ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S 166 of 2011

BETWEEN:

PT GARUDA INDONESIA LTD
ARBN 000 861 165
Appellant

10 **AUSTRALIAN COMPETITION & CONSUMER COMMISSION**
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

1. These submissions reply to those of the ACCC filed and served on 25 November 2011 (**RS**).

2. **RS para 3.** The ACCC now disagrees with Garuda's formulation of the issue. Garuda's formulation is accurate. It was accepted as accurate by the ACCC
20 when special leave was granted: see [2011] HCATrans 280 (extract attached). The ACCC does not proffer an alternative formulation. Instead it propounds a distinction between legislation which prohibits, and legislation which applies in an "attenuated, incidental or indirect way". That imprecise distinction does not assist legal analysis of the question as to the scope of the immunity.

3. **RS para 5.** The ACCC disagrees with Garuda's summary of the case. The focus of the disagreement seems to be directed to disputing whether the ACCC's case was whether there was a contract, as opposed to an arrangement or understanding, between the airlines with a proscribed anticompetitive purpose
30 or effect on some market. As may be seen perhaps most clearly from the table

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of contents at AB 8 and the contraventions alleged at AB 75-77, the ACCC's lengthy pleading confines itself to asserting an arrangement or understanding, as opposed to a contract, between the airlines. The subject matter of the alleged arrangement or understanding was the contractual prices to be charged for freight services. The ACCC quotes one half of a sentence in para 25 of Garuda's submissions in chief and assert that it is "simply not correct"; Garuda maintains that the sentence fairly describes the case advanced by the ACCC.

4. The reason for the ACCC's disagreement is this. The ACCC seeks to elide the *conduct* alleged to contravene the TPA Act (reaching an arrangement or understanding with anticompetitive purpose or effect in an Australian market) with the *subject matter* of those alleged arrangements or understandings. The latter are (obviously) commercial transactions, between carrier and purchaser of freight services. Equally obviously, the latter are *merely* the factual background to the proceeding. There is no allegation of any breach of those contracts. The parties to them are not parties to the proceeding. The contracts are not mentioned in the pleading, save implicitly by allegations as to the giving effect of the alleged understanding "by imposing a fuel surcharge" or "by imposing an insurance surcharge". (They are mentioned in the boot-strapping particulars served 2½ months after Garuda's motion was served, as noted in RS footnote 1.)

5. The resolution of the statutory question, whether the *proceeding* concerns a commercial transaction, is not answered by an appeal to the factual background which, as it happens, includes commercial contracts. The character of the *proceeding* depends upon the character of the elements of the causes of action alleged. Those elements are:

   (a) the making of an arrangement or arriving at an understanding, one of whose provisions has either an anticompetitive purpose or effect;

   (b) which has the purpose or effect of substantially lessening competition in a market in Australia in which Garuda supplies services; and

(c) the giving effect to a provision of an arrangement or understanding whose purpose or effect is anticompetitive.

It is tolerably plain that the factual issues which will be determinative, if there is no immunity, are: were there the arrangement or understanding alleged by the ACCC. Did they have a proscribed purpose? Were they given effect to? Was there intended to be, and was there in fact, a substantial lessening of competition in some Australian market?

6. In short, the fact that the underlying subject matter of the alleged arrangements and understandings said to have been entered into and given effect to are the many hundreds or thousands of commercial freight transactions does not answer the question posed by s11. It is necessary to analyse the character of the issues formulated by the pleading.

7. **RS para 10.** The ACCC appears to have misread paragraph 24 of Garuda's submissions. Plainly there is an *ejusdem generis* definition ("or like transaction", "or a like activity"). Plainly paragraphs (a), (b) and (c) are not confining of that definition ("without limiting the generality of the foregoing").

8. **RS para 11.** Garuda agrees with the ACCC that it would do violence to the statutory language to confine the legal meaning of the text to contractual dealings. That is why Garuda conceded that commercial activities which fell short of contract were encompassed by it (at para 25 of its submissions in chief).

9. **RS para 13.** The passages from *Svenska Petroleum Exploration AB* and Dickinson, Lindsay & Loonam relied on by the ACCC require examining the subject matter of the proceedings, being the claims and the acts or omissions on which the claims are based, in contradistinction to the factual background. That examination will (at least ordinarily) take place in the absence of a defence and evidence. In this respect, it is no different from other "jurisdictional" issues; cf *Re Wakim; ex parte McNally* (1999) 198 CLR 511 at [139]; *Agtrack (NT) Pty Ltd v*

Hatfield (2005) 223 CLR 251 at [29]. Those factual matters and issues are identified above; they are a consequence of the formulation of the norms of conduct established by s45(2)(a)(ii) and 45(2)(b)(ii) of the TPA Act.

10. **RS para 17.** The ACCC draws attention to regulatory proceedings under the *Conciliation and Arbitration Act* and the *Occupational Health and Safety Act* which would fall within the s12 exception. Garuda agrees. Section 12(2) in terms extends the exception in s12(1) to include "a right or obligation conferred or imposed by a law of Australia". No such language appears in s11. The absence is telling.

11. **RS paras 26-29.** In these paragraphs the ACCC conflates the doctrine of restrictive immunity with one of the exceptions which it reflects.

12. Of course the doctrine of restrictive immunity was not confined to protecting contractual rights. That is why there are a *series* of exceptions in the Act. For example, the exception to which Lord Maugham referred cited in RS para 28 is reflected in the qualified admiralty exception in s18.

13. The question in this appeal is not the content of "the doctrine of restrictive sovereign immunity" and whether that is confined to contractual rights. The question is the scope of one aspect of the statutory implementation of that doctrine, namely, the commercial transaction exception.

14. **RS para 32.** The ACCC asserts that Garuda's argument is as flawed as that rejected in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [51]. It was there held that a high level statutory purpose (revenue raising) assists little in relation to the specific questions of construction. The ACCC's reliance at a high level of generality on the Act implementing the doctrine of restrictive sovereign immunity is attended by the flaw identified in *Alcan*. Garuda's argument, to the contrary, is based in this respect on the

textual proposition that exceptions to a rule are not construed so as to undermine its generality.

15. **RS para 33.** The ACCC asserts that Garuda's construction would result in a carrier being free to mislead and deceive Australian consumers who did not enter into a contract. That is a straw man. As Garuda said in its submissions prior to the grant of special leave "It by no means follows that [Garuda's] construction would permit a separate entity to publish false advertisements for airline tickets with impunity; on any view, a contract for carriage by air is a commercial transaction" (submissions in reply filed 15 June 2011, para 5).

16. **RS paras 35-47.** It is common ground that there is no Australian or foreign decision precisely on point. Other countries have differently worded statutes, which have been applied in different circumstances. There is limited assistance from those decisions.

17. One thing may be said, however. It would not be inconsistent with the approach taken by overseas courts for the Act to be construed so as to leave intact sovereign immunity where a foreign State is alleged to have entered into an arrangement, outside Australia, with anticompetitive consequences on a worldwide market. For example, it would not be out of line for the ACCC to be unable to proceed in the Federal Court of Australia against, say, Kuwait, Qatar and the United Arab Emirates, following a decision from OPEC to reduce the supply of oil, even though that had a demonstrable effect on an Australian market.

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HAYNE J: Can the proceeding brought by ACCC be described as a proceeding seeking penal enforcement of a norm of conduct governing commercial transactions generally?

MR HOWE: Your Honour, we would not cavil with the proposition that what we are concerned with here is broadly in the nature of enforcement proceedings brought by a regulator to enforce standards of conduct which apply to the very conduct in issue here, namely, the engagement in a commercial transaction directed to, allegedly, the diminution of competition in a market.

HAYNE J: The question that would then arise is whether a proceeding seeking the penal enforcement of the norm of conduct governing commercial transactions generally in which the focus falls upon one or more commercial transactions that have been undertaken in pursuance of some agreement arrangement or understanding concerns a commercial transaction. Is that the question that confronted the courts below?

MR HOWE: Yes, your Honour.

HAYNE J: You say it is resolved one way, Mr Leeming says it is resolved the other.