Foreign State Immunity in Australia

The High Court of Australia has rejected Garuda's appeal against the finding that it was not immune from Australian jurisdiction as a "separate entity" of a foreign state, namely Indonesia. The case arose from a proceeding brought by the Australian competition regulator (the ACCC) over alleged price-fixing in the air freight market to and from Australia. Our earlier posts on the case are here and here.

The decision turned on the meaning of the "commercial transaction" exception to state immunity in s 11 of the Foreign States Immunities Act 1985 (Cth), which may be of interest to British readers given the similar (but not identical) wording of s 3 of the State Immunity Act 1978 (UK).

Garuda argued that it did not fall within the "commercial transaction" exception either because the proceedings were not brought against it by a party to the transaction seeking private law relief; or because the transaction (the alleged price-fixing) was not contractual in nature.

The High Court rejected those arguments. The joint judgment of French CJ, Gummow, Hayne and Crennan JJ held that:

> *"The definition of "commercial transaction" fixes upon entry and engagement by the foreign State. It does not have any limiting terms which would restrict the immunity conferred by s 9 and s 22 to a proceeding instituted against the foreign State by a party to the commercial transaction in question. Further, it should be emphasised that the definition does not require that the activity be of a nature which the common law of Australia would characterise as contractual. The arrangements and understandings into which the ACCC alleges Garuda entered were dealings of a commercial, trading and business character, respecting the conduct of commercial airline freight services to Australia. The definition of a "commercial transaction" is satisfied." [at [42]]*

Heydon J agreed, and emphasised that the individual contracts with air freight clients were sufficient to engage the "commercial transaction" exception. "If a

contract in contravention of [competition law] is capable of being a commercial transaction, non-contractual arrangements or understandings are capable of being "a commercial, trading … transaction … or a like activity"' within the meaning of s 11 [at [74].

P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission [2012] HCA 33 (7 September 2012)