State Immunity in Australia

A recent decision of the Full Court of the Federal Court of Australia considers an unusual area of private international law, namely the applicability of foreign state immunity to government-owned airlines in the context of civil proceedings for breach of competition laws. The case was brought by the Australian competition regulator against two airlines—Garuda Indonesia and Malaysian Airlines—in relation to a cartel for the fixing of air freight prices.

In Australia, the law of foreign state immunity is largely in statutory form by virtue of the *Foreign States Immunities Act 1985* (Cth). That act extends immunity in some circumstances to a 'separate entity' of foreign states, defined as being an agency or instrumentality of the foreign State which is not part of that State's executive government.

The Full Court considered that (contrary to the trial judge's ruling) Garuda was such an agency or instrumentality of Indonesia, but that (in accordance with the trial judge's ruling) Malaysian Airlines was
not such an agency or instrumentality of Malaysia. Nevertheless, because the conduct in question fell within the commercial transaction exception in s 11 of the Act, Garuda was not entitled to foreign state immunity.

Lander and Greenwood JJ considered that 'agency' and 'instrumentality' were two separate concepts. By contrast, Rares J declined to draw this distinction between the two terms. The joint judgment stated:

> *"We think the difference is in their constitution. An instrumentality is a body created by the State as an instrumentality for the purpose of performing a function for the State. … An instrumentality of the State cannot be created by an organ other than the State. A natural person or a corporation cannot create an instrumentality and certainly not an instrumentality of the State.*
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> *"An instrumentality is created by the State for the purpose of carrying out functions on behalf of the State and is not available to carry out any functions for any other State, person or corporation. …*
>
> *"An agency may have the same characteristics as an instrumentality, but not necessarily so. An agency of the State, in our opinion, does not necessarily have*

to have been created by the State itself. It may be, but need not be. … [at [36]-[39]]

This distinction had one important consequence for the test to determine whether an entity was the instrumentality or agency of a foreign state, namely that the question of ownership and control was in their Honours' opinion less important than the trial judge may have assumed:

"Ownership cannot be determinative of the question whether a person or corporation is an agency or instrumentality of a foreign State. A natural person will not have an owner. Australian law does not countenance ownership of a person. An instrumentality will usually be created by legislation. It may have "an owner". In many cases it will not have "an owner" but will simply be a creation of statute. An agency may or may not be owned by the State. If it is then it is more likely to be found to be an agency of the State. But if it is not owned by the State that is not determinative of the question whether the person or corporation is an agency of the State. The agency might exist as a result of a contractual relationship between the State and the person or corporation. It follows that ownership cannot be the sole criteria in determining whether a natural person or a corporation is an agency or instrumentality of a foreign State. …

"Like Rares J, we do not, with respect, agree with the primary judge that the test whether a natural person or a corporation of the kind referred to in the definition is to be determined by reference to whether the foreign State has the day-to-day management control of the agency or instrumentality. We think, as we have said, such a holding is inconsistent with s 3(2), which contemplates that a separate entity may be the agency of more than one foreign State and, indeed, numerous foreign States, not all of which presumably would have the actual day-to-day control of that foreign entity.

"Ownership and control will be important in determining whether a natural person or a corporation is an agency or instrumentality of a foreign State. However neither, in our opinion, can be determinative factors. [at [44], [46]-[47]]

Rares J reached the same conclusion, but without the need to distinguish between

‘agencies’ and ‘instrumentalities’, since both connoted a ‘means to achieve some purpose or end of [the foreign] State’. For that reason,

> *“the primary judge erred in construing the definition of “separate entity” as containing requirements that the foreign State own and control a corporation to the point where it exerted a real or tangible level of day-to-day management control over it. Those requirements are not contained in express or implied terms in the Act. They are not necessary to give the Act effect. They are inconsistent with the express provision that an individual, who cannot be owned, can be a separate entity. They assimilate the position of a corporation to an organ of the foreign State, contrary to the exclusion of such a body in the express words of the definition. …*
>
> *“The correct approach is to consider, on the whole of the evidence, whether the person is acting for, or being used by, the foreign State as its means to achieve some purpose or end of that State in the relevant circumstances.” [at [124], [128]]*

Significantly, the Court held that a dealing did not cease to be a ‘commercial transaction’ simply because it was unlawful. This was relevant because the ‘transaction’ in question was the formation of an anti-competitive cartel. As the joint judgment remarked:

> *“It would be curious if the effect of s 11 is to except from the general claim for immunity a lawful transaction for the provisions of services but provides an immunity for a contract, arrangement or understanding which is unlawful” [at [63]]*

Or, as Rares J expanded:

> *“The exception provided in s 11(1) is not for a commercial transaction, as that expression is defined in s 11(3). Rather, the subject-matter of the exception from immunity is the proceeding “in so far as [it] … concerns a commercial transaction”. The airlines were carrying on business, offering for sale and selling air freight services. The proceedings concerned the allegation that the cartel conduct was an activity that affected the ordinary market price setting mechanisms. That allegation concerned what was inherently an activity of a*

commercial, trading or business kind." [at [205]]

PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2011] FCAFC 52 (19 April 2011)