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

RESPONDENT'S SUBMISSIONS

The respondent is a separate entity of the Republic of Indonesia, a foreign State under the *Foreign States Immunities Act 1985* (Cth) (the **FSIA**). It participates in this appeal for the purpose of continuing to assert its claim to immunity from the jurisdiction of the Australian
courts as recognised in ss 9 and 22 of the FSIA, and not for any other purpose.

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 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, where that same body corporate seeks to invoke the immunity provided by ss 9 and 22 of the FSIA?[1]

Part III: NOTICE OF CONSTITUTIONAL MATTER

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

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[1] The difference between the issue as so expressed and that articulated by the appellants is identified by underlining here and is addressed at Pt IV below.

Part IV: MATERIAL FACTS

4. The respondent does not contest the facts set out in the appellants' submissions and chronology. One more is necessary: the respondent is incorporated in Indonesia.[2]

PART V: ARGUMENT

The issue

5. The appellants misidentify the issue in their ground of appeal and in their statement of issues. The issue is not whether the exception arises where the proceeding concerns the winding up of *any* body corporate that is a separate entity of a foreign State (as formulated by the appellants); it is whether the exception arises where the proceeding concerns the winding up of *the same* body corporate as that which asserts immunity under ss 9 and 22 of the FSIA. The appellants accept that it was on that basis that the decisions below turned: Appellants' Submissions (**AS**) [13].

6. The difference between the two formulations is significant because the appellants' formulation contains the same ambiguity found in s 14(3)(a) itself. Answering only the appellants' question would not resolve the statutory ambiguity. Nor would it resolve the respondent's claim to immunity. For example, the respondent agrees with the first sentence of AS [15] (save insofar as the body corporate is the same foreign State or separate entity asserting the immunity). Many of the arguments in the AS address only the appellants' formulation, without grappling with the necessary further aspect of the question.[3]

Summary of the respondent's argument

7. The Court of Appeal was correct to find that the body corporate identified in s 14(3)(a) is an entity different to the foreign State or separate entity referred to in the chapeau to s 14(3). The correct construction is evident from the structure of s 14. It is supported by reference to the extrinsic materials, particularly the **ALRC Report**[4] (which led to the FSIA, and which explains the purpose and history of s 14) and is consistent with the underlying principle of the sovereign equality of states.

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2 PJ [1] (CAB 7).
3 See in particular AS [15], [16] (and by implication [17] to [20]), [22], [23], [27] and [38].
4 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984).

The FSIA

8. Section 9 of the FSIA provides that "except as provided for by this Act, a foreign State is immune from jurisdiction of the courts of Australia in a proceeding."

9. Section 22 of the FSIA extends the general immunity conferred on foreign States by s 9 to each "separate entity" of a foreign State, such that a separate entity is immune from the jurisdiction of the courts of Australia in a proceeding, in the same way as a foreign State is immune.

10. "Foreign State" is relevantly defined in s 3(1) of the FSIA as "a country the territory of which is outside Australia …" and by s 3(3), also includes:

> *(a) a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State;*
>
> *(b) the head of a foreign State, or of a political subdivision of a foreign State, in his or her public capacity; and*
>
> *(c) the executive government or part of the executive government of a foreign State or of a political subdivision of a foreign State, including a department or organ of the executive government of a foreign State or subdivision –*
>
> *but does not include a reference to a separate entity of a foreign State.*

11. Section 3(1) provides that a "separate entity" in relation to a foreign State includes a body corporate (other than a body corporate "that has been established by or under a law of Australia") that is "an agency or instrumentality of the foreign State" and is not "a department or organ of the executive government of the foreign State."

12. It is common ground that the respondent is a separate entity of a foreign State within the meaning of s 3(1), and that – save to the extent that an exception under the FSIA might apply – the respondent enjoys the immunity granted by ss 9 and 22 of the FSIA.[5]

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[5] CA [2] (CAB 33).

Section 14: the exception for 'Ownership, possession and use of property etc'

13. The only exception to the immunity on which the appellants rely is s 14(3)(a) of the FSIA. Section 14 is headed '**Ownership, possession and use of property etc**', and is set out at AS [11].

The applicable principles of statutory construction

14. The applicable principles of statutory construction are well established. The starting point is the text of the statute, read in light of its context and purpose.[6] Reference to extrinsic materials may be of assistance and, at common law, is not conditioned upon the existence of ambiguity.[7] Where more than one meaning is reasonably open, there is a "constructional choice".[8] Context, including the legislative history, can assist in making the correct constructional choice.[9] The literal meaning of a statutory provision will not always accord with its legal meaning.[10]

15. As to the relevance of the ALRC Report, in an oft-quoted passage in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[11] the plurality stated:

> *It is well settled that at common law ... the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy ... [I]f the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result*

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6 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [36]-[37] (Gageler J); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 331 (Dawson J), at 332 (Brennan J), at 339-340 (Gaudron J), at 346 (McHugh J). See also *Acts Interpretation Act 1901* (Cth) (**AIA**), s 15AA.

7 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); see also AIA, s 15AB.

8 *Coverdale v West Coast Council* (2016) 259 CLR 164 at 172-173 [23].

9 Ibid.

10 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 (Mason and Wilson JJ); *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 (Dixon CJ, Williams, Webb and Taylor JJ agreeing).

11 (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

> *may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.*

The proper construction of s 14(3)(a) in its context

16. As observed in the second reading speech of the bill that became the FSIA, the main argument for the restrictive theory of immunity applied by the FSIA is the view "that commercial or trading activities conducted by or on behalf of foreign governments should not attract the special jurisdictional immunity enjoyed by foreign states".[12] Such activities are deprived of immunity by the commercial transactions exception, being s 11 of the FSIA. The appellants did not rely on that exception in the courts below.

17. In contrast to the commercial transactions exception, which has been interpreted broadly by the courts,[13] the exceptions in s 14 serve a different purpose; they have a different history and a different international context. That history and context was explained by the ALRC in the passage quoted at [18] below and is discussed further at [57] to [61] below. It is to that purpose and context to which attention must be directed in construing s 14. Indeed, the appellants support a distinct approach being taken to each of ss 11 and 14: see AS [32].

18. In a passage that is key to understanding the purpose of s 14(3), the ALRC said:[14]

> Movable Property. *In addition to the immovable property exception [in s 14(1)], the common law has long recognised a further exception relating to movable property, based on a similar rationale to the immovable property exception. Where a local court is administering, or supervising the administration of, property it is appropriate that it should be able to adjudicate on all the conflicting claims to such property.[131] Situations where this might arise include bankruptcy, insolvency, the winding up of companies, and the administration of trusts, of estates of deceased persons or of estates of persons of unsound mind. Some of the overseas legislation has explicit provision denying immunity in these situations.[132] It is recommended that the proposed legislation do likewise.*

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12 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 1985, 141 (Lionel Bowen, Attorney-General).

13 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393 at 438 [207] (Rares J, Lander and Greenwood JJ agreeing).

14 ALRC Report, 69 [117] (most footnotes omitted). See also the similar observations in the Summary section of the ALRC Report at xx [29].

131 *ILC, 35th Report, para 92. See also Sucharitkul, Fifth Report, para 118-33 for reference to supporting state practice.*

132 *European Convention of State Immunity, art 14; State Immunity Act 1978 (UK) s 6(3); State Immunity Act 1979 (Singapore) s 8(3); State Immunity Ordinance 1981 (Pakistan) s 7(3); The International Law Commission has provisionally adopted an article containing a provision to similar effect: ILC, 35th Report, para 95, art 15(1)(c)-(e).*

19. From that passage it can be seen that the purpose or rationale of s 14(3) is to allow domestic courts to adjudicate on all conflicting claims to property, including any claims concerning an otherwise-immune foreign State.[15]

20. None of the ALRC Report, the second reading speech or the relevant explanatory memorandum (**EM**) states or implies that s 14(3) was intended to introduce a new and far-reaching exception to immunity – unknown to the common law and not found in any of the legislative regimes considered by the ALRC – that would allow for the bankrupting or winding up of foreign States and their separate entities by Australian courts.

21. Of the exceptions in s 14, only that in s 14(1), concerning immovable property, warranted mention in the list of exceptions mentioned in the second reading speech.[16] No mention was made there of any prospect of Australian courts bankrupting or winding up foreign States or their separate entities.

22. The Outline that accompanied the draft legislation at Appendix A to the ALRC Report summarised each of the exceptions. In respect of cl 14, the summary is "where the case arises from ownership or use of local immovable property or involves certain other property disputes."[17] Clearly, the intention was that cl 14 provide for property disputes. This supports a construction of s 14(3)(a) in which the bankruptcy, insolvency or winding up is not that of the foreign State, but some other entity, in the property of which the foreign State may have an interest.

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15 The history of the rule which led to s 14(3) is further explained in the ALRC Report at 8-9 [10] and is discussed at [58] to [61] below.

16 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 1985, 141 (Lionel Bowen, Attorney-General).

17 ALRC Report, Appendix A, 129.

23. The EM notes in relation to s 14(3) only that it "removes the immunity of foreign States in bankruptcy and related proceedings and in proceedings concerning trusts or the administration of deceased estates."

24. As the primary judge and the Court of Appeal observed,[18] if the legislature had intended to exempt foreign States and their separate entities from immunity to winding up proceedings, it would clearly have said so. Were it the objective intention of the legislature to expand what had previously been thought of as an exception concerning property in which a foreign State was concerned, to also include the winding up of foreign States and their separate entities, one would expect the extrinsic materials to have said at least something about such windings up.

25. The appellants' primary argument is that their proceeding to wind up the respondent was one which "concerns … the winding up" of a body corporate (being the otherwise-immune separate entity of a foreign State). What they characterise as an alternative argument – that their application was a proceeding which [otherwise] "concerns insolvency"[19] – adds nothing to their primary point. The relevant constructional choice is between reading the words "a body corporate" in "bankruptcy, insolvency or the winding up of a body corporate" as referring to the foreign State (or its separate entity) in question, or reading those words as referring to some different entity. Whether the appellants rely on "insolvency" or "winding up", the constructional choice is the same.

26. For the reasons given by the primary judge and the Court of Appeal, the proper constructional choice, consonant with the text, context, purpose, object and history of the section, is that the words "bankruptcy, insolvency or the winding up of a body corporate" refer to some entity other than the claimant to immunity.

The Court of Appeal's construction is not contrary to the "plain and clear" meaning

27. The appellants submit at AS [15] that the Court of Appeal's construction is contrary to the "plain and clear" meaning of s 14(3)(a). But section 14(3)(a) is neither plain nor clear.

28. Although ambiguity is not required before regard should be had to context (including extrinsic materials) there is a lack of clarity in s 14(3) by reason of the use of the

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18 PJ [24] (CAB 11); CA [75]-[76] (CAB 56).
19 AS [12], [14], [27].

indefinite article in the body of s 14(3)(a) ("… winding up of *a* body corporate"). 'A' is an indefinite article which can be used to describe "something of which nothing specific is known, but which is merely generic or hypothetical."[20] But 'any' is the indefinite article which carries the meaning 'any at all'. While in an appropriate context, 'a' can mean 'any',[21] it does not necessarily mean 'any'.

29. Parliament's choice to use 'a' rather than 'any' as the relevant article leaves unclear the extent of the class of windings up contemplated by that paragraph, and relevantly, whether it includes the winding up of the particular body corporate which would – absent the operation of the exception – be the object of the immunity.

30. To resolve that ambiguity by adopting the construction accepted by the Court of Appeal does not require additional words to be read in to the provision,[22] but merely requires consideration of the existing structure of the provision, in light of its context and purpose.

31. Similarly, the appellants' suggestion that words concerning an interest in property need to be inserted[23] is incorrect. The connection with property is part of the history and purpose of the section that guides its interpretation, but it is not an additional limitation on its scope. Contrary to AS [15], neither the primary judge nor the Court of Appeal expressed the connection with property as a limitation on s 14(3)(a).[24] Indeed, both referred to potential applications of s 14(3)(a) in the context of windings up in which the foreign State makes no claim to property.[25] The exception applies to whatever role the foreign State or separate entity may play in the winding up of any body corporate other than itself. That role may be as an entity claiming an interest in property,[26] as a creditor,[27] as a debtor,[28] or even as a person with information concerning the examinable affairs of

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20 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2011) 243 CLR 558 at 566 [19] (French CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
21 *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407 at 417 (Mason CJ, Dawson and McHugh JJ).
22 Contra AS [16] and [27].
23 See AS [16]-[20] and [27].
24 See CA [38]-[42] (CAB 44-46).
25 See PJ [26] (CAB 12) and CA [40]-[41] (CAB 45).
26 *Re Russian Bank for Foreign Trade* (1933) Ch 745 at 769-70.
27 As in *Re Rafidain Bank* [1992] BCLC 301 at 304 which was referred to by Bell CJ at CA [41] (CAB 45), and as contemplated by the primary judge referring to voidable transaction proceedings against creditors at PJ [26] (CAB 12), which in turn was referred to at CA [40] (CAB 45).
28 As contemplated by the primary judge at PJ [26] (CAB 12), referring to the recovery of property belonging to a corporation being wound up, and referred to by the Court of Appeal at CA [40] (CAB 45).

the body corporate.[29]

32. At AS [21]-[23], the appellants refer by way of contrast to examples where the FSIA restricts the types of bodies corporate to which it applies. But each such instance equally works against the appellants' argument, because in each the legislature has made clear the intended relationship between the foreign State and the body corporate:

(a) in s 3(1), the words used are (underlining added) "***separate entity***, in relation to a foreign State, means … a body corporate …;

(b) in s 16(1)(a), the words used are (underlining added) "A foreign State is not immune in a proceeding in so far as the proceeding concerns its membership … of a body corporate …;

33. There is no such statement of an intended relationship between the foreign State and the body corporate in s 14(3)(a). If the foreign State or separate entity *could itself be* the body corporate, then the legislature would have indicated this. The clearest way to have done so would have been by way of an additional subsection (c):

> *(3) A foreign State is not immune in a proceeding in so far as the proceeding concerns:*
>
> *(c) its bankruptcy, insolvency or winding up.*

34. The appellants' purely textualist approach is inconsistent with the principles of interpretation laid down by this Court. No support is offered for the assertion at AS [24]. As for AS [25], any further ambiguity that might have been created by the use of the definite article could easily have been remedied by the addition of obvious further words, were the use of the definite article consistent with the legislative intent.

The effect of subsections 14(1) and (2) on the construction of subsection (3)

35. By grouping ss 14(1), (2) and (3) together in the same section, Parliament indicates that the subject matter of subsection (3) is related to – and should be construed by reference to – that of subsections (1) and (2): *noscitur a sociis*.

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[29] As contemplated by the primary judge at PJ [26] (CAB 12) and referred to by the Court of Appeal at CA [40] (CAB 45).

36. Subsection 14(1) refers to an interest of the State in, or possession or use by the State of, immovable property, or an obligation arising out of one of those things. Subsection 14(2) refers to an interest of the State in property that arose by gift in Australia or by succession. The subject matter of those two subsections is clearly related; they are concerned with a foreign State or separate entity's ownership of, interest in, or possession of property. This is consistent with the heading of the section, '**Ownership, possession and use of property etc**'.

37. At AS [18]-[20], the appellants over-emphasise the differences between the language used in subsection (3) and that used in the other subsections. Those differences do not mean that there is no rational connection between the subsections. The presumption of construction that different words used within an Act have different meanings[30] cannot be enlarged to a presumption that differences in language between subsections of a single section imply the absence of a relationship between their respective subject matters.

38. A section must be read as a whole.[31] If there was no relationship or connection between the three subsections, Parliament would have made subsection (3) a standalone exception.

The role and impact of the ALRC Report

39. As observed by this Court in *Kingdom of Spain v Infrastructure Services Luxembourg sàrl* (***Kingdom of Spain***),[32] the EM explains that the proposed legislation was "based upon a report and recommendations of the Law Reform Commission ... which involved a thorough review of developments in other countries and at the international level, including the work of the International Law Commission".

40. Here, the Court of Appeal observed that its analysis and the primary judge's construction were "powerfully reinforced" by consideration of the ALRC Report.[33]

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30 *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579 at 590 (Higgins J); *King v Jones* (1972) 128 CLR 221 at 266 (Gibbs J); *Paul v Cooke* (2013) 85 NSWLR 167 at 178-179 [44] (Leeming JA; Ward JA agreeing).

31 *Director of Public Prosecutions (Vic) v Khodi Ali and Dounia Ali (No 2)* (2009) 25 VR 656 at 662 [30] (Weiberg JA); *South Western Sydney Local Health District v Gould* (2018) 97 NSWLR 513 at 531 [85] (Leeming JA, Basten and Meagher JJA agreeing).

32 (2023) 275 CLR 292 at 306 [11].

33 CA [51] (CAB 48).

41. The appellants' attempt to marginalise the ALRC Report at AS [38] is misconceived. The relevance of extrinsic materials to statutory interpretation is firmly established both by s 15AB of the *Acts Interpretation Act 1901* (Cth) (**AIA**) and by this Court's case law. And this Court has had regard to the ALRC Report each time that it has considered the FSIA.[34] Its significance was specifically noted by Nettle and Gordon JJ in *Firebird Global Master Fund II Ltd v Republic of Nauru.*[35]

42. There is no principled basis on which to say that only positive assertions in the ALRC Report may be taken into account.[36] Indeed, the absence of indications in the ALRC Report has been taken into account by this Court in previous decisions.[37] One need only read the ALRC Report at [117] to note the absence of an intention to expand the property-related exceptions to allow for the bankruptcy, insolvency or winding up of foreign States. In any case, the ALRC Report does not merely contain an absence of indications, it provides positive, direct and clear guidance as to the purpose of what became s 14.[38]

The role of the common law presumption against legislative extraterritoriality

43. At AS [46]-[48], the appellants take issue with the Court of Appeal's reference to the presumption at s 21(1)(b) of the AIA at CA [45] (CAB 46). That paragraph of the Court's reasons needs to be read together with CA [46]-[47] (CAB 46-47) as part of the support which the Court of Appeal identified for construing the reference to a body corporate in the body of s 14(3)(a) as a different entity to the body corporate which (as a separate entity of a foreign State) is referred to in the chapeau. That reasoning does no more than recognise the common law presumption against legislative extraterritoriality which is reflected in s 21(1)(b) of the AIA.[39]

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34 *Kingdom of Spain* at 306 [11], 308 [17]-[18], 308-309 [20], 312 [28]; *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 (***Firebird***) at 41-42 [5]-[6], 43 [10]-[11], 44 [14], 52 [53], 55 [64], 56 [68], 58 [76], 62 [95], 64 [102]-[103], 66 [110], 67 [115] (French CJ and Kiefel J), at 72-73 [140]-[142] (Gageler J), at 81 [173], 88 [198], 91 [205], 95 [217]-[218], 97 [222] (Nettle and Gordon JJ); *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 (***PT Garuda HCA***) at 245 [7], 247-248 [18] (French CJ, Gummow, Hayne and Crennan JJ), at 261-262 [65] (Heydon J).

35 (2015) 258 CLR 31 at [173].

36 contrary to AS [38].

37 *Firebird* at 62-63 [95] (French CJ and Kiefel J) and *PT Garuda HCA* at 261-262 [65] (Heydon J).

38 As noted by Bell CJ at CA [44] (CAB 46).

39 See *BHP Group Limited v Impiombato* (2022) 96 ALJR 956 at 964-965 [33]-[37] (Kiefel CJ, Gageler J) and at 971-972 [63] (Gordon, Edelman and Steward JJ).

The construction must be capable of sensible application to both separate entities and foreign States

44. The appellants contend at AS [42] that the inability for a foreign State to be wound up is irrelevant because s 14(3)(a) applies only if there is a body corporate capable of being wound up. That is incorrect – importantly, s 14(3)(a) also applies if there is an entity capable of being bankrupted. But it is also beside the point. The fact that foreign States are in most circumstances[40] incapable of being subjected to insolvency proceedings supports the conclusion that the foreign State is the entity referred to in the chapeau only, and not the entity referred to in subsection (a). That is the only construction of s 14(3)(a) which is capable of sensible application to foreign States. The legislature should not be taken to have passed an exception for the winding up of foreign States which is largely incapable of application to foreign States.

The prospect of bankrupting a head of State indicates that the appellants' construction is wrong

45. The definition of 'foreign State' in the FSIA includes natural persons who are foreign sovereigns or heads of State. On the appellants' construction of s 14(3)(a), foreign sovereigns and heads of State could be bankrupted in Australia if they were personally present, had a place of business, or were carrying on business, in Australia.[41]

46. The distinction that the appellants attempt to draw at AS [44]-[45] between bankrupting a foreign head of State in a public capacity or bankrupting a foreign head of State in a private capacity does not assist. Rather, it demonstrates the absurdity of the suggestion that the legislature intended s 14(3)(a) to permit the bankrupting of a foreign head of State 'in a public capacity' only. Bankruptcy effects a change in the status of an insolvent person; it has no regard to 'capacity' and affects the whole of the person's estate.[42] The legislature would not be taken to have intended a new, bifurcated type of bankruptcy for foreign heads of State. Instead, the objective legislative intent was that the person subject

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40 The exception being departments or organs of the executive government that have a legal personality distinct from the State – a possibility that the ALRC noted at ALRC Report, 38-39 [71]-[72].

41 *Bankruptcy Act 1966* (Cth), s 43.

42 *Culleton v Balwyn Nominees Pty Ltd* (2017) 343 ALR 632 at 643-644 [40]-[44] (Allsop CJ, Dowsett and Besanko JJ).

to bankruptcy, insolvency or winding up proceedings referred to in s 14(3)(a) was not itself the foreign head of State that has the benefit of immunity.

47. That a particular application of an exception "seems unlikely" to the appellants (see AS [43], [44]) provides no basis for ignoring it in construing the statutory provision. Further, it requires no great creativity to imagine a situation where the public act of a foreign head of state in Australia might give rise to a liability that might ultimately lead to insolvency proceedings: e.g. liability for personal services, or negligence arising from an accident.

The primary judge's distinction between the foreign State or separate entity and the body corporate was well founded

48. Contrary to AS [28], when the primary judge described the reference to the foreign State or separate entity in the chapeau of s 14(3) as the object of the immunity and the reference to the body corporate in the body of s 14(3)(a) as someone different: PJ [22] (CAB 11), his Honour was stating a conclusion, not making a "mere assertion".

49. The basis for that conclusion is set out at PJ [23] to PJ [26] (CAB 11-12). PJ [23] and [24] point out that if the Parliament intended to convey the applicants' construction, the language used in s 14(3)(a) was an indirect, unclear and counter-intuitive way of doing so. To convey the meaning clearly, the drafter could have used the same expression in both subsection (a) and in the chapeau (e.g. "a foreign State or a separate entity which is a body corporate is not immune in so far as …"), and/or could have used a definite article to describe the body corporate the subject of the relevant winding up: ("… the winding up of the body corporate", or perhaps even "… the winding up of that or any other body corporate").

50. The question of whether s 14(3) is to be construed as including a reference to the same entity in both the chapeau and subsection (a) requires something more than a mere grammatical exercise which ignores the implications of the competing constructional choices. The applicants' preferred choice leads to the unlikely results explained at PJ [25] and CA [46]-[48] (CAB 46-47).

The role of the overseas legislation in construing s 14(3)(a)

51. As has previously been observed by this Court,[43] the ALRC drew extensively from overseas cases, legislation and commentary in preparing the draft that became the FSIA.

52. The appellants have submitted a schedule which sets out s 14(3)(a) and purports to compare it to the foreign legislation to which the ALRC referred. But the proper comparator to that legislation is the whole of s 14, not merely subsection (3)(a). Also, the ALRC did not refer to the South African or Canadian sections in relation to s 14(3), but only in relation to s 14(2). When one compares s 14 as a whole with the relevant foreign provisions, the similarities are obvious. When one compares s 14(3) with those provisions that the ALRC specifically footnoted, the similarities are again obvious.

53. That there are differences in the language used in each provision[44] in no way undermines the historical reality that the ALRC had regard to those provisions in recommending the adoption of draft s 14. None of the foreign provisions operates to remove the immunity of a foreign State or separate entity in proceedings for the winding up of the foreign State or separate entity. If the ALRC had intended that the Australian provision should differ in such an important and fundamental way from those provisions, it would have said so.

Appellants' reliance on "restrictive immunity" or "commercial activity" as the purpose

54. At AS [30]-[35], the appellants state that the purpose of the FSIA 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 to a "restrictive immunity" approach …*

and they state that the purpose of the exceptions to foreign state immunity is to "significantly restrict[ ] the immunities of foreign states".

55. Neither of those is a legislative purpose in a sense that would assist this court in construing s 14(3)(a). As to the first, while it can readily be accepted that clarification was an aim of the FSIA, clarification is of no utility in determining the specific objective of the paragraph. And the second asserted "purpose" – to "significantly restrict[ ] the

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43 *Kingdom of Spain* at 306 [11].
44 see AS [37].

immunities of foreign states" – relies on a descriptive (rather than purpose-stating) sentence in the ALRC report.[45] As a purpose, it is unhelpful.[46]

56. The appellants go on to assert at AS [33] that s 14(3)(a) reflects the "key policy reason for restrictive immunity" that commercial or trading activities conducted by foreign governments should not attract the special jurisdictional immunity enjoyed by foreign States. It does not. That reason underlies s 11 and some of the other exceptions, but not s 14. That is demonstrated by ALRC Report [88], which the appellants cite incorrectly at AS [33] for the proposition that s 14 is concerned with commercial activity:[47]

> *it is felt that the subdivisions of commercial activity used in the State Immunity Act 1978 (UK) provide a more suitable model than the United States and Canadian Acts. The United Kingdom Act has separate provisions covering commercial transactions, contracts of employment, industrial and intellectual property, membership of bodies corporate, arbitration, and local taxes. For reasons set out below it is recommended that a further provision be added dealing with bills of exchange. Despite differing treatment of commercial activity, all the overseas models contain distinct provisions dealing with torts, property within the jurisdiction and admiralty matters. It is recommended that the proposed Australian legislation contain provisions for each of these categories.*

57. That is, independent of the exceptions dealing with "commercial activity", all the overseas models had distinct exceptions for property within the jurisdiction. That is consistent with the historical development of the property exceptions.

58. As the ALRC noted, the exceptions dealing with property existed under the absolute immunity approach, long prior to the development of restrictive immunity.[48] In explaining absolute immunity and its exceptions, the ALRC wrote:

> *But this general immunity was not without exceptions … The more important of these were:*

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45 ALRC Report, xvi (point 3).

46 See similarly *Carr v Western Australia* (2007) 232 CLR 138 at 143 [6] (Gleeson CJ); see also *Australian Competition and Consumer Commission v Channel Seven Brisbane* (2009) 239 CLR 305 at 335 [101] (Heydon J) and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47-48 [51]-[53] (Hayne, Heydon, Crennan and Kiefel JJ).

47 ALRC Report, [88] (footnote omitted, emphasis added).

48 ALRC Report, 8 [10] (two footnotes omitted, emphasis added).

- *a foreign state interested in a trust or similar fund within the control of the court or of private parties within the jurisdiction could not plead immunity to prevent due administration of the fund*[29]*;*

- *it was probably the case that a foreign state was not immune in an action to determine title to immoveable property within the jurisdiction (on the ground that only the forum's courts could determine such a question);*

- *a foreign state could be called on to show that its claim to personal property within the jurisdiction and not in its possession or control was not 'merely illusory nor founded on a title manifestly defective' before its immunity from suit with respect to such property was allowed.*

29 Lariviere v Morgan (1872) LR 7 Ch App 550, rev'd on the facts (1875) LR 7 HL 423; Strousberg v Republic of Costa Rica (1881) 44 LT 199. Similar considerations applied to the administration of estates in England, to interests in property as bona vacantia, and to the winding up of companies: cf Re Russian Bank for Foreign Trade (1933) Ch 745, 769-70.

59. The restrictive immunity approach was developed later in England, coming to a head (as the ALRC put it) in the 1970s.[49]

60. As set out above, in relation to the winding up of companies, the ALRC specifically referred to *Re Russian Bank for Foreign Trade*,[50] where Maugham J observed:

> *the circumstance that a foreign Government is or may be interested in a trust or other like fund is no reason why the Court should decline jurisdiction. The proposition in the present case must go as far as this, that if a foreign Government may possibly make a claim to some interest in the assets which would reach the hands of a liquidator the Court must decline to make a winding-up order. For the reasons given I am unable to accede to this view.*

61. That same principle was enacted in s 6(3) of the *State Immunity Act 1978* (UK) (one of the sections to which the ALRC referred in recommending draft s 14) which provides:

> *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*

49 ALRC Report, [11].
50 (1933) Ch 745 at 769-70.

> *the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.*

62. In 1992, in *Re Rafidain*, Browne-Wilkinson V-C held that s 6(3) was fatal to a claim by the state of Iraq that the withholding of payment to it as a creditor in the course of winding up Rafidain conflicted with the rights of the state of Iraq as a sovereign state. In that decision, the Vice-Chancellor observed that :

> *The winding up of a company does not directly implead a foreign state, which is simply a creditor. A different question may arise in this case when the petition is heard as to whether the petition itself impleads the state of Iraq as owner of Rafidain.*

63. In other words, it is the former situation to which s 6(3) applies, not the latter. The passages quoted from *Dicey, Morris and Collins on the Conflict of Laws*[51] at CA [42] (CAB 45) are to the same effect.

64. The appellants have not identified any case, anywhere in the world, in which a court has found that it has the power to bankrupt or wind up a foreign state or a separate entity of a foreign State. The respondent's researches have also found no such case.

65. The only case located in that search in which the issue has been considered is *Banco Nacional de Cuba v Cosmos Trading Corp*,[52] in which Sir Richard Scott V-C (Thomas and Walker LJJ agreeing) opined that the proposition that an English court could wind up a foreign central bank was "a ludicrous one", and that a winding up order against the central bank of a foreign state would, in his opinion, be barred by s 14(2) of the *State Immunity Act 1978* (UK) (the equivalent of s 22 of the FSIA).

66. The respondent submits that the purpose of the property exceptions, existing as early as the 1870s and continuing to exist in s 14, was and is to allow domestic courts to deal with conflicting claims to property when administering property, despite one of the parties involved being an otherwise immune foreign State. That purpose is unrelated to the later-developed commercial activity exceptions, being s 11.

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51 16th ed, 2022.
52 [2000] 1 BCLC 813 at 820.

67. Although the appellants rely on an extension of the commercial activity exceptions, they do not say (and nor could they) that the respondent was conducting purely commercial activities.[53]

68. There is no support for the appellants' assertion at AS [34] that the "overwhelmingly likely circumstance" for the operation of s 14(3)(a) is a winding up or insolvency arising from commercial or trading activities. Nor could such an argument be determinative. For the appellants' construction to be accepted, it must be capable of sensible application not only in the context of a separate entity performing purely commercial activities but also in the context of a foreign State or separate entity performing governmental activities.

69. The appellants' reference at AS [34] to the requirement that a foreign company register in Australia if it "carries on business" in Australia does not assist the appellants, as carrying on business under the *Corporations Act 2001* (Cth) is not limited to commercial activities: s 21 expressly includes "administering, managing, or otherwise dealing with, property situated in Australia" as carrying on business, and s 18 specifies that carrying on business includes carrying on business otherwise than for profit. Both foreign States and separate entities could carry on business in Australia whilst engaging in governmental activities. Examples would include national tourism boards and central banks.

70. The appellants' attempt to extend the rationale for the s 11 commercial activities exception to s 14(3)(a) should be rejected as ahistorical and contrary to the stated purpose of s 14 as set out in the ALRC Report.

71. At AS [35] the appellants take issue with the prospect that Australian creditors might be unable to wind up an insolvent debtor by reason of the fact that the debtor is the separate entity of a foreign State. There are two answers to that argument. The first answer is that it is founded on a flawed premise: s 14(3)(a) does not speak to a creditor's ability to seek liquidation of the foreign entity *per se*, merely to the *Australian* courts' jurisdiction to entertain winding up proceedings. The second answer goes to the heart of foreign state immunity: to expose a foreign State or separate entity to the supervisory jurisdiction of

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[53] The unchallenged evidence before the primary judge was that the respondent conducted both commercial and governmental activities. As there was no issue on appeal as to the respondent's status as a separate entity, the evidence as to its activities both commercial and governmental was not included in the material provided to the Court of Appeal. Nor has it been put before this Court.

an Australian court via an Australian insolvency proceeding (with the corollary potential for Australian judicial scrutiny of foreign governmental acts) is inconsistent with the sovereign equality of states.[54] It would involve – adopting the language of Lord Wilberforce in *Playa Largo v I Congreso del Partido*[55] as quoted by the High Court in *PT Garuda HCA*[56] – challenges or inquiries into acts of sovereignty or governmental acts of the foreign State, being a threat to the dignity of the State and an interference with its sovereign functions.

72. Finally, regarding the appellants' submissions at AS [28] as to the operation of s 14(3)(b), this Court need not resolve any question as to the operation of s 14(3)(b) in these proceedings (although the respondent's view is that s 14(3)(b) operates in the same way as the primary judge and the Court of Appeal found s 14(3)(a) to operate). The remarks of Hayne J in the Supreme Court of Victoria in *Adeang v The Nauru Phosphate Royalties Trust*[57] on which the appellants rely are of no assistance: they were *obiter dicta*, they dealt only with s 14(3)(b) and did not grapple with s 14(3)(a), and the arguments accepted in this case below were not advanced before his Honour.

Part VI: TIME ESTIMATE FOR ORAL ARGUMENT

73. The Respondent estimates 2 hours for its oral argument.

Dated: 11 January 2024

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54 See the second reading speech in which the sovereign equality of states is identified as the basic justification for foreign state immunity (Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 1985, 141 (Lionel Bowen, Attorney-General)). See also *Firebird* at 70-71 [133]-[134] (Gageler J).

55 [1983] 1 AC 244 at 262.

56 (2012) 247 CLR 240 at [6] (French CJ, Gummow, Hayne and Crennan JJ).

57 Unreported, 8 July 1992, 7.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

GREYLAG GOOSE LEASING 1410 DESIGNATED ACTIVITY COMPANY
First Applicant

GREYLAG GOOSE LEASING 1446 DESIGNATED ACTIVITY COMPANY
Second Applicant

and

P.T. GARUDA INDONESIA LTD
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the respondent sets out below a list of the statutes referred to in its submissions.

No.	Statute	Version	Provision(s)
1.	*Acts Interpretation Act 1901* (Cth)	Current	ss 15AA, 15AB, 21
2.	*Bankruptcy Act 1966* (Cth)	Current	s 43
3.	*Corporations Act 2001* (Cth)	Current	ss 18, 21
4.	*Foreign States Immunities Act 1985* (Cth)	Current	ss 3, 9, 11, 14, 16, 22,
5.	*State Immunity Act 1978* (UK)	Current	ss 6(3), 14(2)