HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

GREYLAG GOOSE LEASING 1410 DESIGNATED ACTIVITY COMPANY
First Appellant

GREYLAG GOOSE LEASING 1446 DESIGNATED ACTIVITY COMPANY
Second Appellant

and

P.T. GARUDA INDONESIA LTD
Respondent

APPELLANTS' SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. Does s 14(3)(a) of the *Foreign States Immunities Act 1985* (Cth) (**FSIA**) apply to a proceeding in so far as the proceeding concerns the winding up of a body corporate that is a separate entity of a foreign State?

PART III: NOTICE OF CONSTITUTIONAL MATTER

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: DECISIONS OF THE COURTS BELOW

4. The decision of the Court of Appeal of the Supreme Court of New South Wales is not yet reported in the New South Wales Law Reports, though it has been selected for reporting; its unauthorised report citation and medium neutral citation is *Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd* [2023] NSWCA 134; (2023) 410 ALR 371 (**CA**). The decision of the primary judge is not reported; its medium neutral citation is *Designated Activity Company v P.T. Garuda Indonesia Ltd* [2022] NSWSC 1623 (**PJ**).

PART V: MATERIAL FACTS

5. The Appellants are companies incorporated in Ireland. They lease aircraft to the Respondent, the national airline of Indonesia and a foreign company registered under the *Corporations Act 2001* (Cth): **CA [1]–[2] (CAB 33)**.

6. On 15 August 2022, the Appellants applied for orders that the Respondent be wound up on the basis that it is unable to pay its debts or otherwise that it is just and equitable to do so: **CA [5] (CAB 34)**. The alleged unpaid debts, which motivated the winding up application, relate to the lease of aircraft and were the subject of demands under s 585(a) of the *Corporations Act*. They are alleged to exceed US$417 million.

7. On 22 September 2022, the Respondent filed a notice of motion seeking a declaration that the Supreme Court of NSW had no jurisdiction over it by reason of s 9 of the FSIA and an order setting aside the originating process. The Appellants resisted the Respondent's application, invoking the exception to immunity in s 14(3)(a) of the FSIA.

8. Within Pt II of the FSIA, s 9 provides: "Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding".

9. Within the same Part of the FSIA, s 22 provides: "The preceding provisions of this Part (other than subparagraph 11(2)(a)(i), paragraph 16(1)(a) and subsection 17(3)) apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State".

10. The combined effect of ss 9 and 22 of the FSIA is that, except as provided by or under the FSIA, immunity from jurisdiction in s 9 extends to a "separate entity" of a foreign State. It is common ground that the Respondent is a "separate entity" of a foreign State within the meaning of that term in s 3(1) of the FSIA: **CA [2] (CAB 33)**.

11. Section 14 of the FSIA provides (emphasis added):

> (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns:
>
> (a) an interest of the State in, or the possession or use by the State of, immovable property in Australia; or

(b) an obligation of the State that arises out of its interest in, or its possession or use of, property of that kind.

(2) A foreign State is not immune in a proceeding in so far as the proceeding concerns an interest of the State in property that arose by way of gift made in Australia or by succession.

(3) A foreign State is not immune in a proceeding in so far as ***the proceeding concerns***:

(a) ***bankruptcy, insolvency or the winding up of a body corporate***; or

(b) the administration of a trust, of the estate of a deceased person or of the estate of a person of unsound mind.

12. Read on its terms, s 14(3)(a) displaces any immunity in the proceeding instituted by the Appellants to wind up the Respondent. The Respondent is a body corporate: **PJ [12] (CAB 9)**. The application in the Supreme Court of NSW is plainly a proceeding concerning insolvency or the winding up of a body corporate.

13. Yet the primary judge and the Court of Appeal concluded that s 14(3)(a) did not apply: **PJ [17], [22]–[26] (CAB 10, 11–12)**; **CA [13], [44], [74]–[76], [79], [80] (CAB 37, 46, 55–56)**. In reasoning with which the Court of Appeal agreed, the primary judge held that the body corporate in s 14(3)(a) "is not the object of the immunity but someone different, namely the body corporate the winding up of which the proceedings concern": **PJ [22] (CAB 11); CA [9], [13]** (**CAB 35, 37**). The Court of Appeal held that s 14(3) is concerned with judicial proceedings involving questions of property: **CA [38] (CAB 44**). It concluded that s 14(3)(a) only applies to proceedings concerning insolvency or winding up of ***another*** body corporate in which a foreign State or separate entity has or claims an interest in property with which the relevant proceeding is concerned: **CA [38]–[40], [64]–[72]** (**CAB 44–45, 52–55**). For the reasons below, the construction adopted by the primary judge and the Court of Appeal is wrong.

PART VI: ARGUMENT

Plain and clear language of s 14(3)(a) in the context of the FSIA as a whole

14. Section 14(3)(a) of the FSIA says that a foreign State is not immune in a proceeding "in so far as the proceeding concerns … bankruptcy, insolvency or the winding up of a body

corporate". A proceeding in which a creditor seeks to wind up a body corporate on the ground of insolvency is without doubt a proceeding that concerns insolvency or the winding up of a body corporate. That remains so whether or not the body corporate happens also to be a separate entity of a foreign State. That is how the section simply applies on its terms. Six other matters relating to the text of s 14(3)(a) read in the context of the FSIA as a whole bear mention.

15. *First*, nothing in s 14(3)(a) limits the exception to proceedings in which a foreign State claims an interest in property or where the body corporate being wound up is an entity other than a separate entity of a foreign State. However, the Court of Appeal and the primary judge construed s 14(3)(a) in such a manner and, in doing so, adopted a construction that flies in the face of the plain and clear language of the provision.

16. For the construction below to be sustained, the following words need to be added to s 14(3):

> (3) A foreign State is not immune in a proceeding in so far as the proceeding concerns an interest of the State in property the subject of:
>
> (a) bankruptcy, insolvency or the winding up of a body corporate other than a separate entity of a foreign State …

17. There is no warrant to make such a radical alteration to the terms of s 14(3)(a). As developed further below at [42]–[45], applying s 14(3)(a) on its terms does not lead to a result that is absurd or unreasonable. To the contrary, as explained below at [33]–[35] applying s 14(3)(a) on its terms furthers its purpose. In any event, to imply the words above into s 14(3)(a) would involve inserting words that are "too big, or too much at variance with the language in fact used by the legislature".[1]

18. *Secondly*, a limitation of s 14(3)(a) of the kind adopted by the Courts below is denied by the context supplied by s 14(1) and (2). The significance of that context is the ***difference*** in the language used in those subsections from that used in subs (3).

19. In short, where the legislature wished to limit exempt proceedings to those concerning an interest of a foreign State in property, it said so explicitly in s 14(1) and (2). As observed

[1] *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [38] (French CJ, Crennan and Bell JJ).

by the Court of Appeal, the express focus of those subsections is the interest of a foreign State in property: **CA [39], [72] (CAB 44, 55)**. Those subsections refer to a proceeding concerning "an interest of the State in" certain types of property.

20. While the proceedings referred to in subs (3) ***may*** relate to property (such as the property of a corporation being wound up or the estate of a bankrupt), subs (3) is not limited to proceedings concerning an interest of the foreign State in property the subject of the types of proceedings listed in paras (a) and (b). That is, subs (3) is not limited to proceedings in which a foreign State has or claims an interest in property that falls to be administered in an Australian court in the winding up of a body corporate, or the administration of an individual's or body corporate's affairs. If Parliament's intention was that the subject matter of subs (3) was related to — and should be construed by reference to — that of subss (1) and (2), it could have used the same language in subs (3) as was used in subss (1) and (2). Indeed, it is striking that the very words the construction below demands be read into subs (3) are the words used in subss (1) and (2) but not used in subs (3).

21. *Thirdly*, and similarly, where the legislature wished to limit the types of bodies corporate to which a provision of the FSIA applied, it said so.

22. Thus, s 3(1) defines a separate entity in relation to a foreign State as relevantly "a body corporate or corporation sole (***other than a body corporate or corporation sole that has been established by or under a law of Australia***)" (emphasis added). Section 14(3)(a) does not use the same device to limit the bodies corporate mentioned to those "(other than a body corporate that is a separate entity of a foreign State)". If Parliament's intention was that subs (3) was so limited, it could have used that device.

23. Likewise, s 16(1)(a) exempts a foreign State, or a separate entity of a foreign State, from immunity in proceedings concerning its membership, or a right or obligation that relates to its membership, of a body corporate that "(a) has a member ***that is not a foreign State or the Commonwealth***" (emphasis added) and "(b) is incorporated or has been established under the law of Australia or is controlled from, or has its principal place of business in, Australia". If Parliament's intention was to limit subs (3) in the manner construed by the Courts below, Parliament could have used a similar form of words to exclude separate entities from the "body corporate" referred to in s 14(3)(a) – for example, a body corporate that "is not a separate entity of a foreign State". It did not.

24. *Fourthly*, nothing suggests that the indefinite article "a" before "body corporate" should be read in a way that limits the breadth of that term. The use of the indefinite article means that the phrase "a body corporate" encompasses "any body corporate".

25. Contrary to the last sentence of **PJ [23] (CAB 11)** — with which the Court of Appeal also agreed (**CA [13] (CAB 37)**) — it is not the case that the use of the definite article would have given more force to the Appellants' case. The use of the definite article — "the body corporate" — would have indicated that the thing being referred to — a body corporate — had already been identified in s 14(3) expressly or by implication.[2] This would have rendered s 14(3)(a) confusing in circumstances where no other "body corporate" is expressly referred to in s 14(3) and, on any view, the body corporate referred to in s 14(3)(a) may be, but need not be, a separate entity of a foreign State.

26. Also contrary to the first sentence of **PJ [23] (CAB 11)** — with which the Court of Appeal also agreed (**CA [13] (CAB 37)**) — there is no oddity in the legislature's reference to the same person in two different ways, for the reference in the chapeau is broader: it is to any foreign State or (by application of s 22) separate entity, which includes but is not limited to bodies corporate. That likewise explains the use of the indefinite article.

27. *Fifthly*, s 14(3)(a) applies to proceedings in so far as they concern "insolvency". Nothing in s 14(3)(a) indicates that proceedings concerning insolvency cannot concern the insolvency of a separate entity. Indeed, that requires yet more words to be read into the provision:

> (3) A foreign State is not immune in a proceeding in so far as the proceeding concerns an interest of the State in property the subject of:
>
> (a) bankruptcy other than of a separate entity of a foreign State, insolvency other than of a separate entity of a foreign State or the winding up of a body corporate other than a separate entity of a foreign State …

28. *Sixthly*, contrary to **PJ [22] (CAB 11)**, it is mere assertion that the words of the chapeau to s 14(3) refer to the object of the immunity whereas the body corporate referred to in

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[2] See *Tamas v Victorian Civil and Administrative Tribunal* (2003) 9 VR 154 at [8]–[9] (Callaway JA; Ormiston JA agreeing), [44] (Eames JA; Ormiston JA agreeing); *Central Queensland Services Pty Ltd v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 154 at [31]–[32] (Tracey and Reeves JJ).

s 14(3)(a) is someone different. The text of s 14(3)(a) suggests otherwise, as does the text of s 14(3)(b). The "deceased person" or the "person of unsound mind" could, for example, be a natural person who is a separate entity of a foreign State. If a third party instituted proceedings concerning the estate of that deceased person or the estate of that person of unsound mind, the object of the immunity (the separate entity) would be the same as the thing referred to in the exception to the immunity.

29. In sum, contrary to the primary judge's observation at **PJ [24] (CAB 11)** — with which the Court of Appeal agreed (**CA [13] (CAB 37)**) — the legislature ***did*** make its intention clear: the words of s 14(3)(a), read in the context of the FSIA as a whole, are plain and they are the surest guide to legislative intention.[3]

Broader context and purpose

30. Apart from the contextual matters referred to above at [18]–[23] and [28], the other provisions of the FSIA do not otherwise shed much light on how to construe s 14(3)(a). One reason for this may be because the exceptions to immunity from jurisdiction should be read "disjunctively", unless otherwise stated.[4] As this Court observed in *Firebird Global Master Fund II Ltd v Republic of Nauru*,[5] the exceptions overlap. Related to this, the potential for redundancy has little if any significance and it is immaterial whether any other exception — for instance that concerning commercial transactions in s 11 — might ***also*** apply to a case.

31. As to the purpose of the FSIA, it is to clarify the principles applicable in Australia to foreign State immunity, in circumstances where the common law had developed from an "absolute immunity" approach[6] to a "restrictive immunity" approach.[7] The "restrictive

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3 "The language which has actually been employed in the text of legislation is the surest guide to legislative intention": *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).

4 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) (**ALRC Report**) at [88]. See also *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission* (2011) 192 FCR 393 at [213] (Rares J; Lander and Greenwood JJ agreeing).

5 (2015) 258 CLR 31 at [62]–[63] (French CJ and Kiefel J; Gageler J agreeing at [131]).

6 The "absolute immunity" approach was that courts had "no jurisdiction to entertain an action or other proceeding against a foreign State or the head of government or any department of the government of a foreign State" or against the property of those entities: *Firebird* (2015) 258 CLR 31 at [167] (Nettle and Gordon JJ). See also ALRC Report at [10] (citing *The Cristina* [1938] AC 485 at 490).

7 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at [7]–[8], [11] (French CJ, Gummow, Hayne and Crennan JJ); *Firebird* (2015) 258 CLR 31 at [174] (Nettle and

immunity" approach involves an underlying rule of immunity plus enumerated exceptions.[8] This is evident from the structure of the FSIA, and the Explanatory Memorandum and Second Reading Speech.[9] Part II concerning immunity from jurisdiction begins with a general rule of immunity (s 9) followed by enumerated exceptions. The purpose of these enumerated exceptions is to "significantly restrict[ ] the immunities of foreign states".[10]

32. In understanding the exceptions to immunity in Pt II, it is important to bear in mind that "no simple or single criterion dictate[s] a regime of restrictive immunity".[11] The exceptions to immunity from jurisdiction, which give effect to the restrictive approach to immunity, are enumerated by balancing considerations in favour of local jurisdiction or in favour of immunity from that jurisdiction.[12] This indicates that each exception should be construed according to its terms, not by second-guessing what the drafter may have intended by reference to other matters and general trends in foreign legislation at the time.[13]

33. A key policy reason for restrictive immunity is that "commercial or trading activities conducted by or on behalf of foreign governments should not attract the special jurisdictional immunity enjoyed by foreign States".[14] This is because it is in the interests of justice for individuals engaging in such activities with foreign governments to bring

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Gordon JJ); *Zhang v Zemin* (2010) 79 NSWLR 513 at [149] (Spigelman CJ; Allsop P and McClellan CJ at CL agreeing).

8 Explanatory Memorandum to the Foreign States Immunities Bill 1985 (Cth) at 8; Richard Garnett, "Should Foreign State Immunity Be Abolished?" (1999) 20 *Australian Yearbook of International Law* 175 at 176 ("restrictive immunity" meant "that jurisdiction may sometimes be permissible"), 185 ("under the doctrine of restrictive immunity as applied in most common law states, there is a presumption of immunity that may only be displaced where one of the express exceptions is satisfied").

9 Explanatory Memorandum to the Foreign States Immunities Bill 1985 (Cth) at 2, 8; Second Reading Speech for the Foreign States Immunities Bill 1985 (Cth) Hansard, House of Representatives, 21 August 1985 (**Second Reading Speech**) at 141.

10 ALRC Report at xvi.

11 ALRC Report at [58]; see also *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 at 260C-D, 260H; *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393 at [213] (Rares J; Lander and Greenwood JJ agreeing).

12 ALRC Report at [52], [58], [65]; *Firebird* (2015) 258 CLR 31 at [217] (Nettle and Gordon JJ, stating "the restrictive doctrine of immunity from jurisdiction reflects a plurality of principles embodied in the general exception to immunity concerning commercial transactions and the specific exceptions to immunity provided for in ss 12–17").

13 See also *Wilson v Anderson* (2002) 213 CLR 401 at [8] (Gleeson CJ).

14 Second Reading Speech at 141; *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 at 262D-E.

their claims concerning those activities before the courts.[15] To require a foreign State to answer a claim based on those activities, including transactions related to those activities, "does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state".[16] Parliament contemplated that this consideration against immunity would also generally apply in claims brought against separate entities of foreign States.[17] That policy is reflected in s 11 but not exclusively so.[18]

34. The plain text of s 14(3)(a) is more consistent with this consideration than the view in the Courts below. The overwhelmingly likely circumstance for the operation of s 14(3)(a) in relation to a separate entity of a foreign State is a winding up or insolvency arising from commercial or trading activities of the separate entity. That is because the reason for registration of such a separate entity under the *Corporations Act*, and hence its amenability to winding up in Australia, is the general requirement that a "foreign company" not carry on business in Australia unless it is registered under the *Corporations Act*: see s 601CD.

35. The contrary view of the Courts below means that s 14(3)(a) is inapplicable in the obvious example of the winding up of a body corporate for being unable to pay its commercial debts, simply because it is a separate entity of a foreign State. This view has the extraordinary consequence that a body corporate that is a separate entity of a foreign State can continue to trade while insolvent in Australia, without any ability of its unpaid creditors to insist upon its winding up. The Court of Appeal's decision thus puts creditors, including Australian creditors, at a serious disadvantage in their dealings with separate entities of foreign States. It is not apparent why creditors should be deprived of the tools available to any other creditor because their debtor happens to be a foreign company registered in Australia that is also a separate entity of a foreign State.

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[15] *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 at 262D.

[16] *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 at 262E.

[17] Explanatory Memorandum to the Foreign States Immunities Bill 1985 (Cth) at 15–16; Second Reading Speech at 142; *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393 at [113], [120] (Rares J; Lander and Greenwood JJ agreeing).

[18] ALRC Report at [88].

Extrinsic material

36. The Court of Appeal's view that s 14(3)(a) is directed towards a circumstance where a foreign State has or claims an interest in property that is being administered by an Australian court in the winding up and administration of the affairs of an individual or corporation was based heavily upon extrinsic material. To ascertain the limited view of s 14(3)(a) which it preferred, the Court of Appeal looked to the Explanatory Memorandum and the Second Reading Speech, which then directed attention to the more than 100-page ALRC Report: **CA [19]–[21], [43]–[44] (CAB 39, 46**). For the reasons below, the Court of Appeal's extensive journey through extrinsic materials did not support the conclusion to which it came.

37. The text of the ALRC Report must be parsed carefully in order to identify the discrete parts of the report that the Court of Appeal considered relevant as well as other sources relied on by the ALRC — namely, commentary of the International Law Commission on a draft treaty provision that does not resemble s 14(3)(a) of the FSIA and provisions of foreign legislation that do not resemble s 14(3)(a): **CA [62], [64]–[72] (CAB 51, 52–55)**. The **schedule** to these submissions contains the draft treaty provisions and foreign legislation to which the Court of Appeal and the ALRC referred. The differences in the language of that legislation to that used in s 14(3)(a) are readily apparent.

38. In addition, the Court of Appeal's approach requires conclusions to be drawn from what the ALRC Report does ***not*** say: **CA [74]–[76] (CAB 55–56)**. No one reading the FSIA should be expected to review the ins and outs of the ALRC Report and be savvy enough to discern the significance of what is not said in order to construe s 14(3)(a). In circumstances where the FSIA does not, on its terms, limit the application of s 14(3)(a) to proceedings involving the winding up of a body corporate other than a separate entity of a foreign State, the construction of that provision should not be dictated by a meander through extensive extrinsic material.

39. In any event, whatever the ALRC may have intended — as to which see **CA [40], [71]–[72] (CAB 45, 54–55)** — the language it proposed in s 14(3)(a) that was adopted by Parliament was different to that used in the foreign legislation to which it referred. It was on its terms not directed to the "same functional end" as that foreign legislation: cf **CA [68]–[72] (CAB 54–55)**. It is trite that the construction of legislation is governed

by what the words ***mean***, not what the drafter or law reform commissioner ***meant***.[19] Indeed, the very fact that the words used in s 14(3)(a) are ***different*** from those found in the foreign legislation surveyed by the Court of Appeal points to a conclusion that s 14(3)(a) has a ***different*** meaning.

40. So much is supported by the consideration of s 14 of the FSIA Act by Hayne J sitting in the Supreme Court of Victoria in *Adeang v The Nauru Phosphate Royalties Trust*.[20] That case concerned the administration of a trust. The defendant trustee claimed to be entitled to immunity on the basis that it was a separate entity of a foreign State, namely the Republic of Nauru. In the face of the plaintiff's reliance upon the exception to immunity in s 14(3)(b), the trustee asserted — by reference to the ALRC Report — that it was intended to have only the kind of limited operation favoured by the Court of Appeal in this case: that it applies only to the administration of a trust within the jurisdiction of the Court in which a foreign State or separate entity claims an interest, not one where the foreign State or separate entity is the trustee. Hayne J rejected this argument, saying:[21]

> Reference to the Law Reform Commission Report mentioned in the second reading speech as being the genesis of this legislation may lend some support to this view of the intention underlying its enactment. However, ***in my view the section should be given effect according to its terms, and nothing in its terms suggests any limitation of the kind for which the defendant now contends***. [emphasis added]

41. It may be accepted that it was not necessary for his Honour to reach a concluded view on this point, as his Honour stayed the proceeding on *forum non conveniens* grounds. But his Honour's reasons support the criticism the Appellants make of the Court of Appeal's reliance upon extrinsic material in place of the plain terms of s 14(3)(a). On those plain terms, the proceedings brought by the Appellants should have been allowed to continue.

Application to foreign States and heads of State

42. It is no objection to the application of s 14(3)(a) to proceedings for the winding up of a separate entity of a foreign State that a foreign State itself, and every emanation of the

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[19] "We do not inquire what the legislature meant; we ask only what the statute means": OW Holmes, "The Theory of Legal Interpretation" (1899) 12 Harv LR 417, 419, quoted in *Byrnes v Kendle* (2011) 243 CLR 253 at [97] (Heydon and Crennan JJ).

[20] Unreported, 8 July 1992.

[21] Unreported, 8 July 1992, p 7.

foreign State, are themselves incapable of being wound up: cf **CA [47] (CAB 47)**. That is merely a product of the subject matter of s 14(3)(a). The provision applies only ***if*** there is a body corporate capable of being wound up. It has no application where there is not such a body corporate. This says nothing about whether, where there is, that body corporate may be a separate entity of a foreign State.

43. Other provisions of the FSIA work in a similar way: they may not all apply to each emanation of a foreign State or separate entity of a foreign State. For example, it seems unlikely that the head of a foreign State or of a political subdivision of a foreign State, in their public capacity, would be the employer of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia. Accordingly, it is unlikely that s 12(1) of the FSIA would have any application to heads of foreign States or of political subdivisions of foreign States, in their public capacity, but it would apply to other emanations of foreign States and to separate entities of foreign States. It is also unlikely that a department or organ of the executive government of a foreign State — for example, the equivalent of the Department of Home Affairs of another country — would be a member of a body corporate. Accordingly, it is unlikely that s 16(1) of the FSIA would have any application to such entities but the provision would continue to apply to any emanation of a foreign State or a separate entity of a foreign State that was a member of a body corporate.

44. No difficulty is presented by the *in terrorem* possibility of bankruptcy of a foreign head of State referred to in **CA [48] (CAB 47)**, as such a person enjoys immunity under the FSIA only "in his or her public capacity" (see **CA [46] (CAB 47)**). In other words, a head of a foreign State does not enjoy the immunity afforded by s 9 of the FSIA unless they are acting in their public capacity (as an extension of the foreign State). A head of a foreign State acting in their private capacity does not meet the definition of foreign State in s 3(3) of the FSIA and, therefore, they would not enjoy the immunity afforded by the FSIA when acting in that capacity. It seems unlikely that any bankruptcy of the head of a foreign State would relate to them acting in their public capacity. Accordingly, even on the view of the Courts below, s 14(3)(a) would be unlikely to afford protection to the head of a foreign State in bankruptcy proceedings.

45. The immunities of the head of a foreign State acting in their private capacity are determined in accordance with s 36 of the FSIA and the *Diplomatic Privileges and*

Immunities Act 1967 (Cth), which extends, with such modifications as are necessary, to the head of a foreign State as that Act applies to the head of a diplomatic mission. It is in that Act, including its limitations,[22] that any protection for the head of a foreign State in bankruptcy proceedings is likely to be found.

Presumption against extraterritoriality

46. Finally, the Court of Appeal was wrong to think that the presumption in s 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) supported its construction: **CA [45] (CAB 46)**. Section 21(1)(b) provides that, in any Commonwealth Act, references to "other matters and things" shall be construed as "other matters and things in and of the Commonwealth". But to construe the reference to "a body corporate" in s 14(3)(a) of the FSIA as "a body corporate in and of the Commonwealth", as indicated at **CA [45]**, either proves too little or too much.

47. On the one hand, if a body corporate "in and of the Commonwealth" covers all bodies corporate registered under the *Corporations Act*, it would include the Respondent, which is registered as a foreign company; on that view the Appellants must succeed.

48. On the other hand, if a body corporate "in and of the Commonwealth" covers only companies incorporated in Australia, it would exclude any foreign company registered under the *Corporations Act* irrespective of whether it was a separate entity of a foreign State; on that view, s 14(3)(a) would not cover the insolvency or winding up of any foreign company, whether or not it was a separate entity of a foreign State, and a foreign State would enjoy immunity in respect of the winding up of that foreign company, unaffected by s 14(3)(a). On this view, even if proceedings in an Australian court concerned the administration of property occasioned by the winding up of a foreign company and a foreign State had an interest in that property, the proceedings could not continue. That is even counter to the preferred construction of the Court of Appeal.

49. In circumstances where a separate entity of a foreign State, like the Respondent, is carrying on a business in Australia, the common law presumption against legislative

[22] Pursuant to Article 31(1)(c) of the *Vienna Convention on Diplomatic Relations* [1968] ATS 3, the head of a diplomatic mission does not enjoy immunity from the civil or administrative jurisdiction of Australian courts in the case of "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions". This provision has the force of law in Australia: see *Diplomatic Privileges and Immunities Act 1967* (Cth) s 7(1).

extraterritoriality has no role. In any event, recourse to that common law presumption to answer the present problem has the same difficulties as recourse to the presumption in s 21(1)(b) of the *Acts Interpretation Act*.

PART VII: ORDERS SOUGHT

50. The Appellants seek the following orders:

1. The appeal be allowed, with costs.

2. Paragraph 2 of the orders of the Court of Appeal made on 14 June 2023 be set aside and in its place order that:

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   (a) the appeal be allowed, with costs;

   (b) the orders of the Supreme Court of New South Wales made on 28 November 2022 be set aside and, in their place, order that the notice of motion filed by the defendant on 21 September 2022 be dismissed, with costs.

PART VIII: ESTIMATED TIME

51. The Appellants estimate that up to 2 hours will be required for oral argument, including

20 reply.

Dated 7 December 2023

Perry Herzfeld
Eleven Wentworth
T: (02) 8231 5057
E: pherzfeld@elevenwentworth.com

Christina Trahanas
Eleven Wentworth
T: (02) 8023 9017
E: ctrahanas@elevenwentworth.com

SCHEDULE: Section 14(3)(a) of the FSIA compared to foreign legislation referred to by the ALRC[23]

1. FSIA, s 14(3)(a):

> A foreign State is not immune in a proceeding in so far as the proceeding concerns:
>
> (a) bankruptcy, insolvency or the winding up of a body corporate …

2. *European Convention on State Immunity*, entry into force 11 June 1976, art 14:

> Nothing in this Convention shall be interpreted as preventing a court of a Contracting State from administering or supervising or arranging for the administration of property, such as trust property or the estate of a bankrupt, solely on account of the fact that another Contracting State has a right or interest in the property.

3. *Foreign States Immunities Act 1981* (South Africa), s 7:

> (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to—
>
> (a) any interest of the foreign state in, or its possession or use of, immovable property in the Republic;
>
> (b) any obligation of the foreign state arising out of its interest in, or its possession or use of, such property;
>
> (c) any interest of the foreign state in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*.

4. International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property (1983) II(2) *Yearbook of the International Law Commission* 17 at 22, art 15(1)(c)–(e):

> The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:
>
> …
>
> (c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

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[23] See ALRC Report at [117] (n 132), 134.

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

5. *State Immunity Act 1978* (UK), s 6(3):

> The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

6. *State Immunity Act 1979* (Singapore), s 8(3):

> The fact that a State has or claims an interest in any property does not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or mentally disordered persons or to insolvency, the winding up of companies or the administration of trusts.

7. *State Immunity Act 1985* (Canada), s 8:

> A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to an interest or, in the Province of Quebec, a right of the state in property that arises by way of succession, gift or *bona vacantia*.

8. *State Immunity Ordinance 1981* (Pakistan), s 7(3):

> The fact that a State has or claims an interest in any property shall not preclude any Court from exercising in respect of such property any Jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

GREYLAG GOOSE LEASING 1410 DESIGNATED ACTIVITY COMPANY
First Appellant

GREYLAG GOOSE LEASING 1446 DESIGNATED ACTIVITY COMPANY
10 Second Appellant

and

P.T. GARUDA INDONESIA LTD
Respondent

ANNEXURE TO THE APPELLANTS' SUBMISSIONS

20 Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Appellants set out below a list of the statutes referred to in their submissions.

No	Description	Version	Provision(s)
1.	*Acts Interpretation Act 1901* (Cth)	Current	s 21(1)(b)
2.	*Corporations Act 2001* (Cth)	Current	s 601CD
3.	*Diplomatic Privileges and Immunities Act 1967* (Cth)	Current	s 7, Schedule (Art 31(1)(c))
4.	*Foreign States Immunities Act 1985* (Cth)	Current	ss 3, 9, 12, 14, 16, 22, 36