Endnotes

1. See *Forrest* [2012] HCA 39 at [12] where the plurality identified seven important common features of the agreements. See also Heydon J at [87] – [88].
2. *Forrest* [2012] HCA 39 at [18] and [28].
3. *Forrest* [2012] HCA 39 at [20].
4. *Forrest* [2012] HCA 39 at [23].
5. *Forrest* [2012] HCA 39 at [21].
6. *Forrest* [2012] HCA 39 at [22]; compare Heydon J at [95].
7. *Forrest* [2012] HCA 39 at [25]; see also at [27] and [70].
8. *Forrest* [2012] HCA 39 at [24] and [26].
9. *Forrest* [2012] HCA 39 at [33].
10. *Forrest* [2012] HCA 39 at [36]. See also Heydon J at [105].
11. *Forrest* [2012] HCA 39 at [37].
12. *Forrest* [2012] HCA 39 at [39]. However, see also Keane CJ's postulation on the 'curiosity' of ASIC's omission to lead evidence in this regard: (2001) 190 FCR 364 at [201].
13. *Forrest* [2012] HCA 39 at [58]; compare Heydon J at [90]-[91].
14. *Forrest* [2012] HCA 39 at [40]; ASIC conceded at trial that the parties intended the agreements to be legally binding (see at [40]).
15. ASIC disclaimed any special reliance on the use of the word 'binding'; see *Forrest* [2012] HCA 39 at [41].
16. *Forrest* [2012] HCA 39 at [50].
17. *Forrest* [2012] HCA 39 at [94].
18. *Forrest* [2012] HCA 39 at [96] – [101].
19. *Forrest* [2012] HCA 39 at [104].
20. *Forrest* [2012] HCA 39 at [105].

Restrictive immunity

Natalie Zerial reports on *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission* [2012] HCA 33

In accordance with the conventional doctrine of foreign state immunity, domestic governments have long granted immunity to foreign states from domestic court proceedings.[1] There are several historical rationales for the doctrine, most notably the principle of respect for the equality of foreign sovereigns. However, as states began increasingly to engage in transnational commercial activities, the restrictive theory of immunity was developed. Under this approach, the immunity does not extend to cases concerning a foreign state's commercial (rather than governmental) activities.[2]

It is not always clear where or how to draw the line between 'commercial' and 'governmental' activities. In its 1984 *Report on Foreign State Immunity*, the Australian Law Reform Commission observed that arguments in favour of restrictive immunity 'do not point to a single distinction between immune and non-immune cases as appropriate or necessary, whether it is a distinction between 'private' and 'public' law, or between 'commercial' and 'governmental' transactions.'[3]

The line between 'public' and 'private' law in this context was explored in *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission*[4]. The issue in the case was whether the commercial transactions exception to foreign state immunity applied to proceedings brought by a governmental regulator seeking the imposition of civil penalties for the alleged breach an Australian statute prohibiting anti-competitive conduct affecting Australian markets. The appellant (Garuda) argued that the proceedings fell outside of the commercial transactions exception on the basis that they were public proceedings that were not seeking to vindicate any private right. The High Court rejected this argument, and indicated scepticism of the public / private law distinction on which Garuda's submissions relied.

It is not always clear where or how to draw the line between 'commercial' and 'governmental' activities.

Background

Garuda is 95.5 per cent owned by the Indonesian Government. The remaining 4.5 per cent is held by government-controlled corporations and, at the relevant times, four out of five members of Garuda's board were senior officials of the Indonesian Government.

In its Statement of Claim dated 2 September 2009,

the ACCC claimed that Garuda had breached the *Trade Practices Act 1974* (Cth) (TPA) by entering into anti-competitive arrangements or understandings with other international airlines to impose surcharges on commercial freight services to Australia (TPA, sub-s 45(2)(a)(ii)), as well as giving effect to those arrangements or understandings (TPA, sub-s 45(2)(b)(ii). The ACCC sought injunctive, declaratory and civil penalty relief.

The issue in the case was whether the commercial transactions exception to foreign state immunity applied to proceedings brought by a governmental regulator seeking the imposition of civil penalties for the alleged breach an Australian statute prohibiting anti-competitive conduct affecting Australian markets.

Garuda sought to have the proceedings set aside on the basis that it was entitled to immunity from the proceedings under the *Foreign State Immunities Act 1985* (Cth) (Act). Garuda's motion was dismissed at first instance by Jacobson J, who held that Garuda was not a 'separate entity' under the Act and thus not entitled to assert immunity.[5] Garuda's appeal to the full court was dismissed by Lander, Greenwood and Rares JJ, who held that Garuda was a separate entity, but that the proceedings fell within the commercial transaction exception to foreign state immunity.[6] Garuda applied for, and was granted, special leave to appeal to the High Court.[7]

Legal framework

Section 9 of the Act provides that '[e]xcept as provided by or under this Act, a foreign state is immune from the jurisdiction of the courts of Australia in a proceeding.' Although Garuda was not a 'foreign state', by the time the proceedings reached the High Court it was no longer disputed that Garuda was a 'separate entity' of Indonesia, and thus entitled to assert immunity under s 9 by virtue of s 22 of the Act.

Thus, the arguments before the High Court were limited to the application of the commercial transaction exception to immunity in s 11 of the Act. Sub-s 11(1) provides that a foreign state (including a separate entity) 'is not immune in a proceeding in so far as the proceeding concerns a commercial transaction'. Sub-s 11(3) defines 'commercial transaction':

> (3) In this section, commercial transaction means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:
>
> (a) a contract for the supply of goods or services;
>
> (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
>
> (c) a guarantee or indemnity in respect of a financial obligation;
>
> but does not include a contract of employment or a bill of exchange.

Judgment

Garuda submitted that the proceedings did not concern a commercial transaction, because the arrangements or understandings were not contractual, and the case did not involve any person seeking to vindicate a private law right in relation to provision of the freight services. The High Court unanimously rejected this submission in a joint judgment of French CJ, Gummow, Hayne and Crennan JJ and in a separate judgment of Heydon J.

The joint judgment held that the broad terms of the chapeau of sub-s 11(3) were, on their own terms, not limited by the subsequent paragraphs (a) to (c). Their honours were unconvinced by Garuda's argument that the proceedings did not 'concern' a commercial transaction because the proceeding did not seek to vindicate a private law right arising from an underlying contract. Their honours stated that '[t]his postulated dichotomy between private and public law as controlling the meaning of 'concerned' in s 11(1) should not be accepted,'[8]and held that the broad definition in s 11(3) does not require that a commercial transaction be an activity of a contractual nature.

Justice Heydon differed from the joint judgment in that he found that the proceedings involved a 'contract for the supply of goods or services' under s 11(3)(a) of the Act. The proceedings involved such a contract in the form of the individual air freight services contracts giving effect to the anti-competitive arrangements.

These contracts were not merely the 'subject matter' or 'factual background' but rather 'an element of a claim made in the relevant proceedings'. The proceedings also fell within the scope of s 11(3) more generally, as even transactions that are in restraint of trade can constitute commercial or trading transactions.

Garuda's private–public distinction suffered a final blow from Heydon J, who stated that 'there is nothing in s 11 or in any other provision of the Act to support the distinctions the appellant sought to draw between public and private rights, between proceedings brought by a regulator and proceedings brought by beneficial objects of the regulating legislation, and between specific statutory norms and general law norms.'[9]

Endnotes

1. Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at xv.
2. D. Gaukrodger, (2010), 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, 2010/2, OECD Publishing.
3. At xv.
4. [2012] HCA 33
5. *Australian Competition and Consumer Commission (ACCC) v PT Garuda Indonesia Limited* (2010) 269 ALR 98; [2010] FCA 551.
6. *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission (ACCC)* (2011) 192 FCR 393; (2011) 277 ALR 67; (2011) 83 ACSR 35; [2011] FCAFC 52.
7. *PT Garuda Indonesia Limited v Australian Competition & Consumer Commission* [2011] HCATrans 280.
8. Judgment at [41] per French CJ, Gummow, Hayne and Crennan JJ.
9. Judgment at [68] per Heydon J.

Security assessments and the granting of protection visas

Amy Munro reports on *Plaintiff M47/2012 v Director General of Security & Ors* [2012] HCA 46

In *Plaintiff M47/2012 v Director General of Security & Ors*,[1] the High Court of Australia had cause to consider Clause 866.225 of Schedule 2 to the *Migration Regulations 1994* (Cth), which requires the minister for immigration and citizenship (minister) to refuse to grant a protection visa to a refugee if that refugee has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (Public Interest Criterion 4002). A majority of the court held that Public Interest Criterion 4002 was invalid.

The facts

The plaintiff is a national of Sri Lanka. At about 11.10pm on 29 December 2009, he arrived on Christmas Island on a special purpose visa. His visa expired at midnight. Since this time, the plaintiff has been an unlawful non-citizen within the meaning of s 14 of the *Migration Act 1958* (Cth) (Migration Act) and been held in immigration detention pursuant to ss 189 and 196 of that Act.

On 25 June 2010, the plaintiff applied for a protection visa under s 36 of the Migration Act. A delegate of the minster concluded that the plaintiff had a well-founded fear of persecution. As such, the plaintiff was found to be a refugee within the meaning ofthe Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (Refugees Convention).

Despite the finding that the plaintiff was a refugee, on 18 February 2011, the delegate refused the plaintiff's application for a protection visa. The reason for the refusal was an adverse security assessment by ASIO, which meant that the plaintiff did not meet Public Interest Criterion 4002.

The Australian Government does not intend to remove the plaintiff to Sri Lanka and there is presently no other country to which he can be sent.

The questions in the special case

The plaintiff commenced proceedings in the original jurisdiction of the High Court. He challenged the validity of his security assessment and the lawfulness of his detention. On 6 June 2012, Hayne J directed that a special case filed by the parties be set down for hearing by a full court on 18 June 2012. His Honour reserved the following four questions for the court:

1. In furnishing the adverse security assessment, did the director general of security fail to comply with