

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)