IN THE COURT OF APPEAL IN THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

CA No. 4/14

IN THE MATTER	of Sections 3, 9, 11 and 13 Declaratory Judgments Act 1994
AND	
IN THE MATTER	of Cook Islands National Superannuation Fund Act 2000 and the Cook Islands Constitution
BETWEEN	**MINISTER OF COOK ISLANDS NATIONAL SUPERANNUATION FUND** Appellant
AND	**ARORANGI TIMBERLAND LIMITED** First Respondent
AND	**ANDY OLAH** Second Respondent
AND	**MANEA FOODS** Third Respondent
AND	**BECO LIMITED** Fourth Respondent
AND	**JAMES BEER** Fifth Respondent

	AND	**SUPER BROWN LIMITED** Sixth Respondent
	AND	**RAINA TRADING LIMITED** Seventh Respondent

Coram: Williams P
Barker JA
Paterson JA

Counsel: K Saunders (Solicitor-General) and M Ruffin for Appellant
T Arnold for the Respondents

Hearing: 9, 10, 11, 12 June 2014
Judgment: 17 November 2014

JUDGMENT OF THE COURT

Solicitors: Crown Law Office for Appellant
T Arnold for Respondents

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Introduction

1. This is an appeal from the judgment of the Chief Justice given on 31 January 2014[1] in which he declared invalid the Cook Islands National Superannuation Act 2000 ("the Act")[2] by reason of being contrary to the provisions of Article 64(1)(c) of the Cook Islands Constitution ("the Constitution") in a manner and to an extent that was not authorised by the provisions of Article 64(2) or any other provision of the Constitution. The Act established a compulsory Superannuation Fund ("the Fund" or "the Scheme") in the Cook Islands.

2. The case has a somewhat complex procedural history, the details of which are set out in paragraphs 4 to 26 of the Chief Justice's judgment. It is not necessary to record that history at length. It is sufficient to say that an application by the Appellant Minister on 25 November 2011 for a declaratory judgment declaring that the Act did not breach the Constitution was sought against the background of criminal enforcement proceedings previously instituted against certain employers, now the Respondents on this appeal, for failing to pay employer contributions under the Act. These employers had argued in their defence that the Act was unconstitutional. There is no particular reason to distinguish as between the different Respondents who effectively all have the same interest for the purposes of this proceeding.

3. The application by the Minister as Plaintiff for a declaratory judgment sought relief in very broad terms declaring *inter alia* that the Act "did not breach the Constitution of the Cook Islands in any way". The Chief Justice considered that the primary form of relief sought by the Minister was too broad and that it was not competent for a Court, "in the air", to declare that an Act was constitutional. Thereafter Mr Arnold, counsel for the employer Defendants, effectively assumed the role of Plaintiff challenging the constitutionality of the Act with the Minister then defending its constitutional validity.

4. Initially it was considered appropriate to bifurcate the case with the first stage dealing with the question of whether the allegedly offending provisions of the Act constituted a tax and were therefore saved by Article 40(2)(a) of the Constitution. However, in procedural hearings before the Chief Justice it became apparent that the perceived benefits of bifurcation were illusory.

5. The case thereafter proceeded largely on the basis of a comprehensive agreed

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1 *Minster of Cook Islands National Superannuation Fund v Arorangi Timberland Limited and Others* OA 1/11, Judgment of the Court, dated 31 January 2014 ("the High Court Judgment").

2 Agreed Casebooks and Materials, Vol 10 – Appellant's Legislation, Tab 1.

statement of issues[3] prepared at the request of the Chief Justice, which in effect took the place of pleadings and listed all of the issues arising for determination. The Chief Justice in his judgment decided not to address the question of remedies.[4] Having found that the Act was in conflict with Article 64(1)(c) of the Constitution and that such a finding would support a declaration of invalidity, the general question of remedies was left over for further consideration at a subsequent hearing. The Chief Justice favoured a declaration of invalidity and as noted above, made such a declaration, but felt he would need to address other issues including the difficult question of whether the declaration should be retroactive.[5]

6. In this regard he thought that there might need to be a distinction drawn between the defendants in the proceedings (now Respondents in this appeal) who were facing criminal proceedings as a result of alleged breaches of the Act, and all other members of the Fund.[6]

7. The Chief Justice also made certain general observations on remedies suggesting that any declaration of invalidity might be suspended in order to allow Parliament to remedy the defects which he had identified. He concluded by saying that, while it was a matter for the parties and the Court of Appeal, he considered he would still need to resolve the question of remedies after any appeal had been dealt with, assuming that the appeal was not successful.

8. Following issuance of the Chief Justice's judgment, orders were made by consent "for a stay of the consequential steps dealing with remedies at a future hearing and dealing with costs with leave reserved to apply to revisit this order". Thereafter, the Appellant appealed against the Chief Justice's decision and sought an order that the Act was not unconstitutional. The Respondents also filed a memorandum giving notice of their intention to support the judgment on other grounds.

The Origin of the Scheme

9. The evidence discloses that during the 1999 general election, the establishment of a National Superannuation Fund for all employed Cook Islanders was a policy in the New Alliance Party manifesto. It was aimed at

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3 Case on Appeal (Record of Case), Vol A – Key Documents, Tab 7, p 90; Agreed Statement of Facts based on the Summary in the Judgment filed in accordance with paragraph 7(i) of the Minute of the Court of Appeal 18 March 2014, at [6].

4 *The High Court Judgment*, above n 1, at [293]-[309].

5 Ibid, at [297]-[301].

6 Ibid, at [300].

providing financial security for Cook Islanders in their retirement.

10. Prior to the introduction of the Act there was no National Scheme for Cook Island public servants. The previous Government Superannuation Fund ("GSF"), which was a defined-benefit scheme, was closed to new members in 1995. This was evidently because of the financial burden on the Government and thus on the taxpayer. That is an obvious drawback of a defined-benefit scheme.

11. The only Government support for retirees, prior to the Scheme coming into effect, was the Old Age Pension which was, and still is, not means-tested for persons once they reach 60 years of age. It is of a very modest amount.

12. The Deputy Prime Minister when speaking to the second reading of the Bill which became the Act noted that "the purpose of the Bill is to establish a compulsory National Superannuation Fund from which benefits are provided to employees upon their retirement from employment in the Cook Islands".[7]

13. As discussed in detail below, it is clear from evidence produced in the High Court[8] that the Bill was drafted to ensure that the Government was unable to access the contributions going into the Fund. The management of the Scheme was designed to allow the Board and Trustees to act independently of the Government of the day. Overseas expert advice was taken in designing the Scheme.

The Cook Islands National Superannuation Act 2000

14. The statutory basis of the Scheme is the Act. A summary of the main features of the Act, as they are relevant to this case, are as follows:

    (a) *Compulsory.* The membership of the Scheme and, thus, an obligation to contribute to the Fund is compulsory for every person who is in employment in the Cook Islands or whose employment is outside the Cook Islands while the employer is resident in the Cook Islands and for every employer in respect of an employee who is so employed.[9]

    (b) *Contributions.* The Scheme was phased in and, once it applied to an employee's class of employment, the contributions were calculated as

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7 Cook Islands Hansard (23 November 2000), at 827.

8 See Affidavit of Kevin Carr, Case on Appeal (Record of Case), Vol B – Plaintiff's Affidavits, Tab 2, at 134; *The High Court Judgment*, above n 1.

9 Cook Islands National Superannuation Fund Act 2000, above n 2, s 36.

a percentage of the employee's earnings. For one year following the date on which the Scheme becomes applicable to a class of employees, the employer and employee are both required to pay 3% of the employee's earnings. That percentage rises to 4% in the second year and thereafter 5% per annum. These rates may be amended by Order-in-Council in accordance with a recommendation of the Board and the Trustee.[10]

(c) *National Superannuation Board.* The Board comprises five members. One is the Financial Secretary of the Cook Islands who is to be a permanent member while the other four are nominees of particular interest groups. Those groups are the Cook Islands Workers Association Inc, the Cook Islands Chamber of Commerce Inc, the private sector employers who are not members of the Chambers of Commerce, and one member nominated by contributors to represent them. Only one member of the five member Board has any association with the Cook Island Government.[11]

(d) *Board's functions.* The initial function of the Board was to prepare the Trust Deed to establish the Fund. Other functions include the appointment and removal of the Trustee, administering the Scheme under the Act, enforcing collection and payment of contributions to the Fund, monitoring the performance of the Trustee under the Trust Deed, advising the Trustee and reporting to and advising the Minister as the Minister requires. The usual obligations of members of the Board to act in good faith, with reasonable care, diligence and skill and with honesty and integrity are stated in the Act.[12]

(e) *The Trust Deed.*[13] The obligation to prepare the Trust Deed rested with the Board and not the Government. The Board was required to appoint the initial Trustee and to submit the Trust Deed to the Minister and provide him with a certificate from the Chairman of the Board certifying that the Trust Deed was not inconsistent with the Act. Under s 16 of the Act certain provisions were mandatory. They included:

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10 Ibid, s 39.
11 Ibid, s 4(2).
12 Ibid, ss 11 and 12.
13 Affidavit of Kevin Carr, Case on Appeal (Record of Case), Vol B – Plaintiff's Affidavits, Tab 6, Exhibit A, "The Cook Islands National Superannuation Fund Trust Deed with the Public Trustee of New Zealand" executed on 19 September 2001 ("Trust Deed"), at 211.

(i) To establish the Fund;

(ii) To appoint the initial trustee;

(iii) To provide for the conditions of entry of members to the Fund;

(iv) To provide for the conditions as to termination of membership of the Fund;

(v) To provide for the conditions under which benefits become payable and the way in which the benefits are to be determined;

(vi) To provide for the circumstances in which the Fund may be wound up and the way in which the assets of the Fund are to be distributed in an event of a winding up;

(vii) To contain no restrictions on the Trustee's Investment powers other than which is provided in s 19;

(viii) To subject the Trustee to all equitable duties and responsibilities that a trustee has at law;

(ix) To provide for separate accounts for each contributor;

(x) To give the Trustee power to borrow money for the purposes of making any investment or paying any benefit or meeting any liability or for the purpose of management of the Fund; and

(xi) To give the Trustee power to enter into any insurance or reinsurance contract relating to the payment pursuant to the Fund of any pension or other benefits contingent on the death or survival of human life.

(f) *Trustee.* The Trustee must be a company under the Trustee Companies Act 1967 (New Zealand) or the Public Trust Office Act 1957 (New Zealand) or an independent professional corporate trustee of similar standing and experience in the trusteeship of superannuation schemes or plans. The Trustee must be appointed by the Board which has the power to replace a Trustee. Another provision requires the Trustee to be appointed "following a transparent and contestable process".[14]

[14] Cook Islands National Superannuation Fund Act 2000, above n 2, ss 2, 11(1)(b) and 11(2)(b).

(g) *Investment of Fund.* The Trustee has the responsibility for investing the Fund on a prudent commercial basis consistent with best practice portfolio management. It is required each year to provide to the Board its investment strategy for the year which is to include the Trustee's expectation as to risk and return and anticipated specific investments and class of investments. The Board does have a power to direct the Trustee to invest the Fund:[15]

(i) To meet the Government's expectation as to the Fund's performance, including the Government's expectation as to risk and return; and

(ii) Not to invest in a specified investment or class of investments to which the Crown already has a direct or indirect exposure for the purpose of limiting the exposure; and

(iii) To invest a proportion of the Fund not exceeding 20% within the Cook Islands.

This direction can only be given after consultation with the Minister.

(h) *Amendment of Trust Deed.* The Board has the right after consultation with the Trustee to rescind, alter or add to any of the provisions of the Trust Deed. However, an amendment is not to adversely affect a contributor's right or claim to benefits or the amount of those benefits that have accrued up until the date of the amendment without the consent of the contributor unless the amendment is required to comply with the Act or is solely to correct a mistake which has advantageously altered a contributor's right or claim to accrued benefits of the amount of those accrued benefits.[16]

(i) *Taxation.* The Trustee on behalf of the Fund and the Fund are exempt from income tax.[17] An employer's contribution is deductible for tax purposes and an employee pays tax on the employee's contribution to the Fund. Benefits received by a member are free of tax in the hands of the member.

(j) *Transfer between Funds.* An employee who was in an existing superannuation fund may cease contributions to that fund if the fund so

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15 Ibid, s 19(3).
16 Ibid, s 21.
17 Ibid, s 27.

permits and transfer the employee's benefit in the fund to the Fund. If the employee's existing superannuation fund does not permit withdrawal of funds to enable them to be transferred to the Fund, the employee is exempted from the provisions of the Act and is not obliged to be a contributor in the compulsory scheme.

(k) *Withdrawal.* The only right to withdraw before reaching retirement age is where a person is resident in the Cook Islands for the sole purpose of being employed under a contract of service of not more than 3 years. The employee receives a refund of the employee contributions on the person's permanent departure from the Cook Islands. The employer's contributions are not paid to the employee but are transferred to the reserve account within the Fund.[18]

(l) *Government influence*. As discussed in more detail below, the Act reflects the statement of the Deputy Prime Minister when speaking to the second reading of the Bill when he said it was "designed to be completely above board and completely independent of Government interference". [19] One of the Board's functions is to "report to and to advise the Minister, as the Minister requires". There is no general provision requiring the Board to comply with any Ministerial instruction or advice. There is the investment power already referred to where the Board may, after consultation with the Minister, direct the Trustee to invest in certain funds. This is not an obligation to comply with any direction which the Minister may give and some of the restrictions on the exercise of this particular power suggest that they are designed to ensure that the Fund is not put at risk. The only provision which may carry an inference that the Government expects a certain type of investment is the requirement to invest a proportion of the Fund not exceeding 20% within the Cook Islands. Once again, the restriction of 20% may be said to be designed to protect the Fund but at the same time give some impetus to local investment for the sake of the economy.

There is a right for the Minister with the concurrence of Cabinet to make representations to the Board in respect of the general policy of the Government as that policy may affect the Fund and which is not inconsistent with the Act or the Trust Deed. The Board is then required to consult with the Minister and may, but is not obliged to, have regard to any such representation. Such representation must be conveyed to

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18 Ibid, s 53.

19 Cook Islands Hansard (23 November 2000), at 825.

the Board and Trustee in writing by the Minister. It must be tabled in Parliament within fourteen sitting days of the representation being made and the response being provided to the Minister.[20]

(m) *Benefits not available.* Unless provided in the Act or the Trust Deed, in no event may any benefit be assigned or charged or attached or passed to any creditor or a contributor by operation of law. Nor shall any money payable on the death of any contributor be assets for the payment of the deceased contributor's debts or liabilities.[21]

(n) *Overview*. The Act contains the essential elements of the Scheme which is operated by a Board in accordance with the terms of the Trust Deed. It is a compulsory defined contribution Scheme with very limited rights of withdrawal before an employee reaches the age of retirement. The contributions of both the employer and the employee become the property of the employee. The limits on investing in the Cook Islands may be intended to reduce the possibility of making unwise investments similar to some past investments made by the Government, including the disastrous Vaimaanga hotel project.[22]

The Trust Deed [23]

15. The Trust Deed was executed on 19 September 2001 between the Board and the Public Trustee of New Zealand, which is now called the Public Trust.[24] The Trust Deed established the Fund and contains many of the provisions usually included in defined contribution superannuation scheme deeds. It has been tailored to accord with the provisions of the Act and to implement them.

16. The Trust Deed contains 131 clauses, many of which are not relevant to the issues in this case. Those that are relevant include:

(a) *Contributor's accounts.*[25] A member has a compulsory account and if the member elects may also have a voluntary additional account. At the time the member is entitled to a pension, that member might also have a pension account. The mandated contributions of the employer and the

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20 This provision is ambiguous: presumably the fourteen days runs from the later date i.e., the date of the provision of the response to the Minister.

21 Cook Islands National Superannuation Fund Act 2000, above n 2, s 63.

22 As to the Vaimaanga hotel project, see [140], infra.

23 See Trust Deed, above n 13.

24 Section 3 of the Public Trust Act 2001 established the Public Trust and provided for the Public Trust to take over the role and undertakings of the Public Trustee of New Zealand.

25 Trust Deed, above n 13, at Clauses 15-17.

employee go into the member's compulsory account.

A member's compulsory account is fully vested in the member. There is no such provision relating to the member's voluntary account. A member's compulsory account shows the balance vested in that member after crediting mandated contributions of both the employee and the employer, any amount transferred from another superannuation fund, any insured benefit which may be credited to that member, less any insurance premium paid on behalf of the member in accordance with the terms of the Trust Deed and an amount determined by the Trustee, subject to the consent of the Board, to be debited and paid to the reserve account to meet fund expenses. In addition, the balance will be adjusted either positively or negatively annually with an amount calculated by applying the appropriate crediting rate for the Fund account. The "crediting rate" is in effect based on the Fund's performance and the value of their assets. Because the crediting rate may be negative and there will be deductions for managing the Fund and paying an insurance premium on behalf of the member, a member's interest in the Fund may be less than the combined contributions of the member and the employer.

(b) *Pension account.*[26] When an employee is entitled to a benefit and retires the balance in the compulsory account is transferred to a pension account and used to provide a pension that may also be used to buy an annuity for the employee. After acquiring an actuarial report the Trustee in consultation with the Board may increase or reduce the pension factor and may make other alterations to the benefits payable to a member.

(c) *Reserve accounts.*[27] There is provision for both a general reserve account and a pension reserve account. Funds may only be transferred to those reserve accounts, which may only be transferred from a member's compulsory account to meet the expenses of the Fund.

(d) *Benefits payable.*[28] Subject to one or two exceptions, benefits are payable by way of pension. If the balance of a member's compulsory account is less than $25,000 it may be paid as a lump sum. A member entitled to a pension may elect to take a cash sum of up to one-quarter

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26 Ibid, at Clause 20.
27 Ibid, at Clause 27.
28 Ibid, at Clauses 42-46.

of the balance in the member's compulsory account. Benefits are normally paid when a member reaches normal retirement age, provided a member has not received earlier benefits from the Fund. There are provisions for earlier payment for total and permanent disablement and provisions for payment on the death of a member. There are also provisions for payment of a spousal benefit and payment of an insurance benefit in the case of premature death.

(e) *Trustee's indemnity.*[29] The Trustee is indemnified against all liabilities and expenses incurred in the execution of its duties and will have a first and paramount lien on the Fund for such indemnity. There are the usual provisions that the indemnity will not be available if the Trustee or a director of the Trustee fails to act in good faith or honestly in a matter concerning the Fund or the acts or omissions of the Trustee or that director are the result of wilful or negligent default or wilful or negligent breach of trust or the dishonesty or fraud of any of its directors, officers or other persons or persons appointed by the manager.

(f) *Powers of investment.*[30] The powers of investment vested in the Trustee are extensive and it has the same powers it would have as a beneficial owner of the Fund. These powers are subject to the provisions of the Act including the power of the Board after consultation with the Minister to make the directions referred to in paragraph 14(g) above.

(g) *Dissolution of the Fund.*[31] The Fund dissolves if it no longer has any members or on a date the Board determines in consultation with the Trustee and Cabinet. It also terminates the day prior to the date of expiration of the perpetuity period but the definition of "perpetuity period" in effect means that it is in existence for very many years to come.

(h) *Distribution on dissolution.*[32] On dissolution, the funds are paid in accordance with the Trust Deed to the contributors entitled to them less the expense of dissolution. Any surplus does not go to the Government of the Cook Islands. It may at the discretion of the Trustee be paid to members, former members or pensioners or other dependants by way

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29 Ibid, at Clauses 79-81.
30 Ibid, at Clause 94.
31 Ibid, at Clause 117.
32 Ibid, at Clause 118.

of further benefits.

17. The Scheme as provided for in the Act and the Trust Deed is obviously a genuine attempt by the Cook Islands Government to provide an adequate superannuation scheme for Cook Islanders. The Government does not have the power under the present provisions to meddle in the investment of the Fund or to deprive the contributors of their vested interests in the Fund. It has not retained for itself rights to amend the Trust Deed. Under the amended provision of the Trust Deed the Board may rescind, alter or add to any of the provisions of the Trust Deed but any such action cannot alter adversely a member's right or claim to accrued benefits or the amount of those accrued benefits without complying with certain provisions. One of those provisions is the consent of the member. Once contributions have been made to the Fund the Government has no right to access those contributions and cannot encourage an amendment to the Trust Deed to enable it to access funds unless it receives the consent of contributors. It could be restrained by the Courts from so doing.

18. Under the Scheme an employee's contributions can be negatively impacted by the Fund suffering a loss on its investments, either caused by the downturn of the markets in adverse times such as another GFC or by mismanagement. Neither the management performance of the Fund nor the very wide powers of investment given to the Trustee are specific issues in this proceeding.

19. Another basis for a contributor having the balance in the contributor's compulsory account reduced is the debiting of administration and management fees. The Government to date has largely met these costs in recognition of the fact that such costs will be a burden on the Fund until such time as the size of the Fund is self-sustaining. Annual accounts for the years 2011 and 2012 suggest that that time was near before the present litigation commenced and the flow of funds was thus disrupted.

20. Unfortunately, the accounts for the years 2011 and 2012, as produced in evidence,[33] were in summary form and do not provide some of the information that would allow this Court to have a complete overview of the Scheme. This is particularly so in respect of "Vested Benefits". Presumably this liability includes benefits from both compulsory and voluntary

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[33] Second Affidavit of Anne Herman, Exhibit "B" Annual Report of the Trustee to the Members for the year ended 31 December 2011, Case on Appeal (Record of Case), Vol B – Plaintiff's Affidavits, Tab 7, at 252; Third Affidavit of Anne Herman-Fua, Exhibit "A" Annual Report of the Trustee to the Members for the year ended 31 December 2012, Case on Appeal (Record of Case), Vol B – Plaintiff's Affidavits, Tab 9, at 302.

contributions. Surprisingly, there is no reference to a "reserve" account or a "pension reserve" account. It is not apparent where the forfeited employer contributions to migrant workers appear in the accounts. If they have not been transferred to a reserve account, presumably they have been utilised to pay expenses. At 31 December 2012, net assets available for benefits of $64,250,186 exceeded vested benefits of $63,845,271. This excess in value of assets over benefits appears to be the only reserve available.

21. Another matter is in whose name investments are held. The Act provides for the Trustee to have responsibility for investing the Fund and the powers of the Board. The provisions relating to the Trust Deed as set out in the Act do not specifically state that the Trustee is to hold title to the investments of the Fund in its own name. An affidavit from the Chief Executive Officer of the Fund[34] suggests that the Trustee may not hold title to the investments. It suggests that the contributions are paid into the Fund's bank account in the Cook Islands and once reconciled are sent to the Fund's administration manager (appointed by the Trustee) to be imported into the main registry system. The funds (less any funds required to cover current claims), are then sent to four individual investment funds. This narrative suggests that the money never passes through the hands of the Public Trust but is silent on whether title to the various assets is held in the name of the Fund or the Trustee. The appointment provision in the Trust Deed does state that the Public Trust was appointed as Trustee and "agrees to act as trustee for the members and pensioners and to hold the Fund assets in trust for the members of the pensions upon and subject to the terms and conditions contained or implied in this Deed".[35]

22. Whether or not titles to investment are registered in the name of the Trustee, the legal position under Clause 3 of the Deed is that the Trustee holds the assets in trust for the members and is in legal possession of the Fund's assets.

The Constitution of the Cook Islands

23. The nature and structure of the Cook Islands Constitution has been considered by this Court in two prior cases, namely *Henry v Attorney-General*[36] and

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34 Affidavit of Anne Herman, Case on Appeal (Record of Case), Vol B – Plaintiff's Affidavits, Tab 1, at 110.

35 Trust Deed, above n 13, Clause 3.

36 *Henry v Attorney-General* [1985] LRC (Const) 1149 (abbreviated judgment); Full judgment contained in Professor D. Paterson "A Collection of Judgments of the High Court and Court of Appeal of the Cook Islands 1981 – 1985", (The University of South Pacific School of

Clarke v Karika.[37,38] The first case was not cited before the Chief Justice. As to the latter case, the Chief Justice said that in *Clarke v Karika* this Court "touched very lightly upon the issues now before the Court" and he commented that "there is no suggestion that the current application is to be resolved by following earlier Cook Islands precedent".[39] With all due respect to the Chief Justice, we disagree, and we shall return to *Clarke v Karika* later.

24. The constitutional background deserves particular consideration in this case because one of the grounds of unconstitutionality asserted is that the Act should have been entrenched to protect it from government interference. In *Henry v Attorney-General*, this Court noted that (as was common in the case of constitutions of newly independent countries established on the Westminster model) the Constitution was brought into force by an Act of Parliament. In the exercise of its sovereign power to make laws for the peace, order and good government of the Cook Islands, the New Zealand Parliament passed the Cook Islands Constitution Act 1964.

25. The Court in *Henry* said that this latter Act was "the vehicle for giving life to the Constitution which is then set out in the Schedule". The Constitution is the "supreme law of the Cook Islands".[40] Since it was enacted in 1965, the Constitution has been amended 16 times and is a comprehensive instrument comprising 86 Articles divided into nine separate parts as follows:

    (a) Part I: The Government of the Cook Islands.

    (b) Part II: The Executive Government of the Cook Islands.

    (c) Part III: The Parliament of the Cook Islands.

    (d) Part IV: The Judiciary.

    (e) Part IVA: Fundamental Human Rights and Freedoms.

    (f) Part V: The Public Revenues of the Cook Islands.

Law, Vanuatu, 2002) at 128.

37 *Clarke v Karika* [1985] LRC (Const) 732.

38 As Counsel acknowledged, the Court was a very strong Court, including as it did, Lord Cooke of Thorndon and Keith J, who become Sir Kenneth Keith of the New Zealand Court of Appeal and later a Judge of the International Court of Justice.

39 *Clarke v Karika*, above n 37, at [41] and [45].

40 Cook Islands Constitution Act 1964, s 4.

(g) Part VI: The Cook Islands Public Service.

(h) Part VIA: Miscellaneous Provisions.

(i) Part VII Transitional Provisions.

26. The format of the Constitution is similar to that of many other constitutions based on the Westminster model. In *Hinds v The Queen*,[41] a case referred to in *Henry*,[42] the Privy Council, on appeal from the Court of Appeal of Jamaica, observed that constitutions based on the Westminster Model have two things in common which have an important bearing on their interpretation:[43]

> They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject-matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which governments was carried on, the legislature, the executive and the courts reflected the same basic concept. The new constitutions, particularly the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.
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> Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and a judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government.

27. The special status of the Constitution as the supreme law of the land is reflected in the provisions of the Constitution governing the legislative

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41 *Hinds v The Queen* [1976] 1 All ER 353.
42 *Henry v Attorney-General*, above n 36, at 135.
43 *Hinds v The Queen*, above n 41, at 359.

competence of Parliament. The two articles of relevance are Articles 39 and 41. Article 39 provides as follows:

> 39. *Power to make laws*
> (1) Subject to the provisions of this Constitution, Parliament may make laws (to be known as Acts) for the peace, order, and good government of the Cook Islands.
> (2) The powers of Parliament shall extend to the making of laws having extraterritorial operation.
> (3) Without limiting the generality of the power conferred by subclause (1) of this Article to make laws for the peace, order, and good government of the Cook Islands, that power shall, subject to the provisions of this Constitution, include the repeal or revocation or amendment or modification or extension, in relation to the Cook Islands, of any law in force in the Cook Islands.
> (4) Except to the extent to which it is inconsistent with this Constitution, no Act and no provision of any Act shall be deemed to be invalid solely on the ground that it is inconsistent with any law in force in the Cook Islands.

28. In recognition of the supremacy of the Cook Islands Constitution, Article 41 creates more complicated procedures for amending the Constitution than those sufficient for enacting ordinary Acts of Parliament, which can be passed by a simple majority. Article 41(1) provides that no bill repealing, amending, modifying or extending the Constitution shall be deemed to have been passed unless:

> (a) At both the final vote thereon and the vote preceding that final vote it receives the affirmative votes of not less than two-thirds of the total membership (including vacancies) of the Parliament; and
> (b) There is an interval of not less than 90 days between the date on which that final vote was taken and the date on which the preceding vote was taken; and no such Bill shall be presented to the Queen's Representative for assent unless it is accompanied by a certificate under the hand of the Speaker to that effect.

29. Article 41(2) provides that no bill repealing or amending or modifying or extending any of the provisions of ss 2 to 6 of the Cook Islands Constitution Act 1964, or Article 2 of this Constitution (which states that Her Majesty the Queen in right of New Zealand is the Head of State) or Article 41 shall be submitted for assent by the Queen's Representative unless:

> (a) It has been passed by the Parliament in accordance with the provisions of subclause (1) of this Article; and
> (b) It has been submitted to a poll, conducted in a manner prescribed

by law, of the persons who are entitled to vote as electors at a general election of members of the Parliament; and

(c) It has been supported by not less than two-thirds of the valid votes cast in such a poll; and

(d) It is accompanied by a certificate under the hand of the Speaker to that effect.

30. Article 41 is the only constitutionally entrenched provision in the Cook Islands. Entrenched law is higher law, the superior status of which is gained through the enacting of extra requirements or procedures in order to change the law. The Constitution itself is entrenched by Article 41(1). Article 41(1) is also entrenched by Article 41(2). By doubly entrenching in the Constitution, Parliament has signalled a manifest intention that the Constitutional safeguards "should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws".[44]

31. Articles 39 and 41 impose limits on the sovereign power of Parliament to make laws in the Cook Islands. As this Court said in *Henry v Attorney-General*,[45] "[i]nasmuch as the Constitution is the supreme law and the legislative power is subject to its provisions, legislation inconsistent with the Constitution is invalid on the ground of unconstitutionality".[46] The Court continued:[47]

> The constitutional authority to determine the constitutionality of legislation, and for that purpose to declare (where the issue is raised) whether there has been compliance by the Legislature with the requirements imposed by Articles 39 and 41, rests with the Courts. Under Article 47 of the Constitution the High Court has all such jurisdiction as may be necessary to administer the law in force in the Cook Islands. That law includes the Constitution itself: (see the definition of "Law" in Article 1(1)). In exercising that responsibility the Court has "a duty to see that the Constitution is not infringed and to preserve it inviolate." (*Bribery Commissioner v Ranasinghe* [1965] AC 172, 194; [1964] 2 All ER 785, 790).

32. In deciding whether any provisions of a law passed by Parliament are inconsistent with the Constitution, the Court is not concerned with the propriety or expediency of the law impugned but, rather, as noted by the Privy

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44 *Hinds v The Queen*, above n 41, at 361.

45 *Henry v Attorney-General*, above n 36, at 131.

46 In *Clarke v Karika*, the Court used the term "inoperative" rather than "invalid" but the difference is not material.

47 *Henry v Attorney-General*, above n 36, at 132.

Council in *Hinds*:[48]

> … solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering the entrenched provision.

33. The next relevant provision is Article 40, which also appears in Part III of the Constitution. In this appeal, the Respondents contend that the Act is inconsistent with Article 40(1) of the Constitution. Article 40 is what is commonly known as a "takings clause" and provides, in relevant part, as follows:

> 40. *No property to be taken compulsorily without compensation*
> (1) No property shall be taken possession of compulsorily, and no right over or interest in any property shall be acquired compulsorily, except under the law, which of itself or when read with any other law–
> (a) Requires the payment within a reasonable time of adequate compensation therefor; and
> (b) Gives to any person claiming that compensation, a right of access, for the determination of his interest in the property and the amount of compensation, to the High Court; and
> (c) Gives to any party to proceedings in the High Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a Court of original jurisdiction.
> (2) Nothing in this Article shall be construed as affecting any general law–
> (a) For the imposition or enforcement of any tax, rate or duty;
> […]

34. The final provision of relevance to the present appeal is Article 64, which appears in Part IVA of the Constitution. The Ninth Amendment to the Constitution was passed in 1981 and introduced a new Part IVA concerning Fundamental Human Rights and Freedoms. Article 64 provides as follows:

> 64. *Fundamental human rights and freedoms*
> (1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms-
> (a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law;

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48 *Hinds v The Queen*, above n 41, at 361.

(b) The right of the individual to equality before the law and to the protection of the law;

(c) The right of the individual to own property and the right not to be deprived thereof except in accordance with law: […]

(2) It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed, by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands.

35. In this case, the Respondents contend that the Act is also in conflict with Article 64(1)(a) (in that the Act deprives individuals of the right to security of the person, which the Respondents say extends to their economic security) and Article 64(1)(c) (in that the Act involves a deprivation of property). The Respondents say that neither of these infringements is saved by Article 64(2).

36. Article 64(2) recognises that the rights in Article 64(1) are subject to certain "limitations". Those limitations may be imposed by an Act, inter alia, "in the interests of public safety" or "the general welfare". Thus, in considering whether an Act is inconsistent with the rights in Article 64(1), the Court must engage in a balancing exercise. This balancing exercise has been described in various ways. The seminal formulation is to be found in the advice of the Privy Council delivered by Lord Clyde in *Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*,[49] a case concerning the fundamental rights and freedoms provision of the Antigua and Barbuda Constitution. The criteria adopted by Lord Clyde involve the Court asking itself:[50]

> … whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

37. As explained at length in the recent United Kingdom Supreme Court decision

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49 *Elloy de Freitas v Permanent Secretary of Ministry of Agrigulture, Fisheries, Lands and Housing* [1999] 1 AC 69, at 80 per Lord Clyde.

50 These criteria were drawn from Canadian jurisprudence and two cases from Zimbabwe, one of which was *Nyambrirai v National Social Security Authority* [1996] 1 LRC 64, a constitutional case involving an unsuccessful challenge to the constitutional validity of the Zimbabwe National Social Security Act 1989. This case was referred to by both parties in the Court below and in this Court.

in *Bank Mellat v Her Majesty's Treasury (No 2)*,[51] the *de Freitas* formulation has since been adapted and refined by various common law courts and is now generally known as "the proportionality test". The *Bank Mellat* case, which was accepted as authoritative by the parties in the Court below, contains a detailed discussion of these refinements and developments. Authoritative reformulations of the proportionality test were provided by Lord Sumption and Lord Reed. Lord Sumption stated that the proportionality test:[52]

> … depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.

38. This approach (and specifically the need for an "exacting analysis of the factual case advanced in defence of the measure") amplifies what was said by this Court in *Clarke v Karika* when it held that, in deciding the constitutionality of the Rehearing of Te Puna Lands Act 1980:[53]

> … the two major matters for scrutiny are the object of the 1980 Act and the means chosen to pursue it. Is the object constitutionally legitimate and do the means bear a reasonable relation to it? This involves considering on what evidence or other material the questions are to be resolved; on whom the burden lies and how far the Court should go in reviewing the legislative judgment.
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> As to the evidentiary and burden points, any Court must begin with the statements of the legislature of the Cook Islands in the preamble to the 1980 Act … [and] relevant background information … to avoid "the austerity of tabulated legalism", ... to understand the object of the Act and the rational or other character of the means chosen to pursue it.

39. It was also emphasised in *Clarke v Karika* that the party alleging unconstitutionality of the law "must carry the burden of showing that [the impugned aspect of the law] does not rest upon any reasonable basis, but is essentially arbitrary" and that there must be a "strong case, convincingly made out by those attacking the legislation" before it would upset the

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51 *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38, [2013] 3 WLR 179.
52 Ibid, at [20].
53 *Clarke v Karika*, above n 37, at 746.

legislation and make a finding of unconstitutionality.[54]

The Presumption of Constitutionality

40. In considering the constitutionality of legislation, the Court must start with the presumption that the Act is consistent with the Constitution. As noted below, there are many authorities to this effect in relation to constitutions based on the Westminster model. However, with respect to the Chief Justice, we disagree with his treatment of the presumption of constitutionality. He said as follows:[55]

> [62] Turning, then, to the Act and its interpretation. The usual principles of statutory interpretation apply. Other than in relation to section 21(2) there is no particular controversy in that regard, as will be seen shortly. But there is an overarching obligation to interpret the Act, if at all possible, in a way consistent with the Constitution.
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> [63] Article 65, of course, applies to the interpretation of a statute. A statute is to be given a fair, large and liberal interpretation. There is no particular controversy about that in this case.
>
> [64] To what extent, if at all, should the Court defer to the legislature? In interpreting the Act, the Court is not expected to defer to the legislature. As Bastarache J put in *Gosselin v Quebec*:
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> > '… In this case, the Government claims that the group that it is in fact trying to protect is the very same group whose rights have been infringed. This should militate against an overly deferential approach. If the Government wishes to help people by infringing their constitutional rights, the Courts should not, given the peculiarities of such an approach, be overly deferential in assessing the objective of the impugned provision or whether the means used were minimally impairing to the right in question. (paragraph [262])'
>
> [65] The short point is that, if the Court concludes that the Act infringes the Constitution, it cannot shy away from that conclusion. Notwithstanding the above, there is a suggestion that there should be some deference and this emerges from the Supreme Court of Zimbabwe in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, 72. Mr Ruffin accepted that if I found that the Act was unconstitutional then no rule of deference was available to save it.

41. At the outset it is important to distinguish between two different applications

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54 Ibid, at 750.

55 *The High Court Judgment*, above n 1, at [62]-[65].

of the presumption. The first is as a canon of construction. This was appropriately acknowledged by the Chief Justice.[56] Applied in this way the presumption requires a court, if possible, to read the language of a statute as subject to an implied term which avoids conflict with any constitutional limitations. As Lord Cooke has explained,[57] this application of the presumption requires courts to 'read down' legislation, if sufficiently precise implications may be articulated, so as to make it conform to the Constitution.

42. The Chief Justice did not accurately describe the second application of the presumption.[58] This involves the court, when presuming that a statute is constitutional, accepting that the burden on a party seeking to prove that a statute is unconstitutional is a heavy one. This principle was expounded, although not in so many words, in *Public Service Appeal Board v Omar Maraj*,[59] where the Privy Council said that "[t]he constitutionality of a Parliamentary enactment is presumed unless it is shown to be unconstitutional". An earlier example, which also comes from the Privy Council is *Attorney-General v Antigua Times Ltd*,[60] where the Privy Council was asked to consider whether legislation, which required newspaper publishers to pay an annual licence fee and to deposit a sum of $10,000 with the Accountant-General to satisfy any judgment of the Supreme Court for libel, was necessary for any of the purposes permitted by s 10 of the constitution. These included, inter alia, defence, public safety, public order, public morality or public health, or for the purposes of protecting the reputations, rights and freedoms of other persons. In the Privy Council's view, the proper approach to this question was to presume that until the contrary appears or is shown, all Acts passed by the Parliament of Antigua were necessary for the purposes permitted by s 10 of the constitution. A similar approach was taken by the Privy Council in *Hinds v The Queen* when considering the constitutionality of certain provisions of the Gun Court Act of Jamaica.[61]

43. A similar presumption applies in Australian constitutional law, as is shown by Isaac J's statement in *Federal Commissioner of Taxation v Munro*:[62]

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56 Ibid, at [62].
57 *Observer Publications Ltd v Matthew* [2001] UKPC 11, at 49.
58 *The High Court Judgment*, above n 1, at [64]-[65].
59 *Public Service Appeal Board v Omar Maraj* [2010] UKPC 29, at 29.
60 *Attorney-General v Antigua Times Ltd* [1976] AC 16.
61 *Hinds v The Queen*, above n 41, at 369.
62 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, at 180.

> Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.

44. As to the United States, the presumption emerged at a very early stage in the development of American constitutional law.[63] A modern example of the presumption in action can be found in the recent decision of the United States Supreme Court in *National Federation of Independent Business v Sebelius*[64] concerning the constitutionality of the "Obamacare" legislation. Chief Justice Roberts, giving the judgment of the majority of the Court, said:[65]

> Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. 'Proper respect for a coordinate branch of the government' requires that we strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.' *United States v. Harris,* 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

45. There were some authorities cited by the parties in the Court below to the same general effect, but focusing instead upon what has been called the "margin of appreciation" to be afforded by the courts to the legislature in constitutional cases. Some of these authorities are now noted, for they are also relevant to the proportionality test which this Court must apply. In *La Compagnie Sucrière de Bel Ombre Ltee and Others v Government of Mauritius*,[66] Lord Woolf discussing whether there had been a taking, said:[67]

> Their Lordships on the issue of this nature, like the European Court, will extend to the National Court a substantial margin of appreciation. Similarly, their Lordships are in accord with the European Court in respecting the national legislature's judgment as to what is in the public

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63 See the famous article by J.B. Thayer, *The Origin and Scope of American Doctrine of Constitutional Law* (1893) Harvard Law Review 129.

64 *National Federation of Independent Business v Sebelius* 132 S.Ct. 2566 (2012) ("Obamacare").

65 Ibid, at 2579.

66 *La Compagnie Sucrière de Bel Ombre Ltee and Others v Government of Mauritius* [1995] 3 LRC 494.

67 Ibid, at 503.

> interest and implementing social and economic policies unless that judgment is manifestly without foundation: See James v United Kingdom (1986) 8 EHRR 123.

46. Similar views were expressed by the Privy Council in *Grape Bay Ltd v Attorney-General (Bermuda)*,[68] which was concerned with whether McDonald's restaurants should be allowed in Bermuda. Their Lordships noted[69] that policy matters, such as whether franchise restaurants were desirable on Bermuda, should be left to the legislature and not to judges. Whether or not it was a wise decision to ban these restaurants, or whether the prohibition had been framed more widely than necessary, it was said:

> The issues which they raise are pre-eminently matters for democratic decision by the elected branch of government. The members of the legislature are not required to explain themselves to the judiciary nor persuade them that their view of the public interest is the correct one. Their Lordships note that in the Court of Appeal Kempster JA commented that "the legislature rather than the Courts is in the best position to assess the requirements of the public interest and should be allowed a wide margin of appreciation". Their Lordships agree.

47. The Zimbabwe case of *Nyambirai v National Social Security Authority and Another*[70] is important not only because it upheld the constitutionality of a compulsory superannuation scheme enacted to ensure that older members of society had superannuation benefits but also for the following statements of principle by Gubbay CJ concerning the margin of appreciation:[71]

> I do not doubt that because of their superior knowledge and experience of society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the judiciary to appreciate what is to the public benefit. In implementing social and economic policies a government's assessment as to whether a particular service or programme it intends to establish will promote the interest of the public, is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation, unless convinced that the assessment is not manifestly without reasonable foundation.

48. The Minister in that case had proclaimed that the scheme was in the public interest and the Court held that it should respect this statement and that it was

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68 *Grape Bay Ltd v Attorney-General (Bermuda)* [2000] 1 W.L.R 574.
69 Ibid, at 585.
70 *Nyambirai v National Social Security Authority and Another* [1996] 1 LRC 64.
71 Ibid, at 72 per Gubbay CJ.

not manifestly without reasonable foundation. Gubbay CJ noted:[72]

> The few authorities dealing with social insurance schemes to which this Court was referred to in argument, support the view that compulsory contribution payments made thereunder are utilised for the public benefit to provide a service in the public interest.

49. Gubbay CJ quoted[73] from *Woods v Minister of Justice, Legal and Parliamentary Affairs*:[74]

> What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the Courts. There is no legal yardstick proper such that the quality of reasonableness of the provisions under attack is to be adjudged on whether it arbitrarily or extensively invades the enjoyment of the guaranteed right according to the standards of a society that has proper respect for the rights and freedom of the individual.

50. The Court must bear these important statements of principle in mind when considering the constitutionality of the Act.

Principles of Constitutional Interpretation

51. In *Henry v Attorney-General*,[75] this Court discussed at considerable length the principles of constitutional interpretation, drawing on the leading decisions from the Privy Council. As noted earlier, the Cook Islands Constitution is a Westminster model, not dissimilar to the constitutions of many former British colonies, which were granted independence. We consider that Privy Council decisions on those constitutions are authoritative.

52. Several of the Privy Council decisions cited in *Henry* were referred to by the Chief Justice in the judgment under appeal. We do not need formally to rule that they are binding, merely because the Privy Council is the Cook Island's final Court of Appeal. However, they are entitled to great respect because of that fact and also because, in the two major constitutional decisions of this Court, *Henry v Attorney-General* and *Clarke v Karika*,[76] this Court gave prominence to Privy Council decisions on Westminster model constitutions.[77]

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72 Ibid, at 73 per Gubbay CJ.
73 Ibid, at 75, per Gubbay CJ.
74 *Woods v Minister of Justice, Legal and Parliamentary Affairs* (1994) 1 LRC 359, at 362.
75 *Henry v Attorney-General*, above n 36.
76 Ibid; *Clarke v Karika*, above n 37.
77 It may be noted that in *Breuer v Wright* [1982] 2 NZLR 77, the New Zealand Court of Appeal observed that a decision of the Privy Council given in respect of an appeal from the one

53. In *Henry v Attorney-General*, this Court made the following observations concerning the principles of constitutional interpretation:[78]

> A constitution on the Westminster model is in a technical sense created by statute. It does not follow that it should necessarily be construed in the manner and according to rules generally applicable to the interpretation of other statutes. It must be interpreted according to principles suitable to its particular character. This fundamental consideration is at the heart of Lord Wilberforce's exposition of the approach to constitutional interpretation in *Minister of Home Affairs v Fisher* [1980] AC 319; [1979] 3 All ER 21. The question in that case was whether in the context of the relevant provision of the Constitution of Bermuda "child" included "illegitimate child". Lord Wilberforce observed at p 328 (p 25) that the antecedents of the Constitution and the form of Chapter I (which dealt with the protection of fundamental rights and freedoms of the individual) itself called for a generous interpretation, avoiding what had been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms. He went on to refer to the two possible interpretation approaches open to the Court in this way (p 329; p 26):
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> > 'The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that "child" means "legitimate child" but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.
> >
> > It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of

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country which would be binding upon the Courts of the other countries which retain the Privy Council right of appeal. In *R v Chilton* [2005] 2 NZLR 341 (CA), the Court of Appeal made broadly similar observations. See also the article by the late Professor Taggart "The Binding Effect of Decisions of the Privy Council" (1984) NZULR 66.

78 *Henry v Attorney-General*, above n 36, at 133.

> the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences. In their Lordships' opinion this must mean approaching the question what is meant by "child" with an open mind.'

54. In *Ong Ah Chuan v Public Prosecutor* the same question of the proper interpretation approach to a constitution on the Westminster model – in that case the constitution of Singapore – arose again for consideration in the Privy Council. In delivering the advice of the Judicial Committee Lord Diplock expressly adopted the approach taken by Lord Wilberforce in *Fisher* and said:[79]

> ...the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but 'as sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law'

55. In *Attorney-General of Fiji v Director of Public Prosecutions* the Judicial Committee, in advice delivered by Lord Fraser of Tullybelton, fully accepted that a constitution should be dealt with in the manner referred to in their two earlier judgments in *Fisher* and *Ong Ah Chuan* and "should receive a generous interpretation".[80]

56. Counsel for both parties submitted, and we entirely agree, that the Constitution of the Cook Islands should be interpreted in the spirit urged by Lord Wilberforce in *Fisher*. The Constitution has a special fundamental character of its own; austere legalism is to be avoided; a generous interpretation is required. The construction of the Constitution involves paying proper attention to the language used in the particular provisions but at the same time giving full weight to the overriding objects and scheme of the Constitution so as to avoid a blind literal and legalistic interpretation.

The Constitutional Challenge to the Act and the Chief Justice's findings

57. In the Court below, the two fundamental objections[81] to the Scheme made by the Defendants (now the Respondents in this appeal) were as follows:

    (a) First, the Scheme used State compulsion to force contributions

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79 *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, at 669-670.
80 *Attorney-General of Fiji v Director of Public Prosecutions* [1983] 2 WLR 275.
81 *The High Court Judgment*, above n 1, at [104]-[106].

(property in the form of monetary contributions) into a Fund that, had inherent risk of partial or total failure – without the State assuming any responsibility to contributors by providing a guarantee if that should occur.[82] The State-mandated superannuation Scheme amounted both to a taking (or acquisition) in terms of Article 40(1) and a deprivation in terms of Article 64(1)(c). Counsel for Defendants referred to a number of authorities to support the proposition that it was not necessary to rely upon one single restriction but, rather, upon an accumulation of minor restrictions.

(b) Secondly, the Act containing the Scheme was not entrenched. Even if there were a government guarantee, in the absence of entrenchment, the protection might be illusory.

58. There were three other subsidiary objections from the Respondents[83] concerning the position of migrant workers, the inability of poorer members of society to make any contributions at all, and the consequential collapse of the existing schemes into the new scheme under the Act.

59. The Chief Justice summarised the essential themes of the Respondents' case as follows:[84]

> Mr Arnold for the defendants painted a fairly glum picture of vulnerable members ripe for exploitation either by the Trustee or, perhaps more ominously, by the Government using powers to amend the legislation or otherwise. He also painted a picture of members vulnerable to the vagaries of international investment. In theory, many (but not all) of the risks painted by him exist and they are discussed in more detail below. But the fact remains that, over the last thirteen years, the Fund has been reasonably successful notwithstanding the GFC. The Public Trustee is a highly reputable Trustee. The Government has not intervened, despite its powers to do so.[85] Theory needs to be tempered with reality.

60. Later in his judgment, the Chief Justice noted the important concession made by the Respondents. He said:[86]

> It is common ground that there is a public good in the form of a superannuation scheme. The defendants do not contend otherwise. There is much, they say, in the Scheme to commend it. Their approach,

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82 A meaning of the word "guarantee" as used by the Chief Justice is discussed at [65], below.
83 *The High Court Judgment*, above n 1, at [107]-[109].
84 Ibid, at [86].
85 This is a doubtful proposition, see the analysis of the Act and the Trust Deed, at [14(l)], supra.
86 Ibid, at [235].

rather, is to say that the Scheme needs to be fixed up.

61. As to the constitutional foundations relied upon by the Respondents in respect of the first argument, namely the combination of compulsion and risk, it was also asserted[87] by the Respondents that "security of the person" under Article 64(1)(a) had a social welfare dimension and encompassed economic concepts of social security. In this area, the writings of William Blackstone were referred to at length by the Respondents. In addition Canadian jurisprudence was invoked, and, in particular, the Supreme Court decision in *Gosselin v Quebec (Attorney-General)*,[88] the latter notwithstanding that the majority view in that case was seen by the Chief Justice as unfavourable to the Respondents. (The Respondents relied upon the dissenting judgment of Arbour J.)

62. In the Court below, the Chief Justice expressed reservations[89] about the argument and doubted whether the framers of the Constitution intended the expression "security of the person to have the wide-ranging economic dimension of social security". However, he preferred to deal with the case by reference to Article 64(1)(c) and to express no final view on the question.[90]

63. The legal basis for the Respondents' first broad objection was Articles 40(1) and 64(1)(c). The Chief Justice noted that both parties accepted that the superannuation contributions of the employer and the employee amounted to property in terms of Articles 40(1) and 64(1)(c) and that both the contributions of the employee and the employer amounted to property of the employee and he proceeded on that footing.[91]

64. The Chief Justice rejected the Respondents' arguments based on Article 40(1) but found that there was a deprivation in terms of Article 64(1)(c) and that the deprivation was not saved by reference to an Article 64(2) proportionality analysis. His reasoning may be summarised as follows:

    (a) The loss of full ownership of the contributions in exchange for an equitable interest meant that there was a "loss of present enjoyment of the property" but that fact alone did not amount to a deprivation, assuming that the "superannuation scheme has adequately met the

87 Ibid, at [108].
88 *Gosselin v Quebec (Attorney-General)* [2002] 4 SCR 429.
89 *The High Court Judgment*, above n 1, at [111]-[112].
90 Ibid, at [143]-[155].
91 Ibid, at [157].

balance between the present and the future".[92]

(b) The lack of a guarantee, together with the absence of entrenchment, was "directly relevant to assessment of the defendants' claim of deprivation".[93]

(c) Unlike other Pacific schemes there was no scope for members to access funds for any purpose prior to their entitlement to a benefit at retirement. For example, there was no scope to borrow money for housing or to use money for education purposes.[94]

(d) It was by no means clear why, pursuant to s 53(3) of the Act, migrant workers should lose their employer contributions if they left the jurisdiction; this dispossession seemed "unnecessary and unfair".[95]

(e) For poorer members of society, making any payment at all would be a struggle and the resulting benefit in due course would be equally small and of little value.[96]

(f) Members of previous schemes lost the benefits of those as a result of the collapse of their schemes by the Act.[97]

(g) The "sort of factors described immediately above, coupled with the more important features also described (lack of guarantee and entrenchment), do … amount to a prima facie deprivation of property"[98] and that "the absence of a Government guarantee … coupled with the absence of entrenchment, [was] a significant flaw".[99]

(h) It was "inevitable that [his] prima facie conclusion of unconstitutionality must affect the entire Act".[100]

(i) The prima facie breach of Article 64(1)(c) was not saved by reference to a proportionality analysis. As to the first two criteria in *Bank*

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92 Ibid, at [211].
93 Ibid, at [215].
94 Ibid, at [216].
95 Ibid, at [217].
96 Ibid, at [219].
97 Ibid, at [220].
98 Ibid, at [222].
99 Ibid, at [228].
100 Ibid, at [227].

Mellat,[101] it was clear that the objective of the Act was sufficiently important to justify the limitation of a protected right. It was also accepted that there was a rational connection between the Act and its objective. But as to the last two criteria, the Chief Justice held that it was:[102]

> … quite clear that less intrusive measures could have been adopted. Most importantly, I believe that by giving a Government guarantee and entrenching the Act, the impairment represented by the Scheme would have been minimised. I also think that the absence of any ability to access the monies prior to retirement is too restrictive and the position, generally, of migrants is not satisfactory.

The Meaning of "Government Guarantee"

65. It is apparent that what the Chief Justice called "the lack of a guarantee" was a central element, along with a lack of entrenchment, in his finding of unconstitutionality. It is necessary to try to identify precisely what the Chief Justice meant by that term. The first references in the judgment to this topic were as follows:[103]

> [87] There were a number of Pacific superannuation schemes placed before the Court and the differences between those schemes, and that of the Cook Islands, were strongly emphasised by Mr Arnold. I will shortly refer to some of the main points made by him. First, though, there is a note of caution to be sounded.
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> [88] Details of the different superannuation schemes were put before the Court mainly by means of attaching copies of relevant legislation as exhibits to an affidavit. In addition, the deponent referred to some materials located on relevant websites. None of this material was mediated through experts in the relevant law of the different countries and there can be no certainty that the various references were complete.
>
> [89] Having sounded that caution, though, some reasonably consistent themes emerged.
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> [90] First, other than Papua New Guinea (and, of course, the Cook Islands), all of the countries surveyed had some form of Government underwriting or support for the relevant scheme. This support came in different shapes and sizes. At one end, perhaps, was that of Tonga where the relevant provision provided that if there was a shortage of necessary funds then a request could be made to the Minister for

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101 *Bank Mellat v HM Treasury*, above n 51; see [37], above.
102 *Gosselin v Quebec (Attorney-General)*, above n 88, at [238].
103 *The High Court Judgment*, above n 1, at [87]-[91].

assistance. Other countries had more specific Government obligations. Vanuatu, for example, in section 18 of the relevant legislation had this obligation:

> 'If the Board is at any time unable to pay any sum which is required to be paid under the provisions of this Act, the sum required shall be advanced to the Board by the Government and the Board shall as soon as practicable repay to the Government the sum so advanced if required to do so under the terms of the advance.'

[91] Many of these provisions are coupled with a minimum rate of return (for example 2½% or 4%). Strictly speaking, the combination of these two factors do not amount to guarantees but they amount to a form of underwriting by the respective Governments. I think it is appropriate to refer to the combination of these features as a guarantee and, as long as the term is understood in this sense, I will continue to use such a label to describe this type of arrangement.

66. Then in deciding whether there had been a deprivation under Article 64(1)(c), he added:[104]

> [213] I start with the lack of a Government guarantee. Or, more precisely, the absence of provisions comparable to those in other relevant constitutions in which the State will provide advances to the superannuation scheme in case of need. These powers are generally coupled with a minimum rate of return. By a combination of these features, the member gains greater certainty of outcome than is the case for the current Scheme which does not have these features. Of course, this assumes the Government can (and does) stand behind its obligations in any given case. While that assumption needs to be made, I believe that such a guarantee does need to be assessed in the mix. Coupled with this, is the lack of entrenchment. Even if the Act provided for a Government guarantee, that could be removed by simple majority in the absence of entrenchment. Realistically, then, I think the two need to be considered together and I do so.
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> [214] Mr Ruffin strongly argued that the absence of a guarantee was not relevant to assessing whether there was a deprivation. He said that until a loss occurred, the absence of the guarantee had no tangible effect. There was no loss. This, I think, is far too literal. In simple economic terms, there is a difference between loaning money to someone without a guarantee and a situation where the loan is supported by a guarantee. That hardly seems controversial. If it were otherwise, why would banks generally seek guarantees of personal loans?
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> [215] In my opinion, it is largely irrelevant whether loss has actually occurred. That is a matter of quantification. Rather, what we are talking

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104 Ibid, at [213]-[215].

> about is economic risk. In my opinion, Mr Arnold is right to submit that the lack of a guarantee, together with the lack of entrenchment, is directly relevant to assessment of the defendants' claim of deprivation.

67. We return to the "Government guarantee" issue below when addressing the proportionality question.

The Issues for Determination

68. Based on the conclusions of the Chief Justice, and the arguments made in this Court, the issues arising in the appeal may be summarised as follows:

    (a) Does the Act constitute a compulsory taking or acquisition of property contrary to Article 40(1) of the Constitution and, if so, does the requirement to provide compulsory contributions constitute a tax under Article 40(2)(a), so as to immunise it against challenge under Article 40(1)?

    (b) Does the Act infringe the right of the individual to "security of the person" contrary to Article 64(1)(a) of the Constitution and, if so, is the infringement saved by Article 64(2)?

    (c) Does the Act infringe the right of the individual not to be deprived of property contrary to Article 64(1)(c) of the Constitution and, if so, is the infringement saved by Article 64(2)?

    (d) How should costs be allocated?

Was there a Taking or Acquisition under Article 40(1)?

69. The terms of Article 40(1) have been set out above.[105] The Respondents' position is that the Scheme, involving compulsory contributions to the Fund, is a taking under Article 40(1) of the Constitution. The Appellant says it is not such a taking and that the article is limited to situations where there is a compulsory acquisition of property by the State from the owner in terms of the State's power of *eminent domain*.

70. The Chief Justice determined that Article 40(1) was not breached. There was considerable discussion before him on whether there is an overlapping of the two Articles 40(1) and 64(1)(c) or whether as Mr Arnold submitted, Article 40(1) is a subset of Article 64(1)(c). In this Court's view, it is not necessary to determine that issue. This is because it agrees with the Chief Justice that

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[105] See [33], above.

the Scheme does not amount to an acquisition of property under Article 40(1). It is better to leave the issue of whether or not there is an overlap to another day when the issue may be relevant.

71. Article 40(1) prohibits two actions unless within a reasonable time adequate compensation is paid. Those actions are:

    (a) Compulsorily taking possession of property; and

    (b) Compulsorily acquiring a right over or interest in any property.

72. It is necessary to consider in the light of the Constitutional guarantee given by the Article, the wording in it, and the manner in which similar provisions have been interpreted when deciding whether the requirement to make compulsory contributions to a superannuation scheme is taking possession of the property or acquiring a right over or interest in the property.

73. When an employee makes a compulsory contribution to the Fund, the legal effect is that the employee is being required to give up a right to money (a chose in action) and to take in its place an expectancy or future chose in the Fund. That expectancy is a vested interest in a proportion of the Fund payable in the future usually in another form in that it may be payable by way of pension and only a portion as a lump sum payment. The employee is giving up the face value of the money at the time it is due and paid to the Fund for a vested proportional interest in the Fund payable in the future. If the compulsory contributions are held to amount to a taking under Article 40(1), there are obvious difficulties in valuing the expectancy when an employee enters the Scheme. It may be very difficult to assess what would be adequate compensation at that time.

74. The Chief Justice did accept, as does this Court, that Article 40(1) was concerned with the doctrine of eminent domain. However, he was uncertain whether eminent domain defined the boundaries of the Article.

75. The Chief Justice analysed several cases in coming to his view that Article 40(1) did not apply in the circumstances. The cases were not on similar facts and it was necessary to draw analogies. The case which was nearest on the facts was the Zimbabwean Supreme Court decision of *Nyambirai v National Security Authority*.[106] In that case the parties conceded that contributions payable by employees and employers to a pension fund fell within both the

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106 *Nyambirai v National Social Security Authority and Another,* above n 70.

acquisition and deprivation sections of the relevant Act (those sections were analogous to and had the same effect as Articles 40(1) and 64(1)(c) except that compensation was payable if there had been a deprivation as well as if there had been an acquisition). Mr Ruffin for the Appellant sought to distinguish this case on the grounds that it was a concession, unsurprisingly which had been made as there was no account in the name of the contributor, the Minister established the Scheme, and there was no underlying deed of trust. For the same reasons this Court does not find the case of assistance.

76. Several cases, including some from the Privy Council and the House of Lords, were referred to the Chief Justice and, as noted, none was directly on point. Further, in most cases both the taking under the equivalent of Article 40(1) and a deprivation under the equivalent of Article 64(1)(c) required the payment of adequate compensation. Some of the cases considered the differences between acquisition and deprivation.

77. Two recent Privy Council cases give some guidance on the application of Article 40(1). In *Grape Bay Ltd v Attorney-General of Bermuda*[107] the Court noted that it was well-settled that restrictions on use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. It is a principle of law that payment of compensation is not required where private rights are restricted by legislation of general application which is enacted for the public benefit. Their Lordships held that the case before the Court was clearly one where the principle of general regulation and public interest applied. A relevant comment made by Lord Hoffmann was that the Bermuda Government was in the best position to know what the public interests of Bermuda required in respect of the issue at hand.[108] While the legislative decision may not have been a wise one, the issues which were raised were pre-eminently matters of democratic decision by the elected branch of Government. The members of the legislature are not required to explain themselves to the judiciary or persuade them that the view of the public interest is correct. It was the role of the legislature rather than the Courts to assess the requirements of the public interest and the legislature should be allowed a wide margin of appreciation.

78. The Privy Council decision in *Campbell-Rodrigues v The Attorney-General*

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107 *Grape Bay Ltd v Attorney-General of Bermuda*, above n 68.

108 Ibid, at 585(E)-585(F).

of Jamaica[109] reviewed several of the cases referred to before this Court including *Grape Bay*.[110] It cited with approval a statement made by Brandeis J in *Pennsylvania Coal Co v Mahon*,[111] which had itself been cited in *Belfast Corporation v OD Cars Limited*, per Viscount Simonds.[112] Brandeis J said:[113]

> Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the State of rights and property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely a prohibition of a noxious use.

79. In this Court's view the same principle arguably applies to other forms of property including the contributions to the Scheme in this case. It is generally accepted that the term "police power" is not used in a strict sense but applies to decisions made by the State in the public interests of its members.

80. In *Campbell-Rodrigues* it was stated:[114]

> It is always necessary to exercise a degree of care in relying on analogies, not to press them too far, but their Lordships consider that they provide some useful guidance in deciding the issues before them. They establish clearly that there are limits to the concept of taking property and that some types of State action which could linguistically be so regarded are not to be regarded as justiciable. It is well established that measures adopted for the regulation of activity in the public interest, such as planning control or the protection of public health, will not constitute the taking of property, notwithstanding the fact that they may have an adverse economic effect on the owners of certain properties.

81. We adopt the principles enumerated in the foregoing cases, namely that a deprivation of property is not necessarily an acquisition of property for the purposes of Article 40(1). If the deprivation or restriction is imposed to protect the public health, safety or morals from dangers threatened, it is not a taking under the equivalent of Article 40(1). Likewise if the deprivation is in the public interest it may not amount to a taking under Article 40(1).

82. Other cases have stated similar principles and contain relevant findings. In

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109 *Campbell-Rodrigues v The Attorney-General of Jamaica* [2007] UKPC 65.
110 Ibid, at [8].
111 *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).
112 *Belfast Corporation v OD Cars Limited* [1960] AC 490, at 519 per Viscount Simonds.
113 *Pennsylvania Coal Co v Mahon*, above n 111, at 417 per Brandeis J (dissenting).
114 *Campbell-Rodrigues v The Attorney-General of Jamaica*, above n 109, at [18].

Pennsylvania Coal Co v Mahon[115] it was said by Holmes J that when it is necessary to determine the limits within which values incident to property may be diminished under the police power without compensation, the extent of the diminution is a fact for consideration. Further, in determining whether there has been such a diminution in values incident to property under the police power as to require an exercise of eminent domain and the payment of compensation, the greatest weight is given to the judgment of the legislature. It always is open to interested parties to contend that that the legislature has gone beyond its jurisdictional power.

83. There is distinction between measures that are regulatory and measures that are confiscatory. And a measure which is *ex facie* regulatory may in substance be confiscatory. A reasonable measure may be regulatory and an unreasonable measure may be confiscatory.[116]

84. There is a second reason why Article 40(1) may not have application in this case. This is the principle accepted in the Australian case of *Commonwealth v WMC Resources*.[117] The facts were very different from the present case and the provision in the constitution which was being interpreted was paragraph 51(xxxi). The intention of that paragraph was to enable the Federal Government to acquire property in terms of the power of eminent domain but only on just terms. It was held that, in Australia, the paragraph does not apply unless the Commonwealth or some other person acquires proprietary rights under a law of the Commonwealth. It was held that the mere extinction of diminution of a proprietary right residing in one person does not necessarily result in the acquisition of a proprietary right by another. There was no acquisition under the Australian provision unless the Commonwealth or another person acquired a proprietary right under the laws of the Commonwealth. It was not necessary that what was required corresponded precisely with what was taken. It was necessary to show that the Commonwealth acquired an interest in property even if the interest acquired was slight or insubstantial.

85. *Smith* v *ANL Limited*[118] did not undermine the finding in *WMC* Resources. There it was held that removing an employee's right to bring a personal injury claim against an employer for damages was in effect an acquisition of property. This case can be distinguished on the basis that the employer did

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115 *Pennsylvania Coal Co v Mahon*, above n 111, at 415 per Holmes J.
116 *Belfast Corporation v OD Cars Ltd* [1960] AC 490.
117 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.
118 *Smith v ANL Limited* (2000) CLR 493.

gain a benefit from the extinguishment of the right.

86. An analysis of the provisions of the Scheme leads us to the view that the Scheme requiring as it does compulsory contributions to the Fund is not a taking possession or acquiring of property. It falls within the principle of general regulation and public interest referred to in the *Grape Bay* case.[119] The Act does restrict private rights, but it is an Act of general application enacted for the public benefit, and it is in the public interest of the Cook Island people. While there may be some short term adverse economic effects, the purpose of the Act is to benefit of all employees in the Cook Island in their retirement years.

87. Secondly, and independently, the requirement to make a compulsory payment to a Fund in the circumstances is not in this Court's view a compulsory acquisition of those contributions nor is it the taking of possession of them by the Government. We accept the submission of the Appellant that there is no recipient of a proprietary interest other than the employee contributor. The funds are to be paid into an account in the name of the contributor who obtains a vested interest in those funds.[120] A contributor has an expectancy. He/she has a vested interest in funds to which he/she has contributed and in funds provided by the employer. In normal times the employee can look to an increment from the earnings of the Fund. He/she will bear their share of expenses and certain amounts will be paid on their behalf.

88. Although not a decisive factor, the compensation requirement in Article 40(1) imposes difficulties if it applies to the contributions to the Fund in this case. The expectancy which arises from each contribution may or may not be adequate consideration for each combined contribution. Compensation may need to be considered each time contributions are made. Further, a reasonable time required of Article 40(1) may never arrive. Even an underwriting of a minimum annual return has its problems. It is not a payment within a reasonable time. The suggestion of a loan from the Government to meet short term requirements if there are to be withdrawals in the time of an economic downturn also has its problems. Such an arrangement cannot in this Court's view be classified as a payment of adequate compensation within a reasonable time.

89. There are other difficult valuation issues in assessing adequate compensation which will largely depend on estimating future markets' behaviour and may

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119 *Grape Bay Ltd v Attorney-General of Bermuda*, above n 68, at 585.

120 Trust Deed, above n 13, Clause 69.

vary as a result of the contributor's age and when the contributor enters the Scheme. Moreover, it will differ between contributions of different dates on behalf of the same employee.

90. In summary, it is this Court's view that Article 40(1) has no application in this case. First, the contributions under the Scheme are pursuant to the Act which is an act of general application enacted for the public's benefit. Secondly, the property in the contributions or any right over or interest in them is not acquired compulsorily by the Cook Islands Government or any agency acting on its behalf.

Does the requirement to provide compulsory contributions constitute a tax under Article 40(2)(a)?

91. In view of our finding that Article 40(1) does not apply, it is unnecessary to make a finding on the Appellant's contention that even if Article 40(1) applies the contributions are a tax and therefore the tax exemption in Article 40(2)(a) applies. For the sake of completeness we give our views on this issue.

92. Article 40(2)(a) states:

> (2) Nothing in this article in this article shall be construed as affecting any general law –
>
> (a) for the imposition or enforcement of any tax, rate or duty;

93. The Appellant's position in summary is that notwithstanding certain constitutional provisions which are referred to below, the compulsory contributions come within four features which in *Nyambirai* were said to define what is a tax.[121] Reliance was also placed on other cases including in particular dicta in Australian cases. The four features are not statutory in origin but in the Appellant's submission, apply in this case and make the contributions a tax notwithstanding the constitutional provisions.

94. The Chief Justice referred to the three constitutional provisions which relate to tax. It is the third of those which is particularly relevant in this case. Those provisions are:[122]

> 67. There shall be a Cook Islands Government account and such other public funds or accounts as may be provided by law.

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121 *Nyambirai v National Social Security Authority and Another*, above n 70, at 71.
122 *The High Court Judgment*, above n 1, at [67]-[69].

> 68. No taxation shall be imposed except by law.
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> 69. All taxes and other revenues and money raised or received by the Government of the Cook Islands shall be paid into the Cook Islands Government account unless required or permitted by law to be paid into any other public fund or account.

95. Out of deference to Counsel for the Appellant, we examine the cases relied upon by the Appellant. In *Nyambirai* Gubbay CJ, after analysing authorities, stated:[123]

> From these authorities the following features which designate a tax may be said to emerge:
>
> (i) it is a compulsory and not an optional contribution; (ii) imposed by the legislature or other competent public authority; (iii) upon the public as a whole or a substantial sector thereof; and (iv) the revenue from which is to be utilised for the public benefit and to provide a service in the public interest.

96. It is unnecessary to analyse in depth the Australian cases referred to by the Chief Justice and relied upon by the Appellant.[124]

97. The Respondents' position is that the Appellant, in submissions in the High Court, said that the purpose of the contributions was to address a need for compulsory savings for retirement. It was therefore difficult to categorise such contributions as tax payments. Mr Arnold also noted that the judges in *Roy Morgan Research Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* [125] relied upon by the Appellant had appeared to depart from the earlier definitional dicta in the *Australian Tape Manufacturers* case.[126]

98. It is not necessary to analyse the Australian cases to the extent of the analysis made by the Chief Justice but we note that we agree with his conclusions. There is a distinction noted in those cases between an exaction in the public

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123 *Nyambirai v National Social Security Authority and Another*, above n 70, at 71.

124 See, *Matthews v Chicory Marketing Board* (1938) 60 CLR 263*, Air Caledonie International v Commonwealth of Australia* (1998) 82 ALR 385 and the High Court of Australia decision in *Australian Tape Manufacturers v Commonwealth* (1993) 177 CLR 480, and the High Court of Australia case of *Roy Morgan Research Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* (2011) 244 CLR 97, which arguably distanced itself from some of the statements in the *Australian Tape Manufacturers* case.

125 *Roy Morgan Research Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* (2011) 244 CLR 97.

126 *Australian Tape Manufacturers v Commonwealth* (1993) 177 CLR 480.

interest and an exaction for public purposes. The Chief Justice, rightly in this Court's view, considered that to use "public interest" as a benchmark for what may be a tax "may then admit a too wider category of payments as taxes". In the present case, it is easy to accept that the contributions are in the public interest. The issue however is whether they are for "a public purpose". In *Nyambirai* the fourth requirement is that the revenue is utilised "for the public benefit and to provide a service in the public interest".[127] If the revenue is for the "public benefit" it is for the public purpose. The contributions to the Scheme are being made in this case for the benefit of the contributor.

99. Like the Chief Justice, we agree that in each case it is necessary to look at the character of the payment made and the constitutional arrangements in the relevant country. He found something fundamentally counter-intuitive in the Appellant's proposition that a payment made by a contributor into a trust fund to be held, ultimately, for the benefit of that member, be characterised as a tax. So does this Court. The Chief Justice did not believe that even the Australian cases supported such a conclusion. We agree.

100. Putting to one side for the moment Article 69 of the Constitution, we are of the view that the contributions are not taxes even under the *Nyambirai* formula.[128] They are contributions being made for the benefit of the contributor and are held on his behalf in a vested beneficiary's account. They may be being made in the public interest but are not being made for a public purpose.

101. In any event, the matter is put beyond doubt in our view by Article 69 provisions already referred to. We do not accept that the adjective "public" only qualifies "fund" and not "account" at the end of Article 69, which requires taxes to be paid into the "Government account unless required or permitted by law to be paid into any other public fund or account." The Appellant's submission was that the Fund was an "account" for the purposes of Article 69. We agree that the Chief Justice was correct in rejecting this contention. Like the Chief Justice we do not believe that the word "tax" is used in two different meanings within the Constitution. If the contributions under the Act were to be classified as taxes they would be being raised by the Government under the Act and therefore required to be paid into the Government Account or into any other public fund or account. They are not being so paid.

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127 *Nyambirai v National Social Security Authority and Another,* above n 70, at 71.
128 Ibid, at 71.

102. If it had been necessary to make a determination, we would have determined that the contributions did not fall within the tax exemption in Article 40(2)(a).

Does the Act infringe the right to "security of the person" under Article 64(1)(a)?

103. In the High Court, the Respondents argued that the Act was unconstitutional because Article 64(1)(a) conferred a positive right to "security of the person" which obliged the State to guarantee the Fund so as to assure that security. The Chief Justice reached no final conclusion on whether the phrase "security of the person" in Article 64(1)(a) incorporated notions of economic or social security (as opposed to physical security or bodily integrity) and, therefore, whether the Act was inconsistent with Article 64(1)(a) of the Constitution.

104. In this Court, the Appellant contended that the Chief Justice ought to have made a ruling confining the phrase "security of the person" to mean physical security or bodily integrity. Equally, the Respondents re-affirmed their arguments made in the High Court. We must therefore reach a final conclusion on which interpretation of Article 64(1)(a) is correct.

105. We begin, as we must, by considering the language which has been used in Article 64(1)(a). We share the Chief Justice's reservations about whether Article 64(1)(a) can be interpreted to have the far-reaching effect for which the Respondents contend. The Chief Justice expressed doubt,[129] as do we, about whether the framers of the Constitution intended the expression "security of the person" to encompass a wide-ranging economic dimension of social security. The proper interpretation of the phrase "security of the person" is informed by the immediately preceding two words "life, liberty …" which suggest that Article 64(1)(a) is focused on physical security rather than economic security. Like the Chief Justice, we also consider it significant that Article 64(1)(a) is followed by the more specific property rights enshrined by Article 64(1)(c). This suggests that the framers of the Constitution intended that the phrase "security of the person" should be read in a narrower sense.

106. We draw support for our conclusion from Canadian cases which have considered the scope of the equivalent to Article 64(1)(c) in the Canadian Charter, namely s 7 which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof

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129 *The High Court Judgment*, above n 1, at [145].

except in accordance with the principles of fundamental justice".

107. The leading Canadian decision is *Gosselin v Quebec (Attorney-General)*,[130] which considered whether a social assistance regime enacted in 1984 violated the appellants' rights under s 7 because that the regime set the base amount of welfare payments to persons under the age of 30 at roughly one-third of the base amount payable to those aged 30 and over.

108. McLachlin CJ, on behalf of the majority of the Court, observed that:[131]

> … the dominant strand of jurisprudence on s 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely those 'that occur as a result of an individual's interaction with the justice system and its administration'.

109. Under this narrow interpretation:[132]

> … s 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice.

110. McLachlin CJ then considered whether s 7 could protect rights and interests wholly unconnected with the administration of justice:[133]

> Even if s 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar. (original emphasis)

111. McLachlin CJ did not rule out the possibility that one day s 7 might be interpreted to include positive obligations. But her conclusion was that the circumstances did not warrant a "novel application of s 7 as the basis for a positive state obligation to guarantee adequate living standards".[134] On this basis, the appeal was dismissed. We note that Arbour J dissented from the majority, holding that s 7 encompassed economic rights and imposed positive obligations on the State.

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130 *Gosselin v Quebec (Attorney General)*, above n 88.
131 Ibid, at [77] per McLachlin CJ.
132 Ibid, at [77].
133 Ibid, at [81].
134 Ibid, at [82]-[83].

112. We have no doubt as to the correctness of the majority opinion in *Gosselin*. We reject the Respondents' expansive interpretation of Article 64(1)(a), which relied heavily upon William Blackstone's Commentaries and his analysis of fundamental rights and freedoms. We endorse the comments of the Chief Justice.[135] He concluded that the Respondents' attempt to read the phrase "security of the person" as encompassing a negative right (let alone a positive right) so far as it concerned social security was "radical". This was especially so since the Respondents' interpretation was based substantially or wholly on the generalised political philosophy of writers from the Enlightenment.

113. We uphold the Appellant's argument that "security of the person" in Article 64(1)(a) means physical security and does not encompass economic security.[136] It may be noted in passing that economic, social and cultural rights were deliberately excluded from the New Zealand Bill of Rights Act 1990.[137] Sir Geoffrey Palmer, the architect of the New Zealand Bill of Rights Act 1990, expressed the view in 2006 that inclusion of such rights would have amounted to judicial encroachment into the prerogatives of the executive and the legislature which would be unacceptable in New Zealand.[138]

Does the Act amount to a deprivation of property under Article 64(1)(c)?

114. The Appellant contends that the Chief Justice erred in concluding that the absence of a "Government guarantee" and the absence of entrenchment of the legislation were features which prima facie amounted to a deprivation of property in terms of Article 64(1)(c) of the Constitution. The reasoning of the Chief Justice was that, while any Superannuation Scheme, analysed simplistically, could be characterised in terms of deprivation, the additional factors present in relation to the Scheme, especially the lack of "Government

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135 Ibid, at [134].

136 We note in passing that many international bilateral investment treaties provide that the State must give to foreign investors "full protection and security". The prevailing view is that this standard refers to physical security only, and does not include legal, political or economic security. As noted by Dugan et al *Investor-State Arbitration* (OUP, 2008) at 532, the concept of full protection and security in international investment law is linked to the customary international law standard of protection of aliens and their property. Both investment treaties and customary international law have traditionally focused on physical security only.

137 See, Joss Opie "A case for Including Economic, Social and Cultural Rights" (2012) 43 VUWLR 471, at 475-478.

138 Geoffrey Palmer "The Bill of Rights Fifteen Years On" (Keynote Speech for the Ministry of Justice Symposium on the New Zealand Bill of Rights Act 1990, Wellington, 10 February 2006) at [27]-[28] as cited in Joss Opie, above n 137, at 478.

guarantee" and the lack of entrenchment and also the other matters constituted a deprivation in terms of Article 64(1)(c).

115. There was no dispute that the superannuation contributions were "property" for the purposes of Article 64(1)(c). As the Chief Justice recorded,[139] both parties accepted that the making of employer contributions, was a term of individual employment agreements. Hence, at the point the contribution was made by the employer, it became, strictly speaking, the employee's property. The first question, therefore, is whether there is a deprivation in terms of Article 64(1)(c).

116. The Appellant submitted that there was no deprivation because the Act simply postponed access to the property of the individual until the eligibility criteria in the Act were met. The contributions were credited to the account of the contributor, invested by the Trustee to earn income, held in trust by the Trustee and applied to provide for the eventual benefits set out in s 18 of the Act.

117. The Respondents submitted that there were several factors which contributed to making the compulsory contributions a deprivation of property. While not discarding all the other factors, the Chief Justice accepted the Respondents' submission "that the lack of a guarantee, together with the lack of entrenchment, is directly relevant to assessment of the defendants' claim to deprivation". The Chief Justice said:[140]

> I have little doubt that the absence of a Government guarantee (in the form described above) coupled with the absence of entrenchment, is a significant flaw. That was the defendants' primary argument and I uphold it.

118. As the Chief Justice acknowledged in relation to his review of Superannuation Schemes in other countries and, as noted earlier,[141] the term "guarantee" is a convenient shorthand term for the Fund itself paying a modest return and the right and, in one Pacific state, the obligation of the Government to provide loans to enable the Scheme to pay its debts. Those loans are required to be repaid as soon as practicable. There is no reason why the Cook Island Government cannot make similar loans under the Ministry of Finance and Economic Management Act 1995-96 (the MFEM Act)

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139 *The High Court Judgment*, above n 1, at [71].
140 Ibid, at [228].
141 See [65], above.

provided they are consistent with the fiscal responsibility objectives of the MFEM Act. The Chief Justice assumed that the respective Pacific Governments will stand behind the various schemes' obligations.[142] In reality they have no obligation to do so and the "guarantees" being referred to in the judgment place no legal obligation on a Government to underwrite the Scheme. There is only one exception in the schemes referred to the Court where a Government is required to lend to a scheme to enable it to pay its debts.

119. In most of the Pacific schemes the contributor receives a minimum rate of return on the balance in the Fund. It is the minimum rate of return in most of these Funds coupled with a right, and in one case the obligation, of the Government to advance funds to the scheme which had "some form of Government underwriting" to which the Chief Justice was referring. In no scheme was there a "Government guarantee" as such and, as noted above, only in one Pacific State, Vanuatu, was a Pacific State Government.

120. Where the Cook Islands Scheme differs from other Pacific Island schemes is that in the other schemes the contributor is not required to share in investment losses. In the Court's view this is an important factor in assessing whether there has been a deprivation of property.

121. Although valuation evidence was not called by either of the parties, this Court is of the view that the compulsory scheme does amount to a deprivation of property. While the contributions are credited to the employee's compulsory account, the employee is losing the right to utilise portion of his or her income at the time the contributions are earned and made. The contributor receives an expectancy in exchange for a chose in action. While the employee may benefit at the time of retirement, the valuation of the expectancy at the date of the contribution is likely to be less than the value of the chose in action.

122. The lower value of the expectancy reflects the factors which in this Court's view establish a deprivation of property. Another important factor is that the employee is required to bear a proportion of investment losses which may be caused by an economic downturn or bad investment decisions. Thus an employee may ultimately receive less than the employee's contributions to the scheme. Further factors are that the costs of non-use of money makes money received in the future of lesser value than the same amount of money received when earned, and the need to bear a share of management fees (although this may not have occurred in the Cook Islands because of the

142 See [66], above.

Government meeting most of these costs). Thus an employee is being deprived of possession of property to which that employee was otherwise entitled. The fact that the employee receives an expectancy in future property does not mean that there has not been the deprivation of property.

123. In determining that there has been a deprivation, it is accepted that there are factors which may increase the value of the Fund, both of a capital and income nature, that interest attributable to the employee's interest in the Fund is earned on a tax-free basis and on retirement benefits are paid to a contributor on a tax-free basis. In many cases the deprivation of property will ultimately be for the benefit of the employee. In some cases, the opposite may be the case particularly if the timing of an employee's entry or retirement from the Fund is at the time of a financial downturn.

124. While the Court accepts there is a deprivation of property, it does not place the same emphasis as did the Chief Justice on the lack of a "Government guarantee" and entrenchment being elements of a deprivation. The lack of a "Government guarantee", or more particularly, the lack of any underwriting does not in itself amount to a deprivation, nor does the lack of entrenchment. These are factors which in this Court's view are to be weighed when the proportionality analysis is undertaken.

Is the Deprivation Saved by Reference to the Proportionality Analysis required under s 65(2) – Background Circumstances

125. In addressing this question it is necessary first to consider the background circumstances relating to the Act, including the World Bank report "Averting the Old Age Crisis", the relevant political and economic history of the Cook Islands in the years after Independence, the design and implementation of the Scheme and the legislative history of the Act. We take this approach in light of the emphasis in Lord Sumption's judgment in *Bank Mellat* on the need for "an exacting analysis of the factual case advanced in defence of the measure".

World Bank Report – Averting the Old Age Crisis[143]

126. As part of the consideration of the background circumstances, it is also appropriate to refer to an exhibit produced by consent at the hearing in the High Court, namely the World Bank Policy Research Report entitled "Averting the Old Age Crisis" published in 1994 ("the Report"). This Report

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143 A World Bank Policy Research Report "Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth", Oxford University Press, New York, September 1994.

would have been available to the Government, prior to enacting the Act in 2000, and can be assumed to have been part of the factual background known at that time. The Report stressed the need for governments to be involved in old age security plans on the grounds that private capital and insurance markets were inadequate and redistribution to the poor was needed. It also noted that Government intervention often led to inefficiencies of their own.

127. The Report advocated a three pillar scheme and noted that a single pillar scheme was unlikely to succeed, for reasons which it stated but which are unnecessary to repeat here. The three pillars, in summary, are as follows:[144]

    (a) *First Pillar*. A mandatory publically managed pillar which is taxed, financed, means-tested with minimum pension guarantees. The Cook Islands Old Age Pension Scheme is a first pillar scheme, except that it is not means-tested.

    (b) *Second Pillar.* A mandatory privately managed pillar with regulated fully funded scheme with personal savings and co-insurance. Such a pillar links benefits actuarially to costs and carries out the income smoothing or saving function for all income groups in the population. A successful second pillar scheme reduces the demand on the first pillar. The parties were agreed that the scheme of the Cook Islands Superannuation Act is a second-pillar scheme.

    (c) *Third Pillar.* A voluntary pillar, which is fully funded with personal savings plans and co-insurance. This provides supplementary income.

128. The Report stated that there were problems in all the schemes and their implementation. One problem noted in the report was the employee's exposure to the risk of a sharp decline in the market at the time of retirement.

129. Of particular relevance to this case are the Report's comments on guarantees because the Chief Justice's finding that the lack of a "guarantee" was an important factor in coming to his finding of unconstitutionality. The Report noted that in countries with a mandatory savings scheme, social assistance was often provided to people who were not covered and a minimum pension may be guaranteed to those who are covered.

130. The Report referred to various types of schemes and guarantees. It stated that the problem with guarantees is their cost. The Report noted[145] that the cost of

144 Ibid, at 1-23.
145 Ibid, at 229.

the minimum pension ought to be carefully calculated in advance to ensure that the State does not take on a large unfunded liability that it will be unable to meet. The Report suggests that if the cost is expected to be high, the minimum guarantee should be lowered or the required contribution rate raised, unless the government wishes to use general revenue finance as a redistributive instrument.

131. Another statement made in the Report[146] was that in mandatory schemes workers assume the investment, longevity and inflation risk of their retirement funds. In a summary to the guarantee section, the Report stated:[147]

> Mandatory saving plans can provide an adequate pension for middle and high income employees but they fail to protect workers with low wages as they grow old or to ensure against sharp dips in investment performance. To alleviate long term poverty and to help diversify risks, these plans must be accompanied by a minimum pension guarantee or other public financed redistributive benefits thereby ensuring old age security for all.

132. It is apparent from the Report that a "Government guarantee" or even the type of underwriting referred to by the Chief Justice may not be financially affordable in a country with a miniscule economy. A government has carefully to consider its financially ability to underwrite such a Scheme.

Cook Islands political and economic history – economic difficulties in the years after Independence

133. In the Court below, the parties filed affidavits which covered previous events in Cook Islands politics which could be said to have given rise to the need for a superannuation scheme. The affidavits also referred to the Hansard record prior to the passage of the Act and other material relating to the introduction and passage of the Act. There were no affidavits from the Appellant to contradict the Respondents' affidavits.

134. The Chief Justice indicated that he had considered affidavits recording "something of the political and cultural environment in which this scheme had its provenance". He referred to the Respondents' affidavits painting a picture of a financial crisis due to Government maladministration. The Chief Justice opined that the admissibility of this sort of material was "problematic" because it recorded a variety of opinions and perspectives on matters that

146 Ibid, at 207.
147 Ibid, at 231.

went wider than that which might usually be considered by a court when interpreting legislation.[148]

135. However, at the request of both parties, he read the affidavits which he said corresponded with his own 15 years of experience in and knowledge of the Cook Islands.[149] He did not specifically refer to the evidence of the deponents or to the Hansard speeches given when the Act was introduced. He said that these speeches were roughly consistent with the material in the affidavits and "indeed what can be distilled from construing the Act itself".

136. We propose to some reference to the to the affidavit evidence since it does provide background material of the sort that we must consider as part of our "exacting analysis" of the circumstances which led to the enactment of the Act, its aims and purposes and whether it struck a reasonable and proportionate balance between the rights of the affected individuals and the governmental objective of introducing a beneficial superannuation scheme.

Affidavit of Mr Trevor C Clarke for the Respondents[150]

137. Among the affidavits we refer first to the principal affidavit for the Respondents, namely that of Mr Trevor C Clarke. He has been a resident of the Cook Islands for almost 50 years and has held the office of Advocate-General. He practised in Rarotonga as a barrister and solicitor until 1985. Over the years, he participated in many Government-appointed committees and gave legal and commercial advice to various governments. In 2003 to 2010, he was Chairman of the Financial Supervisory Commission.

138. He is one of the major business people on Rarotonga. He is Chairman of Directors and Chief Executive of the Cook Islands Trading Corporation Ltd ("CITC") which has the largest commercial undertaking in the Island. He is also a director of Island Hotels Limited ("IHL") which operates one of the largest resorts on Rarotonga. Neither IHL nor CITC is a party to the present proceedings. Both companies have proceeded on the assumption that the superannuation fund is validly constituted and that the obligations imposed on employer and employees are binding.

139. Mr Clarke considered, and we agree, that the events in the decade prior to the enactment of the Act must be considered as providing reasons both for the

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148 *The High Court Judgment*, above n 1, at [30] and [31].

149 Ibid, at [31].

150 Affidavit of Trevor Charles Clarke, Case on Appeal (Record of Case), Vol C Part 1 – Defendant's Affidavits, Tab 1, at 326.

legislation in the form in which it was enacted and for the commonly-held distrust of the Government in the 1990s.

140. In January 1989, a Cook Islands Party ("CIP") Government came to power at a time when the outgoing Democratic Party ("DP") Government had committed to a DM51 million loan to build what is today the still incomplete Vaimaanga Hotel. A Commission of Inquiry report sought by the incoming CIP Government showed that a building contract had been let for the hotel when the design was unknown and at a location not yet finalised. The incoming Government nevertheless elected to continue with the project. By the time of the financial collapse of the government some years later, the total outstanding loan for this hotel project was well over NZ$100 million.

141. The Government of the early 1990s embarked on a process of ambitious borrowing from several sources, including the Nauru Government and French sources (for the power supply). It purchased, as a speculative venture, a decommissioned hospital in Wellington, New Zealand. At the same time, it expanded the size of the public service to record levels.

142. Over the course of 1993 and 1994, it became clear that the Government was facing a financial crisis. The Crown's indebtedness had risen dramatically and its cash flow became critical. To remedy the situation, the Government issued bank-notes without proper backing in reserves.

143. The two Australian banks operating in the Cook Islands forced an outcome to this unsatisfactory situation. The Government was obliged to withdraw the Cook Islands' currency and to enter into arrangements with the banks to resolve the position. The national debt, which had been $24 million in 1990, was on the way to a 1996 high point of $245 million. At the same time, the Cook Islands population fell from around 20,000 in 1996 to around 16,500 in 1999. Many people exercised the right to reside in New Zealand or Australia and fled the "shrinking island economy".

144. Once the Government's ability to issue bank-notes had been withdrawn, it faced an immediate and acute financial liquidity crisis. The Government diverted for its own use a variety of funds held by public bodies including the Post Office Savings Bank, the Justice Department Trust Account, the Workers' Compensation Fund and other accounts. Although Cook Island public servants were entitled to membership of the New Zealand Government Superannuation Fund, the Cook Islands Government omitted to pay its employer contributions into the New Zealand Fund.

145. In Mr Clarke's view, what took place over this crisis fundamentally changed the demographics of the country. It gave rise to a feeling of distrust in the relationship between the voting population and the Government. He considered that if a superannuation scheme were not properly ring-fenced and it were to fall prey to Government "borrowing" or to creditors, even more Cook Islanders would "vote with their feet" exercising their rights as New Zealand citizens to leave for Australia and New Zealand.

146. The financial crisis, and the economic reforms which were introduced by the Government following that crisis, have been the subject of reports from the Asian Development Bank and other bodies, so it is reasonably well-documented. The crisis and the resultant migration resulted in the ending of careers, and the disbanding of households. Extended family relationships were damaged. The adverse consequences for the Cook Islands Public Service were the subject of a report by Massey University of New Zealand.

147. Mr Clarke said that the Asian Development Bank report statistics were quite telling. They showed that the number of Government employees, 3205 in April 1996, was reduced to 1319 by May 1999, a reduction of almost 60%. The report pointed out that the reduction in public services had a disproportionate impact in the outer islands. Many residents from these islands migrated to New Zealand and the very viability of the smaller outer islands was seriously compromised. In Mr Clarke's experience, many of those who left did not return. As a result, in 1999, the country was facing a skill shortage and significant numbers of immigrant workers had to be employed.

148. Mr Clarke expressed concern that the "track record" of successive subsequent Governments has given little confidence that the Crown could be trusted with the "peoples' money".

Affidavit of Mr Iaveta Short for the Respondents[151]

149. Another affidavit, to which we consider it necessary to refer, is that of Mr Iaveta Short. This is because he was the key proponent of the need for entrenchment.

150. Mr Short is a retired solicitor who, over a long career, has been a legal practitioner, Member of Parliament, Minister of the Crown and Cook Islands

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151 Affidavit of Iaveta Short, Case on Appeal (Record of Case), Vol C Part 5 – Defendant's Affidavits, Tab 9, at 1490.

High Commissioner to New Zealand. He was one of the initiators of the present scheme. He considered that, as a small country with a miniscule economy, the Cook Islands Government might be unable in the future to provide adequately for the welfare of its old and retired people. Therefore, he considered the Government should force people to save for their retirement and aim to provide back-up for those "who fall through the gaps".

151. In his role as High Commissioner, Mr Short played a significant role in the "damage control" that followed the financial crisis described by Mr Clarke. He dealt with New Zealand Government officials to negotiate a way out of the situation caused by the Cook Islands Government's superannuation contributions for its public servants not having been forwarded to the New Zealand fund. The particular shortfall was anything between $7 and $13 million but could not be specified with accuracy because of the bad record-keeping. He also dealt extensively on behalf of the Government with the creditors of the Cook Islands over a long period in order to reach compromises. The biggest debt was to the Italian interests which owned the Vaimaanga hotel site. This debt was finally reduced from $120 million to $30 million when it was fully paid off in 2006-2007.

152. From his broad experience of Cook Island politics, Mr Short considered that there was a need for entrenchment of the Superannuation Act because a desperate Cook Islands Government in financial trouble could take hold of money from wherever it could get its hands on, as it did with the employer contributions to New Zealand Superannuation Scheme in 1992. He could foresee a situation where a government was forced to take money from the superannuation fund as part of future settlement with creditors should an economic crisis arise.

Affidavit of Mr Bret Gibson for the Respondents[152]

153. Mr Bret Gibson, who has been practising as a solicitor in Rarotonga since 1987, gave one instance of legislation passed under urgency having immediate damaging effect on the rights of private individuals. This was the Development Investment Amendment Act 1991 which on 28 June 1991 was introduced as a Bill in the Parliament and given a first reading. It then passed through all subsequent stages to become effective on 1 July 1991. The Act expressly denied his then client and all persons who might find themselves in breach of the Development Investment Act any remedy under the Illegal

152 Affidavit of Bret Gibson, Case on Appeal (Record of Case), Vol C Part 6 – Defendant's Affidavits, Tab 10, at 1619.

Contracts Act. The legislation had been promoted by a lawyer (now deceased) who was a Member of Parliament who had spoken in support of the legislation which benefited his then client. Mr Gibson quoted extracts from a judgment of the High Court in *Anderson v Arnold* [1995] CKHC 5 which confirmed, in critical terms, what he had said about the misuse of the legislative process and the speed with which the legislation had been enacted.

154. Mr Gibson considered that the lesson from the above example was that the small size of the Cook Island Parliament, the vested interest of the politicians, and a lack of procedural checks and balances put the country at risk of ill-considered legislation. He feared that Parliament could push through legislation changing the *status quo* at a speed and in a manner which should not occur in more mature democracies.

The Cook Islands economic reforms in 1996

155. The background circumstances would not be complete without a reference to the legislation enacted in 1996 as part of the economic reforms to introduce responsible fiscal management by the Government. Of relevance to the present appeal is the Ministry of Finance and Economic Management Act 1995-96 (the "MFEM Act"). Section 23 provides as follows:

> **23 Principles of responsible fiscal management**
> (1) Subject to subsection (4) of this section, the Government shall pursue its policy objectives in accordance with the principles of responsible fiscal management specified in subsection (2) of this section.
> (2) The principles of responsible fiscal management are–
> (a) managing total Crown debt at prudent levels so as to provide a buffer against factors that may impact adversely on the level of total Crown debt in the future, by ensuring that, unless such levels have been achieved, the total operating expenses of the Crown in each financial year are less than its total operating revenues in the same financial year; and
> (b) achieving and maintaining levels of Crown net worth that provide a buffer against factors that may impact adversely on the Crown's net worth in the future; and
> (c) managing prudently the fiscal risks facing the Crown; and
> (d) pursuing policies that are consistent with a reasonable degree of predictability about the level and stability of tax rates for future years. […]

156. Section 60 of the Act provides:

> **60 Power to give guarantees and indemnities**

> (1) The Minister on behalf of the Crown may from time to time, if it appears to the Minister to be necessary in the public interest to do so, give in writing a guarantee or indemnity upon such terms and conditions as the Minister thinks fit, in respect of the performance of any person, organisation, or Government but only with the approval of–
>
> (a) Cabinet; and
>
> (b) on the advice of the Financial Secretary; and
>
> (c) where such guarantee or indemnity is consistent with the fiscal responsibility objectives of this Act.
>
> (2) The Minister shall state at the next sitting of Parliament following the granting of a guarantee or indemnity why it was necessary in the public interest to grant the guarantee or indemnity as the case may be and shall provide an assessment of the risks associated with the guarantee or indemnity. […]

157. This Section, thus, enables the Government to provide Guarantees, if thought appropriate, in respect of the Scheme, providing that they are consistent with the fiscal responsibility objectives of the MFEM Act.

The design and implementation of the Cook Islands Superannuation Scheme

158. After the 1996 reforms, it became apparent that there was no safety net for most Cook Islanders who either became unemployed or were under 60 years of age or who were from the salaried section of the public service and who had departed from the Cook Islands after cashing up their New Zealand superannuation.

159. Many neighbouring states in the Pacific Islands had operated compulsory superannuation schemes for a long time. The scheme in Fiji was set up in 1966, Samoa in 1972, the Solomon Islands in 1973, Tuvalu and Kiribati in 1981 and Vanuatu in 1986.[153]

160. During the 1999 election campaigns the establishment of a National Superannuation Fund for all employed Cook Islanders was a policy in the New Alliance Party manifesto aimed at providing financial security for all Cook Islanders in their retirement. This policy was pursued by the New Alliance / Democratic Party Coalition government after its election.

161. The Deputy Prime Minister, the Hon. Norman George, was responsible for the establishment of the Superannuation Scheme. The objective of the Scheme was to reduce the welfare burden on the government in the long term

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153 Affidavit of Anne Herman, above n 34, see Exhibits "C", "D", "E" and "F".

and encourage Cook Islanders to save towards their retirement.

162. Mr George filed an affidavit on behalf of Respondents in this proceeding.[154] He is a practising lawyer who has been an MP for over 30 years representing the island of Atiu. He deposed how he, along with others, had assembled advisors to prepare a superannuation scheme and take public soundings on the concept. He affirmed that, as Minister in charge of the Bill, the only way the scheme would be supported by the people was for them to be persuaded into a scheme where the money was their property. As to the need to entrench the legislation, he said that that could not be achieved at the time because there was not a sufficient majority. The mere passing of the Act would reflect on the mismanagement of the preceding Sir Geoffrey Henry Government. For that reason, Mr George did not wish at that point to get into a debate with the opposition over entrenchment. However, Mr George acknowledged in the Parliamentary debates the need for possible future amendments to the Act.

163. Other evidence about the genesis of the Act came principally from an affidavit filed by the Appellant by Mr Kevin Carr[155] who had been Financial Secretary to the Cook Islands from July 1998 to February 2007 and acting in that capacity from February 2010 to October 2010. In December 1998, when informed that a superannuation scheme was to be designed in the Cook Islands, Mr Carr noted his thoughts as to how it might be designed. He noted that the scheme must be administered by a professional fund manager, not by an agency of the Cook Island Government saying "we do not want to repeat the NZ Government's superannuation scheme where they were never able to determine how much the scheme had been under-funded"

164. Mr Carr was involved from August 2000 in the preparation of the Scheme which involved a number of specialised professional advisors in Wellington, New Zealand. Cabinet appointed a Taskforce chaired by Mr Tetupu Araiti (and later by Mr Carr) to assist with the development of the Scheme. On 9 May 2000, Cabinet approved the various principles developed by the Taskforce for the design of the Scheme. The key principles were that:

    (a) The retirement age would be set at 55 years of age;

    (b) The scheme would be compulsory for those aged 18 years and above;

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154 Affidavit of Norman George, Case on Appeal (Record of Case), Vol C Part 5 – Defendant's Affidavits, Tab 8, at 1473.

155 Affidavit of Kevin Carr, above n 8.

(c) A trust would be established for the management of the Scheme; and

(d) The scheme would eventually replace the government's responsibility to pay for the retirement costs of an ageing population.

165. In the months that followed, the Taskforce consulted with existing private sector superannuation schemes in the Cook Islands, all of whom expressed full support for the proposed Scheme. The President of the Chamber of Commerce and other interested parties were also briefed and indicated their support for the Scheme.

166. On 7 July 2000, the Deputy Prime Minister sought and obtained Cabinet approval to commence the drafting of the Cook Islands National Superannuation Act and the Trust Deed. In a memorandum addressed to Cabinet,[156] he stated: "It is proposed that Crown Law be involved in the process. The drafting of the legislation will also be requested to be mindful of the Cook Islands Constitution".

167. The Taskforce and the Deputy Prime Minister then commenced public consultation. On 10 July 2000, Mr Carr prepared a memorandum for Cabinet indicating that the Ministry of Finance and Economic Management fully supported the proposal to establish the Scheme. Mr Carr's memorandum specifically addressed (in section 2 headed "Guarantees") whether a guarantee should be given by the Government and possible areas where a guarantee could be called upon. This section stated:

> It needs to be clearly established if there are to be any guarantees. Some areas to consider are:
>
> 2.1 Where an employer delays payment of contributions, causing an employee to forgo possible earnings.
>
> 2.2 Where an employer never pays the contribution to the collecting agency regardless of the reason.
>
> 2.3 Whether the contributions of the employee/employer or of the earnings be guaranteed?
>
> 2.4 In discussions it has been ascertained that if a beneficiary lives beyond the credit held in the fund, the pension will continue to be paid from special reserves to be set aside from the employers' levy. This

156 Memorandum for Cabinet: National Superannuation Scheme, 7 July 2000, at [3.1], Case on Appeal (Record of Case), Vol D – Agreed Discovery Volume, Tab 1, at 1689.

must be spelt out in any documentation.

168. In a separate part of his memorandum,[157] under heading "GSF Scheme" (referring to the existing Government Employees' Superannuation Fund), Mr Carr cautioned against any comparisons of the existing GSF Scheme and the new Scheme to be enacted by the Act unless the Government was "guaranteeing the local scheme against loss of contributions and earnings or [had] suitable insurance in place". He continued:[158]

> If the impression is given that the local scheme is a "no loss" scheme claims could be made against the Government in future years as a result of misrepresentation if the fund, as it is likely to, at some stage makes [sic] a loss in a particular year.

169. Mr Carr concluded his July 2009 memorandum by saying that "[b]efore any scheme is implemented, the issues relating to guarantees must be resolved as a priority".[159] It is therefore apparent that government officials (and presumably Cabinet, when considering this memorandum) gave consideration to whether the Government would be guaranteeing the Scheme to be passed in the Act. In his affidavit, Mr George's recollection was that the Government "did not have any firm view" on whether a guarantee should be given.

170. In his affidavit,[160] Mr Carr indicated his personal concern at the ease and speed with which Parliament in the Cook Islands could change legislation without public consultation. He believed the Act should have been drafted with similar provisions to apply as for an amendment to the Constitution (i.e., entrenchment). In his view this provision would allow time for public involvement and comment on any proposed changes. He had considered making an amendment concerning the treatment of expatriate workers. This possible change was rejected and any proposal to amend the Act was left in abeyance.

The Introduction of the Cook Islands Superannuation Fund Bill into Parliament and its Enactment

171. When the Cook Islands Superannuation Fund Bill was introduced into

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157 Further Cabinet paper on national superannuation scheme by Kevin Carr, 10 July 2000, at [7], Case on Appeal (Record of Case), Vol D – Agreed Discovery Volume, Tab 5, at 1702.

158 Ibid, at [7].

159 Ibid, at [14.7].

160 Affidavit of Kevin Charles Carr, above n 8, at 138.

Parliament on 22 November 2000, the Deputy Prime Minister, speaking in support of the Bill, said:[161]

> Mr Speaker, I begin by saying that today marks one of the most important events in our history. What is happening today, Mr Speaker, is something that has never been done in the 34 to 35 years' history of Self-Government in this country. It is with a sense of pride and a sense of achievement that this Government puts before this House a Bill that will reflect on the future of every man, woman and child in this country. Today, this Bill guarantees that people can retire as early as 55 years of age. When they retire and they have been contributing to this Scheme, they will have money there to live on for the rest of their lives.

172. The consensus in Parliament was that the government should have no involvement in the Scheme. The Deputy Prime Minister made this point very clear. He said:[162]

> Mr Speaker, the Scheme we are putting forward into this Bill is one that we have designed to be completely above board and completely independent of Government interference. It is to be accepted by every man, woman and child in this country as their Scheme and their property so that God forbids a future Government to interfere with this the people's Superannuation Scheme.
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> […]
>
> Following the views of the private sector, the Workers Association, the business community, from our people, we have done our very best to distance Government from the Scheme and to protect the Scheme from being raided by future Governments. I appeal to the public of this country to take possession of this Scheme as belonging to you personally and privately in large numbers to make it your provide possession so you can monitor future Governments.

Is the Act saved through the proportionality analysis?

173. As noted earlier, Article 64(2) recognises that the fundamental rights of Article 64(4) may be the subject to limitations imposed by an act seeking to promote "the general welfare". Here the Court must engage in the balancing exercise described in *de Freitas*, now known as the proportionality test and most recently contained in the overlapping four-stage analysis of *Bank Mellat*.

First and Second Stages - whether the objective of the Act is sufficiently

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161 Cook Islands Hansard (23 November 2000), at 825.

162 Ibid, at 825-826.

important to justify the limitation of the fundamental right not to be deprived of property and whether the Act is rationally connected to the objective

174. As noted earlier, there was no real dispute between the parties in these first two areas and the Chief Justice found that both were satisfied. He said:

> [238] I now address the four steps. There is no particular dispute or controversy about the first two steps. It is accepted by the defendants that the objective of the Act is sufficiently important to justify the limitation of a protected right. It is also accepted that there is a rational connection between the Act and its objective.

175. We agree that there are undoubtedly significant benefits to the population as a whole from the Scheme in a small country where earnings are low and post-retirement earnings even less (despite a very modest old age pension now taxed). The aim of a State, unable to use its own resources to provide a better income for retirees, in initiating a superannuation scheme, is well within the bounds of prevailing international order as evidenced by the World Bank Report and various International Conventions which were referred to in the Court below. Indeed, the Respondents themselves are in support of the Scheme but not in its present form.

Third Stage - whether a less intrusive Act could have been successfully introduced

176. The Chief Justice found that less intrusive measures could have been taken, saying:[163]

> In my opinion, it is quite clear that less intrusive measures could have been adopted. Most importantly, I believe that by giving a Government guarantee and entrenching the Act, the impairment represented by the Scheme would have been minimised.

Absence of a "Government guarantee"

177. At first blush, it is perhaps surprising that the Cook Islands did not follow the example of other small Pacific nations which provide some form of Government underwriting to their schemes. It may be argued that the omission is particularly surprising when many persons have been forced to give up significant benefits severing their association with existing schemes in favour of the "one fits all" compulsory scheme.

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163 *The High Court Judgment*, above n 1, at [238].

178. In this Court's view a feature which did not figure largely in submissions before this Court requires serious consideration. It is that the Scheme does not provide for a minimum rate of return and in fact the employee contributors bear the investment risk. As noted in paragraph 184 below the Fund has performed credibly. Working on material before the Court it is noted that the net investment gain for the year ending 31 December 2011 was 2.6% after allowing for investment and management fees and the full amount was allocated against the members' compulsory account. In the year ending 31 December 2012, the gain increased to 14.13% on the same basis and was once again allocated in full to members' compulsory accounts. The track record of the Trustee and the investment since the Scheme was established 13 years ago shows a reasonably good return and professional investment policies.

179. Against the foregoing considerations, it is important, when considering the lack of Government underwriting, to take into account the history of maladministration over the decade preceding the enactment of the Act and the grave public feeling of suspicion and scepticism surrounding Cook Islands legislative activity. The failure of the Government in the 1990s to pay the contributions for the Cook Islands' civil servants to the New Zealand Superannuation Public Service Fund plus the "raiding" by the Government of accounts which should have been sacrosanct provided justification for suspicion and cynicism about the political process.

180. Mr Carr's evidence was that the question of providing a "Government guarantee" was raised and discussed at Cabinet. There is no evidence as to why a "Government guarantee" was not included, but it may be inferred that one reason for its exclusion was the stated objective of keeping the Government out of the Scheme. For if a guarantee was given, the Government would necessarily be drawn into an involvement with the Scheme. The reasons that justify this inference are as follows:

    (a) The desperate economic plight of the Government, at the time the Act was passed in 2000, was such that the Government, most likely, could not afford to give a guarantee nor would it have been able to comply with the requirements of s 60 of the Ministry of Finance and Economic Management Act 1995-1996 as to "Government guarantees".

    (b) The strong desire of Cabinet, in the economic milieu of the time, to avoid jeopardising the creation of a Superannuation Scheme by having direct Government involvement, or the potentiality for such involvement through a guarantee. In short, it might not have been

possible to obtain passage of the legislation if there was direct Government involvement in the Scheme. This thesis is supported by the way in which the Scheme was deliberately designed to be "completely independent of Government interference"[164] and centred offshore in New Zealand with an independent Trustee and independent managers.

(c) Aligned with this, if the Government was to be underwriting the downsides of the Fund's future financial performance, it would logically wish to have a greater involvement in the day-to-day management and control of the fund. But this was the antithesis of what the architects of the Scheme were advocating.

181. It is also appropriate to refer to the downside risks of "Government guarantees", as noted by the World Bank in their Report. The World Bank postulates the rhetorical question, "[i]f Government regulates and guarantees the scheme, will it not eventually end up controlling the funds?"[165] Similarly, the World Bank also notes that the provision of a "Government guarantee" reduces the element of prudence required to run the Fund efficiently due to moral hazard (i.e. the elimination of efficiency incentives).[166]

182. It is acknowledged that the balance of a contributor's account may be less than the total of combined contributions of the employee and the employer. The summary in paragraph 184 indicates this possibility and the statistical risk of it happening. However, as the World Bank Report indicates it is usual for employees in a mandatory scheme to assume the investment risk. If a Government is to assume this risk, it would want greater control of the Scheme with the heightened risk of Government interference. Further, investment policies are likely to be more conservative and the benefits as a whole decreased. The public benefits from such a scheme must be weighed in the proportionality exercise.

183. It follows from the foregoing that the inclusion of a guarantee would have likely unacceptably compromised the objective, namely the achievement of a Superannuation Scheme without Government involvement. Indeed, it is quite likely that the legislation may not have received sufficient support if it had been accompanied by a "Government guarantee". In short, it may have made the desirable objectives of the Act impossible to achieve. Accordingly, in

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164 See [172], above.

165 A World Bank Policy Research Report "Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth", above n 143, at 203.

166 Ibid, at 215.

terms of the third criterion in *Bank Mellat*, it is extremely doubtful whether a less intrusive measure (i.e. one which made the contributions compulsory but also provided a "Government guarantee") could have been included if the legislation was to be passed.

184. In arguing that the lack of a "Government guarantee" *per se* amounted to an unconstitutional deprivation, the Respondents' case hinged upon their being able to establish a strong likelihood that the Scheme would fail at some point in the future. That case is weakened because the Fund appears to have been soundly managed and successful for the past 14 years. As a result of the investment policy, on the information available to the Court, it has been largely unaffected by the GFC and the risk of failure, while it never can be discounted, appears to be negligible:

    (a) Since inception, the Fund has paid out over $5 million member benefits. Despite the effects of the global financial crisis in 2008 and 2009, the Fund has only made a loss in one year. Evidence was given about the Fund's investment strategy. The original asset allocation in 2001 was split between 75% in fixed income assets and 25% in growth assets. In July 2003, following discussions between the Board and the Trustee, the Fund's investment strategy was amended so that 65% was invested in bonds, and 35% in shares.

    (b) The current Statement of Investment Policies and Objectives states that the investment objective of the Fund is to produce a minimum real rate of return of 3% per annum. In 2011, the Trustee engaged expert consultant actuaries to review the Fund's asset allocation strategy. The actuaries produced a report in which they concluded that:

        (i) The Fund was "more-or-less in line with market practice with regard to the allocation of assets between the various investment sectors" (i.e. shares, property, bonds and cash);

        (ii) The chance of a negative return (after allowing for investment fees) over any one-year was said to be 12.3%. Over a 5-year time horizon, the chance of a negative (cumulative) return was 0.4%.

        (iii) The current portfolio was expected to generate returns of 4.3% per annum after inflation and on an annual basis this was expected to meet the 3% real return target 59% of the time. Over a 5-year time horizon, the chances of meeting the real return target were said to be 70%.

(iv) By comparison with other balanced funds operating in New Zealand, the asset allocation of the Fund was on the conservative side.

(v) If the Fund were weighted more in favour of growth assets, this would result in a small increase to expected long-term returns but with a higher risk of negative returns.

185. In summary, the feelings of mistrust of the Government and a track record of fiscal irresponsibility had led to a situation where the Government of the day needed to promote a scheme under which the Government could not "get its hands on the money" as it had done in the case of the Cook Islands Public Service contributors' contributions to the New Zealand scheme in the 1990s.

186. Nor do we see the lack of underwriting, as that term was defined by the Chief Justice, as constitutionally objectionable. As already noted, the World Bank Report states that it is usual in mandatory schemes for the employees to assume the investment risk. Realistically, if a scheme is to succeed without a Government guarantee, which many governments would not be in a position to give, the risk must ultimately be borne by members. If it is not borne by members and there is no reserve fund, and there does not appear to be one in the Fund, the combined balances in members' accounts may come to exceed total net assets if the Fund encounters unexpected market turbulence. In such circumstances a scheme has the potential to fail in times of financial crisis. To bring a scheme back into balance it is likely that in future years a portion of the income would be transferred to a reserve account. In such circumstances the future members would be funding past losses and not the Government. However, the decision as to whether present or future members are to bear investment losses is, in our view, a decision for a Government and not a court.

187. We therefore conclude that the Respondents have failed to meet their burden of proof by showing a clear and convincing case that the provision of a guarantee would have led to a less intrusive measure, and one more protective of the contributors. On the contrary, we consider that the provision of a "Government guarantee" might well have made the passage of the Act impossible.

The absence of entrenchment

188. We have noted the firm views expressed by some of the deponents and endorsed by the Chief Justice that it would have been desirable for the Act to

be entrenched. These views were expanded upon by the Respondents in their written submissions where it was said that "[t]his Court should give a broad and purposive interpretation to the Cook Islands Constitution, affirming and promoting the Article 41 requirement that legislation affecting individuals' rights in a constitutionally inappropriate way must be passed by a 'super majority' after a period of time that allows due deliberation and an opportunity for opposition to be voiced and alternatives to be proposed".[167]

189. It was further noted on behalf of the Respondents that their prime objective was to force the Government to accept the constitutional underpinnings of the Superannuation Scheme and to amend and entrench the Act so that it gave effect to the principle that it was the Government's national responsibility to care for its people with no social security and no means to provide for themselves in old age.[168]

190. We do not accept these contentions which the Respondents did not support in any way by reference to legal principle or decided cases. We consider that the concept of entrenchment is appropriately reserved for legislation creating the constitutional structure of a state, especially to preserve the specific rights and freedoms deemed by its Parliament to be sacrosanct. As the Privy Council said in *Attorney General of Trinidad and Tobago v McLeod*,[169] "[b]roadly speaking it is those provisions of the Constitution that deal with the institutional characteristics of Parliament … that are protected by entrenchment". Similarly, Professor Philip Joseph, the New Zealand public law scholar, has said:[170]

> For ascertaining legitimate subjects of entrenchment, lawyers draw a rudimentary distinction between constitutional process and contestable policy. The former may be legitimately the subject of constitutional entrenchment, the latter not. Entrenchment must serve a necessary constitutional purpose. Typical subjects of entrenchment include a country's primary electoral machinery, the separate functions of government, the independence of courts and a bill of rights. The object is to vouchsafe the constitutional system and protect it against ill-intended change […] Politically contestable policy – the subject of party-political debate – must be distinguished from subjects of entrenchment.

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167 Respondent's Final Appeal Submissions, (undated), at [19(h)].
168 Ibid, at [204].
169 *Attorney General of Trinidad and Tobago v McLeod* [1984] 1 WLR 522, at 528.
170 See, Philip Joseph "The Future of Electoral Law" in Caroline Morris et al *Reconstituting the Constitution* (Springer, New York, 2011), at 226-227).

191. The distinction between matters of constitutional structure and politically contestable policy perhaps explains why Article 41 of the Constitution is one of the few entrenched provisions within it.[171] Similarly, in New Zealand, s 268 of the Electoral Act 1993 (NZ) is the only constitutionally entrenched provision in the Statute Book. It safeguards the electoral machinery provisions of the Electoral Act 1993 (NZ).

192. It may be noted in passing that the concept of entrenchment of ordinary legislation is controversial in the United States. As stated by Roberts and Chermerinsky in "Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule":[172]

> One legislative majority should never be able to bind future legislative majorities by means of ordinary legislation. The well-established rule prohibiting legislative entrenchment, once described by Charles Black [in Charles L Black Jr *Amending the Constitution: A Letter to a Congressman* 82 Yale LJ 189, 191 (1972)] as an idea which is 'on the most familiar and fundamental principles, so obvious as rarely to be stated' should continue to be followed.
>
> […]
>
> The practical case against entrenchment may be summarized as follows, Good government requires that each legislature and each public majority reassess the need for new policies and the costs and benefits of each. No one can foresee the conditions that legislation, however wise or popular when enacted, will face in the future. Every legislative body should be free of binding restrictions on its freedom of action, and that principle is embodied in the settled legal rule that no legislature may bind its successors. We believe that the relatively minor costs of adhering to the rule are outweighed by its vast benefits.

193. The reference to the "rule that no legislature may bind its successors" is obviously a reference to the entrenchment of ordinary legislation, as opposed to constitutional safeguards such as Article 41 of the Cook Islands Constitution.

194. Despite the misgivings expressed by the Respondents about prior Government maladministration and the pace at which legislation in the Cook Islands can be amended or repealed, this Court considers that the Act is far removed from those types of legislation which are appropriately reserved for entrenchment. The Act more readily falls within the category of "politically

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171 See [28]-[30], above.

172 Roberts and Chermerinsky "Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule" 91 California Law Review 1773 (2003), at 1777.

contestable policy" which Professor Joseph considers, as do we, is not a legitimate subject of entrenchment.

195. Moreover, the question whether legislation should be entrenched is pre-eminently a matter for Parliament to consider. It is a radical notion that legislation of this kind should be the subject of entrenchment. It is even more radical to suggest that the absence of entrenchment amounts to an unconstitutional deprivation and thereby renders the Act inoperative. Indeed, this Court is unaware of any other precedent in the Commonwealth, or elsewhere, where a court has declared a statute to be unconstitutional because it has not been entrenched.

196. The Respondents in this Court seemed to be suggesting that what it called "the instabilities and distortions of [the] Cook Islands micro-state democracy" required the Court to adopt an unorthodox approach and hold that, unless the Act was entrenched, it would amount to an unconstitutional deprivation of property since subsequent inappropriate legislative or Governmental involvement might undermine the Scheme. We cannot accede to these submissions. To do so would be to introduce an unacceptable level of judicial involvement in political affairs, especially since, for all its economic trials and tribulations, the Cook Islands has been, since Independence, a stable law-abiding democracy.

197. It is also unclear to the Court what additional protection entrenchment would provide to contributors. The principal fear of the Respondents is that at some undetermined point in the future a Government might "get its hands on the money" just as it did in the mid-1990s when the certain Government accounts were "emptied" to use the words of Mr Olah in his affidavit.[173] The Respondents' fears need to be tempered with some reality.

198. Practically speaking, we consider that it would be very difficult for any Government to "get its hands on the money". Unlike the public accounts apparently accessed by the Government in the mid-1990s, the superannuation contributions not held under the Act are invested in assets (principally shares and bonds) by fund managers engaged by the Public Trust, based in New Zealand. The Fund's assets are also held by the Trust "in trust for the members and pensioners". The Trustee would be in breach of trust if it paid Fund assets over to the Government.

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173 Affidavit of Andrew Olah, at [66], Case on Appeal (Record of Case), Vol C Part 1 – Defendant's Affidavits, Tab 2, at 476.

199. Moreover, in the very unlikely event that Parliament passed legislation to amend the Scheme so as to acquire part of the Fund's assets, this would almost certainly amount to an actionable breach of Article 40(1) of the Constitution for which it would be required pay adequate compensation within a reasonable time and "give to any person claiming compensation a right of access for the determination of his interest in the property and the amount of compensation, to the High Court". An affected party in these circumstances could seek an expedited hearing for a declaration of invalidity. These Constitutional safeguards provide adequate protection to contributors without the Act being entrenched.

200. The final point made here is that entrenchment and its requirement of a super majority for any later amendment might in fact impede what the Government of the day regarded as beneficial amendments to the Act because it might be unable to secure the requisite majorities needed to alter any entrenched provisions.

201. For all of the above reasons, the Court does not consider that entrenchment of the Act would have produced a less intrusive deprivation. On the contrary, even if entrenchment would have been possible, a dubious proposition, it has not been demonstrated that it would have improved the position of the contributors. It is just as likely that it would have had a negative effect because entrenchment might have impeded the successful introduction of improvements to the legislation by making it impossible to achieve the voting majorities required by entrenchment.

The other complaints made about the Scheme

202. Whilst the lack of a "Government guarantee" and the lack of entrenchment were the primary complaints of the Respondents, the other concerns must be considered. They are "strands in the rope" rather than "links in the chain" to borrow from the normal analogy about circumstantial evidence. The individual strand might not be enough to bear the burden but the strands when woven together could be sufficient.

203. First, there is the complaint about the position of migrant workers. It is necessary to record the Respondents' submissions in this Court on this matter. It was as follows:[174]

> [W]hile the question of discrimination against foreign workers is not

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174 Respondent's Final Appeal Submissions, above n 167, at [6].

> abandoned or conceded, at first instance the Chief Justice made a helpful observation to the effect that if a finding of unconstitutionality with regard to the rights of contributors, generally, was found, it would be unnecessary for him to embark on the consideration of the discrimination. On this basis, the Respondents, before this Court, do not make any specific submissions regarding the question of discrimination. They are content to rest on the written submissions advanced at first instance and will not prepare argument on that question unless otherwise directed by the Court.

204. As noted earlier, migrant workers can uplift their contributions but if they do so, they lose those made by the employer. The Chief Justice remarked that it was recognised it would not be fair to lock the migrant workers into the scheme but it was by no means clear why they should lose their employer's contributions. The situation of migrant workers has to be seen in the light of the circumstances outlined in Mr Clarke's affidavit and elsewhere. The numbers of these workers have increased, particularly in the hospitality industry, because of the migration of Cook Islanders to New Zealand and Australia particularly from the outer islands. The rather anomalous position of migrant workers not being allowed to access the employer's contribution is one of the "strands in the rope".

205. A citizen, not a migrant worker leaving the Cook Islands, is not entitled to withdraw contributions which are locked in until the age of retirement. Whatever the Court may think of the fairness of such proposal it was well within the legislature's power to legislate on such matters of social policy. In this regard, we note that in *Pillai v Mudanayake* [1953] AC 514,[175] the Privy Council held that the alleged discrimination against immigrants, namely Indian Tamils, was intra vires the Ceylon Legislature because it was based upon not their nationality but on their migratory habits.

206. Nor do we find that, to quote this Court in *Clarke v Karika*, "the challenged provisions are discriminatory in a way which singles out persons for reasons not consonant with a legitimate and apparent legislative purpose".[176] As was said in *McGowan v Maryland*, quoted in *Clarke v Karika*, equal protection or non-discrimination clauses permit State legislatures:[177]

> … a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to

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175 Referred to in *Henry v Attorney-General*, above n 36, at 135-136.
176 *Clarke v Karika*, above n 37, at 746.
177 *McGowan v Maryland* 366 US 420 (1961), at 425.

the achievement of the State's purpose.

207. There is a legitimate purpose to the challenged provisions regarding migratory workers because they act as disincentive to people migrating and depopulating the Cook Islands. Accordingly, we conclude that this part of the Act is not inconsistent with Article 64(1)(b), namely the right of the individual to equality before the law and to the protection of the law. Even if there were an infringement of Article 64(1)(b), this conclusion would not justify striking down the Act as a whole became the beneficial objectives of the Act far outweigh the detriments to migrant workers.

208. A second complaint was that, unlike some other Pacific schemes, the Cook Islands Scheme did not allow members to access funds for any purpose prior to the entitlement to a benefit on retirement such as using the money for housing or education. Whilst these uses may be desirable, we do not think that the Scheme can be challenged because of the lack of such provisions. The legislature may well have thought that for the scheme to be viable, given the small population base and the limited earning power of most of the workers, it should have no ability to leech funds at an unpredictable rate.

209. The same can be said for the arguments that the Scheme is a struggle for poorer members of society and that members of existing schemes have lost the benefits because those existing schemes were collapsed into the statutory scheme. Again, in the words of the jurists quoted earlier, these are matters for the legislature in its wisdom, particularly when dealing with social or economic policies and it is not for this Court to "second guess" these. As the Chief Justice said, it is unrealistic to assume that people will save for their retirement particularly in a poor economy unless they are in effect made to do so.

Fourth Stage - whether a fair balance has been struck between the rights of the individual and the interests of the community

210. Turning to the fourth criterion, in the particular circumstances which prevailed at the time of the enactment of the Act, a fair balance has been struck between the rights of the individual and the interests of the Cook Islands community as a whole. The undoubted benefits of the Act are not disputed. The structure and mode of administration of the Scheme adequately safeguarded the interests of the contributors, as is shown by the track record of the Scheme over the last 14 years. The authorities show that the legislature is allowed a large margin of judgment in areas of social and economic policy, and in our view no sufficient case has been made out by the Respondents to

satisfy the burden which lies upon them to convincingly establish that the Act disproportionately intrudes upon the rights of the individuals in terms of Article 64(1)(c).

211. The Respondents submitted that the evidence showed that the Act was "rushed through in the face of objections from the Opposition and an assurance – never honoured – of further consideration and amendment as appropriate, to address outstanding concerns". It was said that there was no principled weighing of the constitutional rights of individuals at the time the legislation was conceived. We disagree with the Respondents' characterization, especially since while the debates may have not have been lengthy the legislation was preceded by an extensive period of consultation by the Taskforce and a process of drafting by experts from Australia and New Zealand. While the Opposition did express some reservations about the Act, the Court observes that when the Bill was read for a third time the Leader of the Opposition rose and stated that:[178]

> [W]hatever I might think of the Deputy Prime Minister I think the product before us is a good one. We join Government in extending congratulations to the Deputy Prime Minister and the Taskforce and those advisors that worked with them to bring this product to the House. I believe it can be improved on and I believe it is a Bill that needs some more amendment and a Bill that requires a whole lot more explaining. But we support entirely the principles and the merits of the Bill.

212. The Prime Minister then responded as follows:[179]

> I am just full of joy and gratitude Mr Speaker for the remarks made by the Leader of the Opposition. This shows our people that we in here are one and together in getting this Superannuation Scheme for them through successfully.

213. To use the words of Lord Sumption in *Bank Mellat*,[180] every case about constitutional validity turns on its own facts. Here, the particular circumstances of the Cook Islands lead us to conclude that any deprivation under Article 64(1)(c) was justified taking into account the significant benefits which flowed from the establishment of the Scheme. In addition, the Court considers that, both a "Government guarantee" in either the strict or liberal sense of that term and entrenchment were both accompanied by significant disadvantages. These disadvantages were not given sufficient

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178 Cook Islands Hansard (23 November 2000), at 851.
179 Ibid, at 852.
180 *Bank Mellat v Her Majesty's Treasury (No 2)*, above n 51, at [26].

weight by the Respondents or the Chief Justice.

214. For all of the foregoing reasons, the Court concludes that the Respondents have failed to meet their burden to establish a convincing case of an unconstitutional deprivation under Article 64(1)(c) or Article 64(1)(b).

Findings of the Court

215. For all of the foregoing reasons, the appeal is allowed and the judgment of the High Court is set aside. This Court finds and declares that the Act is not inconsistent with the rights of individuals not to be deprived of their property except in accordance with law under Article 64(1)(c) and not in breach of the equal protection processes of Article 64(1)(b). There will be a declaration that the Act is a valid enactment of the Parliament of the Cook Islands.

Concluding Comments – Suspended Declarations of Invalidity in Constitutional Cases

216. As noted earlier in this judgment,[181] the Chief Justice, following Canadian and New Zealand jurisprudence, indicated that, if and when he came to decide the question of remedies, he might consider it appropriate that any declaration of invalidity be suspended in order to allow Parliament to remedy the defects which he had identified. As matters stand as a result of this judgment, there is no need for the question of remedies to be revisited. But for future reference we should note that while the Canadian and New Zealand practice appears to be founded upon the same general power to issue and temporarily suspend declarations as exists under Cook Islands law[182] it is an altogether different question as to whether such a discretion should be exercised. The Court notes that the Canadian and New Zealand practice in this area may raise difficult questions of judicial policy. Our silence on the question of remedies is not to be taken as indicating that in any future constitutional case this approach would necessarily be found to be acceptable. It is certainly possible that such direct interaction with the Parliament might create more problems than it would solve.

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181 *The High Court Judgment*, above n 1, at [293]-[309].

182 See, s 10 of the Declaratory Judgments Act 1994 (general power of the Court to issue a declaration) and perhaps also s 50 of the Judicature Act 1980-1981 (power of the High Court to stay the execution of any judgment for such term as the Court thinks fit). See also, *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 and *Spencer v Attorney General* [2014] 2 NZLR 780.

Costs

217. The question of costs is reserved. However, the provisional view of the Court is that it is not appropriate to make any cost order.[183] While the Respondents have ultimately failed to establish the unconstitutionality of the Act, their arguments were not without merit and raised questions of general public importance. Indeed, the Court ventures to hope that the public ventilation of these issues might well lead the incoming Government to conduct, with the assistance of outside experts, a formal general review of the Act to ascertain whether there are presently any areas where amendments might be warranted.

218. If any application for costs is to be made, it must be filed within 21 days of the date of this judgment.

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183 This was the view of the Zimbabwe Supreme Court in *Nyambirai v National Social Security Authority*, above n 70, at 77, where a similar challenge to the comparable Zimbabwe legislation failed.

Dated this 17th day of November 2014 at Rarotonga

David A.R. Williams (President)

Sir Ian Barker (Justice of Appeal)

B.J. Paterson (Justice of Appeal)