nauru Appeals Act conferring appellate jurisdiction is that s 8 does not provide for the enforcement and execution of judgments, unlike ss 31 and 37 of the *Judiciary Act*. Counsel for the Director submitted that, if this Court is exercising original jurisdiction, then an essential characteristic of a "matter" is that there be a remedy enforceable in this Court. Counsel relied on statements by Gleeson CJ and myself in *Abebe v The Commonwealth* (78). There we said that the existence of a "matter" "cannot be separated from the existence of a remedy to enforce the substantive right, duty or liability." We also said that "there must be a remedy enforceable in a court of justice, that it must be enforceable in the court in which the proceedings are commenced and that the person claiming the remedy must have sufficient interest in enforcing the right, duty or liability to make the controversy justiciable." However, courts may exercise judicial power and original jurisdiction even though no question of "enforcement", as such, arises. Making declarations, giving advice to trustees, receivers and liquidators and granting probate of wills or letters of administration are examples (79). In addition, s 31 of the *Judiciary Act* may apply to an order of this Court exercising original jurisdiction under the Nauru Appeals Act. It would apply, for example, to a costs order, and such an order could be enforced in respect of any assets of a party within the jurisdiction. Section 31 would also apply to any other order, which Nauruan law would then pick up as a "datum" and apply in Nauru. The absence of any provision for the enforcement or execution of a judgment given under s 8 is inconclusive as to whether the jurisdiction is original or appellate. At

(77) Nauru Appeals Act, s 9(b)(ii).
(78) (1999) 197 CLR 510 at 528 [32].
(79) cf *R v Davison* (1954) 90 CLR 353 at 368.

all events, it does not preclude a conclusion that this Court exercises original jurisdiction when it hears an "appeal" under s 5.

46 Counsel for the Director submitted that, in the absence of a relevant Nauruan law, an order directing the release of Mr Ruhani would not be enforceable and there would be nothing to make such an order enforceable in this Court. Again, however, that is not conclusive. Section 31 has application in such a situation. The courts of Nauru could pick up any judgment of this Court as a "datum" or a "fact" and apply it in Nauru.

47 Another factor pointing to the jurisdiction under the Nauru Appeals Act being appellate is that the Supreme Court of Nauru is a superior court of record of unlimited jurisdiction. In the exercise of its original jurisdiction, this Court has power to set aside a judgment of a superior court of record, such as the Federal Court. However, it can do so only where, as in the case of the Federal Court (80), the court is a court of limited jurisdiction. The Supreme Court of Nauru, by contrast, is a superior court of record (81) invested with the widest jurisdiction (82), subject to some presently irrelevant exceptions. It is a central thesis of the common law that a superior court of record is assumed to have acted within jurisdiction (because it has jurisdiction to determine its own jurisdiction). As a result, its orders are binding until set aside on appeal. This factor suggests that the orders of the Supreme Court of Nauru are binding unless set aside on appeal and that any review of the orders of the Supreme Court of Nauru can only be an exercise of appellate jurisdiction. The authorities on which the Director relies in support of this contention, however, are concerned with decisions of superior courts of record within the same judicial hierarchy (83). The review of decisions of a superior court of record of an independent sovereign nation raises quite different issues. As a result, the reasoning of the Court in those cases is not determinative of the present case and does not compel a conclusion that this Court exercises appellate jurisdiction under the Nauru Appeals Act.

48 The foregoing discussion indicates that the terminology and the substance of the Nauru Appeals Act although consistent with appellate jurisdiction are not necessarily determinative of the class of jurisdiction exercised by the Court under the Act. What, if any, provisions of that Act or other matter indicate that the jurisdiction conferred by the Nauru Appeals Act is original jurisdiction?

49 Counsel for the Director accepted that the term "original jurisdiction" in ss 75 and 76 of the *Constitution* may mean "the right to enter the jurisdiction of a court for the first time". And precedents in

(80) *Re Macks; Ex parte Saint* (2000) 204 CLR 158.
(81) *Constitution of Nauru*, Art 48(1).
(82) *Courts Act 1972* (Nauru), s 17.
(83) See, eg, *Eastman v The Queen* (2000) 203 CLR 1 at 32-33 [104] per McHugh J; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 184 [49] per Gaudron J; at 209-210 [135] per McHugh J.

this Court support the proposition that the Court may be exercising original jurisdiction notwithstanding that the conferral of jurisdiction refers to an "appeal". Those precedents — *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (84), *Watson v Federal Commissioner of Taxation* (85) and *Pasini v United Mexican States* (86) — were concerned, however, with the review of decisions, not from courts or magistrates, but from persons, authorities or tribunals exercising administrative powers. In those cases, there had been no exercise of judicial power of any kind until the so-called "appeal" was brought before a court exercising the judicial power of the Commonwealth. They invoked the original jurisdiction of the relevant court because it was the first time that the matter was brought into a court exercising judicial power. They are different from the present case in that in this case the matter has already been brought before a superior court exercising judicial power, albeit not the judicial power of the Commonwealth.

50 A federal court may also exercise original jurisdiction even though the enactment conferring jurisdiction uses the nomenclature of "appeal" and the decision in respect of which review is sought involved the exercise of judicial power other than the judicial power of the Commonwealth. In *Hembury v Chief of General Staff* (87), for example, this Court held that the *Defence Force Discipline Appeals Act 1955* (Cth) conferred original jurisdiction on the Federal Court. Original jurisdiction was conferred despite s 52(3) of that Act conferring on the Federal Court "jurisdiction to hear and determine matters arising under this section with respect to which appeals are instituted in that Court". That Act also provided that such jurisdiction was to be exercised by that Court constituted as a Full Court. The decision in *Hembury* turned on the review of a decision of the Defence Force Discipline Appeal Tribunal, which is a body that exercises judicial power but not the judicial power of the Commonwealth. Thus, the exercise of original jurisdiction under s 76 of the *Constitution* is not confined to situations involving the first exercise of judicial power.

51 For constitutional purposes, engagement with the judicial power of the Commonwealth (or the Australian curial system, if the Territories are included) for the first time is a powerful indicator that original jurisdiction under s 75 or s 76 of the *Constitution* is being exercised. Indeed, if a matter engages the judicial power of the Commonwealth for the first time, then the exercise by a court of federal jurisdiction in relation to that matter must be original jurisdiction unless the

(84) (1959) 101 CLR 652.
(85) (1953) 87 CLR 353 at 371.
(86) (2002) 209 CLR 246 at 253-254 [10]-[13] per Gleeson CJ, Gaudron, McHugh and Gummow JJ.
(87) (1998) 193 CLR 641 at 653-654 [31]-[33] per Gummow and Callinan JJ, citing *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 657 per Dixon CJ.

jurisdiction is exercised in accordance with s 73 of the *Constitution*. It is true, of course, that, when this Court exercises jurisdiction under s 73 of the *Constitution* in respect of State appeals, it is exercising appellate jurisdiction although it is the first time that the judicial power of the Commonwealth is engaged. But that is because such appeals fall within s 73. When the case is not within s 73 the jurisdiction of a federal court exercising the judicial power of the Commonwealth for the first time must be original jurisdiction.

52 As no "matter" arises under the Nauru Appeals Act until proceedings are commenced in this Court, there is no exercise of the judicial power of the Commonwealth until this Court exercises its jurisdiction in respect of such proceedings. And the jurisdiction to hear an "appeal" under the Nauru Appeals Act is not jurisdiction falling within s 73 of the *Constitution*. Thus, despite the use of the term "appeal" and the investment of powers consistent with appellate jurisdiction, the decisive factor in determining the nature of the jurisdiction is that only when an "appeal" under the Nauru Appeals Act is lodged is the judicial power of the Commonwealth engaged. And because the proceeding is not within s 73 of the *Constitution* it follows that the jurisdiction conferred is original jurisdiction. The Director's argument that the Nauru Appeals Act purports to confer appellate jurisdiction, contrary to s 73 of the *Constitution*, must therefore be rejected.

Source of legislative power authorising the conferral of jurisdiction on this Court

53 However, the fact that the Nauru Appeals Act invests original jurisdiction in this Court is not conclusive of its validity. A grant of original jurisdiction, to be valid, must confer jurisdiction in accordance with s 75 or s 76 of the *Constitution*. So, the next question for determination is whether the federal Parliament legislated in accordance with either or both of those sections when it conferred original jurisdiction on this Court to hear "appeals" from orders of the Supreme Court of Nauru.

54 Mr Ruhani contended that original jurisdiction was validly conferred under s 76(ii) or, alternatively, s 75(i) of the *Constitution*. Under s 76(ii), the Parliament of the Commonwealth may confer original jurisdiction on this Court "in any matter … arising under any laws made by the Parliament". Under s 75(i), the Parliament may confer original jurisdiction "[i]n all matters … arising under any treaty".

The requirement of "matter"

55 Both ss 76(ii) and 75(i) require that there be a "matter" for the purposes of conferring original jurisdiction on this Court. This Court cannot exercise original jurisdiction if there is no "matter" in the constitutional sense. Whether or not a controversy is a "matter" is not always easy to decide. A proceeding is not itself a "matter" for constitutional purposes. Thus, the mere creation of a proceeding by legislation does not mean that the controversy to be resolved by the

proceeding is a "matter … arising under" the relevant Act (88). (If the mere creation of a proceeding could give rise to a "matter … arising under" the relevant Act, there would be no work for s 76(ii) to do. The law conferring the jurisdiction would be the law under which the "matter" would arise.)

56 In *Abebe* (89), Gleeson CJ and I held that the term "matter" meant "subject matter for determination in a legal proceeding", that is, the "determination of rights, duties, liabilities and obligations in a legal proceeding", and not simply "legal proceeding" (90). Gummow and Hayne JJ identified three elements that may be used to ascertain whether there is a "matter" (91): "the subject matter for determination in a proceeding", the "right, duty or liability [that] is to be established" and "the controversy between the parties".

57 In determining whether this Court has original jurisdiction under s 76(ii), it is therefore necessary to ascertain whether, first, the Nauru Appeals Act confers jurisdiction on this Court, and secondly, a "matter" arises under the Nauru Appeals Act. Similarly, in determining whether this Court has original jurisdiction under s 75(i), it is necessary to ascertain whether a "matter" arises under the 1976 Agreement.

58 In this case, the determination of rights, liabilities and privileges of persons by reference to the law of Nauru is the subject matter of proceedings authorised by the Nauru Appeals Act. One view is that the controversy between the parties is the controversy as to whether the judgment of the Supreme Court of Nauru is right or wrong. Another view — and I think the better view — is that the controversy is whether the Nauruan Immigration Act and regulations made under it properly supported the special purpose visa and the conditions attached to the visa, according to the law of Nauru. On this view, the controversy is whether the grant of the visa and the conditions attaching to the visa were lawful under Nauruan law. Such a question involves the proper construction of the Nauruan Immigration Act and regulations and a determination as to whether the appellant is lawfully detained under that regime. The right, duty or liability to be established is the right of Mr Ruhani not to be unlawfully detained. An alternative formulation is that the Director of Police has a duty not to detain Mr Ruhani unlawfully as a matter of Nauruan law. This right of Mr Ruhani includes the right to have the correctness of the judgment of the Supreme Court of Nauru reviewed by this Court by reference to

(88) *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 557-558 per Taylor J. In *Collins*, this Court held s 31 of the *Conciliation and Arbitration Act 1904* (Cth) invalid on the ground that it attempted to invest the Court of Conciliation and Arbitration with appellate jurisdiction from State courts exercising State jurisdiction.

(89) (1999) 197 CLR 510.

(90) *Abebe v The Commonwealth* (1999) 197 CLR 510 at 524 [24].

(91) *Abebe v The Commonwealth* (1999) 197 CLR 510 at 570-571 [165].

Nauruan law. The right also includes the right to a determination of the rights, liabilities and privileges of Nauruans by reference to Nauruan law.

Section 76(ii)

59 Two requirements must be satisfied before this Court can exercise original jurisdiction under s 76(ii). First, there must be a law conferring jurisdiction on this Court in a "matter". Secondly, that matter must be a "matter … arising under any laws made by the Parliament".

60 The "matter" in the present case, as I have indicated, is the determination of the right of Mr Ruhani not to be detained unlawfully under Nauruan law. The Nauru Appeals Act confers jurisdiction on this Court in respect of that matter. But the ultimate question is whether the "matter" is one "arising under any laws made by the Parliament".

61 An extensive body of case law has grown up around the question whether or not a "matter" arises under a law of the Parliament of the Commonwealth. One of the most authoritative statements on the issue is that of Latham CJ in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (92). There, his Honour said that a matter arises under a federal law:

> "if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law."

Latham CJ did not regard it as essential that the matter depend on federal law for its enforcement as well as its existence; rather, it suffices if one or the other of the criteria was satisfied.

62 Counsel for the Director correctly conceded that the original jurisdiction of this Court under s 76 of the *Constitution* can be supplemented by federal legislation. However, he submitted that there was no "matter … arising under" the Nauru Appeals Act upon which a conferral of jurisdiction could validly operate. He contended that the mere creation of a proceeding does not mean that the controversy to be resolved by the proceeding is a "matter … arising under" the relevant Act (93). In this case the proceeding is a proceeding to determine whether the Supreme Court of Nauru erred. Counsel argued that the Nauru Appeals Act assumes that the relevant rights and duties to be adjudicated in this Court depend for their existence on the law of Nauru. Applying the tests articulated by the joint judgments of Gleeson CJ and myself and Gummow and Hayne JJ in *Abebe*, counsel submitted that the rights of the parties arise under Nauruan law, not Australian law. As the controversy arises under Nauruan law and only under Nauruan law, the "matter" is the controversy arising under

(92) (1945) 70 CLR 141 at 154.

(93) Citing *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 557-558 per Taylor J.

Nauruan law. Accordingly, it could not be a "matter … arising under" the Nauru Appeals Act. That Act merely creates the remedy.

63 It is not disputed that the rights and duties of the parties in this case are determined by reference to the terms of Nauruan law. Nor is it disputed that the terms of Nauruan law provide the basis for the subject matter of the proceeding between the parties under the Nauru Appeals Act. However, it is erroneous to suggest that the subject matter of the proceeding between the parties depends only on, and is wholly defined by, the law of Nauru.

64 Sections 5(1), (2) and 8 of the Nauru Appeals Act provide a right to institute proceedings in this Court, confer jurisdiction on this Court to hear and determine such proceedings and create a "matter" or controversy between the parties under federal law to be determined by reference to the law of Nauru. Section 5(1) of the Nauru Appeals Act by implication confers a right to institute proceedings in this Court in certain instances, as it provides that "[a]ppeals lie to the High Court of Australia from the Supreme Court of Nauru". Section 5(2) confers jurisdiction on this Court to "hear and determine" proceedings brought under s 5(1). Section 8 confers remedies, the section empowering the Court to "affirm, reverse or modify" the judgment or order of the Supreme Court of Nauru, to "give such judgment [or] make such order … as ought to have been given [or] made … in the first instance" and to remit the case for re-determination in accordance with the directions of this Court. Although s 8 does not expressly say so, by necessary implication it directs this Court to apply the law of Nauru to determine the proceedings brought under s 5(1). To this end, the section operates to give Nauruan law the force of federal law for the purpose of determining the controversy. A "matter" therefore arises under a federal law for the purpose of s 76(ii) because the right or duty in question in this Court — ie, the right of Mr Ruhani not to be detained unlawfully and the duty of the Director of Police to detain persons lawfully — owes its existence to the Nauru Appeals Act.

65 The subject matter of proceedings in respect of which this Court is invested with jurisdiction is defined by the Nauru Appeals Act. That Act identifies Nauruan law as the factum by reference to which the Act operates and Nauruan law as the law to be applied in the resolution of proceedings brought under the Act. This construction of the Act is supported by the words in s 8 that the Court may "give such judgment [or] make such order … *as ought to have been given [or] made … in the first instance*" (emphasis added). They imply that the Nauru Appeals Act — which is federal law — requires this Court to apply the terms of Nauruan law. The Act does not provide for this Court to give such judgment or make such order "as it deems fit", for example. Instead, the direction to give such judgment or make such order as ought to have been given or made *in the first instance* requires this Court to apply the law of that forum to determine the proceeding,

which, in this case, is Nauruan law. The provision thus impliedly directs the Court to apply the law of Nauru in determining the controversy.

66 Consequently, the Nauru Appeals Act has the effect of applying Nauruan law as federal law. By necessary implication, for the purpose of the "appeal", the Act gives effect to the law of Nauru as federal law. Nauruan law is applied to resolve the subject matter of the proceeding brought into this Court under the Nauru Appeals Act and, for the purposes of resolving the proceeding, Nauruan law is given the force of federal law. Nauruan law thus forms the factum that gives rise to federal rights. They include the right to have the correctness of the judgment of the Supreme Court of Nauru reviewed by this Court by reference to Nauruan law and the right to a determination of the rights, liabilities and privileges of Nauruans by reference to Nauruan law. The Court did this in *Amoe v Director of Public Prosecutions (Nauru)* (94) and *Director of Public Prosecutions (Nauru) v Fowler* (95) when it applied Nauruan criminal law to resolve appeals brought under the Nauru Appeals Act to this Court. There was no objection to jurisdiction in those cases. By giving Nauruan law the force of federal law for the purposes of a proceeding under the Nauru Appeals Act, that Act gives rise to the controversy and, hence, a "matter" for the purpose of s 76(ii).

67 Several decisions of this Court — *Hooper v Hooper* (96), *LNC Industries Ltd v BMW (Australia) Ltd* (97), *The Commonwealth v Evans Deakin Industries Ltd* (98) and *Western Australia v The Commonwealth (Native Title Act Case)* (99) — support this construction of the Nauru Appeals Act.

68 In *Hooper*, this Court rejected a challenge to the validity of the *Matrimonial Causes Act 1945* (Cth). That Act purported to invest State and Territory courts with certain jurisdiction in relation to matrimonial causes and directed those courts to exercise the invested jurisdiction in accordance with the law of the State or Territory in which the person instituting the proceedings was domiciled. Part III of the *Matrimonial Causes Act* related to the "[i]nstitution of matrimonial causes by certain persons domiciled in Australia". Section 10(1) provided that a person resident but not domiciled in a State or Territory could "institute proceedings in any matrimonial cause in the Supreme Court of" the State or Territory of residence. Section 10(2) invested the Supreme Court of each State and Territory with federal jurisdiction to hear and determine such proceedings. Section 11 provided that the Supreme Court of the State or Territory was to exercise any jurisdiction with

(94) (1991) 66 ALJR 29; 103 ALR 595.
(95) (1984) 154 CLR 627.
(96) (1955) 91 CLR 529.
(97) (1983) 151 CLR 575.
(98) (1986) 161 CLR 254.
(99) (1995) 183 CLR 373 at 484-485.

which it was invested under s 10 in accordance with the substantive law of the State or Territory in which the person instituting the proceedings was domiciled.

69 This Court held that Pt III of the *Matrimonial Causes Act* gave the State laws the force of federal law. It also held that that Part conferred substantive rights, which, when put in suit, gave rise to a "matter … arising under" a law of the Parliament within the meaning of s 76(ii). There was a clear "enactment" of a substantive law of the Commonwealth by the adoption of the relevant State law for the purpose of the suit, and a direction to the forum to apply the substantive law of that State (100):

> "In order to appreciate the real effect of Pt III of the Act, it is necessary to read s 10(1) with s 11, and s 10(2) is then seen as investing the Supreme Courts with the jurisdiction necessary to give effect to rights which are really created by ss 10(1) and 11. Section 10(1) says (to put it shortly) that, where a person is domiciled in one State but has been resident for one year in another State, he or she may institute a 'matrimonial cause' in the Supreme Court of that other State. This, in form, merely authorises certain persons to take proceedings of a character defined in s 3. As a matter of substance, however, it confers rights, though it does not tell us precisely what those rights are. It is s 11 that tells us precisely what those rights are. They are the rights which the person mentioned in s 10(1) has according to the law of the State in which he or she is domiciled. A substantive 'law of the Commonwealth' is thus enacted, and, whenever a 'matrimonial cause' is instituted putting any of those rights in suit, there is a 'matter' which 'arises' under that law of the Commonwealth. And 'with respect to' that 'matter' State courts may be lawfully invested with federal jurisdiction under s 77(iii) of the *Constitution*.
>
> It is no answer to the above analysis to say that the right put in suit when a 'matrimonial cause' is instituted under the Act is a right created by State law – by the law of the State of the domicil. What the Act does is to give the force of federal law to the State law. The relevant law is administered in a suit instituted under the Act not because it has the authority of a State, but because it has the authority of the Commonwealth. For the purposes of the suit it is part of the law of the Commonwealth. The Act might, in s 11, have defined the rights to which effect was to be given in 'matrimonial causes' by enacting a system of its own. Or it might have defined those rights by reference to the law of England or the law of New Zealand or the law of one particular Australian State. The fact that it chose to adopt the law of the State of the domicil in each particular case cannot affect the substance of the matter."

(100) *Hooper v Hooper* (1955) 91 CLR 529 at 536-537.

70 Nothing turned on the fact that the rights to which effect was to be given in "matrimonial causes" were those created by State law. The Court explicitly recognised that the Parliament might have defined those rights by reference to the laws of another polity, for example, the law of England or New Zealand. This obiter dictum supports the conclusion that the fact that the rights to which effect is given under the Nauru Appeals Act are defined by reference to the law of Nauru does not preclude the Act from operating to give those laws the force of federal law. A controversy arising under those laws therefore arises under the Nauru Appeals Act for the purposes of the conferral of jurisdiction on this Court.

71 One difference between *Hooper* and the present case is that the *Matrimonial Causes Act* had the effect of changing rights in the provision that permitted or authorised its application. In contrast, the Nauru Appeals Act actually creates a right in the provision that permits or authorises its application. This difference is not significant. If legislation conferring rights is otherwise supported by a head of legislative power, the Parliament can create those rights by reference to the law of another polity.

72 Unlike the *Matrimonial Causes Act*, the Nauru Appeals Act does not expressly direct the court in which jurisdiction is invested to apply the substantive law of a particular forum. The Nauru Appeals Act does not contain a provision that is directly comparable with s 11 of the *Matrimonial Causes Act*. The direction to the relevant State or Territory court to exercise the invested jurisdiction in accordance with the law of the State or Territory in which the person instituting the proceedings is domiciled was a clear adoption of the substantive law and a direction to the forum to apply the substantive law of that State or Territory. However, as I have indicated, as a matter of implication, the Nauru Appeals Act adopts the substantive law of Nauru as the substantive law by reference to which the rights and duties of the parties are to be ascertained.

73 The Director contended that *Hooper* differed from the present case in that this case does not concern the application of, in effect, a choice of law rule. Rather, it involves reviewing the law of Nauru. According to this argument, the controversy remains one arising under the law of Nauru and not one arising under the law of the Commonwealth. However, on its proper construction, s 8 of the Nauru Appeals Act, by necessary implication, gives effect to the law of Nauru as federal law. The controversy is not simply one of reviewing or applying the law of Nauru or reviewing the correctness of the decision of the Supreme Court of Nauru. Such a conclusion necessarily follows from an examination of the powers conferred on this Court under s 8 of the Nauru Appeals Act to determine proceedings brought under the Act. The broad powers conferred by s 8 suggest that the Court does more than simply review the correctness of the decision of the Supreme Court or apply the law of Nauru. The Court is instead directed to

determine the underlying controversy between the parties – in this case, the lawfulness of the appellant's detention.

74 In *LNC Industries Ltd*, this Court held that a claim in a contractual dispute constituted a "matter" arising under a law of the Commonwealth in respect of which federal jurisdiction was engaged. The claim was framed as a claim for damages for breach of contract or for relief for breach of trust. It was common ground that such a controversy may arise under State law and relief may be available under State law. In this instance, however, the subject matter of the claim owed its existence to federal law. The rights and liabilities of the parties which could become the subject of a contract or trust existed only because of the operation of federal law. The relevant right was the right of a licensee who was permitted under the terms of the licence to import a certain number of motor vehicles to transfer that quota. Federal law and regulations established the licence and quota regimes. For constitutional purposes, a "matter" existed because the subject matter of the contracts and the action arose under and existed only by reason of the provisions of certain federal regulations and the federal Act under which the regulations were made. In their joint judgment, Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ said (101):

> "When it is said that a matter will arise under a law of the Parliament only if the right or duty in question in the matter owes its existence to a law of the Parliament that does not mean that the question depends on the form of the relief sought and on whether that relief depends on federal law. A claim for damages for breach or for specific performance of a contract, or a claim for relief for breach of trust, is a claim for relief of a kind which is available under State law, but if the contract or trust is in respect of a right or property which is the creation of federal law, the claim arises under federal law. The subject matter of the contract or trust in such a case exists as a result of the federal law."

75 Counsel for the Director submitted that, as the content of the claim in *LNC Industries Ltd* derived from the regulation, it showed that some "federal" controversy was required for a matter to arise. However, as *Hooper* demonstrates, a "matter" owes its existence to federal law if the subject matter of the proceeding exists only because of the federal law. In *LNC Industries Ltd*, there could be no contract between the parties about the treatment of the import quotas in the absence of the federal regulations. But it does not follow that, for the purposes of identifying a "matter" that owes its existence to federal law, that subject matter must itself be a creature of federal law. If federal law adopts the law of another forum and gives effect to rights and liabilities under that law, there is a "matter … arising under" that law. Investing a court of federal jurisdiction with jurisdiction to determine a

(101) *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

proceeding involving those rights and liabilities is investing it with jurisdiction in a "matter" arising under federal law.

76 *Evans Deakin Industries Ltd* concerned a claim brought by a sub-contractor against the Commonwealth under the *Subcontractors' Charges Act 1974* (Qld). This Court held that, although s 64 of the *Judiciary Act* "does not subject the Commonwealth to the operation of State laws", it enabled "the provisions of State law [to] be the measure by reference to which rights and obligations are ascertained in suits to which s 64 applies" (102). *Evans Deakin Industries Ltd* is an example of the assimilating capacity of ss 64 and 79 of the *Judiciary Act*. Those sections may apply in a way that gives rise to a controversy by reference to a law, in that case a State law, that is picked up and applied by operation of the federal Act. The result is an exercise of federal jurisdiction applying federal law. *Evans Deakin Industries Ltd* differs from the present case because the present case applies foreign law, but the effect is the same in character.

77 In the joint judgment in the *Native Title Act Case* (103), Mason CJ, Brennan, Deane, Toohey and Gaudron JJ and I held:

> "There can be no objection to the Commonwealth making a law by adopting as a law of the Commonwealth a text which emanates from a source other than the Parliament (104). In such a case the text becomes, by adoption, a law of the Commonwealth and operates as such."

The difference between the *Native Title Act Case* and the present case is that in this case the Nauru Appeals Act purports to "adopt" Nauruan law, rather than the common law or the statute law of a State or Territory. However, as *Hooper* suggests, nothing turns on this point of distinction.

78 Contrary to the submission of the Director, the finding that by necessary implication s 8 gives the force of federal law to Nauruan law does not create a risk that there would be no coincidence between the determination of this Court and the determination of the Supreme Court of Nauru. It is also incorrect to assume that this Court would not be making such order as ought to have been made below, but rather would be making such order as ought to be made under this adopted law of Australia. There is no disconformity between the law applied in the proceeding before this Court and the law applied in the Supreme Court of Nauru, because there is only a single law applied in this

(102) *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 268 per Brennan J, see also at 264 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

(103) (1995) 183 CLR 373 at 484-485.

(104) *Hooper v Hooper* (1955) 91 CLR 529 at 536-537. The law of the States that was picked up as a law of the Commonwealth in that case was statute law, not common law. Where a State statute is thus picked up and enacted as a law of the Commonwealth, the common law which has affected the construction of the text or has attached doctrines to its operation continues to have the same effect on the law of the Commonwealth as it has or had on the law of the State subject to contrary provision.

forum as federal law, and that is the law of Nauru. Reasonable minds may differ as to the interpretation and application of that law, but the body of law remains constant.

79 Likewise, there is no risk that this Court would be required in the application of the law of Nauru to exercise jurisdiction that is fundamentally inconsistent with the exercise of federal jurisdiction or the discharge of the duties of a federal judicial officer. If a party brought an "appeal" to this Court in relation to *Kable*-type legislation (105), for example, this Court would refuse to hear it on the basis that the power that the Court is being asked to exercise is incompatible with the integrity, independence and impartiality of this Court. In addition, such an "appeal" may involve a question of Nauruan constitutional law, in which case an appeal would not lie to this Court under the Nauru Appeals Act (106).

80 It is also immaterial for constitutional purposes that the Nauru Appeals Act, by operation of ss 5(1), (2) and 8, simultaneously creates a "matter", invests this Court with jurisdiction and provides for a remedy (107). There can be no dispute that the Parliament is empowered to create a right and provide a remedy at the same time as it invests a court with jurisdiction in the matter. That much is clear from the decisions of this Court in *Barrett* and *Hooper*. Latham CJ acknowledged in *Barrett* that (108):

> "[I]t is within the power of the Commonwealth Parliament, when legislating upon a subject matter within its constitutional competence, to provide that a court may make orders which are incidental to carrying into effect the legislative scheme, and that a proceeding to obtain such an order is a matter arising under the Federal law. A right is created by the provision that a court may make an order, and such a provision also gives jurisdiction to the court to make the order."

Endorsing the approach of Latham CJ, in *Hooper* this Court accepted that a federal law may at once create a right and provide a remedy by providing that a person may take proceedings in a particular court to obtain a remedy (109).

81 It is also not decisive against the existence of a "matter … arising under" a law of the Commonwealth that the Nauru Appeals Act does not expressly provide for enforcement. Unlike the legislation considered in *Hooper* and *Pasini*, the Nauru Appeals Act does not expressly provide for the enforcement or execution of judgments or orders. Nevertheless, as Latham CJ acknowledged in *Barrett*, a matter

(105) *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
(106) Nauru Appeals Act, s 5 and Sch, Art 2(a).
(107) See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165 per Dixon J; *Hooper v Hooper* (1955) 91 CLR 529 at 535-536.
(108) (1945) 70 CLR 141 at 155.
(109) (1955) 91 CLR 529 at 535-536.

may exist if the right or duty in question owes its existence to federal law *or* depends upon federal law for its enforcement. In any event, there is nothing to suggest that the *Judiciary Act* does not apply in relation to the enforcement in Australia of judgments or orders of this Court in proceedings brought under the Nauru Appeals Act. For example, a costs order may be enforceable within Australia against the assets of a party within the jurisdiction. It is true that the enforcement of some rights and liabilities ultimately depends on Nauruan law. To this end, Art 4(2) of the 1976 Agreement provides for orders of this Court "to be made binding and effective in Nauru." Section 51 of the *Appeals Act 1972* (Nauru) provides for judgments and orders of this Court to "have force and effect in Nauru as if they were the judgment and orders of the Supreme Court [of Nauru]" and to be given effect in Nauru accordingly. But there has never been any objection to this Court making orders with respect to matters that can only be enforced out of the jurisdiction. Typically, there is some mutual enforcement or recognition provision, but even the absence of such a provision does not prevent this Court from exercising jurisdiction.

82 As a result, the Nauru Appeals Act is a valid enactment of the federal Parliament that confers original jurisdiction on this Court in respect of a "matter" within the meaning of s 76(ii) of the *Constitution*. Having reached this conclusion, it is therefore unnecessary for me to consider whether original jurisdiction is also conferred on this Court under s 75(i).

83 For these reasons, I joined in the order disallowing the notice of objection to competency. The Director should pay the costs of the proceedings in respect to that objection. But I see no reason for making any of the additional orders sought by Mr Ruhani. There is no reason for thinking that the Director will not meet the costs order. In those circumstances, there is no ground for adding either Nauru or the Commonwealth as a party. And there is no case for an order for indemnity costs. The Director had a powerful argument to put in support of his competency objection. It was an objection that was well taken — although it was unsuccessful — in adversary litigation. Because that is so, it would be contrary to the practice of this Court to make an order for the payment of indemnity costs.

84 GUMMOW AND HAYNE JJ. The appellant, an Afghan national, arrived in the Republic of Nauru on 21 December 2001. He was one of a number of "asylum seekers" brought to Nauru at that time by Australian sea transport. Facilities for the accommodation of these persons were established at two localities called "Topside" and "Former State House".

85 By a proceeding instituted in the Supreme Court of Nauru in April 2004, the appellant alleged that he was held at "Topside" against his will by or on behalf of the Director of Police and he sought habeas corpus. The Supreme Court granted an order nisi but on the return the Supreme Court (Connell CJ) discharged the order nisi and dismissed

the application. The Chief Justice delivered detailed and written reasons for that decision.

86 By notice of appeal filed in this Court on 2 July 2004, the appellant appeals from the judgment and order of the Supreme Court of Nauru and seeks, inter alia, the relief refused by the Supreme Court. Reliance is placed for the jurisdiction of this Court upon the *Nauru (High Court Appeals) Act 1976* (Cth) (the Nauru Act). The respondent has contended that this Court lacks jurisdiction to entertain the appeal because the Nauru Act is not a valid law of the Commonwealth. This Court has previously exercised, without objection to competency, jurisdiction under the Nauru Act in *Director of Public Prosecutions (Nauru) v Fowler* (110) and *Amoe v Director of Public Prosecutions (Nauru)* (111).

87 The constitutional questions raised by the respondent are of considerable importance. Upon the answer given to them depends, in large measure, the scope for the provision by Australia of direct assistance in the operation of the judicial systems of other countries who seek that assistance.

88 Particular provision for proceedings in this Court under the Nauru Act is made by O 70A of the *High Court Rules* (112). Order 70A r 8 deals with objections to competency of an appeal and provides for the setting down of objections before a Full Court. The respondent's notice of objection to competency of the appeal was dated 28 July 2004. The objection was resisted by the appellant.

89 Given the assertion of invalidity of the Nauru Act, the controversy gave rise to a matter arising under the *Constitution* or involving its interpretation within the meaning of s 76(i) of the *Constitution* and s 30(a) of the *Judiciary Act 1903* (Cth). It is that jurisdiction of which the Full Court presently has been seized. There was no intervention by the Attorney-General of the Commonwealth, on behalf of the Commonwealth, in exercise of the right conferred upon the first Law Officer of the Commonwealth by s 78A of the *Judiciary Act*.

90 On 9 December 2004, the Court ordered that the objection to competency be disallowed and reserved all questions of costs. The appeal was then set down and heard on 19 April 2005 by a differently composed Bench. What follows are our reasons for joining in the disallowance of the objection to competency. We also deal in this judgment with the costs of that objection.

91 Various provisions of the Nauru Act turn upon the definition of "Agreement" in s 3. This states:

> "In this Act, *Agreement* means the agreement between the Government of Australia and the Government of the Republic of

(110) (1984) 154 CLR 627.

(111) (1991) 66 ALJR 29; 103 ALR 595.

(112) These proceedings were commenced in the Court before the commencement of the *High Court Rules 2004*. The references to the *High Court Rules* are to the *High Court Rules 1952* as in force at the relevant times.

Nauru relating to appeals to the High Court of Australia from the Supreme Court of Nauru that was signed on 6 September 1976, being the agreement a copy of the text of which is set out in the Schedule."

The Agreement entered into force on 21 March 1977 (113) and the Nauru Act commenced on that day (114).

92 Section 4 of the Nauru Act states:

"The Agreement is approved."

93 Before turning to consider the substantive provisions of the Agreement and the provisions of the Nauru Act which reflect the Agreement, two general points should be made concerning the Agreement. The first is that Art 6 provides for the continuation of the Agreement until the expiration of the ninetieth day after notice in writing is given by one Government to the other of its desire to terminate it. No such notice has been given by either Government.

94 Secondly, the preamble to the Agreement includes the following:

"Recalling that, immediately before Nauru became independent, the High Court of Australia was empowered, after leave of the High Court had first been obtained, to hear and determine appeals from all judgments, decrees, orders and sentences of the Court of Appeal of the Island of Nauru, other than judgments, decrees or orders given or made by consent,

Taking into acount the desire of the Government of the Republic of Nauru that suitable provision now be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru."

95 The reference to the state of affairs immediately before Nauru became independent is to the commencement of s 4 of the *Nauru Independence Act 1967* (Cth) (the Independence Act). The effect of s 4 was that on the expiration of 30 January 1968, the day preceding Nauru Independence Day, all Acts of the Commonwealth extending to Nauru as a Territory of the Commonwealth ceased so to extend and the *Nauru Act 1965* (Cth) (the 1965 Act) was repealed; on and after Nauru Independence Day, Australia was not to exercise powers of legislation, administration or jurisdiction in and over Nauru.

96 The preamble to the 1965 Act recited the approval by resolution dated 1 November 1947 of the General Assembly of the United Nations to the placing of the Territory of Nauru under the International Trusteeship system on terms set out in the Trusteeship Agreement, a copy of which was set out in the First Schedule to the 1965 Act (115).

(113) [1977] *Australian Treaty Series*, No 11.

(114) Nauru Act, s 2.

(115) The Trusteeship Agreement recited the earlier history of Nauru under a Mandate conferred upon His Britannic Majesty and said to be administered in accordance with the Covenant of the League of Nations by the Government of Australia on the joint behalf of the Governments of Australia, New Zealand and the United Kingdom. Australian legislation immediately before and during the Mandate

Articles 2 and 4 of the Trusteeship Agreement designated the Governments of Australia, New Zealand and the United Kingdom as the joint Authority to exercise the administration of the Territory, with responsibility for the peace, order, good government and defence of the Territory (116).

97 The preamble to the 1965 Act also recited the entry by the three Governments constituting the joint Authority into an agreement dated 26 November 1965 which made further arrangements for the government of the Territory in accordance with the Trusteeship Agreement. A copy of this agreement was the Second Schedule to the 1965 Act. Article 3 thereof vested the administration of the Territory in an Administrator appointed by the Government of Australia. Article 5 provided for a court system, with an appeal to the High Court of Australia by leave of the High Court. It was in implementation of Art 5 that s 54 of the 1965 Act provided for the exercise of jurisdiction by the High Court to hear and determine, by leave, appeals from the Nauru Court of Appeal.

98 It was this state of affairs which came to an end on the expiration of 30 January 1968, the day preceding Nauru Independence Day.

99 In the Second Reading Speech on the Bill for the Nauru Act, the Attorney-General (Mr R J Ellicott QC) said (117):

> "This Parliament, in the enactment of [the Independence Act], made provision for the final moves of the Nauruan people to the adoption of their own constitution. In the course of negotiations that preceded the independence of Nauru, the Nauruan leaders expressed a wish that provision be made for appeals to the High Court from certain judgments of the Supreme Court of Nauru that was to be established under that constitution.
>
> The Government is happy to accede to the desire of the Nauruan leaders and so to enter into the arrangements necessary for a suitable scheme for appeals to the High Court. Accordingly the terms of the necessary Agreement were discussed in detail between officers of the 2 governments and the Agreement was finally made at Nauru on 6 September 1976."

(cont)

period included the *Nauru Island Agreement Act 1919* (Cth) and the *Nauru Island Agreement Act 1932* (Cth). There is further consideration of the Mandate period and of the activities of the British Phosphate Commissioners on Nauru by Megarry V-C in *Tito v Waddell [No 2]* [1977] Ch 106 at 150-156, in the article by Dr Varsanyi, "The Independence of Nauru", *Australian Lawyer*, vol 7 (1968) 161, and in two opinions by Sir Robert Garran reproduced as Opinion Nos 1029 and 1048 in Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia* (1988).

(116) The terms of the Mandate and then of the Trusteeship Agreement for New Guinea had directly identified the Commonwealth of Australia as sole mandate and trustee authority: *Jolley v Mainka* (1933) 49 CLR 242 at 273; *Fishwick v Cleland* (1960) 106 CLR 186 at 194-195.

(117) Australia, House of Representatives; *Parliamentary Debates* (Hansard); 7 October 1976, p 1647.

100 We return to consideration of the Nauru Act. Section 5 provides:

"(1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.

(2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).

(3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave."

101 Section 5(1) directs attention to and derives its content from the adoption of Arts 1 and 2 of the Agreement. These state:

"Article 1

Subject to Article 2 of this Agreement, appeals are to lie to the High Court of Australia from the Supreme Court of Nauru in the following cases:

A. In respect of the exercise by the Supreme Court of Nauru of its original jurisdiction –

(a) In criminal cases – as of right, by a convicted person, against conviction or sentence.

(b) In civil cases –

(i) as of right, against any final judgment, decree or order; and

(ii) with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.

B. In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction –

"In both criminal and civil cases, with the leave of the High Court."

Article 2

An appeal is not to lie to the High Court of Australia from the Supreme Court of Nauru –

(a) where the appeal involves the interpretation or effect of the Constitution of Nauru;

(b) in respect of a determination of the Supreme Court of Nauru of a question concerning the right of a person to be, or to remain, a member of the Parliament of Nauru;

(c) in respect of a judgment, decree or order given or made by consent;

(d) in respect of appeals from the Nauru Lands Committee or any successor to that Committee that performs the functions presently performed by the Committee; or

(e) in a matter of a kind in respect of which a law in force in Nauru at the relevant time provides that an appeal is not to lie to the High Court."

102 The jurisdiction of the High Court to hear and determine appeals and applications for leave under s 5 is to be exercised by a Full Court consisting of not less than two Justices (s 7). This is a law on its face supported by s 79 of the *Constitution*. This provides that the federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

103 Section 76(ii) of the *Constitution* requires more than a bare conferral of jurisdiction; there must be revealed a substantive law under which there arise the matters the subject of the conferral of jurisdiction. The appellant submits that s 5(2) and 5(3), stating respectively that this Court has jurisdiction to hear and determine the appeals mentioned in s 5(1) and the leave applications mentioned in s 5(3), are laws made by the Parliament in exercise of its authority under s 76(ii) of the *Constitution* to make laws conferring original jurisdiction on the High Court in any matter "arising under any laws made by the Parliament". The appellant further submits that the relevant matters arise under federal law because they owe their existence to the adoption and translation into Australian law (by s 5(1) and (3) of the Nauru Act) of Arts 1 and 2 of the Agreement. This statutory implementation of the Agreement is an exercise of the powers of the Parliament to make laws with respect to "external affairs" (s 51(xxix)) and "the relations of the Commonwealth with the islands of the Pacific" (s 51(xxx)).

104 The rights and obligations in controversy and for determination in the matter are whether in a particular instance leave to appeal should be granted and, if so, and in cases of an appeal as of right, whether the judgment, decree, order or sentence appealed from should be affirmed, reversed or modified and consequential orders made as provided in s 8 of the Nauru Act. Section 8 will be set out below.

105 These submissions by the appellant should be accepted and those put in opposition by the respondent should be rejected.

106 The result is the conferral upon this Court of original jurisdiction as provided in s 76(ii) of the *Constitution*. Section 31 of the *Judiciary Act* makes general provision respecting judgments in the exercise of its original jurisdiction and the execution thereof. This is supplemented by s 8 of the Nauru Act, which provides that in the exercise of its "appellate jurisdiction" under s 5 of that Act, the High Court:

> "may affirm, reverse or modify the judgment, decree, order or sentence appealed from and may give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court."

107 The Agreement speaks throughout, beginning with its heading, of "appeals" from the Supreme Court of Nauru to the High Court of Australia. Section 57(2) of the *Constitution of Nauru*, which came into force on Nauru Independence Day, states:

> "[The] Parliament [of Nauru] may provide that an appeal lies as prescribed by law from a judgment, decree, order or sentence of the Supreme Court to a court of another country."

The *Appeals (Amendment) Act 1974* (Nauru) amended the *Appeals Act 1972* (Nauru) to provide for appeals from the Supreme Court to this Court, in terms later reflected in the Agreement. Hence it was to be expected that, in approving and implementing the Agreement, the Nauru Act would use the same appellate nomenclature adopted initially by and from the perspective of Nauruan law.

108 However, the exercise of jurisdiction by this Court under the Nauru Act represents the first engagement in Australia of any judicial power. From that perspective, which, as a matter of Australian constitutional law and Ch III of the *Constitution*, is essential for a consideration of the Nauru Act, the jurisdiction is original in nature (118).

109 The use in the Nauru Act of appellate nomenclature does not require the contrary conclusion that what has been attempted in the Nauru Act is the addition of a new head of appellate jurisdiction outside the boundary of s 73 of the *Constitution*. Such an attempt would, as further mentioned hereunder, fail and a construction of the Nauru Act which sustains validity is to be preferred.

110 It should be added that the use by the Parliament of the term "appeal" to identify what has been an exercise of this Court of original jurisdiction extends over a century. Early examples include the *Patents Act 1903* (Cth) (s 58), the *Land Tax Assessment Act 1910* (Cth) (s 44), and the *Income Tax Assessment Act 1915* (Cth) (ss 37, 38). The case law has long established that the terminology adopted in such legislation has not been determinative of the character of the jurisdiction for the purposes of Ch III of the *Constitution*. Thus, in *Minister for the Navy v Rae* (119), Dixon J remarked:

> "A Compensation Board [acting under the National Security (General) Regulations] cannot, under our constitutional system, exercise any of the judicial power of the Commonwealth. That power is brought into play for the first time when, on so called proceedings to review, the Court determines the compensation. They are in truth originating proceedings in the original jurisdiction, just as are the 'appeals' from the Commissioner of Taxation and from taxation Boards of Review and Valuation Boards."

111 Nor is it a ground of objection to the validity of the Nauru Act that it performs a double function of creating and enforcing rights "in one blow" (120). Federal laws drawn in that fashion have been held effective by a line of cases dealing with s 76(ii) of the *Constitution*.

(118) cf *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 653-654 [31]-[33]; *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [10]-[13].

(119) (1945) 70 CLR 339 at 340-341. See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 181; *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353 at 370-371.

(120) *Fisher v Fisher* (1986) 161 CLR 438 at 453.

The cases commence with *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (121) and are too numerous and too well known to warrant listing here. However, it will be necessary later in these reasons to refer to two of the cases, *Hooper v Hooper* (122) and *LNC Industries Ltd v BMW (Australia) Ltd* (123).

112 The respondent contended that the rights and obligations to be adjudicated in this Court in exercising jurisdiction under the Nauru Act could not arise under a law of the Commonwealth because their source lay elsewhere, in the law in force in Nauru. That submission is to be rejected.

113 Undoubtedly, from the constitutional perspective of Nauru, the source of the rights and obligations adjudicated in the Supreme Court of Nauru have their source in the law in force in the Republic of Nauru. But, as remarked above, in considering the Australian legislation, there is a change in perspective. A law made by the Parliament in exercise of a power in s 51 of the *Constitution*, here in paras (xxix) and (xxx), may answer the relevant constitutional description even though it defines rights and obligations by adoption of, or by reference to, the laws of another polity.

114 The joint judgment in *Hooper v Hooper* indicates that this polity may be external to Australia. That case concerned the *Matrimonial Causes Act 1945* (Cth) which provided for the exercise of federal jurisdiction in certain matrimonial causes, based on the residence of the petitioner, but with a provision by s 11 for the law of the State of domicile of the petitioner as the lex causae. Their Honours said in *Hooper* (124):

> "It is no answer to the above analysis to say that the right put in suit when a 'matrimonial cause' is instituted under the Act is a right created by State law – by the law of the State of the domicil. What the Act does is to give the force of federal law to the State law. The relevant law is administered in a suit instituted under the Act not because it has the authority of a State, but because it has the authority of the Commonwealth. For the purposes of the suit it is part of the law of the Commonwealth. The Act might, in s 11, have defined the rights to which effect was to be given in 'matrimonial causes' by enacting a system of its own. Or it might have defined those rights by reference to the law of England or the law of New Zealand or the law of one particular Australian State. The fact that it chose to adopt the law of the State of the domicil in each particular case cannot affect the substance of the matter."

115 The immediate right, duty or liability to be established by this Court in the exercise of jurisdiction conferred by the Nauru Act is the

(121) (1945) 70 CLR 141. See Zines, *Federal Jurisdiction in Australia*, 3rd ed (2002), pp 124-129.
(122) (1955) 91 CLR 529.
(123) (1983) 151 CLR 575.
(124) (1955) 91 CLR 529 at 536-537.

correctness of the determination by the Supreme Court of Nauru. Were it not for the initial operation of the *Constitution* and laws of Nauru there would have been no such determination and no occasion for the engagement of the Agreement and its implementation in Australian law by the Nauru Act. But without that federal law there would be no subject matter for determination by this Court.

116 Contrary to the respondent's submissions, it is not his case on the objection to competency but that of the appellant which draws support from authorities such as *LNC Industries Ltd v BMW (Australia) Ltd* (125). The plaintiff in *LNC* sued in the Supreme Court of New South Wales upon an alleged agreement that the defendant would hold for the benefit of the plaintiff certain units of quota for the importation of passenger motor vehicles. The defences concerned contractual and trust issues but did not raise any question under the federal statute and regulations which established the import quota system. Nevertheless, the subject matter of the contract and trust asserted by the plaintiff was entitlements which existed only as a result of federal law; the consequent exercise by the Supreme Court of federal jurisdiction rendered incompetent an attempted appeal directly to the Privy Council.

117 In the present matter, the question whether the Supreme Court of Nauru erred in discharging the order nisi for habeas corpus would be answered in this Court by reference to the law in force in Nauru; but there is only a "matter" for determination in this Court as a result of the operation of the Nauru Act.

118 For these reasons, the jurisdiction of this Court in the present appeal under the Nauru Act is supported by a law answering s 76(ii) of the *Constitution*. It is unnecessary to embark upon the reliance placed by the appellant in the alternative upon s 75(i) of the *Constitution*, dealing with matters "arising under any treaty".

119 However, something more should be said respecting the appellate jurisdiction conferred by s 73 of the *Constitution*. The exhaustive and exclusive nature of the provisions of Ch III was recently confirmed by *Re Wakim; Ex parte McNally* (126). As Gaudron J later remarked, decisions supporting the conferral of appellate jurisdiction on this Court by laws sustained purely by the Territories power in s 122 of the *Constitution* are not readily reconciled with that view of Ch III (127). This is not an appropriate occasion to consider further the present state of authority in this area (128). It is sufficient to say that from submissions in the present case there appear no grounds of textual

(125) (1983) 151 CLR 575.
(126) (1999) 198 CLR 511.
(127) *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 337 [27].
(128) See *Putland v The Queen* (2004) 218 CLR 174 at 187-188 [33]; Zines, *Federal Jurisdiction in Australia*, 3rd ed (2002), p 186.

necessity or constitutional expediency which would warrant any distortion of Ch III beyond what may presently be required by the case law concerning s 122.

120 For these reasons, we supported the disallowance of the objection to competency.

121 There remains the question of costs of that objection.

122 The appellant moves for an order joining the Republic of Nauru and the Commonwealth of Australia as parties to the proceeding and an order that those added parties pay the appellant's costs of the objection to competency taxed on an indemnity basis. Pursuant to the directions of a single Justice, the parties to the motion have filed their arguments in writing. There is no occasion to require or permit oral amplification of those arguments. The motion should be dismissed with costs.

123 One of the arrangements recorded in the Memorandum of Understanding (the MoU), which is described more fully in the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ on the appeal itself (129), was that Australia "will assume full financial responsibility for the administration of activities related to asylum seekers". The appellant tendered in evidence in support of his motion copies of some correspondence between the appellant's solicitor and the Australian Government Solicitor, solicitor for the Commonwealth. The Australian Government Solicitor informed the appellant's solicitor, by letter dated 7 December 2004, that "[u]nder the [MoU] between Australia and Nauru, the Commonwealth will meet any costs orders the respondent is ordered to pay in respect of the High Court proceedings" (identified earlier in that letter as proceedings number C8 of 2004 between Ruhani and the Director of Police). The appellant proffers no reason to doubt the accuracy or veracity of this statement by the Australian Government Solicitor which, in any event, appears to do no more than record the effect of the MoU.

124 That the Commonwealth had agreed to meet the costs of the present litigation was apparent from at least the time that the affidavit exhibiting the MoU was filed in the Supreme Court. In these circumstances there is no occasion now to add parties to the proceeding and there is no reason to make some special order for the costs of the objection to competency. The objection having failed, the respondent should pay the costs of the objection, but the appellant should pay the costs of the motion.

125 These orders should be made respecting the objection to competency and the motion for joinder:

(1) Motion seeking joinder of the Republic of Nauru and the Commonwealth of Australia dismissed.

(2) The appellant pay the costs of the respondent of the motion.

(3) The respondent pay the costs of the appellant of the objection to competency.

(129) *Ruhani v Director of Police [No 2]* (2005) 222 CLR 580 at 582 [2], 584 [9].

(4) The costs provided for in orders (2) and (3) be set off.

126 KIRBY J. These proceedings involve an objection to the competency of a purported appeal from a judgment and orders of the Supreme Court of Nauru (130). A connected motion in relation to costs is also before the Court.

The facts

127 Mr Mohammad Arif Ruhani (the appellant) was one of three applicants for the issue of a writ of habeas corpus out of the Supreme Court of Nauru. The application was rejected in the decision now challenged in this Court. The appellant is an Afghan national who, with many others, wished to enter Australia, claiming protection under the Refugees Convention and Protocol (131). However, he was intercepted at sea and taken to Nauru by a vessel of the Royal Australian Navy. He and 318 others in a like position were then kept (to use a neutral word) in Nauru, pursuant to intergovernmental arrangements between the Governments of Australia and Nauru, eventually expressed in a Memorandum of Understanding (MoU) (132). The other two applicants for habeas corpus were successively permitted to enter Australia. At the time these proceedings were heard by this Court, the appellant had not been given that permission. That is the background to his appeal.

128 The proceedings in this Court were not mounted under the *Australian Constitution*, s 75(v), to engage the original jurisdiction of the Court in order to question the lawfulness of the actions of officers of the Commonwealth leading to the appellant's removal to Nauru; the execution of the MoU; the application of the legislation as it affected him (133): or the role of the officers of the Commonwealth who, as the record shows, played a continuing part in Nauru in "managing" the appellant. Instead, the appellant claims to exercise rights afforded to him both under the law of Nauru and Australian federal law to bring an appeal to this Court so as to challenge what are said to be errors in the determination by the Supreme Court of Nauru of the case that he brought to that Court challenging the lawfulness of his detention.

(130) *Mohammed Ali Amiri v Director of Police* (unreported, Supreme Court of Nauru, 15 June 2004, per Connell CJ).

(131) Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5; and the Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37. See *Migration Act 1958* (Cth), s 36.

(132) Memorandum of Understanding between Australia and Nauru for Cooperation in the Management of Asylum Seekers and Related Issues signed on 9 December 2002 and extended by agreement on 25 February 2004. The MoU is discussed by Connell CJ in *Amiri* at [3].

(133) *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth). See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; *Vadarlis v Minister for Immigration and Multicultural Affairs* (2001) 22(20) Leg Rep SL 1.

129 Because of the nature of the process the appellant has initiated, and the challenge to the validity of that process brought by the Director of Police of Nauru (the respondent), it is unnecessary and would be inappropriate for this Court, at this stage, to consider the substantive merits of the appeal. On the face of things, the respondent's challenge to the competency of the appellant's proceedings presents a dry issue of Australian constitutional law, to be decided in accordance with the text of the *Australian Constitution*, read with such light as is cast by decisional authority. However, enough has been said about the facts to show that there are peculiarities that give this case more than a purely statutory connection to Australia. Such additional connections may arise in the relations between neighbouring States and the people in those States. They provide the factual setting in which the Australian constitutional questions now fall to be decided.

Australian legal links with Nauru

130 *Colony and League mandate*: Since 31 January 1968, Nauru has been an entirely independent nation. It is not part of the Australian Commonwealth. Specifically it is not an Australian Territory (134). With the arrival of the European powers in the Pacific, Nauru was colonised by the German Empire (135). Yet, even during this time, the company licensed to exploit the rich phosphate deposits of Nauru was the Pacific Phosphate Co, a corporation domiciled in Australia (136).

131 After the commencement of the First World War, Nauru was quickly occupied by an Australian military force. At the end of that war, the Australian Prime Minister called for the annexation of Nauru, as a conquered German colony (137). However, after Germany ceded its overseas possessions, including Nauru, under the Versailles Treaty (Art 119), a mandate of the League of Nations to administer Nauru was conferred on "His Britannic Majesty" (138). Pursuant to an agreement between the Governments of the United Kingdom, Australia and New Zealand (the 1919 Agreement), it was provided that Nauru should be administered, under the League mandate, by an Administrator nominated by the Australian Government. This tripartite agreement was subsequently confirmed by the Parliaments of the three nations

(134) *Constitution*, s 122.

(135) By the Anglo-German Declaration of 1886, signed at Berlin on 6 April 1886. See Varsanyi, "The Independence of Nauru", *The Australian Lawyer*, vol 7 (1968) 161, at p 161.

(136) Hunter Miller, *The Drafting of the Covenant* (1928), vol 1, p 103. See Varsanyi, "The Independence of Nauru", *The Australian Lawyer*, vol 7 (1968) 161, at p 161.

(137) Hunter Miller, *The Drafting of the Covenant* (1928), vol 1, p 112. Hunter Miller described this view as "reactionary". See Varsanyi, "The Independence of Nauru", *The Australian Lawyer*, vol 7 (1968) 161, at p 161.

(138) League of Nations, Doc 21/31/14A. See Varsanyi, "The Independence of Nauru", *The Australian Lawyer*, vol 7 (1968) 161, at p 161.

concerned (139). The Australian statute authorising the Australian part in the arrangement was the *Nauru Island Agreement Act 1919* (Cth) (140).

132 Pursuant to Art 1 of the 1919 Agreement, given effect in this way, the Administrator was empowered to make ordinances (amongst other things) "to establish and appoint courts and magistrates with civil and criminal jurisdiction". A supplementary agreement of 1923 (141) between the three mandatory powers provided that the State appointing the Administrator should have the power to confirm or disallow ordinances made by the Administrator. In the result, because all of the Administrators of Nauru were appointed by Australia pursuant to the 1919 Agreement, the ultimate power over the content of Nauruan written law for the entire period of the League mandate rested with the Government of the Commonwealth of Australia. This position, under Australian law, reflected the fact that Nauru was classified by the League of Nations as a "Class C" mandate. Under the Covenant of the League (Art 22), such mandates were territories described as those that can be "best administered under the laws of the Mandatory as integral portions of its territory" (142). That was the way Australia administered Nauru.

133 Pursuant to the powers so conferred, the Administrator of Nauru made ordinances which terminated the former jurisdiction of the courts of the German Empire (143), and established courts and provided for an appeal from them to the Administrator (144). These arrangements were not repealed until 1957 when the *Judiciary Ordinance* of Nauru of that year provided for the establishment of a Court of Appeal. That Court was to be "a superior court of record and consist … of one judge" (145). Such judge was to be a person who "is, or has been, a justice of the High Court of the Commonwealth or of the Supreme Court of a State or Territory of the Commonwealth" (146). In that way, for the first time, a formal link was envisaged between the judiciary of Nauru and a member, or former member, of the judiciary of Australia.

(139) Varsanyi, "The Independence of Nauru", *The Australian Lawyer*, vol 7 (1968) 161, at p 162.

(140) See Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case", *Harvard International Law Journal*, vol 34 (1993) 445, at pp 450-452.

(141) Approved by the *Nauru Island Agreement Act 1932* (Cth).

(142) Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case", *Harvard International Law Journal*, vol 34 (1993) 445, at pp 454-456. New Guinea, also a former colony of the German Empire and later a mandated territory, was a "Class C" mandate. As such, it was administered by Australia together with the Australian Territory of Papua.

(143) *Judiciary Ordinance 1922* (Nauru), as amended by the *Judiciary Ordinance Amendment 1925* (Nauru) and the *Judiciary Ordinance Amendment Ordinance 1932* (Nauru).

(144) *Judiciary Ordinance 1922-1932* (Nauru), s 17.

(145) *Judiciary Ordinance 1957* (Nauru), s 27(1).

(146) *Judiciary Ordinance 1957* (Nauru), s 28(3).

134 *United Nations trusteeship*: Meantime, the constitutional status of Nauru had continued to evolve. After a short Japanese occupation during the Second World War (147), Nauru, like other mandated territories, was brought under the supervision of the Trusteeship Council of the United Nations (148). A tripartite trusteeship agreement was eventually approved by the Australian Parliament in the *Nauru Act 1965* (Cth). That Act incorporated, in its Second Schedule, the Nauru Agreement of 1965 (the 1965 Agreement). The 1965 Agreement provided for the establishment of legislative, executive and judicial branches of government for Nauru. By Art 5(4) of the 1965 Agreement, an appeal was envisaged from the Court of Appeal of Nauru to this Court, with the leave of this Court (149). It was thus, by the 1965 Agreement and the *Nauru Act 1965* (Cth), that for the first time an institutional link was established by law between the judiciary of Nauru and the judiciary of the Commonwealth of Australia.

135 In 1962, a United Nations mission sharply criticised the administration of Nauru (150). It recommended that the earliest possible date be fixed for independence. In December 1967, the General Assembly of the United Nations resolved that the tripartite trusteeship over Nauru be terminated (151).

136 *Independence and later links*: By this stage the accession of Nauru to independence on Nauru Independence Day, 31 January 1968, had been decided (152). By s 4 of the *Nauru Independence Act 1967* (Cth) it was provided that, on the day immediately prior to that day, the *Nauru Act 1965* (Cth) was repealed. On and after Independence Day, it was provided that "Australia shall not exercise any powers of legislation, administration *or jurisdiction in and over Nauru*" (153).

137 Although the *Nauru Independence Act 1967* (Cth) severed the institutional links briefly created by the *Nauru Act 1965* (Cth), and terminated any Australian jurisdiction in and over Nauru, the Constitution of Nauru envisaged that such institutional links might continue. By Art 57 of the *Constitution of Nauru* it is provided:

"(1) Parliament may provide that an appeal lies as prescribed by

(147) Varsanyi, "The Independence of Nauru", *The Australian Lawyer*, vol 7 (1968) 161, at p 162. See also Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (1992).

(148) Pursuant to the Charter of the United Nations, Ch XII. See United Nations, General Assembly, Resolution 140(II) (1 November 1947).

(149) See *Nauru Act 1965* (Cth), s 54.

(150) United Nations, Visiting Mission to the Trust Territories of Nauru and New Guinea, Trusteeship Council, 29th Session, No 2, *Report on Nauru* (1962), p 12. See Varsanyi, "The Independence of Nauru", *The Australian Lawyer*, vol 7 (1968) 161, at p 164.

(151) United Nations, General Assembly Resolution 2347 (XXII). See also *Commonwealth of Australia Gazette* (1968), p 581 (the gazetted date for independence was 31 January 1968).

(152) *Nauru Independence Act 1967* (Cth).

(153) *Nauru Independence Act 1967* (Cth), s 4(2) (emphasis added).

law from a judgment, decree, order or sentence of the Supreme Court constituted by one judge to the Supreme Court constituted by not less than two judges.

(2) Parliament may provide that an appeal lies as prescribed by law from a judgment, decree, order or sentence of the Supreme Court to a court of another country."

138 It was pursuant to Art 57(2) of the *Nauru Constitution* that the Parliament of Nauru, which is created by that Constitution (Art 26), later provided for further appeals from the Supreme Court that was likewise created by that Constitution (Art 48).

139 It follows that, after Nauruan independence, Australia and Nauru were linked by history and experience but were completely independent nations in relation to each other. To achieve the institutional judicial link envisaged by the Constitution of Nauru, and desired by the Government of Nauru, it became necessary for Australia and Nauru to negotiate the new institutional link. Such negotiation took place. It resulted in a new agreement between the Government of Australia and the Government of the Republic of Nauru. This was signed on 6 September 1976 (the 1976 Agreement).

140 Within Australia, approval of the Parliament for the 1976 Agreement was afforded by the *Nauru (High Court Appeals) Act 1976* (Cth) (the Nauru Appeals Act) (s 4). The 1976 Agreement, which is reproduced in the Schedule to the Nauru Appeals Act, recites the position that had obtained before Nauru's independence whereby the High Court of Australia was empowered, after leave, to "hear and determine appeals from all judgments, decrees, orders and sentences of the Court of Appeal of the Island of Nauru". It also recites "the desire of the Government of the Republic of Nauru that suitable provision now be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru". Finally, it recites the "close and friendly relations between the two countries".

141 The 1976 Agreement sets out the cases in which appeals are to lie to this Court (154) and instances where an appeal is not to lie (155). The latter include "where the appeal involves the interpretation or effect of the Constitution of Nauru" (156).

142 Provision is also made by the 1976 Agreement that orders of this Court, on appeals from the Supreme Court of Nauru, "are to be made binding and effective in Nauru" (157). Provision is made for the ready termination of the 1976 Agreement if that should be desired. Such termination is to take effect after the expiration of ninety days following a written notice of either Government of its desire to

(154) The 1976 Agreement, Arts 1A and 1B.
(155) The 1976 Agreement, Art 2.
(156) The 1976 Agreement, Art 2(a).
(157) The 1976 Agreement, Art 4(2).

terminate the 1976 Agreement (158). It was common ground in this appeal that at no time has either of the Governments concerned effected such a termination.

143 Under the *Appeals Act 1972* (Nauru), as amended (159), the Parliament of Nauru had already made provision for appeals from the Supreme Court of Nauru to this Court. It did so in anticipation of (and in terms later confirmed by) the 1976 Agreement. By that Act, an "appeal" lies to "the High Court". The latter expression is defined as "the High Court of Australia established under the Constitution of Australia" (160). For Australia, the Federal Parliament has made facilitating provisions in the Nauru Appeals Act, affording the right to appeal so far as Australian law is concerned. By s 7 of that Act it is provided that:

> "The jurisdiction of the High Court to hear and determine an appeal … under section 5 shall be exercised by a Full Court consisting of not less than 2 Justices."

144 By s 8 of the Nauru Appeals Act, it is provided:

> "The High Court in the exercise of its appellate jurisdiction under section 5 may affirm, reverse or modify the judgment, decree, order or sentence appealed from and may give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court."

145 It is pursuant to these enactments, respectively of the Parliaments of Nauru and of Australia, that the appellant has brought his appeal to this Court. He asserts the competency of this Court to hear and determine his proceedings in accordance with the foregoing laws. On the other hand, the respondent contends that the proceedings are incompetent by virtue of the *Australian Constitution*. It was not suggested that there is any relevant problem under the *Nauruan Constitution* or laws (161).

146 The respondent did not dispute that the determination of the issue of the competency of the appellant's proceedings presented a matter which, itself, properly engaged the jurisdiction and power of this Court. The appellant agreed in that proposition, treating the objection to the competency of the appeal as an aspect of valid proceedings in this Court.

(158) The 1976 Agreement, Art 6(1).

(159) *Appeals (Amendment) Act 1974* (Nauru), s 10 inserting ss 44 and 45 in the *Appeals Act 1972* (Nauru).

(160) *Appeals (Amendment) Act 1974* (Nauru), s 3(d) inserting a new definition in s 2 of the *Appeals Act 1972* (Nauru).

(161) Under Nauruan legislation, the jurisdiction of this Court is enlivened by the *Constitution of Nauru*, Art 57(2) and the *Appeals Act 1972* (Nauru) as amended. This jurisdiction is, however, limited: see Nauru Appeals Act, s 5(1) and the 1976 Agreement in the Schedule to that Act, Art 2.

The issues

147 Upon the questions argued in the respondent's objection to the competency of the appellant's appeal, the following issues arise:

(1) *The character of the proceedings issue*: What is the true character of the proceeding initiated in this Court for the purposes of Australian constitutional law? Is it truly an "appeal" as the 1976 Agreement, the legislation and the appellant's process assert? Or is it properly to be classified as an invocation of the original jurisdiction of this Court, although called an "appeal"?

(2) *The s 73 issue*: If the true character of the proceedings is an invocation of the appellate jurisdiction of this Court, is such an "appeal" permissible in accordance with the *Australian Constitution*, having regard to the terms of s 73 of the *Constitution* and any implications that arise from that section or from the language of the other provisions of Ch III of the *Constitution* and its structure?

(3) *The s 75(i) issue*: Having regard to the answers to (1) and (2), or in case those questions are answered unfavourably to the appellant, may the purported "appeal" from the judgment and orders of the Supreme Court of Nauru to this Court be treated as an invocation of the original jurisdiction of this Court pursuant to the self-executing provisions of s 75(i) of the *Constitution* because arising in a "matter" which itself arises under a treaty, namely the 1976 Agreement between Australia and Nauru envisaging the facility of "appeals" to this Court?

(4) *The s 76(ii) issue*: In case the foregoing questions are answered unfavourably to the appellant, is the jurisdiction of this Court in the "appeal" correctly original jurisdiction conferred on this Court in a matter arising under "any laws made by the Parliament", namely the Nauru Appeals Act? Is it so to the extent that that Act picks up and gives effect, within this Court, to the law of Nauru applicable to the case? Would any such view of the "original jurisdiction" contradict implied limitations within s 76(ii) or elsewhere in Ch III of the *Constitution*, that would confine the exercise of such jurisdiction to "matters" apt to the judicial power of the Commonwealth, as distinct from the judicial power of a foreign State?

(5) *The costs issue*: In addition to the foregoing issues, as will appear, an issue arises as to the costs orders that should be made in disposing of the proceedings.

The character of the proceedings is appellate

148 *Necessity of a neutral approach*: The duty of a court established under Australian law, where possible, is to give effect to any federal legislation applicable to the proceedings. The power assigned to this Court by the *Australian Constitution*, to invalidate laws that do not

conform to the *Constitution*, is a solemn one. It is one not to be ventured upon lightly. Amongst other things, this is because of respect due to the Federal Parliament as the palladium of the representative democracy that is a central feature of the *Constitution*. But it is also the case because of the checks that exist within the legislative and executive branches, against the enactment of unconstitutional laws. It is the outcome of the approach to challenges to constitutionality required in Australia both by statute (162) and the common law (163). Thus, it is a settled rule of Australian constitutional law that (164):

> "If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open."

This Court has taken that approach on many occasions, including where a challenge has been made to the conferral of appellate jurisdiction on this Court and other federal courts (165).

149 In discharging this constitutional function, when a party contends invalidity, there is obviously a limit to the extent to which this Court can re-express or re-interpret the words of the Parliament in order to avoid the rock of invalidity which those words appear to present. In every case of such a kind, it is a question of what is "reasonably open".

150 A neutral application of its powers requires this Court to pay heed to this limit. The Court must approach the challenged law without presuppositions. This, in effect, was what the respondent asked this Court to do in taking the first step that he invited. That was to declare the true character of the jurisdiction invoked by the appellant's proceedings as "appellate" and not "original" jurisdiction for the purposes of the *Australian Constitution*. The respondent took this course because, on the basis of recent judicial observations (166), such a conclusion presented a foundation for his submission of constitutional invalidity.

151 Given that the Nauru Appeals Act, the 1976 Agreement and the process filed by the appellant all describe the proceedings undertaken in this case as an "appeal" — and hence suggest, or say, that the jurisdiction invoked is "appellate" — the correct starting point in these proceedings is the one chosen by the respondent. If Australian law purports to confer appellate jurisdiction on this Court, it is appropriate

(162) *Acts Interpretation Act 1901* (Cth), s 15A.
(163) *Residual Assco Group v Spalvins* (2000) 202 CLR 629 at 644 [28].
(164) *Residual Assco Group v Spalvins* (2000) 202 CLR 629 at 644 [28].
(165) See, eg, *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 181; *Minister for the Navy v Rae* (1945) 70 CLR 339 at 341.
(166) *Gould v Brown* (1998) 193 CLR 346 at 402 [63], 426-427 [131]-[132]; *Northern Territory v GPAO* (1999) 196 CLR 553 at 591-592 [92], 603 [125], 650-651 [256]-[257]; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 574-575 [111]; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 336-337 [25]-[26], 348-349 [66].

for this Court to assume that the Parliament knew, and intended to do, what it said it was doing. To assume otherwise is to start in quite the wrong place.

152 *Appellate jurisdiction — language*: The respondent made a compelling argument that the jurisdiction invoked by the appellant in this Court is, for Australian constitutional purposes, appellate and not original. I accept the respondent's argument in this regard. With all respect, the contrary view cannot be reconciled with the language, history and purpose of the law and the character of the proceedings for which that law provides.

153 The language of the Nauru Appeals Act is perfectly clear. Thus, s 5(2) of that Act purports to invest this Court with the jurisdiction to hear and determine "appeals", as defined (s 5(2)). So defined (s 5(1) (emphasis added)), they are "*[a]ppeals* … from the Supreme Court of Nauru in cases where the [1976] Agreement provides that such *appeals* are to lie". When reference is made to the 1976 Agreement (Art 1), it too talks of "appeals". By way of juxtaposition, such appeals are to lie to the "High Court" in respect of the exercise by the Supreme Court of Nauru of its "original jurisdiction". It is rare indeed (if it has ever happened) for an "appeal" to lie from the original jurisdiction of a Supreme Court of an independent nation to the original jurisdiction of this or any like court.

154 The clearest indication that the jurisdiction so invested was intended to be "appellate" is found in s 8 of the Nauru Appeals Act. That Act, a statute of the Australian Parliament, describes the function which this Court is intended to exercise as "the exercise of its *appellate jurisdiction*" (s 8 (emphasis added)). Moreover, the Act invokes the familiar language of appellate orders. Indeed, it describes the intended dispositions in terms taken directly from the *Australian Constitution*, s 73, the section described in the marginal note as dealing with the "[a]ppellate jurisdiction of High Court". Thus, the Nauru Appeals Act empowers this Court to affirm, reverse or modify the "judgment, decree, order or sentence" that is appealed from. This collection of determinations, typically made in the exercise of primary jurisdiction and subject to appellate correction, is that which appears in s 73 of the *Australian Constitution* itself.

155 It can scarcely be imagined that, in drafting the Bill that became the Nauru Appeals Act and in enacting it, those responsible were unaware of the distinction drawn in the *Australian Constitution* between the "appellate jurisdiction" of this Court (in s 73) and its "original jurisdiction" (in ss 75, 76 and 77). Whilst the chosen language cannot determine conclusively the character of the jurisdiction, it would require an unreasonable alteration of the character of the jurisdiction expressed by the two legislatures to turn the language of *appeals* into the substance of *original* jurisdiction. Prudent conjuring with words is the stuff of constitutional interpretation. Magic belongs elsewhere.

156 *Appellate jurisdiction — history*: Additionally, when the language of the Nauru Appeals Act is read against the background of its history, its effect, namely investing this Court with appellate jurisdiction, becomes still clearer.

157 The history of the interrelationship between the exercise of the judicial power of Nauru and the personnel and institutions of the Australian executive and judicial branches of government (167) discloses the gradual emergence of links to the Australian Judicature which were to be avowedly "appellate" in character.

158 At first, an appeal lay to the Administrator who was an officer of the Australian Commonwealth. However, prior to Nauruan independence, as has been explained, a link was established with personnel of the superior Australian courts and later an institutional link with this Court. The last was extinguished upon independence. Then, as such, it was explicitly revived. Moreover, it was revived in terms of an international treaty, being the 1976 Agreement. This was an instrument between two independent nation States, negotiating with each other as legal equals.

159 Whilst the task of characterising the jurisdiction conferred by the Nauru Appeals Act, an Australian federal law, falls for determination by this Court, it cannot be disconnected from its source in the 1976 Agreement. That Agreement did not envisage a relationship between this Court and the Supreme Court of Nauru on the footing that this Court would exercise "original jurisdiction" in relation to the Supreme Court of Nauru. It certainly did not provide, or envisage, that this Court would regard that Supreme Court effectively as a court of inferior jurisdiction subject to the "original jurisdiction" of this Court. On the contrary, the dignity and equality of the States parties which contracted the 1976 Agreement demanded nothing less than an appellate relationship between the two courts. So much was inherent in the fact that the Supreme Court of Nauru was, by the Constitution of Nauru, the highest court of that country. It enjoys the constitutional character of "a superior court of record" (168). It is the final municipal court of an independent nation State. It has the statutory character of a court (subject to irrelevant exceptions) enjoying all of the jurisdiction vested in, or capable of being exercised by, the High Court of Justice in England as at the day of independence (169).

160 Whilst it is true that, within the Australian Commonwealth, judges of federal courts have been held to be subject to the original jurisdiction of this Court (170), that is so only because, within the

(167) See above at 533-537 [130]-[146].

(168) *Constitution of Nauru*, Art 48(1).

(169) *Courts Act 1972* (Nauru), s 17(2). See also *Civil Procedure Act 1972* (Nauru), s 72 and *Custom and Adopted Laws Act 1971* (Nauru), ss 4-6.

(170) *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54 at 62, 66-67, 82-83, 86; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

peculiar language of s 75(v) of the *Constitution*, such judges have been held to be "officers of the Commonwealth". On no account is a judge of the Supreme Court of Nauru now to be so described. The Nauru Appeals Act must be read in the light of the 1976 Agreement and the status of the contracting parties to that Agreement. As such, it would be a distortion of language, and a misdescription of a serious kind, for this Court to hold that the jurisdiction conferred on it by that Act is "original" within the *Australian Constitution*. That would not only be contrary to the clear language and purpose of the Nauru Appeals Act, an Australian law. It would be contrary to the evolution of the jurisdiction of the Supreme Court of Nauru following Nauru's independence. For whatever Australian constitutional consequences may follow, the jurisdiction conferred is, as it says it is, "appellate". When the technical legal word "appeal" is used at such a high level of intergovernmental discourse and enactment, this Court should accept its use and give the word its technical meaning. Doing so is as important in a case of this kind as it is in construing the far less important provisions of purely local legislation (171).

161 *Appellate jurisdiction – purpose*: Nor are the powers afforded to this Court by the Nauru Appeals Act appropriate to the exercise of "original" jurisdiction. Had it been intended that this Court would exercise its original jurisdiction, other and different powers, such as the issue of the writs and other remedies of the kind mentioned in s 75 of the *Constitution* or in the *Judiciary Act 1903* (Cth), would have been provided. Unsurprisingly, given the 1976 Agreement, the history, the language and the objects of the Nauru Appeals Act, the remedies afforded to this Court in relation to determinations of the Supreme Court of Nauru were, and were only, those appropriate to the exercise of its appellate jurisdiction.

162 Nor is the language of the appellant's notice of appeal apt to an invocation of this Court's original jurisdiction. In terms, it invokes appellate jurisdiction. It seeks appellate remedies. There is no mention amongst the grounds of appeal of any suggested jurisdictional or like error by the Supreme Court of Nauru. Instead, the notice of appeal, as the 1976 Agreement and the Nauru Appeals Act contemplate, requests this Court to determine the legal merits of the matter as on an appeal which accepts that the same questions have been determined earlier by the Supreme Court of Nauru.

163 Thus, the purpose of the Australian federal law and of the appellant's proceedings is to engage a legal process properly described as "appellate" not "original" in character. In the *Tramways Case [No 1]* (172), Griffith CJ explained the distinctiveness of appellate

(171) cf *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 260 [25], where the word "pawn" was given a technical meaning despite textual and contextual considerations suggesting the contrary.

(172) (1914) 18 CLR 54 at 60-61 per Griffith CJ. See also at 64-65 per Barton J; at 72-81 per Isaacs J; at 82-83 per Gavan Duffy and Rich JJ; at 83-85 per Powers J.

jurisdiction. He contrasted it with the purposes and character of original jurisdiction. The former involves a re-determination of the original cause between the same parties by examining the merits and correcting any error in the decision, of fact or law, as may be allowed. The latter is a new proceeding. Typically, it involves different parties. It ordinarily addresses some defect as to jurisdiction. As such, it is usually unconcerned with the merits of the case itself. Normally, its focus is process and conformity with legal powers. By these criteria, the purpose of the "appeal" afforded by the 1976 Agreement and the Nauru Appeals Act, and invoked by the appellant's process, is appellate. It is not an invocation of original jurisdiction.

164 *Appellate jurisdiction — true character*: Against the background of this analysis, it is not really difficult to classify the proceedings invoked in this case. They are truly a step in an "appeal" (173), just as they assert they are. They are designed to correct the errors of the court appealed from, the Supreme Court of Nauru, as a matter of legal substance. They are not, as such, designed to create a wholly new legal right, collateral to the earlier proceedings (174).

165 It is true that, occasionally, the Australian Federal Parliament, in a domestic context of federal law, has used the word "appeal", although conferring original jurisdiction, including on this Court (175). Typically, such cases involve a review of decisions of persons or inferior tribunals carrying out administrative functions, where the matter is, for the first time, brought into a court that exercises judicial power (176). The use of the word "appeal" in this context of jurisdictional subordination is familiar in Australian legal discourse. Indeed, it is acknowledged in federal statute law (177).

166 However, in the present context, given the explicit language of the 1976 Agreement and the Nauru Appeals Act, the history that lay behind those instruments, the purpose of the provision of an "appeal", the dignity of the States parties that agreed to it and the character of the jurisdiction that ensued, such local analogies are completely inapplicable.

167 As the Supreme Court of a nation State, respected as independent by Australian law, recognised as such by international law, it is inadmissible to suggest that the judgments, decrees, orders and sentences of Nauru's Supreme Court would be made, or are, subject to this Court's original jurisdiction. This Court should not construe the 1976 Agreement to give effect to a result contrary to its language and

(173) *Attorney-General v Sillem* (1864) 10 HL Cas 704 at 724; *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109; *Eastman v The Queen* (2000) 203 CLR 1 at 32-33 [104].

(174) *R v Snow* (1915) 20 CLR 315 at 322. See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 196.

(175) *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 653 [31]; see also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 181.

(176) cf *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353 at 371.

(177) *Federal Court of Australia Act 1976* (Cth), s 19.

purpose (178). It should not do so because of imagined local constitutional difficulties with the contrary conclusion.

168 If, in the interpretation of the *Australian Constitution*, this Court has taken (as it has) a strict view of the meaning of the word "appeal" (179), why should it now adopt a different, contrary and malleable meaning for that notion as contemplated, in the context of the Nauruan Constitution, by its statute law — and by the international agreement made with Australia pursuant to such law? Why should it say that, in the latter context, unlike the former, "appeal" means a very different legal process with different consequences, namely an invocation of original jurisdiction?

169 In the result, this Court should construe the Nauru Appeals Act so as to carry the 1976 Agreement into effect according to its terms and not so as to alter and rewrite the Act and the Agreement. Any such rewriting would involve this Court in an intrusion upon the governmental powers that belong to others, both in Nauru and Australia. Still less should we engage in a rewriting that denies the status of the Supreme Court of Nauru as a superior national court of record and thus insusceptible to another court's original jurisdiction, including that of this Court (180).

170 It may be true that in the text of the *Australian Constitution* the words "appellate jurisdiction" do not appear in Ch III (181). However, the expression exists in the marginal note to s 73 (Appellate jurisdiction of High Court). And it appears there in contrast to the marginal note to s 75 (Original jurisdiction of High Court). The juxtaposition is plain and the remedies provided in s 73, and contemplated by s 75, are apt to each specified legal procedure. The remedies that are sought, and are apt, in this case are those proper, and only proper, to the exercise of appellate jurisdiction. It requires extended mental gymnastics to conclude otherwise.

171 It is also true that appellate jurisdiction normally implies that the appellate court lies in the "same curial system" as the court a quo (182). But as the availability of appeals to the Judicial Committee of the Privy Council long showed, that "same curial system" is a legal construct. It is defined by legal instruments. It may include the judicial institutions or personnel of another country or of several countries. A number of other appellate courts of the Commonwealth of Nations, present and superseded, demonstrate that this is so (183). We should

(178) *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29]; *Coleman v Power* (2004) 220 CLR 1 at 27-28 [19], 91-92 [240].

(179) *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [17]-[18], 25-26 [75]-[76], 41 [131]-[133], 63 [190], 96-97 [290]; cf at 93 [277], 117-118 [356] and cases there cited.

(180) *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 184 [49], 209-210 [135].

(181) Reasons of Gleeson CJ at 499 [7].

(182) Reasons of McHugh J at 507 [38].

(183) Such as the newly created Caribbean Court of Justice established to replace appeals to the Privy Council. There may also be mentioned the former regional

not needlessly demean the Supreme Court of Nauru by reducing its status to the equivalent of the former Australian Taxation Board of Review (184), Valuation Boards (185), or the Defence Force Discipline Appeal Tribunal (186) which were or are not even courts. In this, I agree with what Callinan and Heydon JJ state in their reasons (187).

172 *Conclusion: jurisdiction is appellate*: It follows that I am confirmed in the view that I stated in *Re Wakim; Ex parte McNally* (188). The jurisdiction conferred on this Court by the Nauru Appeals Act is "appellate in character". What is the consequence of this conclusion?

The appeals named in s 73 are not exhaustive

173 *The respondent's case*: On the basis of the foregoing classification, the respondent invoked a series of observations in this Court, some from its earliest days, suggesting that s 73 of the *Constitution* constitutes an exhaustive statement of the Court's appellate jurisdiction (189). Because there is no explicit provision in s 73 that envisages the conferral of appellate jurisdiction with respect to determinations of a court of a foreign nation, it follows (on the argument of the respondent) that the attempt by the Nauru Appeals Act to confer such jurisdiction on this Court had failed.

174 On the foregoing premises, the respondent contested the capacity of the legislative powers invoked by the appellant to sustain the Nauru Appeals Act (190). Such powers, like all of those in s 51, are expressed to be "subject to this Constitution". As such, they are subject to s 73 and Ch III. Section 73 does not afford the power to engage the appellate jurisdiction of this Court. When read with the rest of Ch III, a negative implication arises to exclude laws conferring federal jurisdiction beyond that stated in s 73. The submissions for the respondent draw, in this respect, upon many judicial opinions expressed during the history of this Court, most (but not all) in obiter dicta, inessential to the decision in question.

175 This argument is by no means meritless. If one accepts the view that s 73 of the *Constitution* exclusively defines the "matters" which may be the subject of the exercise of appellate jurisdiction by this Court, the argument would be compelling. My conclusion that the jurisdiction provided for in the Nauru Appeals Act (and the 1976 Agreement) is

(cont)
Commonwealth appellate courts in Africa, the East African Court of Appeal and the West African Court of Appeal, now defunct.

(184) See reasons of McHugh J at 508-509 [43].

(185) Reasons of Gummow and Hayne JJ at 528 [110].

(186) Reasons of McHugh J at 511 [50].

(187) Reasons of Callinan and Heydon JJ at 570-573 [276]-[285].

(188) (1999) 198 CLR 511 at 608-609 [205].

(189) *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268; *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 538; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 300.

(190) *Constitution*, s 51(xxix) (external affairs), s 51(xxx) (islands of the Pacific) and s 51(xxxix) (matters incidental to execution of judicial powers).

appellate would then lead to the success of the respondent's submission and the dismissal of the appellant's purported appeal as incompetent by reason of incompatibility with the *Australian Constitution*.

176 However, for a number of reasons I cannot agree with this second step in the respondent's argument. I do not agree that s 73 exhaustively defines this Court's appellate jurisdiction. In particular, I do not agree that the "appeals" specified in s 73 of the *Australian Constitution* represent the universe of the possible appellate jurisdiction of this Court, particularly where the Court is not exercising the judicial power of the Commonwealth as such. Moreover, I do not agree that Ch III of the *Constitution* contains the negative implications on which the respondent relied.

177 *Section 73 is not exhaustive*: The starting point must be the text of the *Constitution*. It, and not judicial expositions, expresses the law that governs this Court. In terms, s 73 is not expressed negatively. It does not state that this Court shall have jurisdiction in appeals "only" in the three categories mentioned (one of them, today, effectively a dead-letter (191)). This is a significant omission because, where the need for such a negative stipulation was felt, it was stated in the *Constitution*, as in the confinement of appeals under s 73(iii) "as to questions of law *only*" (emphasis added).

178 Had it been the purpose of the *Australian Constitution* to restrict appeals to this Court to the three categories mentioned, and to them alone, the facultative language used would have been different. As Higgins J observed tellingly in *Porter v The King; Ex parte Yee* (192):

> "Section 73 may not give the jurisdiction to hear the appeal, but some other section of the Constitution may. Section 73 does not say that the jurisdiction of the High Court on appeal shall be confined to appeals from the Courts mentioned in s 73. It does not even say that 'the jurisdiction of the High Court shall be to hear appeals from the Courts' mentioned. The form of expression used is 'the High Court shall have jurisdiction' etc, just as if it were 'the High Court shall have a marshall'; this would not forbid other officers appointed under some other power."

179 Since a number of the early opinions were written in this Court, to the effect that the specifications in s 73 of the *Constitution* are exhaustive, three pertinent developments have happened in constitutional exposition. Each is relevant to rebut the suggestion that s 73 is an exhaustive statement of this Court's appellate jurisdiction.

180 First, courts are now much more cautious about the use of the expressio unius principle of construction generally and in the context

(191) *Constitution*, s 73(iii), appeals from "the Inter-State Commission, but as to questions of law only".

(192) (1926) 37 CLR 432 at 446 noted in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290. See also on appeal *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 538.

of constitutional interpretation especially (193). In giving meaning to a written text, but especially in a constitutional instrument expressed in brief terms the text of which has proved difficult to change, it is now generally accepted that it is a mistake to infer that an affirmative catalogue necessarily excludes every other case.

181 Secondly, the opinion that s 73 of the *Australian Constitution* was an "exhaustive" statement of the appellate jurisdiction first emerged in a time when the approach to statutory construction in this and other courts was highly literal. This Court was then subject to supervision by the Privy Council (194), including in most constitutional matters. Since that time, appellate courts throughout the common law world (195), including this country (196) and especially in constitutional matters (197), have adopted contextual and purposive approaches to contested problems of legal interpretation. They have generally rejected the approach of verbal literalism.

182 This profound change in the judicial approach to deriving the meaning of contested language needs to be kept in mind by contemporary judges when reading the constitutional expositions of their predecessors. It was natural for judges of this Court in earlier times to adopt a highly literalist approach to problems of constitutional interpretation. That was the approach to the judicial task then generally accepted and, in any case, enforced by the Privy Council. Today, we should be cautious about citing such approaches. They may not represent accurately the contemporary understanding of the law of the *Australian Constitution* or any national Constitution.

183 Thirdly, this consideration has special significance for constitutional interpretation, more than a century after the adoption of the *Australian Constitution*. There are too many instances, including in recent cases, to deny the force of Professor P H Lane's observation that a change in the "interpretative method" of this Court on constitutional questions has occurred "from literalism and legalism to a kind of New Realism" (198). Professor Lane detected, correctly in my view, a "greater quest for the purpose in a constitutional provision and an invocation (in some quarters) of contemporary perceptions and

(193) *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 605 [200] with reference to *Russell v Russell* (1976) 134 CLR 495 at 539; *Houssein v Under Secretary, Department of Industrial Relations & Technology (NSW)* (1982) 148 CLR 88 at 94.

(194) *Constitution*, s 74.

(195) eg, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913; [1998] 1 All ER 98 at 114-115 per Lord Hoffmann.

(196) *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350-352.

(197) *Bropho v Western Australia* (1990) 171 CLR 1 at 20, approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

(198) Lane, *Commentary on the Australian Constitution*, 2nd ed (1997), p x. See also *Sue v Hill* (1999) 199 CLR 462; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Singh v The Commonwealth* (2004) 222 CLR 322.

values". In my opinion, this is no more than affording such a text a functional analysis. That is an analysis befitting the purpose of the *Constitution* as an enduring charter of government, necessarily adapting from age to age, within its language, to the needs of governance of the Australian Commonwealth (199).

184 When these basic changes of approach are recognised, and given effect, consistently and not selectively, they oblige the present judges of this Court to draw back from the suggestions made in earlier opinions that s 73 is an exhaustive statement of the Court's appellate jurisdiction. The section does not say that. The restraints that apply to the imposition of a restrictive implication (200) persuade me that it would be a serious error to read s 73 in such a way.

185 It was perhaps natural in the context of 1901 that the *Australian Constitution* did not *expressly* provide in s 73 for the conferral of jurisdiction upon this Court to hear and determine appeals from the judgments of courts of friendly countries beyond Australia, specifically in the Pacific Islands. In those days, such appeals, where they existed, would normally have gone to the Queen in Council, for which, in the Australian case, s 74 of the *Constitution* provided. But the facility eventually to provide for such appeals existed in s 51 (201). Only an expansion of a negative implication in Ch III would cut back the availability of that facility in Australia today.

186 Given the need to harmonise the entire *Australian Constitution*, including ss 51 and 73, and to read the document as a whole and always as an instrument stating the principles of governance of an independent nation (202), there are abundant reasons for avoiding the narrow view propounded by the respondent. It represents the breath of a bygone age which we should not continue to inflict on the *Constitution* without the soundest reasons for doing so.

187 *Section 73 – other exceptions*: Moreover, despite repeated judicial affirmations that s 73 represents an exhaustive statement of the appellate jurisdiction of this Court, from the earliest days of the Commonwealth, this Court's practice has been to the contrary.

188 Thus, the Court originally exercised jurisdiction under the *Colonial Courts of Admiralty Act 1890* (Imp) (203). It has twice exercised

(199) *Grain Pool (WA) v The Commonwealth* (2000) 202 CLR 479 at 522-523 [111]; see also Inglis Clark, *Studies in Australian Constitutional Law* (1901), p 21.

(200) *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 145, 151-152; cf *The Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 413; *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85; *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 83; *Victoria v The Commonwealth (the Payroll Tax Case)* (1971) 122 CLR 353 at 401-402.

(201) *Constitution*, s 51(xxix) and (xxx).

(202) *Gould v Brown* (1998) 193 CLR 346 at 492-494 [304]-[310].

(203) See, eg, *John Sharp & Sons Ltd v The Katherine Mackall* (1924) 34 CLR 420. This jurisdiction was repealed in relation to Australia by the *Admiralty Act 1988* (Cth), s 44.

jurisdiction in Nauruan appeals (204). Although it is true that jurisdiction in those appeals was not contested, it is a fundamental duty of every court, before entering upon the exercise of jurisdiction, to satisfy itself that such jurisdiction exists. This Court has said as much on many occasions (205). Presumably, none of the learned Justices who took part in the earlier appeals saw any difficulty in the exercise of the jurisdiction called "appellate". In none of those appeals was an order conventional to the exercise of original jurisdiction made by this Court.

189 The most important exception to the treatment of s 73 as an exhaustive statement of the appellate jurisdiction of this Court concerns the appeals from the Supreme Courts of the Australian Territories. Unless, derivatively, such courts are to be classified as "federal courts" (a view that has been denied at least when they are exercising the judicial power of the Territory concerned (206)), Territory appeals could not fall within any of the other categories expressly stated in s 73 (207). Yet the Federal Parliament has validly provided for appeals from Territory courts to this Court. Such appeals are regularly heard and determined. The judgments, decrees, orders and sentences of this Court are made in the disposition of such Territory appeals.

190 It is not an answer for the respondent, or anyone else, to say that the Territory "exception" is an anomaly that proves the general rule. Either s 73 of the *Constitution* expresses an exhaustive list or it does not. So long as Territory appeals continue to come to this Court, or to any other federal court within Ch III, they deny, upon this premise, the postulate of exhaustiveness. They are fatal, unless overturned, to the central plank of the second step in the argument of the respondent. They necessarily admit of categories of appeal to Ch III courts from courts beyond those specified in s 73(i) and (ii) of the *Constitution*.

191 Disjoining Territory appeals from the integrated Judicature of the Australian nation, at this stage of the evolution of the Commonwealth, would be unthinkable. Only ultra-formalism and the narrowest literalism would embrace such an unnecessary and nationally disruptive consequence. True, narrow constitutional views have sometimes prevailed (208). However, usually they have been avoided because of the functional approach now taken by this Court to basic

(204) *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627; *Amoe v Director of Public Prosecutions (Nauru)* (1991) 66 ALJR 29; 103 ALR 595.
(205) *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employes Association* (1906) 4 CLR 488 at 495; *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 at 415.
(206) *Northern Territory v GPAO* (1999) 196 CLR 553 at 615-616 [168], 616-617 [170].
(207) *Porter v The King; Ex parte Yee* (1926) 37 CLR 432; *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.
(208) eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

questions of constitutional interpretation (209). This is not a time, and this is not a subject matter, upon which to embrace such a gnarled and shackled view of the *Australian Constitution*.

192 *Section 73 — judicial power of the Commonwealth*: It is difficult to reconcile all of the case law on the meaning and operation of s 73 in the context of Ch III of the *Constitution*. One way of doing so was expounded for the appellant. This was to treat s 73, as appearing in Ch III, as an exposition of the structure and content of the "judicial power *of the Commonwealth*" (emphasis added), which is mentioned in s 71 at the outset of the Chapter. Upon this view, s 73 is designed to provide for this Court's appellate jurisdiction in all Australian *federal* matters involving the exercise of the judicial power of the Commonwealth. That includes in appeals from a single Justice of this Court and from federal and State courts as identified in s 73.

193 It is true that this view might, with some exceptions, reconcile some of the judicial remarks in this Court with the practice observed in respect of appeals from Territory courts and others not expressly spelled out in s 73 (210). I do not exclude it. Upon this view, the purpose of s 73 is not to afford an exhaustive list but to entrench minimum entitlements to appeal from courts of the several Australian polities (federal and State) viewed as making up the constituent units of the federation. Because appeals from the Supreme Court of a foreign country do not involve the hearing and determination of process from a judgment, decree, order or sentence made in the exercise of the judicial power *of the Commonwealth*, s 73 would be silent as to such jurisdiction. Nothing else in Ch III expressly forbids it.

194 Whilst I acknowledge the force of this argument, it presents certain difficulties. This is so because, reading s 73 with today's eyes, I regard Territory courts as "other federal court[s]" within s 73(ii). I consider that, their jurisdiction and powers being ultimately traced to s 122 of the *Australian Constitution* and to federal law, such courts are at all times exercising "[t]he judicial power of the Commonwealth" within the *Australian Constitution*. Moreover, at least so far as Australian courts are concerned, even on an appeal from a foreign court, they would in my view probably be exercising, in part, the judicial power of the Commonwealth. They would do so because, unless forbidden expressly by s 73 or impliedly by the language of Ch III, part of that judicial power has been deployed for Australian (as well as Nauruan) purposes under s 51 of the *Constitution*. It is unnecessary to take this point further.

195 I have considered whether I should subordinate my opinion about the meaning of s 73 of the *Australian Constitution* and the

(209) See, eg, *Western Australia v The Commonwealth* (1975) 134 CLR 201; *Queensland v The Commonwealth* (1977) 139 CLR 585. As to the need to give an ample construction to the *Constitution*, see *Abebe v The Commonwealth* (1999) 197 CLR 510 at 531 [41] per Gleeson CJ and McHugh J.

(210) *Gould v Brown* (1998) 193 CLR 346 at 493-494 [307]-[309].

requirements of Ch III to the assertions that the section is an exhaustive statement of this Court's appellate jurisdiction. I have previously expressed my view on this issue (211). For the moment, it is a minority one.

196 In matters of ordinary public and private law, judges of this Court normally submit to the considered exposition of the law as stated by the majority (212). However, in the interpretation of the fundamental law of the Constitution, a different rule prevails (213).

197 Where the constitutional point is important, a judge of this Court may continue to give effect to a minority view the judge holds. Such, in my opinion, is the case here. The respondent's textual arguments are unconvincing. The assertions of exhaustiveness have admitted of several clear exceptions. The suggested negative implication fails by the test ordinarily deployed to sustain such implications (214). The repetitions of the assertion arguably represent confirmations of interpretations adopted in an earlier time when a highly literalist approach to constitutional and statutory meaning was given effect. The earlier dicta have been insufficiently subjected to fresh scrutiny.

198 There are, it is true, some negative implications to control the conferral of an appellate jurisdiction on this Court from the judgments, decrees, orders and sentences of courts of a foreign country. These include a prohibition on the conferral of jurisdiction that would violate the essential character of a court of the Australian Judicature to which the appeal was brought (215). Similarly, it would be fundamentally inconsistent with Ch III of the *Australian Constitution* to endanger, in any way, the independence of such a court or to threaten to over-burden it, deflecting it from its constitutional and statutory functions in Australia.

199 None of these dangers exists in the present case. Nor were they suggested. The appellant has withdrawn an argument that, potentially, would have involved this Court in the interpretation of the *Constitution of Nauru* (216). With this, the respondent withdrew one ground of his objection to competency of the appeal based on Art 2(a) of the 1976

(211) *Gould v Brown* (1998) 193 CLR 346 at 491-496 [301]-[312]; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 604-611 [197]-[210].

(212) See, eg, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626 [238] (with reference to the *Caparo* principle); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 78-79 [242].

(213) *Queensland v The Commonwealth* (1977) 139 CLR 585 at 593-594; *Stevens v Head* (1993) 176 CLR 433 at 461-462; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 55-56 [76]; *Coleman v Power* (2004) 220 CLR 1 at 109 [289]; cf *Singh v The Commonwealth* (2004) 222 CLR 322 at 417-418 [265].

(214) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 292 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 545; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 601 [190].

(215) *Gould v Brown* (1998) 193 CLR 346 at 497 [319].

(216) Ground 6(b).

Agreement. These steps confined the objection to competency to the respondent's arguments based on the Australian Constitution.

200 *Conclusion — appellate jurisdiction is valid*: The result of my analysis is that there is no express or implied limitation in s 73 of the *Australian Constitution*, or in any other part of Ch III, that forbids the conferral of the appellate jurisdiction contained in the Nauru Appeals Act.

201 Once this conclusion is reached, there is no relevant restriction upon the enactment by the Australian Parliament of a law conferring jurisdiction and power upon this Court in terms of the Nauru Appeals Act. The legislative power so to provide appears in ample terms in s 51 of the *Australian Constitution*, notably in para (xxix) (external affairs); para (xxx) (the relations of the Commonwealth with the islands of the Pacific); and para (xxxix) (matters incidental to the execution of any power vested by this Constitution in the Parliament … or in the Federal Judicature).

202 I have previously referred to the need for, and utility of, such an appellate jurisdiction (217). The slightest familiarity with the involvement of Australia in attempts to strengthen the institutions of governance in Pacific countries, including in judicial and legal matters (218), demonstrates the importance, both for Australia and for the neighbouring countries themselves, of such judicial links where they are mutually agreed on appropriate terms and conditions, as they were in the case of appeals from the Supreme Court of Nauru.

203 The respondent's arguments, in respect of the ambit of the appellate jurisdiction of this Court, represented an attempt to press upon Ch III of the *Australian Constitution* a view about its capacity to adapt to succeeding ages akin to A D Hope's ironic description of Australia (219):

> "*They call her a young country, but they lie:*
> *She is the last of lands, the emptiest,*
> *A woman beyond her change of life, a breast*
> *Still tender but within the womb is dry.*"

204 I decline to take such a view of s 73 or of Ch III of the *Australian Constitution*. That *Constitution* has proved resilient and generally adaptable to new times and new necessities. The present is simply the latest instance. The womb is not dry. The Australian Parliament is competent to provide for appeals to this Court from courts of neighbouring countries which agree to them, and to do so is, in the present age, beneficial for the purposes of the Commonwealth. Such

(217) *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 610 [208].

(218) Australia, Australian Agency for International Development (AusAID), *Good Governance: Guiding Principles for Implementation* (2000); Australia, AusAID, *Twelfth Annual Statement to Parliament on Australia's Development Cooperation Program* (2003), p 8.

(219) From "Australia" (1939), reproduced in Ferguson et al (eds), *The Norton Anthology of Poetry*, 4th ed (1996), pp 1373-1374.

appeals constitute a useful facility conducive to the advantage of Australia and to a neighbouring State — and to the rule of law and good governance in this region of the world. The provision of the facility is not alien to the legal tradition against which the *Australian Constitution* was written — on the contrary, it conforms to that tradition, adapting it to the present age. It is valid under the *Australian Constitution*.

205 *Intention of founders not determinative*: The question is not, with respect, whether the founders of the Australian Commonwealth "considered it necessary, or desirable, to make provision for the bringing of appeals to [this] Court from another dominion or colony of the Empire, let alone from a foreign country" (220). Such an approach would forever yoke the *Australian Constitution* to the intentions and expectations of men of the nineteenth century. Those men neither claimed, nor sought to enjoy, such a power (221). The question is rather whether the words which they proposed, which the electors endorsed and which the people of Australia as sovereign accept as the basic law, permit the adaptation that today's governmental needs have produced in a law propounded as constitutionally valid. No other approach is compatible with the way this Court has interpreted and applied the *Constitution*. This case is not an occasion to change course.

The invocation of original jurisdiction is inapplicable

206 *Original jurisdiction inapplicable*: The objection to competency therefore failed on the foregoing grounds. The proceedings are an "appeal". They permissibly invoke the appellate jurisdiction of this Court. They do not, may not, and do not purport to involve the original jurisdiction of the Court. They are not analogous to proceedings within federal domestic jurisdiction in Australia that are called "appeals" but which are not truly so in their character. Only a strained characterisation of the appellant's process would sustain the application of such a municipal analogy.

207 This being the case, it was unnecessary for me, in order to arrive at my orders, to consider what might have been the case if, contrary to my opinion, the appellant's process was not an "appeal" and the Nauru Appeals Act provided for the invocation of the original jurisdiction of this Court. I shall refrain from adding excessive remarks on an hypothesis with which I strongly disagree.

208 *Hypothesis of original jurisdiction*: Nevertheless, because other members of this Court have elected to reverse the sequence in which the respondent advanced his objection to the competency of the appeal (222), I will add some observations on the hypothesis of an

(220) Reasons of Callinan and Heydon JJ at 573-574 [286].

(221) *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599-600 [186]-[187]; see also Inglis Clark, *Studies in Australian Constitutional Law* (1901), p 21; *Grain Pool* (2000) 202 CLR 479 at 522-523 [110]-[112].

(222) Reasons of Gummow and Hayne JJ at 530 [118].

invocation of original jurisdiction. Doing so may be prudent, given the interpretation of s 73 that presently enjoys majority support in this Court.

209 *The s 75(i) contention*: Gleeson CJ, McHugh J, and Gummow and Hayne JJ find it unnecessary to embark upon the appellant's reliance on s 75(i) of the *Constitution* concerned with the jurisdiction expressly conferred on this Court "[i]n all matters … arising under any treaty". In the present case, the appellant suggested that this self-executing conferral of original jurisdiction applied because, albeit indirectly, the "matter" constituted by the substantive controversy between the appellant and respondent arose under the 1976 Agreement, which was a "treaty" in the constitutional sense.

210 I adhere to the view that I expressed in *Re East; Ex parte Nguyen* (223):

> "A matter arises under a treaty if, directly or indirectly, the right claimed or the duty asserted owes its existence to the treaty, depends upon the treaty for its enforcement or directly or indirectly draws upon the treaty as the source of the right or duty in controversy."

211 In the contest before this Court, presented by the respondent's objection to the competency of the appellant's "appeal", it may be arguable that the original jurisdiction is enlivened by s 75(i), at least to that extent. Once however that "matter" is disposed of, there remains only the "controversy" presented by the substantive appeal. That controversy does not depend on the construction or effect of the treaty, namely the 1976 Agreement scheduled in Australian law to the Nauru Appeals Act. Nor has any other "treaty" been identified as relevant. Instead, the remaining issues in the grounds of appeal, so described, concern only the interpretation of various laws of Nauru in their relation to the facts and specifically the conditions purportedly imposed on the special purpose visas granted to the appellant but allegedly not sought by, consented to or wished for by him.

212 On the face of things, upon this hypothesis, the appellant's invocation of original jurisdiction would face the same difficulties as I identified in *Re East* (224). It would fail because the necessary element of a relevant constitutional "matter" would be missing.

213 *The s 76(ii) contention*: Gleeson CJ, McHugh J, and Gummow and Hayne JJ, however, uphold the jurisdiction of this Court to hear and determine the appellant's "appeal" pursuant to s 76(ii) of the *Constitution*.

214 The respondent submitted that it was incorrect to regard the "matter" in controversy between the parties as "arising under any laws made by the [Australian Federal] Parliament". According to his submission, properly classified, the controversy, in the sense of the dispute about

(223) (1998) 196 CLR 354 at 385 [72].
(224) (1998) 196 CLR 354 at 386-391 [74]-[84].

the substantive rights and duties in question, owed its existence solely to the law of Nauru; not to an Australian law made by the Federal Parliament.

215 It would have been natural enough for this Court to have adopted a requirement that a matter must arise *directly* under the Australian federal law postulated in s 76(ii) of the *Constitution*. After all, the Court, from its early days, has rejected the suggestion that s 76(i) could found jurisdiction unless there are "matters which present necessarily and directly and not incidentally an issue upon [the] interpretation [of the *Constitution*]" (225). Professor Lane (226) observed that "[i]n keeping with the High Court's general literalism I rather expected to find an observation by the Court to the effect that jurisdiction under *Constitution* s 76(ii) does not obtain unless the matter arises 'directly' under a law made by the Parliament". Nevertheless, as he noted, that was not the approach adopted by this Court in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (227). In that case, the right or duty claimed owed its existence, or depended for its enforcement, on regulations that were allegedly authorised by an Ordinance, in turn made under the *Seat of Government (Administration) Act 1910* (Cth), s 12. The law invoked was thus twice removed. Yet it was held sufficient to sustain the assumption of jurisdiction under s 76(ii) of the *Constitution* (228).

216 If it is permissible, under s 76(ii), for the Parliament to confer original jurisdiction on this Court in a matter arising *indirectly* under a law made by the Parliament, the controversy in the present case can readily be so classified. The Australian federal law simply picks up the Nauruan law. It treats it as a factum upon which the exercise of this Court's jurisdiction is performed.

217 Of course, many of the same arguments were deployed by the respondent against this construction. Thus, s 76 of the *Constitution* would, upon one view, be subject to an implied limitation that it was concerned, and only concerned, with "laws made by the [Federal] Parliament" so far as they related to controversies, the resolution of which depended wholly on Australian law. However, that is not a limitation that should be read into s 76 of the *Constitution* as necessary to its operation. On the contrary, it is not uncommon in controversies in Australian courts, involving private international law, for foreign law to be proved as a fact and for Australian courts to give effect to such

(225) *James v South Australia* (1927) 40 CLR 1 at 40.
(226) Lane, *Some Principles and Sources of Australian Constitutional Law* (1964), p 175.
(227) (1929) 42 CLR 582 at 586-587.
(228) Professor Lane contrasts *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 540, 556-557: Lane, *Some Principles and Sources of Australian Constitutional Law* (1964), pp 175-176.

law (229) where there is no inconsistent Australian law and certainly no countervailing consideration of public policy (230).

218 It follows that if, contrary to my preferred conclusion, the jurisdiction of this Court invoked by the appellant pursuant to the Nauru Appeals Act is indeed "original", and not "appellate", I would agree with the opinion expressed by Gleeson CJ, McHugh J and Gummow and Hayne JJ. Upon that hypothesis, there is no express provision in s 76 of the *Constitution* to forbid such construction. There is nothing in the other provisions of Ch III to stand in the way. Upon that hypothesis, there are many reasons of principle and policy which would support such a construction of s 76(ii). It is consistent with the past authority of this Court that has acknowledged that the "matter" in controversy may arise *indirectly* under a law made by the Parliament. Here such an indirect connection would certainly exist. But it is important not to overlook the difference between the majority's conception of implied limitations in s 73 and the lack of such implications allowed in s 76(ii) of the *Australian Constitution*.

The constitutional challenge to the appeal fails

219 The observations made in the preceding part of these reasons constitute a secondary, not a preferred, opinion. My primary view remains that the jurisdiction of this Court invoked by the appellant under the Nauru Appeals Act is, as that Act and the 1976 Agreement state, "appellate". As such, it is compatible with s 73 of the *Australian Constitution*. There is no negative implication either in that section or elsewhere in Ch III that forbids the exercise of such appellate jurisdiction. The exercise is sustained by an Australian law made under s 51 of the *Australian Constitution* and by a compatible Nauruan law envisaged by the *Nauruan Constitution*. Arguably, the Australian law is also expressly envisaged by s 51(xxx) of the *Australian Constitution*, viewed with contemporary eyes. That is why the objection to the competency of the appeal failed.

The costs issue

220 *Motion for indemnity costs*: It remains for me to deal with a motion filed by the appellant, after the hearing of the objection to competency, seeking special orders joining the Commonwealth of Australia and the Republic of Nauru to the proceedings for the purpose of securing against both of those entities an award of indemnity costs in relation to the costs incurred in responding to the objection to competency.

221 *Procedural background*: The background facts pertaining to the objection to competency are described above. However, to understand the appellant's motion and the orders he seeks, I will record a number

(229) As was contemplated would be the case in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 517 [66]-[67].

(230) cf *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40, 51-52; see also *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [No 2]* (1987) 10 NSWLR 86 at 179-180.

of curiosities in these proceedings that are not revealed in the reasons of the other members of this Court. They cast a very different light upon the matter from what at first appears.

222 In preparation for the hearing of this appeal, the respondent, in support of its Australian constitutional objection, filed notices pursuant to s 78B of the *Judiciary Act 1903* (Cth). One such notice was served on the Commonwealth. However, upon the return of the objection for separate argument before a Full Court of this Court, neither the Commonwealth nor the Attorney-General of the Commonwealth appeared, as would have been their right under federal law and normal practice.

223 This left the defence of the validity of the Australian legislation to the appellant alone, acting through his lawyers. It was my view, expressed twice at the outset of the hearing (231), that this presented a most unsatisfactory state of affairs. It is remarkable, and in my experience wholly unprecedented, where there is an attack on the validity of federal legislation of which the Commonwealth is on notice, for it to absent itself from assistance to the Court, either to support (as would be usual), or possibly to disclaim, the validity of the challenged federal law. To leave the defence of that law, when under attack by a public officer of a foreign country having treaty arrangements with Australia, to another foreigner, detained in that country under arrangements with Australia (and such lawyers as that foreigner can secure from that position of disadvantage), is unique. Yet it was not the only unique feature of this case or of the way it was litigated.

224 Neither during the hearing nor after the objection to competency stood for judgment did the Commonwealth (which appears in this Court in so many matters far less sensitive and significant (232)) seek to appear, to intervene or otherwise to provide oral or written submissions in response to the respondent's arguments challenging the validity of the law providing for appeals to this Court from Nauru under the *Australian Constitution*. Although the point argued before the Full Court was one which was of potential importance for the meaning and application of the *Australian Constitution*, the powers of the Australian Federal Parliament and, in particular, as those powers concern the relationships of Australia with neighbouring countries especially of the Pacific Islands, this Court was left to decide the objection without the Commonwealth's assistance.

225 The human mind, ever curious, speculates as to why the Commonwealth was prepared to leave to an indigent foreign refugee in detention the fate of a national law of Australia, potentially of large significance extending beyond the present case and parties. In so far as speculation presents answers to my mind, they do not reflect

(231) [2004] HCATrans 440 at 19, 138.
(232) See, eg, *Papakosmas v The Queen* (1999) 196 CLR 297 at 299.

favourably on the Commonwealth or those who made the decisions on its behalf when notified of the hearing of the objection to competency in this Court.

The costs motion and argument

226 *Revelation of the MoU*: Only when the appellant sought orders for costs against the Commonwealth and Nauru did he flush those entities out of their cocoon of silence. Whereas the earlier silence of Nauru was understandable, that of the Commonwealth was not. The evidence specific to the appellant's motion was restricted. However, the parties' written submissions, and those of Nauru and the Commonwealth, made reference to the record in the earlier proceedings in the Supreme Court of Nauru, detailing the appellant's interception at sea by an Australian sea transport (233), his subsequent transportation to Nauru as part of the "Pacific Solution" to redirect persons who were seeking to travel by ship to Australia to claim refugee status in Australia and his eventual detention in facilities in Nauru provided pursuant to the MoU.

227 Understandably, the MoU is expressed at a level of generality appropriate to an agreement between nation States. In consequence of Nauru's provision of detention facilities for the appellant and other asylum seekers at Australia's request, Australia undertook to provide certain "humanitarian and development assistance" to Nauru, as part of a mutual commitment to "cooperate on the management of asylum seekers on Nauru" and to "minimise the administrative burden of managing the Agreement" on the part of Nauru. However, the MoU makes no reference to any particular obligations in respect of identified detainees or to any specific obligations of Australia in respect of the conduct of particular legal proceedings, such as those involving the respondent's objection to the competency of the appellant's appeal to this Court. The most that the MoU says in any way relevant to the obligations assumed by Australia is that (cl 5):

> "Australia … will reasonably compensate Nauru for its assistance and for any losses incurred in this endeavour including accidents or unforeseen incidents resulting directly from … the residence of asylum seekers on Nauru."

No reference is made to any specific arrangements in relation to these proceedings in this Court, either generally or in respect of the relationship, if any, between the respondent and the Commonwealth in the conduct of such proceedings.

228 At least after the matter was specifically raised by the Court, the fact that the Commonwealth, by way of indemnity, was funding the challenge by the respondent to the competency of the appellant's appeal should, in my view, have been brought to this Court's notice. This is because the answers given to the questions asked in court, with respect, led naturally to a conclusion that the Commonwealth and the respondent were at arm's length; and that the sole source of the

(233) *Amiri* (unreported, Supreme Court of Nauru (Connell CJ), 15 June 2004) at [3].

initiative for the proceedings was a decision on the part of Nauru or its officials, such as the respondent. As it transpires from the affidavits filed in support of the costs motion, not only was the Commonwealth absenting itself from defending the validity of legislation enacted by the Federal Parliament, but it was at the same time providing comfort, by way of an agreed indemnity for costs, to an officer of a foreign country to attack in this Court the validity of Australian federal legislation. I cannot remember a similar position arising in my judicial experience. From my reading, I do not remember any case of a like kind occurring in the entire history of the Commonwealth or of this Court.

229 The Commonwealth should not, of course, be penalised for any lack of full disclosure to the Court by others when the Commonwealth was absent from the hearing. However, that absence takes on a new dimension once the previously undisclosed dealings between Nauru and the Commonwealth in respect of the costs of the proceedings come to light. They were not revealed. Nor was the appellant on notice of them, simply from the terms of the MoU (cl 5). In his written submissions, the appellant states that he was unaware of the circumstances of the costs indemnity to the respondent for the competency issue before press reports appeared, revealing the indemnity, on the day following the conclusion of the hearing of the objection to competency in this Court. I accept that statement.

230 *Nauru's objection to joinder and orders*: Nauru objected to its joinder and to the making of any order for costs against it. So did the Commonwealth. Each asserted that neither the motion nor any special order of joinder or costs was necessary or appropriate. The suggested reason, which has now found favour with the majority of this Court, is that no difficulty arises for the appellant's recovery of costs against the respondent because Nauru (as the Court now knows) is entitled to an indemnity from the Commonwealth in respect of any costs that it is ordered to pay to the appellant. This, it is said, affords an assurance to the appellant that his costs will be met and this Court's order for costs on the competency hearing fully discharged. The appellant responds that the existence of that indemnity is no answer to his submission that he is entitled, in the circumstances, to a *special* order for costs and that, to procure such order, prudence suggests that those who will have to pay it should be added as parties for that limited purpose.

231 The Commonwealth supported Nauru's argument that protection of the position of the appellant with respect to costs was unnecessary, by orders of the kind that the appellant had sought, because, on the day that the appellant's notice of motion was served, 7 December 2004, the Australian Government Solicitor had sent a letter to the appellant's solicitors which included the following statement:

> "Under the Memorandum of Understanding between Australia and Nauru, the Commonwealth will meet any costs orders the respondent is ordered to pay in respect of the High Court proceedings. As such, your motion is unnecessary and an

inappropriate use of the Court's time. Your client should have no concern that the respondent will not meet an order for costs made against it in the High Court proceedings, including the competency application."

232 According to the appellant, this belated acknowledgment of the direct interest of the Commonwealth in the respondent's objection to the competency of the appellant's appeal merely compounds objections to the Commonwealth's undisclosed interest in the proceedings. It does not respond to the claim for a *special* costs order.

Power and criteria for a special costs orders

233 *Power to provide for costs*: Under r 21.05.1(b) of the *High Court Rules 2004*, the Court or a Justice may order that:

> "any person who ought to have been joined as a party *or whose presence in the proceedings is necessary to ensure that all questions in the matter* are effectively and completely determined be joined as a party"

(emphasis added).

234 One question that arose in the appellant's appeal to this Court was the competency of that appeal. That question was raised by the respondent. Another question that has now arisen is the disposition of the costs of the failed objection to competency and the appellant's submission that a special order should be made in his favour.

235 Providing for the costs of proceedings is a normal part of the exercise of the judicial function in determining a matter. This Court, in the exercise of its own jurisdiction and powers, has a large discretion to provide for costs (234). Once this Court's jurisdiction and powers are lawfully invoked, it is within the Court's functions to make orders for the costs, if any, that should be ordered in any disposition of proceedings. To the extent that Nauru, in its written argument, submitted that this Court lacked power to go beyond orders disposing of the appeal, whether under the foregoing provision of the Rules or otherwise, because of the terms of s 8 of the Nauru Appeals Act, I would reject that submission. It is natural that that Act should provide for the disposition of an appeal to this Court. But it is equally understandable that other sources of jurisdiction and power, including quite possibly the *Australian Constitution* itself, permit this Court to make orders for costs consequent upon the disposition of proceedings before it, from whatever source. Were the Court unable to do so, disposition of an appeal in favour of a party would, in many cases, constitute a hollow victory.

236 *Costs orders against non-parties*: But is it necessary for an order to be made joining Nauru or the Commonwealth? The submissions on behalf of those entities that joinder was unnecessary for factual reasons in my view fail. Whilst it is true that the now-revealed particular

(234) *Judiciary Act 1903* (Cth), s 26. See also *Re McJannet; Ex parte Australian Workers' Union of Employees (Qld) [No 2]* (1997) 189 CLR 654 at 657.

indemnity given by the Commonwealth ensures that this Court's costs order against the respondent will ultimately be borne by the Commonwealth, it says nothing about whether a *special* order should be made, as for indemnity costs or solicitor and client costs, such as the appellant has sought. In so far as the indemnity arrangements are belatedly advanced to repel any need for joinder, I would reject the argument. In my opinion, the appellant's request for a special order must be considered in order to dispose of the motion properly.

237 This conclusion presents, in turn, two issues. The first is whether it is necessary to join a person or entity as a party to proceedings so as to make effective an order for costs against that party or whether it is otherwise convenient and proper to do so. The second is whether, in the circumstances of this case, a special costs order should be made.

238 There is no doubt that this Court has the power to make an order for costs against a non-party (235). The jurisdiction and power to do so are engaged when that non-party has an interest in the subject of the litigation and where it is demonstrated that it is involved in some real way in the outcome of the matter (236). Thus, an involvement in the payment of the costs of particular litigation may constitute such an interest as will attract an order directed to a non-party in respect of the costs (237). The exercise of such powers is, of course, subject to observance of the requirements of procedural fairness. Under those requirements, a non-party will not be ordered to pay any part of the costs of the proceedings without first being notified of that possibility and afforded the opportunity to contest the making of such an order (238).

239 *Nauru: no special costs order*: In the present case, the Republic of Nauru and the Commonwealth of Australia were on notice of the appellant's motion. They were both afforded the right to be heard in resistance to a costs order, and in particular a special order for indemnity or solicitor and client costs. To this extent, it is not essential to join the Commonwealth, although it may be appropriate to do so. However, were an order contemplated against Nauru, a foreign State, it would be necessary, and proper, in my view, to join it as a party, out of respect for its status and dignity and so as to permit the different and more substantial questions involved in making any such orders against it to be fully ventilated and decided.

240 In the result, I am unconvinced that Nauru should be joined as a party or that any special costs order should be made against it. Nauru is, in a real sense, already present in the Court in the form of the

(235) *Judiciary Act 1903* (Cth), s 26. See also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

(236) *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 188.

(237) *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192-193, 205; *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 74 ALJR 68 at 74 [25], [27]; 166 ALR 302 at 310.

(238) *Victoria v Sutton* (1998) 195 CLR 291 at 316-317 [77].

respondent. He is a public officer of Nauru. Inferentially, he is carrying out decisions made by the Government of Nauru. I therefore see no utility or necessity to join Nauru as a party. Nor do I consider that anything that Nauru or the respondent have done (so far as the evidence shows) attracts any special order for costs against either of them. In these circumstances, it is not necessary to join Nauru to ensure that all questions in the matter, including costs, are effectively and completely determined. In so far as the motion seeks relief against Nauru, I therefore agree with the other members of the Court that it should be dismissed.

241 *The Commonwealth: indemnity order*: The position of the Commonwealth is different. It must answer to the appellant's claim that it should bear his real costs of resisting the challenge to the competency of the appeal. The simple order that the respondent pay the appellant's costs would entitle the appellant to no more than the bare costs as between party and party. It is within judicial knowledge that such costs represent only a fraction of the real costs that are incurred in bringing, or defending, proceedings in this Court.

242 The appellant has established that the Court should exercise its jurisdiction and power to order that his real costs be paid by the Commonwealth. If a special order were not made, the indemnity given by the Commonwealth to Nauru and the undertaking given by the Commonwealth to meet the appellant's costs of the objection to competency would not go far enough.

243 It is true that this Court, by its costs order, normally provides only for the party and party costs of a successful litigant. But this is not a normal case. A larger costs order, whether for indemnity or solicitor and client costs, will not usually be made, and particularly not against a non-party, unless some feature of the litigation convinces the Court that the party entitled to costs should have a special order. Instances in which such orders are made include where the opponent's conduct has been "plainly unreasonable", pursued for "an ulterior or collateral purpose" (239), undertaken in an "unmeritorious, deliberate or high-handed" way (240) or where that opponent has been shown to be guilty of "unreasonable conduct, albeit that it need not rise as high as vexation" (241).

244 When I have regard to the conduct of the Commonwealth in these proceedings, as now known to the Court, it has been highly unreasonable and such as to warrant the Court's making its disapprobation clear by providing a special costs order.

245 Australian federal legislation was challenged as constitutionally invalid. The Commonwealth was on notice of that challenge. As is now known, it was actually funding the challenge by way of an indemnity

(239) *PCRZ Investments Pty Ltd v National Golf Holdings Ltd* [2002] VSCA 24 at [36].
(240) *NSW Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469 at 494.
(241) *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 616.

arrangement known to the Commonwealth and its officers, but unknown to the appellant. The Commonwealth elected not to appear in this Court to support the validity of the Australian legislation. That validity has now been upheld, but no thanks to the Commonwealth's assistance. Indeed, it is despite its deliberate absence and its now disclosed financial support for the attack upon it.

246 I acknowledge that, where the Commonwealth, or the federal Attorney-General, intervene in the proceedings between parties, it is rare for them to be ordered to pay any costs of the parties (242). However, here the Commonwealth elected not to intervene. In effect, it left to an indigent foreigner, detained in another country under arrangements with it, to find lawyers to defend the validity of Australian federal legislation. Yet, as is now revealed, it was not at arm's length from the parties. It was directly interested in the outcome. It was supporting one party to the contest, namely the respondent. Specifically, it was doing so at first without disclosing that fact to the appellant or to this Court. In effect, the Commonwealth permitted the view that it took of its financial obligations under the MoU with the Government of Nauru to prevail over its duty to the Constitution of the Commonwealth of Australia and the resolution by this Court of a contest about important principles of Australian constitutional law. I regard the conduct of the Commonwealth in this regard as seriously unreasonable. The only way to ensure that it is not repeated is to provide by orders that the appellant, and those who have represented him, are not out of pocket financially. The Government parties and lawyers, who have failed, will not be out of pocket. Why should the appellant and his lawyers, who have succeeded in such circumstances, be so?

247 Although a costs order could be made against the Commonwealth as a non-party which has been heard, I consider that it is preferable that the record be amended to make the Commonwealth a party to the proceedings for the costs disposition that I favour. This would have the additional merit of reflecting, on the record of this Court, the role that the Commonwealth has played, initially undisclosed to this Court, in funding the respondent's challenge to the competency of the appeal, which challenge has failed.

Orders

248 The foregoing are my reasons for joining in the orders of the Court, pronounced on 9 December 2004, dismissing the respondent's objection to the competency of the appellant's appeal. To the orders then announced I would add an order, on the appellant's motion for costs, that the Commonwealth of Australia be added as a party to the proceedings. The Commonwealth should be ordered to pay the appellant's costs of the objection to competency on an indemnity basis, with credit for the costs recovered from the respondent.

(242) *University of Wollongong v Metwally* (1985) 1 NSWLR 722 at 728.

249 CALLINAN AND HEYDON JJ. At the time of federation Nauru was a German possession. It was captured by Australian military forces on the outbreak of World War I and was subsequently administered under a mandate of the League of Nations. Its territory was occupied by Japanese military forces during World War II. Afterwards, under a United Nations trusteeship in favour of Australia, New Zealand and the United Kingdom, Australia administered Nauru on behalf of the Governments of those countries. It is unnecessary to say anything more about the events leading up to the independence of the people of Nauru and the establishment of their republic except that Australia had, during the intervening years, interested itself in the affairs of the territory and has benefited from the exploitation of the substantial resource of phosphate found there. In 1968, its people achieved their independence and the country became a sovereign state. Immediately before that event the Commonwealth Parliament enacted the *Nauru Independence Act 1967* (Cth), which, by s 4 provides that after 30 January 1968 all Acts of the Commonwealth ceased to extend to the Republic and that Australia was not to exercise legislative, administrative or judicial powers in, or over, Nauru.

250 Mr Mohammad Arif Ruhani, the appellant, has filed a notice of appeal in this Court against a decision of the Supreme Court of the Republic of Nauru dated 15 June 2004.

251 The appellant is an Afghan national presently residing in Nauru in supervised premises. He was taken there by Australian sea transport at the end of 2001. Together with some other people, he asserted in proceedings for a writ of habeas corpus brought in the Supreme Court of the Republic of Nauru, that he was being held against his will, and that, although he had neither applied for, nor consented to its issue, a visa permitting him, he would no doubt say, in substance compelling him, to reside in the Republic, has been unlawfully issued to him.

252 The Supreme Court of Nauru is constituted by one judge only, Connell CJ, and accordingly the appellant's application was heard by him. His Honour's decision was as follows:

> "The applicants, arriving without passports or entry permits, were granted special purpose visas, which have been extended from time to time. The last extension, valid for six months, was issued on 28 January 2004 and at this present juncture, is the legal entitlement for the asylum seekers to remain in Nauru. The consent of or application by the applicants was not a necessary requirement for the granting by the PIO [Principal Immigration Officer] of the visa. The conditions imposed by the PIO in the current extension of the special purpose visa did not constitute an illegal detention either for the purposes of the issue of a writ of habeas corpus or a complaint under Art 5(4) of the *Constitution*."

The legislation

253 It is against that decision that the appellant seeks to appeal to this Court. He does so, he contends, as of right pursuant to s 44 of the

Appeals Act 1972 (Nauru) as amended, and the *Nauru (High Court Appeals) Act 1976* (Cth) (the domestic Act). The Director of Police who is the responsible supervising officer in the Republic of the appellant, is named as the respondent to the appeal and has objected to the competency of it. The issue before this Court is whether that objection should be sustained.

254 This Court is not concerned with the validity or otherwise of any Nauruan legislation or with the effect of it. The question before the Court is to be resolved by reference to Australian law, but some attention may need to be given, for the purposes of explanation, to the *Nauruan Constitution* and to the *Appeals Act* of that country.

255 Part V is the part of the *Constitution of Nauru* which deals with the judicature. It says nothing in terms about the High Court of Australia and contemplates, by Art 57, appeals from judges of the Supreme Court sitting alone, to an appellate court constituted by not fewer than two judges of that Court. Article 57(2) does however state that Parliament may provide that an appeal will lie as prescribed by law from a judgment, decree, order or sentence of the Supreme Court, to a court of another country.

256 By a treaty done at Nauru on 6 September 1976, the Government of Australia agreed with the Government of the Republic of Nauru that appeals are to lie from the Supreme Court of Nauru to the High Court of Australia in certain cases as of right, and in others, with the leave of the trial judge, or the High Court of Australia. It is not suggested that the appeal that the appellant wishes to pursue in this instance is one which, if the Court has jurisdiction to entertain it, he may not pursue as of right.

257 One of the articles of the treaty (Art 3) provides that procedural matters in an appeal of this kind are to be governed by the Rules of the High Court. Article 4 provides that pending the determination of an appeal to this Court the judgment, decree, order or sentence to which it relates is to be stayed unless otherwise ordered. The same article provides that the orders of this Court are to be made binding and effective in Nauru.

258 Under Art 6 either nation may give ninety days notice of an intention to terminate the treaty. No such notice has been given and it is not for this Court to speculate upon the reasons why the Republic chooses to challenge the jurisdiction of this Court rather than to terminate the treaty.

259 Similarly, it is not for this Court to speculate upon why the Commonwealth chose not to intervene in the proceedings.

260 The treaty was enacted into and became part of the law of Australia by the domestic Act as a schedule to that Act.

261 Section 5 of the domestic Act provides as follows:

"*Appeals to High Court*

(1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.

(2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).

(3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave."

262 Sections 6 and 7 are as follows:

"6. *Procedure*

The power of the Justices of the High Court or of a majority of them to make Rules of Court under section 86 of the *Judiciary Act 1903* extends to making Rules of Court in relation to matters referred to in paragraph 1 of Article 3 of the Agreement.

7. *Quorum*

The jurisdiction of the High Court to hear and determine an appeal or an application for leave to appeal under section 5 shall be exercised by a Full Court consisting of not less than 2 Justices."

263 Section 8 provides:

"*Form of judgment on appeal*

The High Court in the exercise of its appellate jurisdiction under section 5 may affirm, reverse or modify the judgment, decree, order or sentence appealed from and may give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court."

264 Section 9 is as follows:

"*Decision in case of difference of opinion*

Where the Justices sitting as a Full Court in accordance with section 7 are divided in opinion as to the decision to be given on any question, the question shall be decided as follows:

(a) if there is a majority of the one opinion, the question shall be decided in accordance with the opinion of the majority; or

(b) in any other case:

(i) in the case of an application for leave to appeal — the application shall be refused; or

(ii) in the case of an appeal — the decision appealed from shall be affirmed."

265 Section 10 of the domestic Act confers a right of audience upon any person entitled to practise as a barrister or solicitor in any federal court of Australia, or who is on the register or roll of practitioners in this country or Nauru.

The respondent's submissions

266 The respondent submits that the jurisdiction of this Court is exhaustively prescribed by Ch III of the *Constitution*: that chapter is incapable of supporting a conferral of a jurisdiction to hear and determine appeals, whether so designated or not, from a foreign country. The Supreme Court of Nauru is nowhere mentioned in Ch III of the *Constitution*. The entertainment and disposition of an appeal from the Republic of Nauru cannot be an exercise therefore of the judicial power of the Commonwealth.

267 The jurisdiction that the domestic Act purports to confer is appellate in form and substance. Section 73 of the *Constitution* confines the appellate jurisdiction of the High Court to a jurisdiction to hear and determine appeals from Justices exercising the original jurisdiction of the Court, from any other federal court or court exercising federal jurisdiction, or from the Supreme Court of any State, or from any other court of any State from which, at the establishment of the Commonwealth, an appeal lay to the Queen in Council, or from the Inter-State Commission as to questions of law only.

268 The argument continues, that no other head of constitutional power supports the conferral of what is effectively a Nauruan appellate jurisdiction. Section 122 of the *Constitution* refers only to the Territories of the Commonwealth. It has nothing to say about former territories and independent nations. Nor, it was submitted, could a purported exercise of the external affairs power under s 51(xxix), or the Pacific islands power under s 51(xxx) (243), or the incidental power under s 51(xxxix) of the *Constitution* extend to the conferral of a judicial power upon the High Court to hear and determine a proceeding instituted in Nauru against an official of Nauru where the enforcement of the determination depended upon the active co-operation of other officials of the Executive of Nauru. It follows that the domestic Act purporting to give effect to the treaty by making provision for the hearing of appeals from Nauru is invalid.

269 We will return to these submissions later.

The appellant's submissions

270 The appellant seeks to counter the respondent's objection to competency upon alternative bases. First, he submits that the jurisdiction for which the domestic Act provides, is a form of original jurisdiction conferrable under s 76(ii) of the *Constitution*, because it arises under a law made by the Parliament pursuant to s 51(xxix) or s 51(xxx) or both of them, and accordingly gives rise to a matter for determination by the Court. If that is not so, the appellant submits, the "appeal" which he seeks to pursue in this Court is a matter arising under the treaty and falls within the jurisdiction conferred by

(243) "the relations of the Commonwealth with the islands of the Pacific."

s 75(i) (244) of the *Constitution*. His last submission is that if the jurisdiction conferred by the domestic Act is not original jurisdiction, then it is appellate jurisdiction of a kind that may validly be conferred under ss 73 and 51(xxix) and 51(xxx) of the *Constitution*.

271 The appellant's first proposition may, as a general one, be accepted, that the way in which the proceedings are designated does not necessarily define their character. For this general proposition there is authority, but, as will appear, none of it holds that the definition or description of the proceedings is irrelevant, or by any means immaterial. Indeed, the description or definition here, taken with other matters to which we will refer, is relevant and material.

272 The appellant's second proposition is that whenever a matter arising under Commonwealth law is brought for the first time before a court exercising the judicial power of the Commonwealth, that court will be exercising original jurisdiction. It is a necessary part of that submission that this Court, in entertaining an appeal under the domestic Act, would be exercising the judicial power of the Commonwealth because it would, in doing so, be giving effect to a law of the Parliament of the Commonwealth.

Resolution of the objection

273 In truth the domestic Act here does give rise to a matter. Its enactment as a federal Act and the need of this Court to pass upon its validity and construe it have that consequence. But what the appellant seeks here is not simply the resolution of that federal matter, but of a further matter, the substantive controversy arising in, and already determined by the Supreme Court of the sovereign State of Nauru. In short there are two matters before the Court one of which the Court has jurisdiction to entertain, and the other which it does not, namely the controversy originating in Nauru and the resolution of which, by binding and enforceable orders, can only be effected in Nauru. What we have said is in no way to deny that a valid and enforceable enactment of the Parliament may have a double function of creating and enforcing rights "in one blow" (245). Nor, moreover, does it deny that a right or privilege created by the law of another polity may be given the force of federal law as was the position in *Hooper v Hooper* (246), a case about which more will need to be said later. For present purposes it suffices to say that the adoption by enactment, of legislation of another place, for the purpose of making that legislation binding upon the people of the adopting polity is not what has happened here.

(244) That section provides: "75 In all matters: (i) arising under any treaty; the High Court shall have original jurisdiction."

(245) See the reasons of Gummow and Hayne JJ at 528-529 [111].

(246) (1955) 91 CLR 529.

274 For the most part, the cases cited by the appellant for the second proposition have this in common (247): they were concerned with matters, whether designated as "appeals" or not, which had been heard in the first instance by boards or tribunals, or other bodies established by the federal polity, which, although apparently intended to, and actually operating in a judicial or quasi-judicial way, were not Ch III courts, or courts of the States or Territories, and were not then exercising, and could not exercise the judicial power of the Commonwealth. The issue therefore in those cases, was not whether the High Court did or did not have jurisdiction to entertain the application for recourse to it, but whether the jurisdiction to be exercised on such recourse was original jurisdiction. On that question the definition or description of the process in question, as an appeal or otherwise, was not decisive. The issue that is presented here is a different issue. It is whether the High Court has any jurisdiction at all to entertain the appellant's claim for relief from this Court. In the cases cited, the issue, as to the true nature of the jurisdiction, only arose for resolution because it was necessary to ascertain the nature of the recourse to this Court in order to lay down the manner of disposition, that is the procedure to be followed in deciding the case and whether an appeal lay to the Full High Court.

275 Reference need be made to one only of those cases cited to demonstrate that this is so. In *Minister for the Navy v Rae* (248), the ultimate question was as to the amount of compensation which should be paid by the Commonwealth to the owner of a fishing boat which had been acquired under the wartime *National Security (General) Regulations* for defence purposes. In the first instance the compensation had been fixed by a naval compensation board established by the Commonwealth. The Minister of State for the Navy was dissatisfied with the assessment of the board. He invoked the jurisdiction of this Court (which came to be exercised by Dixon J) under reg 60G of the *National Security (General) Regulations* which provided as follows:

> "(1) If either the Minister or the claimant is dissatisfied with the assessment of a Compensation Board, he may, within one month after receipt of the notice of the assessment of the Board, or, where the assessment was made pursuant to sub-regulation (3) of

(247) *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 181 per Isaacs J; *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd* (1944) 69 CLR 227 at 228 per Latham CJ; *Minister for the Navy v Rae* (1945) 70 CLR 339 at 340-341 per Dixon J; *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353 at 370-371 per Dixon CJ, McTiernan, Williams, Fullagar and Kitto JJ; *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 657 per Dixon CJ; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 312-313 per Brennan J; *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 653 [31] per Gummow and Callinan JJ; *Eastman v The Queen* (2000) 203 CLR 1 at 34-35 [109]-[110] per McHugh J.

(248) (1945) 70 CLR 339.

> regulation 60D of these Regulations, within one month after the doing of the thing in respect of which the claim was made, apply to a court of competent jurisdiction for a review of the assessment.
>
> …
>
> (7) In any matter not provided for in these Regulations the powers, practice and procedure of the court shall be as nearly as may be in accordance with the powers, practice and procedure of the court in civil actions or appeals.
>
> (8) For the purposes of this regulation, 'court of competent jurisdiction' means a court of the Commonwealth, or of a State or Territory of the Commonwealth (other than a court presided over by a Justice of the Peace, Magistrate or District Officer), which would have jurisdiction to hear and determine the application if it were an action between subject and subject for the recovery of a debt equal to the compensation claimed in the original claim to the Minister, or when the compensation claimed is wholly or partly in the form of a periodical payment, of a debt equal to the sum which the periodical payment claimed would amount to for the period of one year (or if the claim is in respect of a period of less than one year, for such lesser period), together with the amount of any other items in the claim."

276 It may be noted that the terminology for the invocation of the jurisdiction of the Court there, correctly, was, "apply … for a review" and not "appeal". His Honour said this of it (249):

> "It is evident that, up to the stage when an application is made to the Court the assessment and award of compensation must be regarded as an administrative matter … [The judicial power of the Commonwealth] is brought into play for the first time when, on so called proceedings to review, the Court determines the compensation. They are in truth originating proceedings in the original jurisdiction, just as are the 'appeals' from the Commissioner of Taxation and from taxation Boards of Review and Valuation Boards. As the matter concerns a claim … against the Commonwealth, it is one over which the High Court has original jurisdiction in virtue of s 75(iii) of the *Constitution* …"

277 It can also be seen, as his Honour pointed out in the passage quoted, that the High Court had original jurisdiction in any event because the claim for compensation was against the Commonwealth, and, as a matter to which the Commonwealth was a party, was one that could be brought in the original jurisdiction under s 75(iii) of the *Constitution*. It was only necessary for Dixon J to identify with precision the nature of the jurisdiction to be exercised because the regulations were not on their face apt for the disposition of proceedings in the High Court.

(249) (1945) 70 CLR 339 at 340-341.

278 It is the presence and form of Ch III of the *Constitution* that dictate the special tenderness that the Parliament and this Court have generally, but not invariably, shown (250) for the due exercise of federal judicial power by courts and not otherwise in this country. Elsewhere, and in past times, the drawing of a distinction between a court of law and a court of other official business was often of little importance. In Machinery of Justice, Professor Jackson makes this point (251):

> "A 'court' was a place for doing business of a public nature, judicial or otherwise, and wherever we find places with any peculiar standing (Royal Forests, Staple Towns, Cinque Ports) or certain industries (lead mining in the Mendips, tin mining in Devon and Cornwall) or classes of men differentiated from the general population (merchants, soldiers, ecclesiastics) we find historically a special body of law with special courts."

279 Over time various other bodies and offices came to be established such as the General and Special Commissioners of Income Tax (in 1803) and the Board of Railway Commissioners (in 1846). In the latter year, the county courts of England were established by the County Courts Act as judicial tribunals of less formality and rigour than the High Courts of Westminster. They were intended to achieve (252):

> "a system of local civic tribunals adapted to the needs of the great masses of the population and the maximum convenience of forum, simplicity of procedure, suitors being able to obtain relief and defend themselves … with summary determination and moderation of expenses …"

280 Review by the courts in its current form and the need therefore to distinguish it from the process by which the first decision was made, are largely products of the twentieth century as a result, among other things, of increased state involvement in many areas of public welfare. A decision as to the nature of the jurisdiction to be exercised by the courts in undertaking the review became important essentially because it affected the nature of the relief, whether by way of prerogative writs or statutory remedies, that could be granted.

281 At federation however, the proliferation of administrative and quasi-judicial tribunals lay in the future, although of course the

(250) For more than fifty years, until the *Boilermakers' Case* (*R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254), the Court of Conciliation and Arbitration and its like predecessors exercised both arbitral and judicial power as if they were Ch III courts, and, in regarding the judges of the Family Court (*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248), and of the Federal Court (*R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113) as amenable to writs issued under s 75(v), this Court treated them as "officers" of the Commonwealth rather than as judges of courts from which appeals lay although Ch III itself in terms distinguishes between judges and courts on the one hand, and "officers" on the other.

(251) *Jackson's Machinery of Justice*, 8th ed (1989), p 107.

(252) See Wraith et al, *Administrative Tribunals* (1973), p 28.

founders were conscious of the need to distinguish in the *Constitution*, as they did, between executive and judicial power. One of their concerns was to define, with as much precision as possible, the scope of each of federal original and federal appellate jurisdiction and to provide a remedy for unlawful conduct by officers of the new federal polity (s 75(v)). A second concern was to give effect to another autochthonous expedient (253), of the conferring upon a final appellate and constitutional court, of a substantial original jurisdiction as well. A further concern was to ensure that original federal jurisdiction would be exercised in truly federal matters only, without trespass upon State jurisdiction (254). No concern or intention on the part of the founders is to be discerned in the language of the debates at the Constitutional Conventions, or in Ch III itself, to transmogrify an appeal into an exercise of original jurisdiction. The appellant's submission that the first contact of a "case" with the High Court involves an exercise of original jurisdiction is plainly wrong. An appeal from a Supreme Court of a State, or the Federal Court is exactly that, an appeal, even though the appeal is the first encounter that the case has with the High Court.

282 It is inapt and wrong to seek to characterise the jurisdiction said to be exercisable here as original jurisdiction for other reasons. Connell CJ in hearing the appellant's application for habeas corpus was sitting as a judge of a court, exercising judicial power. Indeed, the relief sought has been regarded for hundreds of years as uniquely appropriate for the prevention by the courts of excesses and abuses of the Executive and its own administrative bodies and officers. It is the courts which grant the relief against administrative bodies; administrative bodies do not grant it against themselves. We cannot accept that a court invited to reverse the judgment of another court which has dismissed an application for relief of that kind, wherever the court may have sat, would be exercising original jurisdiction. The judgment of the Supreme Court of Nauru cannot be ignored. It would be an affront to all elementary principles of comity to do so. The Supreme Court of Nauru is a real court. The judgment of its Chief Justice is, in every respect, form, substance, application of principle, judicial method, and, it should be emphasised, effect and operation, a judgment of a court, non-compliance with which would be visited in Nauru with all the consequences and sanctions available to any duly established court. To regard an evaluation of that process by a court constituted by several judges of another final court, albeit of a different jurisdiction, proceeding in every relevant respect as if hearing an appeal, as an exercise in original jurisdiction, would be to give effect to a fiction. That the jurisdiction purportedly conferred must be, if anything, appellate, appears most clearly from s 8 of the domestic Act. Courts

(253) cf *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

(254) It is now well established in this Court that the Commonwealth may not confer State jurisdiction upon a federal court: *Gould v Brown* (1998) 193 CLR 346.

exercising a jurisdiction to modify a sentence imposed in a criminal jurisdiction, or order a retrial or a new trial, cannot possibly be said to be exercising an original jurisdiction.

283 Any suggestion that the jurisdiction purportedly exercisable by the Court under the domestic Act is original jurisdiction is comprehensively contradicted by the express language of other parts of it, beginning with its short title which is totally inapt for the exercise of anything but appellate jurisdiction. The words of s 5(1) are "*[a]ppeals* lie to the High Court … in cases where the Agreement provides that such *appeals* are to lie". Each of ss 5(1), (2), (3), 7 and 10(2) and (3) refers in terms to "*appeal*" or "*appeals*".

284 Section 8 further refers to the giving of judgment in the exercise of an *appellate* jurisdiction, that ought to have been made "*in the first instance*". And s 9 makes the sort of provision that is necessary and conventional to resolve a difference of opinion in an appellate court.

285 Every historical and semantic indication is of an intention to confer a genuine appellate jurisdiction. The same is true of the *Appeals Act* of Nauru. The use of the language of appeal there is plainly deliberate and not a mindless adoption of the nomenclature of earlier enactments. There is not the slightest suggestion in the domestic Act that the jurisdiction intended to be conferred on this Court is of an original kind. Presumably, in the proceeding within original jurisdiction which the majority say is now to take place, the appellant would seek to have the matter entirely reheard as if there had not already been a trial in Nauru despite that the reason for recourse to this Court is that there has been a trial and a judicial decision in Nauru. In some unexpressed way, this Court is now, it is urged, bound to proceed as if such a decision has not been made and no trial has taken place. To proceed in that way would be to proceed in the teeth of the most clearly expressed language possible in the domestic Act. We can no more accept that than we can that the Supreme Court of Nauru is to be treated as a foreign equivalent to an administrative and strictly non-judicial emanation of the federal Parliament.

286 It is inconceivable that the founders would have contemplated, and sought to make constitutional provision for, the exercise of an appellate or an original jurisdiction of the High Court, over the citizens or subjects of another country, nation or colony, that was not a territory. At federation, the Privy Council was the final avenue of appeal for all of the colonies and territories of the British Empire and had no judicial role to play in relation to foreign countries. It is unthinkable that the founders would have considered it necessary, or desirable, to make provision for the bringing of appeals to the High Court from another dominion or colony of the Empire, let alone from a foreign country. That they did not do so in making the constitutional settlement with the United Kingdom and in drafting the *Constitution* in the form that they did appears from the form of Ch III itself which is silent on these matters. An expansive interpretation of the *Constitution* is one thing: an interpretation which would confer upon an Australian court, even the

High Court, an appellate jurisdiction over the citizens of, and a sovereign foreign power itself, whether as a result of the making of a treaty or otherwise, would be to go far beyond expansiveness and is much further than we are prepared to go.

287 How is this Court to proceed henceforth in this matter? It can only do so by embarking on an elaborate fiction that the "appeal" is not an appeal. Why should the parties not give evidence if this is to be an exercise of original jurisdiction? May they rely upon the Nauruan laws of evidence? Must they be proved? Will not the substantive law be the law of Nauru? It is an irony that the latest statement of that, and its application to the facts proved in this case in Nauru, are to be found in the judgment of Connell CJ. Why should this Court take a different view of those when this Court is exercising original jurisdiction? Are there to be pleadings? What about subpoenas? How will this Court be able to enforce the service of and obedience to them in Nauru? The answer to all of these questions must be whatever the Court chooses to invent for neither the *Judiciary Act 1903* (Cth), the Rules of Court, nor the *Constitution* supplies any answers.

288 The jurisdiction intended to be conferred by the domestic Act is appellate and appellate only. This Court should not construe the treaty to give effect to a result contrary to its language and purpose. Section 73 of the *Constitution* defines in a clearly exclusive way the appellate jurisdiction of the Court (255). Not surprisingly its authors made no attempt to embrace within it the legal affairs of any other sovereign foreign nation. It is significant that the opening paragraph of s 73 empowers the Parliament to prescribe exceptions to, and regulations for the exercise of the appellate jurisdiction of the Court, but not additions. It may be, we express no concluded view on this, that the Commonwealth could, if it and Nauru were so minded, establish a special tribunal under various heads of constitutional power (256), to hear Nauruan appeals but that would be a very different measure from the impermissible one attempted here, of vesting Nauruan appellate jurisdiction in the High Court, a Ch III court.

289 No matter how the jurisdiction purported to be conferred may be characterised there are further reasons why the objection to competency must be upheld. Nauru, by objecting to competency has taken the stance that it is not to be bound by the decision of this Court in this country. Australia is not likely to send a gun boat to the Republic to enforce obedience to a subpoena or a decision of this Court. And, without the real and effective co-operation of Nauru, a decision of this Court will be unenforceable. The remedy sought here

(255) *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

(256) But see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

is against the executive of a foreign country in a foreign country. As to that, *Halsbury's Laws of England* puts the matter this way (257):

> "Jurisdiction of a state is strictly territorial in the sense that a state cannot exercise its powers or authority in the territory of another state or elsewhere outside its territory except by virtue of a permissive rule derived from international custom or from a treaty or convention. Thus, a state is not entitled to use physical force in the territory of another state to assert its alleged rights. Nor is it entitled to exert peaceable measures on the territory of any other state by way of enforcement of its national laws without the consent of that other state, by way for example of service of documents, police or tax investigations, or by the performing of notarial acts."

(Footnotes omitted.)

290 In *Abebe v The Commonwealth* (258) Gleeson CJ and McHugh J emphasised the critical element of enforceability (259):

> "The existence of a 'matter', therefore, cannot be separated from the existence of a remedy to enforce the substantive right, duty or liability. That does not mean that there can be no 'matter' unless the existence of a right, duty or liability is established. It is sufficient that the moving party claims that *he or she has a legal remedy in the court where the proceedings have been commenced to enforce the right, duty or liability in question*. It does mean, however, that there must be a remedy *enforceable* in a court of justice, that it must be *enforceable* in the court in which the proceedings are commenced and that the person claiming the remedy must have sufficient interest in enforcing the right, duty or liability to make the controversy justiciable."

(Emphasis added.)

291 This is consistent with the stance taken by the Court from its establishment. In *Waterside Workers' Federation of Australia v J W Alexander Ltd* (260), Isaacs and Rich JJ said this:

> "But the essential difference [between arbitral and judicial power] is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted …"

292 In *Rola Co (Australia) Pty Ltd v The Commonwealth* (261), Latham CJ (with whom McTiernan J agreed) was of the view that a committee of reference did not exercise judicial power because it did not have any power to enforce its own determination. With respect to

(257) 4th ed, vol 18, para 1532.
(258) (1999) 197 CLR 510.
(259) (1999) 197 CLR 510 at 528 [32].
(260) (1918) 25 CLR 434 at 463.
(261) (1944) 69 CLR 185.

the definition of judicial power given by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* (262) Latham CJ said (263):

> "If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then, according to the definition quoted, all the attributes of judicial power are plainly present. I refer to what I say more in detail hereafter, that the Privy Council, in the *Shell Case* (264) … expressly held that a tribunal was not necessarily a court because it gave decisions (even final decisions) between contending parties which affected their rights."

293 *Hooper's* case, upon which the appellant relies, and to which we said we would return, is of no assistance to the appellant. There Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ said this (265):

> "It is no answer to the above analysis to say that the right put in suit when a 'matrimonial cause' is instituted under the Act is a right created by State law – by the law of the State of the domicil. What the Act does is to give the force of federal law to the State law. The relevant law is administered in a suit instituted under the Act not because it has the authority of a State, but because it has the authority of the Commonwealth. For the purposes of the suit it is part of the law of the Commonwealth. The Act might, in s 11, have defined the rights to which effect was to be given in 'matrimonial causes' by enacting a system of its own. Or it might have defined those rights by reference to the law of England or the law of New Zealand or the law of one particular Australian State. The fact that it chose to adopt the law of the State of the domicil in each particular case cannot affect the substance of the matter."

294 These points should be made about the passage which we have quoted. The reference to the authority of the Commonwealth is no minor matter. Because the events with which the case and the relevant federal enactment were concerned were ones occurring within, and in respect of persons amenable to the authority of, the Commonwealth, whatever decision was made, was immediately enforceable by and within the Commonwealth. To put the matter another way, the Commonwealth was in a position to enforce the immediate right, duty or liability held to exist by the Court. That is not to say that suits may not be entertained by a federal court, or this Court, simply because the decisions and judgments may be in respect of matters having an extra-territorial effect or operation. But no one has suggested in this case that this Court in entertaining an "appeal" from the Republic of Nauru would be exercising some form of Australian extra-territorial jurisdiction, and nor could any such suggestion be made. No State can

(262) (1909) 8 CLR 330 at 357.
(263) (1944) 69 CLR 185 at 199.
(264) *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530.
(265) (1955) 91 CLR 529 at 536-537.

exercise its powers or authority in the territory of another State or elsewhere outside its territory unless by treaty, convention or international custom, the other State has assented or may be taken to have assented to the exercise of the relevant power or authority. A State may not use physical force in the territory of another State to give effect to asserted rights and may not otherwise impose sanctions to give effect to its laws in another State. Consent is always required, and it may safely be assumed by reason of the stance that the respondent takes here, that it would not assent in any way to the enforcement of a writ of habeas corpus were this Court to entertain this "appeal", allow it, and order that the decision of the Supreme Court of Nauru be set aside and that a writ of habeas corpus issue. In other words, neither this Court nor the Commonwealth has here a capacity to fulfil an essential judicial function referred to in *Brandy v Human Rights and Equal Opportunity Commission* (266), of enforcing decisions (in Nauru), albeit that the domestic Act purports to confer a right to come to the Court.

295 In the absence of willingness on the part of the respondent to accept and give effect to an order of this Court, whether in its original or appellate jurisdiction, a decision of this Court would be without efficacy of any kind. Even though courts may and do nowadays make declarations without other ancillary orders, they do not do so unless the declarations will have some real utility or will produce foreseeable consequences. This appears clearly enough from what was said by Mason CJ, Dawson, Toohey and Gaudron JJ in *Ainsworth v Criminal Justice Commission* (267):

> "It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise.' (268) However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions (269). The person seeking relief must have 'a real interest' (270) and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' (271) or if 'the Court's declaration will produce no foreseeable consequences for the parties' (272)."

(266) (1995) 183 CLR 245 at 268-269 per Deane, Dawson, Gaudron and McHugh JJ.
(267) (1992) 175 CLR 564 at 581-582.
(268) *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437 per Gibbs J.
(269) See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.
(270) *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437 per Gibbs J; *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448 per Lord Dunedin.
(271) *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10 per Gibbs J.
(272) *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188; 18 ALR

Courts do not make declarations of the law divorced from an ability to administer and give effect to that law. A decision in this "appeal" would be no more than declaratory in effect, and could not be administered and enforced without the active and co-operative intervention of the respondent in Nauru.

296 Nothing turns on the exercise, on two occasions, of the appellate jurisdiction of this Court, in Nauruan appeals (273). Decisions in which the point has not been taken and the different positions not argued, have no more binding force than, for example, the suggestion of McHugh J in argument in *Re Wakim; Ex parte McNally* (274) that the domestic Act might be invalid.

297 Another submission of the appellant is that the "appeal" arises under a treaty within the meaning of s 75(i) of the *Constitution*. We would reject that argument also. Here there are two matters. The first and the substantive one raises the question whether the appellant is entitled to a writ of habeas corpus to be enforced in Nauru. The other is whether the appellant is entitled to come to this Court, effectively to have the domestic Act and the *Constitution* construed. Self-evidently, the first of the matters does not arise under a treaty. It arises under Nauruan law exclusively. One aspect of the other matter touches upon but does not arise under the treaty. That is the construction of the domestic Act, and although it may arise out of an Act enacted to give effect to the treaty, that is a different matter from something arising under the treaty itself. Even if it did however, it is not a matter which, if resolved in the appellant's favour, would entitle him to relief enforceable under the treaty and in Nauru.

298 It is not entirely clear whether the appellant was also in some way seeking to contend that the domestic Act was validly made under s 51(xxix), the external affairs power, or s 51(xxx), the Pacific islands power of the *Constitution*, or a combination of them. Section 51(xxix) has nothing to say about the judicial power for which Ch III makes provision. The other head of power, the Pacific islands power, was conferred for reasons entirely unrelated to judicial power (275) and has nothing to say about it either. As we have mentioned, perhaps the Parliament could legislate for the establishment of an appellate tribunal for the Pacific or part of it, with the active support of nations of the region, but such a tribunal would not and may not be the High Court, or a Ch III court of the Commonwealth.

299 We would uphold the objection to competency. The appellant should pay the respondent's costs of the objection. For the reasons given by the majority, we agree that the notice of motion filed by the appellant

(cont)
55 at 69 per Mason J, see also at 189; 71 per Aickin J.

(273) *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627; *Amoe v Director of Public Prosecutions (Nauru)* (1991) 66 ALJR 29; 103 ALR 595.

(274) *Re Wakim; Ex parte McNally* transcript of proceedings, 2 December 1998 at 4979.

(275) eg, a vulnerability to other nations seeking to establish Pacific empires and the acquisition, use, residence and repatriation of Pacific island labour.

and dated 7 December 2004 should be dismissed, and that the appellant should pay the costs of the motion.

Made on 9 December 2004:

The objection to the competency of the appeal is disallowed.

Made on 31 August 2005:

1. *Motion seeking joinder of the Republic of Nauru and the Commonwealth of Australia dismissed.*
2. *Appellant to pay the costs of the respondent of the motion.*
3. *Respondent to pay the costs of the appellant of the objection to competency.*
4. *Costs provided for in orders (2) and (3) be set off.*

Solicitors for the appellant, *Vadarlis & Associates*.

Solicitors for the respondent, *Clayton Utz*.

PTV