IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S 343 OF 2011**

On appeal from

the Federal Court of Australia

BETWEEN: **P T GARUDA INDONESIA LTD ARBN 000 861 165**

Appellant

AND: **AUSTRALIAN COMPETITION & CONSUMER COMMISSION**

Respondent

RESPONDENT'S SUBMISSIONS

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PART I FORM OF SUBMISSIONS

1. The Respondent (**ACCC**) certifies that this submission is in a form suitable for publication on the Internet.

PART II ISSUES

2. Whether the proceeding (NSD 955/2009) against the Appellant (**Garuda**) (the **Proceeding**) concerns a commercial transaction within the meaning of s 11 of the *Foreign States Immunities Act 1985* (Cth) (**Act**).

3. The articulation of the issue at [2] of Garuda's submissions is too broad because it does not discriminate between potentially relevant possibilities. Whatever may be the position in relation to statutory norms of conduct which only apply to commercial transactions in an attenuated, incidental, or indirect way, the Court is here concerned with a statutory scheme which expressly and directly prohibits particular kinds of commercial transactions (those that are anti-competitive in their purpose or effect).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The ACCC certifies that it has considered whether s 78B notices should be given and has concluded that they should not be given.

PART IV FACTS

5. The facts set out in Part V of Garuda's submissions do not properly describe the ACCC's case against Garuda in the Proceeding. That case, in short, is that: Garuda and other airlines entered into anti-competitive arrangements or understandings (between themselves) to impose surcharges on commercial freight services to Australia; pursuant to those anti-competitive arrangements or understandings, Garuda and other airlines imposed such surcharges on commercial freight services to Australia from Indonesia and Hong Kong; and the anti-competitive conduct of Garuda was intended to be implemented, and was in fact implemented, by way of prices charged in contracts entered into by Garuda with its customers. Garuda is simply not correct in asserting (at [25]) that "the ACCC does not allege any contract was entered into".[1]

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[1] By letter dated 21 January 2010, the ACCC provided Garuda with the following further particulars of its Statement of Claim dated 2 September 2009: 'In relation to the whole of the Statement of Claim, references to the provision/supply of air services should be understood as referring to the provision of such services pursuant to fee-for-service contracts. References to the imposition, re-imposition, levying, application or maintenance of particular surcharges should be understood as referring to the imposition, reimposition, levying, application or

PART V LEGISLATIVE PROVISIONS

6. The ACCC agrees that the applicable statute is the Act.

PART VI ARGUMENT

7. The Full Court's conclusion that the Proceeding concerns a commercial transaction is correct. The language of s 11 directs attention to the subject-matter of the Proceeding. Here, all of the relevant conduct alleged against Garuda involved entry by it into commercial transactions (see paragraph 5 above).

8. The Proceeding is concerned with quintessentially commercial conduct – the setting of prices in relation to the provision of commercial services – which conduct was intended to, and did, affect Australian consumers of those services.

9. The Full Court's conclusion is supported by (i) the legislative text (ii) previous Australian cases dealing with the interpretation of "connecting" words or phrases, (iii) the doctrine of restrictive immunity on which the Act is based, (iv) the need to avoid anomalous results, and (v) the construction of similar provisions by courts in the United Kingdom, the United States and Canada.

Text

10. The express statement that paragraphs 11(3)(a)-(c) do not limit the "generality" of the definition of "commercial transaction" precludes resort to the *ejusdem generis* principle invoked by Garuda (at [24]): *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679.

11. The expression "commercial transaction" is very broadly defined in the general definition in s 11(3) to mean: "...a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered *or a* like activity in which the State has engaged". Garuda's arguments (at [24]-[26]) concerning "core" or "central" meaning involve unwarranted glosses on the text of that general definition.

11.1 First, the text of the general definition is not limited to transactions entered into with a party to the proceedings, or to activities engaged in with a party to the proceedings. The definition plainly extends to unilateral activity undertaken by a separate entity. Had the legislature wished to limit the "commercial transaction" exception to dealings between particular parties (such as parties to the proceedings in question), it could readily have said so, as indeed it did in other provisions of Part II: see ss 11(2), 16(1), and 17(3).

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maintenance of such surcharges pursuant to fee-for-service contracts. References to prices and pricing should be understood as references to prices/pricing of services provided/supplied (or to be provided supplied) pursuant to fee-for-service contracts'.

11.2 Secondly, the text of the general definition is incapable of confinement to contractual dealings without doing substantial violence to the language deployed by the legislature.

12. Similarly, contrary to Garuda's Submissions (at [26]-[27]) there is no warrant for confining the text of s 11 to private law remedies, such as damages or rescission. To read s 11 as being so confined would lead to the anomalous result that the present proceeding would "concern a commercial transaction" provided the ACCC confined itself to seeking remedies also available to private litigants.

13. The ordinary meaning of "concern" is broad - "regarding, touching, in reference or relation to; about": *Minister of State for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273 at 289. The primary focus in determining whether a proceeding concerns a commercial transaction must be the factual matters alleged, and issues raised, in the proceeding in question (see *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another (No 2)* [2006] EWCA Civ 1529; [2007] QB 886 at 931; Dickinson, Lindsay & Loonam, *State Immunity: Selected Materials and Commentary,* (2004), at p 357). This is reinforced by the presence of the words "in so far as" in s 11. As Garuda notes (at [13]), the use of the words "in so far as" authorises the severability of a proceeding by reference to particular causes of action and claims. A court could not sensibly embark upon the enquiry which is directed by the use of the words "in so far as" without examining the factual matters alleged, and issues raised, in the proceeding.

14. There is nothing in s 11, or any other provision of Part II, which suggests that civil enforcement proceedings brought by a regulator were intended to fall outside the stipulated exceptions to immunity. The definition of "proceeding" in s 3 unambiguously extends to regulatory proceedings.

15. So to construe s 11 does not undermine the various exceptions in ss 11 – 21 of the Act (cf Garuda's Submissions at [19] and [20]). As Rares J observed, a number of the exceptions in Part II of the Act have a wider reach than the commercial transaction exception in s 11. For example, s 19 excludes liability for bills of exchange drawn, made, issued or endorsed by a foreign State in connection with a non-immune "transaction or event": Rares J at [216]. Similarly, the scope of s 18, which excludes immunity for actions *in rem*, is wider than maritime claims arising from commercial transactions: Rares J at [218].

16. Indeed, a consideration of the various exceptions in Part II makes clear that they cannot be sensibly read down by reference to each other. Rather, where the legislature intended to achieve mutual exclusivity as between particular exceptions, it so provided in express terms: see the interaction between ss 11(3)(c), 12, and 19.

17. Garuda's approach (at [15], [28] and [34]) of attempting simplistically to isolate the "gravamen of the questions" posed by the various exceptions to immunity, such as "[i]s it is an employment dispute?" (s 12) and "[i]s it a personal injury claim?" (s 13) is no substitute for the carefully expressed statutory language deployed in s 11 and Part

II of the Act. The questions posed by Garuda are apt to distort the outcome sought to be achieved by the legislature. For instance, regulatory proceedings to recover penalties for non-payment of award rates of pay under Part VI of the *Conciliation and Arbitration Act 1904* (Cth) (as in force when the Act commenced), and civil penalty proceedings against a separate entity (as an employer) under the *Occupational Health and Safety Act 1991* (Cth), clearly come within s 12(2) of the Act, whether or not they answer the description of an "employment dispute".

18. Significantly, Garuda is unable to point to any authority in Australia or overseas to the effect that the "commercial transaction" exception only applies to proceedings brought by a counter-party to a (contractual) dealing. To the contrary:

18.1 In the case of *Adeang v The Nauru Phosphate Royalties Trust,* (unreported, Vic SC, 8 July 1992 per Hayne J), the plaintiff alleged that the Nauru Trust breached common law and statutory duties by lending money to the Republic of Nauru. The commercial transaction was between the Nauru Trust and the Republic of Nauru. There was no suggestion that s 11 had no application simply because the plaintiff was not a party to the transaction.

18.2 In *Victoria Aircraft Leasing and Ors v United States and Others* (2005) 190 FLR 351, two of the claimants for relief were not parties to the relevant commercial transaction (which took place between the US and Nauru). There was no suggestion that s 11 had no application to them simply because they were not counter-parties.

18.3 In *BP Chemicals v Jiangsu Sopo Corp Ltd* 285 F 3d 677 (8th Cir. 2002), the US Court of Appeal held that a suit brought by BP against a corporation owned by the Chinese government for theft of trade secrets came within the commercial transaction exception in s 1605 of the *Foreign Sovereign Immunities Act 1976* (US). There was no suggestion that the commercial transaction exception did not apply because BP had not been a party to the commercial transaction giving rise to the suit.

18.4 In *State Bank of India v NLRB* F. 2d 526 (7th Cir. 1986), the State Bank of India claimed it was immune from the jurisdiction of the National Labor Relations Board (NLRB). Pursuant to charges laid by the International Federation of Health Professionals (IFHP), the NLRB found that the Bank had committed violations of various statutory provisions by refusing to bargain with the IFHP. The US Court of Appeal rejected the Bank's immunity claim, finding that the commercial activities of the Bank came within the commercial activity exception in the *Foreign Sovereign Immunities Act 1976* (US). There was no suggestion that the exception did not apply because the Union was not a party to the commercial activity engaged in by the Bank.

Previous Australian cases interpreting connectors

19. In *O'Grady v Northern Queensland Co Ltd* (1989) 169 CLR 356 this Court was required to interpret a very similar type of provision, albeit in quite a different statutory context. Section 80 of the *Mining Act 1968* (Qld) conferred exclusive jurisdiction on a Wardens Court in all proceedings "arising in relation to" a specified subject, being mining or any mining tenement. The basic issue before the Court was whether a particular counterclaim was a proceeding which "related to" the stipulated subject-matter - a similar issue to that which arises here. All members in the majority accepted that the counterclaim would have related to "mining or a mining tenement" if it had required adjudication of facts about either of those topics: see Dawson J at 367; Toohey and Gaudron JJ at 374. The minority, Brennan CJ and McHugh J, preferred a more expansive approach: see Brennan CJ at 362, 364, and especially 365; and McHugh J at 377.

20. What is of significance, for present purposes, is that the more stringent approach taken by the majority in *O'Grady* is satisfied here because the Proceeding necessarily requires adjudication of, and depends upon, whether Garuda entered into, and gave effect to, transactions of a commercial kind. The Proceeding cannot be determined except by close reference to the precise content of the commercial dealings upon which the ACCC relies. To adopt the language of Dawson J and Toohey and Gaudron JJ in *O'Grady* (at 367.5 and 374.9 respectively), the Proceeding involves a direct, and not merely coincidental or incidental, connection with commercial transactions.

21. The Full Court's construction of "concerns" in the context of s 11 of the Act is also consistent with other decisions of this Court dealing with the construction of similar connectors, albeit in other contexts: see, for example, *Fountain v Alexander* (1982) 150 CLR 615 at 624.5 (per Gibbs CJ), 629.7 (per Mason J) and 628.9 (Stephen J); *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 398 [24] (per French CJ).

Context, purpose and policy of the Act: the doctrine of restrictive immunity

22. The Act is based on almost identical provisions formulated by the Australian Law Reform Commission (**ALRC**) in its 1984 Report, *Foreign State Immunity* (ALRC 24): *Zhang v Zemin* [2010] NSWCA 255, (2010) 243 FLR 299 at [138]; see also Explanatory Memorandum, *Foreign States Immunities Bill 1985* at 2. An analysis of the ALRC's Report makes clear that the general purpose and policy of the Act was to give effect to the doctrine of restrictive immunity.

23. The essence of that doctrine is that a State is immune from the jurisdiction of foreign courts for acts undertaken in the exercise of sovereign authority (*acta jure imperii*) but not for acts that are private or commercial in character (*acta jure gestionis*): *NML Capital Ltd v Republic of Argentina* [2011] 3 WLR 273 at 280.H; *Saudi Arabia v Nelson* (1993) 507 US 349 at 359-360.

24. This is the basic distinction that underpins the commercial transaction exception in s 11 of the Act. As the ALRC stated at [90]:

> The basic principle upon which the commercial transaction exception to immunity rests is that when a foreign state acts in a 'commercial' matter within the ordinary jurisdiction of local courts it should be subject to that jurisdiction. This is of course the central argument behind the shift from absolute to restrictive immunity during the last century.[2]

25. The Full Court's interpretation of s 11 is squarely in line with these statements of principle.

26. While one of the driving forces of the emergence of the doctrine was to enable individuals dealing with foreign States to enforce their contractual rights, the doctrine has never been confined to such claims: cf Garuda's submissions at [25] and [26]. Rather, the doctrine reflects the more general concept that when governments enter the marketplace in a trading capacity - that is, by engaging in commercial transactions and activities - their acts lose their sovereign character, and take on the character of a private trader: *I Congreso del Partido* [1983] AC 244 at 266.

27. The doctrine of restrictive immunity replaced absolute immunity through a series of common law decisions in the last century. Those decisions make clear that the move away from absolute immunity was prompted by a wider, more fundamental concern than the protection of the rights of counter parties dealing with foreign States: that foreign States should not be permitted to enjoy an unfair advantage over private competitors.

28. For example, in *Compania Vaiera Vascongada v Steamship Cristina* [1938] AC 485, in which the House of Lords upheld but questioned the doctrine of absolute immunity (see *NML Capital Ltd v Republic of Argentina* [2011] 3 WLR 273, 280, [10] and ALRC 24 at [9]), Lord Wright expressed reservations about a situation in which "Governments may use vessels for trading purposes, in competition with private ship-owners, and escape liability for damage, and salvage claims": at 512. In the same decision, Lord Maugham expressed similar concerns at 521-522:

> [T]he question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country?

29. Accordingly, the doctrine of restrictive immunity was not developed simply to protect the contractual rights of counter-parties.

30. This general conception of restrictive immunity is also evident in the views of Lord Denning, whose decisions in the Court of Appeal were instrumental in the development of the doctrine of restrictive immunity: see *NML Capital Ltd v Republic of*

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[2] See also the ALRC Report Summary at [17].

Argentina [2011] 3 WLR 273, 281, [12]. In *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, the Court of Appeal applied the doctrine of restrictive immunity to rule that a state owned Bank was not immune from proceedings to recover on a letter of credit issued by the Bank. Lord Denning, in a judgment that became highly influential, stated at p 558.E:

> If a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place.

31. The rules of the marketplace in Australia include statutory norms of conduct applicable to commercial transactions and activities – in this instance, the provisions of Part IV of the *Competition and Consumer Act 2010* (Cth).

32. As Rares J held, "the restrictive theory of State immunity is concerned, relevantly, to assimilate, as much as possible, the position of a foreign State to that of any other person who engages in commercial or like dealings, or associated activity, with others": at [219]. Given that the general purpose and policy of the Act was to give effect to the doctrine of restrictive immunity, it is wrong to emphasise the conferral of general immunity at the expense of the very exceptions which were intended to give effect to the doctrine: see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, at 47-48 [51]. In that case the plurality noted that facilitation of one statutory purpose (here, conferral of general immunity) should not be allowed to overwhelm other evident statutory purposes, or the plain meaning of the particular text of the statutory provision under consideration.

Avoiding anomalous consequences

33. Confining the commercial transaction exception to proceedings brought by contractual counter-parties would have the consequence that a foreign State (or, as in this case, its separate entity) could freely engage in commercial practices that contravened the *Competition and Consumer Act 2010*, provided no counter-party was affected. For example, there would be no legal recourse in Australian courts against a foreign State publishing false and misleading advertisements directed at Australian consumers unless a private consumer or business was actually misled by the advertising and subsequently entered into a contract. Not only does such an outcome conflict with the plain meaning of the text of s 11 (see Rares J at [201]), it is distinctly at odds with the notion underlying the doctrine of restrictive immunity that States engaging in commercial activities should be treated in the same manner as their private competitors.

34. Furthermore, on Garuda's construction of s 11, a foreign State's exposure to suit would depend on the motivation and resources of individual counter-parties to enforce the relevant statutory standards. This can be contrasted with the position of privately owned companies engaging in the same behaviour who also face the risk of enforcement action brought by the ACCC on behalf of consumers and businesses. Again, this sort of unequal position is inconsistent with the notion that when governments engage in commercial activities, they should be treated like any other market participant.

International authorities

35. It is common ground that it is relevant and useful to consider foreign decisions on counterpart legislation, bearing in mind that the respective legislative provisions vary: see *State Immunity Act 1978* (UK), s 3*; Foreign Sovereign Immunities Act of 1976,* 28 USC § 1605(a)(2) (United States); and *State Immunity Act,* RSC 1985, c S-18, s 4 (Canada).

36. Although foreign courts have not addressed precisely the same issue that arises here, the approach taken by the Full Court to the construction of s 11 is broadly consistent with the construction of similar provisions by foreign courts: Rares J at [218].

The United Kingdom

37. Section 3 of the *State Immunity Act 1978* (UK) uses the connector "relating to" rather than "concerns".

38. In a number of decisions considering the scope of this provision, UK courts have held that the expression is directed to the facts, issues or subject matter of the proceedings. For example, in *Svenska Petroleum Exploration AB v Republic of Lithuania (No 2)* [2007] QB 886, [137]:

> In our view the expression 'relating to' is capable of bearing a broader or narrower meaning as the context requires. Section 3 is one of a group of sections dealing with the courts' adjudicative jurisdiction and it is natural, therefore, to interpret the phrase in that context as being directed to the subject matter of the proceedings themselves rather than the source of the legal relationship which has given rise to them.

39. Contrary to Garuda's submissions at [30], the Full Court's decision is not inconsistent with the House of Lords' interpretation of s 3 of the UK Act in *Holland v Lampden-Wolfe* [2000] 1 WLR 1573. The House of Lords' obiter view that the commercial transaction exception did not apply is readily distinguishable on the facts: see Lander and Greenwood JJ at [65]. The proceeding in *Holland* was not about a commercial transaction (namely, the contract between the university and the US Government), but about the memorandum written by the defendant: at 1587F. In other words, the contract was merely a background or incidental matter. By contrast, the Proceeding is all about the commercial transactions in which Garuda is said to have engaged.

40. To the extent Garuda relies upon decisions in which actions to enforce judgments have been held not to "relate to" commercial transactions, such reliance is misplaced. There is no inconsistency between those decisions and the approach of the Full Court in the present case. In cases involving enforcement of judgments, courts have looked to the subject matter of the proceedings in order to determine whether they are proceedings "relating to a commercial transaction". For example, in *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB), Stanley Burton J rejected the Nigerian Government's submission that an application to register a judgment obtained in Nigeria was a proceeding relating to a commercial transaction. Burton J's reasoning was as follows (at [24], emphasis added):

> In my judgment, the proceedings resulting from an application to register a judgment under the 1920 Act relate not to the transaction or transactions underlying the original judgment, but to that judgment. *The issues in such proceedings are concerned essentially with the question whether the original judgment was regular or not.*

41. More recently, in *NML Capital Ltd v Republic of Argentina* [2011] 3 WLR 273, the Supreme Court was faced with the question of whether a foreign judgment against a foreign state could be enforced by way of a common law action on that judgment in England. In a 3:2 decision, the Court decided that the proceeding related to the foreign judgment, rather than the cause of action underlying that judgment (a claim for default on bond obligations issued by Argentina). In answering that question the Court applied the same analysis adopted by the Full Court below, examining the issues or allegations that the Court was required to adjudicate. Lord Mance JSC said at [85] (emphasis added):

> The pursuit of a cause of action without the benefit of a foreign judgment is one thing; a suit based on a foreign judgment given in respect of a cause of action is another. In the present case, the only issue arising happens to be the issue of state immunity with which the Supreme Court is concerned. But a claim on a cause of action commonly gives rise to quite different issues from those which arise from a claim based on a judgment given in respect of a cause of action. *A claim on a cause of action normally involves establishing the facts constituting the cause of action. A suit based on a foreign judgment precludes re-investigation of the facts and law thereby decided.*

42. Further, there is no inconsistency between the Full Court's decision and the ultimate decisions in those cases. Actions to enforce judgments relating to commercial transactions are much further removed from the underlying commercial transaction than the present proceeding, which requires the ACCC to prove the very existence and content of commercial transactions in order to succeed.

The United States

43. Similarly, appellate authority from the United States focuses on the act or activities that are the subject of the proceeding, rather than the relief claimed by the plaintiff in the proceeding: Rares J at [218]; *Saudi Arabia v Nelson* 507 US 349 at 357; *Kuwait Airways Corporation v Republic of Iraq* [2010] 2 SCR 571 at [29] – [30].

44. The US legislation varies from the Australian Act (and the UK Act). The *Foreign Sovereign Immunities Act,* 28 USC § 1605(a)(2) relevantly provides that a foreign state shall not be immune in any case:

> ... in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

45. The connector "based upon" has been interpreted as requiring a stronger relationship than the word "concerns": *Saudi Arabia v Nelson* at 358 (the term "based upon" was said to "[call] for something more than a mere connection with, or relation to, commercial activity"). Nevertheless, the way US courts have approached the task of determining whether or not the requisite connection is made out is consistent with the Full Court's approach. This is apparent from the US Supreme Court's reasoning in *Saudi Arabia v Nelson.* Nelson sought damages against Saudi Arabia for personal injury arising from detention and torture by the Saudi Government. Nelson had worked in a Saudi hospital under a contract of employment signed in the United States with a recruiter. Consequently, Nelson argued that the Saudi Arabian government was not immune because the action was based upon commercial activity in the United States. The Court's reasoning in rejecting this argument is set out in the opinion of the Court at [358]:

> In this case, the Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him. While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case. The Nelsons have not, after all, alleged breach of contract, see supra, at 354, but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.

46. Similarly, in *Arango v Guzman Travel Advisors Corporation* 621 F.2d 1379 (5th Cir. 1980) the US Court of Appeals for the Fifth Circuit held that the focus of the exception to immunity in § 1605(a)(2) is "whether the particular conduct giving rise to the claim in question actually constitutes or is connection with commercial activity".

Canada

47. The Supreme Court of Canada has taken the widest view of the commercial transaction exception. Section 5 of the *State Immunity Act*, RSC 1985, c S-18, states that "a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state". In *Kuwait Airways Corp v Iraq* [2010] 2 SCR 571, the Supreme Court of Canada held that an application for recognition of a UK judgment against Iraq brought by Kuwait was a proceeding relating to the commercial activity of Iraq, on the basis that the original judgment, obtained from a UK Court, related to a commercial activity – namely, Iraq's retention and use of aircraft seized during Iraq's invasion of Kuwait: at [35]. There is no suggestion in the Supreme Court's judgment that the commercial transaction exception was not applicable because KUC had not entered into contractual relations with Iraq. Rather, like UK and US Courts, the Court looked at the "subject of the litigation". Where the Court went further than the majority in *NML Capital Ltd* was in its preparedness to look at the underlying subject matter, even though those matters were not at issue in the proceedings.

PART VII NOTICE OF CONTENTION OR CROSS APPEAL

48. The ACCC has not filed any notice of contention or cross appeal.

Date of filing: 25 November 2011

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