

BETWEEN:

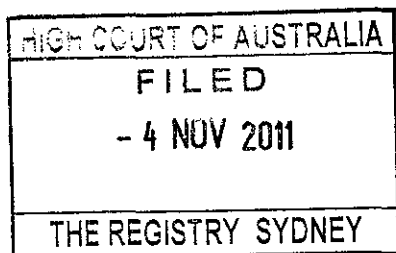
PT GARUDA INDONESIA LTD

ARBN 000 861 165

Appellant

**AUSTRALIAN COMPETITION &
CONSUMER COMMISSION**

Respondent



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APPELLANT'S SUBMISSIONS

Part I:

1. The appellant (**Garuda**) certifies that this submission is in a form suitable for publication on the internet.

20 **Part II:**

2. Whether penal enforcement of an Australian statutory norm of conduct regulating commercial conduct by an Australian regulator falls within the "commercial transaction" exception in the *Foreign States Immunities Act 1985* (Cth) (**Act**).

Part III:

- 30
3. Garuda certifies that it has considered whether s78B notices should be given, and concluded that they should not be given.

Part IV:

4. The decision of the primary judge (Jacobson J) is reported as *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2010) 269 ALR 98. The decision of the Full Court (Lander, Greenwood and Rares JJ) is reported as *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393.

Part V:

5. The respondent (**ACCC**) commenced proceedings against Garuda in 2009 alleging that it, and other international airlines, by conduct in Indonesia and Hong Kong, reached arrangements or understandings to impose fuel surcharges on certain routes, and gave effect to those arrangements and understandings by imposing surcharges on freight services from Indonesia and Hong Kong (Statement of Claim, paragraphs 252-254). On the view of
10 markets contended for by the ACCC, the reaching of the arrangements or understandings, and the giving effect to them, each contravened s45 of the *Trade Practices Act 1974* (Cth) (now, the *Competition and Consumer Act 2010* (Cth)) (**TPA Act**).
6. The ACCC does not allege that any of the arrangements or understandings were reached in Australia. It does not allege that Garuda imposed any surcharge on freight services from Australia. The ACCC alleges that there was a proscribed purpose, or effect, upon one or more markets in Australia. The ACCC asserts there is a "Global market", an "Australian market" and a variety of route specific markets for air freight.
- 20 7. The ACCC seeks declarations, injunctions and civil penalties. It does not seek interlocutory relief. The events the subject of the proceedings took place between 5 and 10 years ago.
8. Garuda applied for the proceeding to be dismissed on the first return date (22 October 2009). The primary judge (Jacobson J) found in favour of Garuda on the "commercial transaction" exception (at [105]-[137]), but held that Garuda was not a "separate entity" to which the immunity conferred by the Act applied. On appeal, all members of the Full Court held that Garuda was a "separate entity" and so entitled to the general immunity in s9. However, all members of the Full Court also held that the proceeding fell
30 within the commercial transactions exception in s11.
9. Garuda has not otherwise taken a step in the proceeding in the Federal Court, so as to submit to jurisdiction (nor does the ACCC suggest that it has).

Part VI:

10. Garuda is a "separate entity" for the purposes of the Act (the Republic of Indonesia directly owns 95.5% of its shares, four of the five members of the Board of Commissioners were, at the relevant times, senior officials of the Indonesian government, and the minority shareholding is held by government controlled corporations associated with Indonesian airports). Section 22 of the Act renders applicable to Garuda the general immunity conferred upon foreign states. Section 9, so read, confirms that Garuda is immune from the jurisdiction of Australian courts "except as provided by or under this Act". The only exception on which the ACCC relies is the "commercial transaction" exception in s11.
11. It follows that it is common ground that Garuda is immune from jurisdiction unless (and only unless) s11 is engaged. The sole issue in this appeal is as to the effect of the words in s11 "in so far as the proceeding concerns a commercial transaction".
12. **A. Statutory language.** The starting point is the statutory language, which contains four elements.
13. **(a) In so far as.** The first element, "in so far as", authorises the severability of a proceeding for the purposes of applying the immunity conferred by the Act. It proceeds on the basis that the same proceeding may involve more than one cause of action against the state (for example, it might include two "completely disparate claim[s]", only one of which falls within an exception; cf *Felton v Mulligan* (1971) 124 CLR 367 at 373). It also proceeds on the basis that a plaintiff may have joined other defendants, which are not entitled to immunity, to the same proceeding.
14. **(b) The proceeding.** These words are defined, exhaustively, in s3 to mean a proceeding in a court excluding a prosecution and a criminal appeal. It was and is common ground that the ACCC's proceeding in the Federal Court is a "proceeding", notwithstanding that it seeks civil penalties. However, what seems to be in issue is the important role the words "the proceeding" have in relation to the characterisation, and in particular the level of abstraction of the characterisation required by the Act.

15. The so-called doctrine of “restrictive sovereign immunity”, which is implemented by the Act, selectively permits some litigious claims against foreign states to proceed, depending upon the character of the proceeding. Each of the exceptions to the general immunity in s9 is framed in terms of an exception to the general immunity “in a proceeding”. It follows that it is necessary to characterise the proceeding, as distinct from the particular allegations that are made and disputed and conceded within it. Hence, the gravamen of the questions posed by sections 12 and following is: “Is it an employment dispute?” or “Is it a personal injury claim?” etc.

10 16. **(c) Concerns.** “Concerns”, no differently from “relating to” or “in respect of”, is a word of connection. It is far from being the most expansive word that could have been used: see for example *Australian Securities Commission v Lord* (1991) 33 FCR 144 at 149 (Davies J). Its natural meaning is “regarding, touching, in reference or relation to, about”: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289. It takes its proper construction from the context: *Commissioner of Taxation v Scully* (2000) 201 CLR 148 at [39].

20 17. Context in this sense includes the immediate textual context, which has two presently relevant aspects. First, the context is a series of *exceptions* to a *general* conferral of immunity. The general conferral of immunity gives statutory recognition to sovereign equality between states and the principle of customary international law “that in the absence of special factors one does not exercise jurisdiction over equals”, that is, states do not sit in judgment upon the acts of other states (see ALRC 24 at [37]). That principle was explained by Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 201-202 as follows:

30 It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability.

18. Accordingly, the specific exceptions are to be construed narrowly, so that the tail of the exception does not wag the dog of the general immunity: cf *Cockle*

v Isaksen (1957) 99 CLR 155 at 165; *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194 at 216.

19. Secondly, amongst those specific exceptions, each is similarly framed: each involves the formula "in so far as the proceeding concerns X". The exceptions are also drafted each having regard to the other. One example of that is the carve-out of "contract of employment" from s11(3)(c) to be dealt with specifically in s12. Another is that "bills of exchange" are likewise excluded from s11(3)(c) such that (by reason of s19) the mere fact that a bill of exchange has been issued is irrelevant in determining whether any exception applies (this overturns what Lord Denning had said in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at 558F). A third is that the exception for certain intellectual property infringements only applies in respect of importations of property into Australia, or the use of property in Australia, to the extent that the importation or use is in the course of or for the purposes of a commercial transaction: s15(2). A fourth is the complex relationship between the qualified lifting of immunity in respect of some aspects of admiralty proceedings in rem against ships in use for commercial purposes or against commercial cargo (s18, noting s18(4)); although it is not express, the confirmation by s18(4) of immunity from arrest of a ship or its cargo, even if the ship is used for commercial purposes or the cargo is commercial cargo, is to be read together with s11 so that both have work to do.
20. Not lightly would a legal meaning be given to one exception such that it undermines the careful delineation between the several exceptions in ss11-21.
21. In short, both the nature of the legislation (exceptions from a general rule) and the interrelationship between those exceptions (each interacting with others) point against a broad meaning to be given to "concerns".
22. Thirdly, a very slight structural consideration is that the exceptions fall into two halves: exceptions largely regulated by common law (contract, tort and property): ss11-14 and exceptions largely regulated by statute (intellectual property, corporations, arbitrations, admiralty, taxation): ss15-20.

23. In contrast with the foregoing, the ACCC's approach has been to transplant the meaning afforded to the word in a different statute and in a different context. It is, with respect, erroneous to seek to extract the meaning given from such a word in a particular context (such as the conferral of jurisdiction in s80 of the *Mining Act* 1968 (Qld) considered in *O'Grady v Northern Queensland Co Ltd* (1989) 169 CLR 356) and apply it to a different context (the extent of an exception to a general conferral of immunity in federal legislation which was plainly derived from United Kingdom and North American antecedents); cf ACCC's summary of argument filed 6 June 2011 paragraphs 2.2 and 23-25 and [2011] HCA Trans 280.
- 10
24. **(d) Commercial transaction.** This term is defined in s11(3), exhaustively. It involves either a transaction of a specified type (defined *ejusdem generis*), or alternatively a "like activity". The examples which follow (contract for the supply of goods or services, an agreement for the provision of finance, or a guarantee or indemnity) exemplify the core meaning, which is where the counterparty to a contract with a foreign state seeks to sue on a contract in an Australian court. Plainly enough, each example needs to be construed so as not to render any of the others otiose: cf *Victoria Aircraft Leasing Ltd v United States* (2005) 12 VR 340 at [3] (Callaway JA).
- 20
25. The ACCC does not allege any contract was entered into; it is an anticompetitive arrangement or understanding which is alleged. It is conceded that the words "like activity" expand the exception so as to include commercial activities which fall short of contract. An example of this would be where there is a question as to whether a contract has been entered into or where a declaration that there has been a valid acceptance of repudiatory conduct.
26. But central to the meaning of "commercial transaction" is a dispute between parties in contractual relations, or as to the existence of their contractual relations. The litigation contemplated by the exception is private, and its subject matter is the commercial contract or like activities sought to be enforced or set aside.
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27. The ACCC is party to no contract or like activity. Nor is it seeking damages, or rescission, or any private law remedy directed to the contract or like activity. Instead it, a non party, with no pre-existing commercial interest, seeks to impose a penalty, foreign to general law, because of an anticompetitive consequence of the alleged arrangements or understandings, contrary to s45 of the TPA Act. That is a fair description of the proceeding. It is not one which concerns a s11 commercial transaction.

28. That is so even if there are allegations within the pleading which do concern a commercial transaction. The question is whether *the proceeding* concerns a commercial transaction, as distinct from some of the allegations made within it. As Callaway JA has said of the exception (albeit in a slightly different context):

In my view it is not enough, as in the case of a grant of legislative power, to say that the alleged agreement is in respect of the provision of finance even if it is also in respect of other things. The question is whether it may fairly be described in the language of s11(3)(b): *Victoria Aircraft leasing Ltd v United States* (2005) 12 VR 340 at [4 fn1].

29. **B. Statutory context.** The purpose of the Act was to set out the law in “clear and accessible form” (explanatory memorandum, p2). The Act was informed by its United Kingdom and North American antecedents, as the ALRC report (ALRC 24, para 90) makes clear. They in turn were informed by developments in the pre-existing case law, and a desire to introduce certainty: see *Zhang v Zemin* (2010) 243 FLR 299 at [142]-[149]. That history makes it “relevant and useful” to consider the foreign decisions on the counterpart legislation: cf *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar* (2008) 237 CLR 66 at [43]. Further, since the subject matter of the legislation is the relationship between Australian courts and foreign states, it is appropriate to prefer a construction which accords with that applying in other legal systems, to which Australia and Australian separate entities will be subject.

30. That was the approach of the primary judge. For the reasons given by him at [113]-[137], the approach of the English courts supports a construction which leaves outside the s11 exception the present proceeding, which is properly characterised as a claim for a pecuniary penalty brought by a regulator

pursuant to an Australian statute. As Lord Millett put the position in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, there is a distinction between the claims arising out of the transaction, and tortious claims arising independently of the transaction but in the course of its performance. The distinguishing considerations are:

- (a) only the ACCC, a non-party to any contract or like activity, could bring proceedings for civil penalties;
- (b) the subject of the proceeding is not the rights or obligations under any commercial contract, but the alleged anticompetitive purpose or effect of the alleged arrangements or understandings on a market in Australia in which Garuda supplies services.

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31. **C. Errors in the Full Federal Court.** With respect, error is disclosed in the reasons of Rares J in putting to one side the English decisions, on the basis that the foreign legislation was “differently worded” and “obviously different”: at [206]. For the reasons given above, they are highly probative. Seemingly, his Honour was referring to the expansion in the Australian provision effected by “like activities”: see at [207], [208] and [220]-[222]. Yet the English legislation, no differently from the Australian, expressly extends to activities as well as transactions: see s3(3)(c). Although focused on different provisions, Spigelman CJ regarded the English and Australian legislation as equivalent: *Zhang v Zemin* (2010) 243 FLR 299 at [132].

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32. With respect, error is also disclosed in the reasoning in the joint judgment. At [62] it is said that the paragraphs in s11(3) do not limit the types of transactions to which s11(3) applies. That is not so: plainly enough the concluding words of s11(3)(c) do so (otherwise the special provisions made in relation to contracts of employment and bills of exchange would be set at naught). Moreover, the proper construction of the provision requires looking at it in its totality, and that includes the fact that the legislation is based upon carefully crafted exceptions to a general immunity.

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33. At [63] their Honours say that it would be curious if there was an exception from the general immunity for lawful transactions, but not for unlawful

transactions. With respect, that is not so. For good reason, criminal proceedings are wholly outside the scope of the Act.


34. At [64] their Honours say that the conduct complained of by the ACCC is conduct which concerns a commercial transaction; that, with respect, elides the distinction between the matters alleged in the proceeding, and the proceeding itself. The Act requires an analysis of the latter.
35. The reasoning of the Full Court on this issue should not be followed. The reasoning of the primary judge, with respect, more clearly accords with the text and the context, and is to be preferred.

10 **Part VII:**

36. A copy of the relevant provisions of the Act is annexed to these submissions.
37. Those provisions are still in force in that form, save for an immaterial amendment to section 3 of the Act (the *Statute Law Revision Act 2010* (Cth) inserted a definition of 'Department of Foreign Affairs' and 'Minister for Foreign Affairs' in section 3 of the Act).

Part VIII:

- 20 38. The appeal be allowed.
39. Set aside orders 2 and 3 of the orders of the Full Court made on 19 April 2011, and in lieu thereof, allow the appeal, set aside order 1 made by Jacobson J on 2 June 2010, and in lieu thereof set aside the service of the proceeding pursuant to s38 of the *Foreign States Immunities Act 1985*.
40. The ACCC to pay Garuda's costs at first instance, on appeal to the Full Court of the Federal Court, and in this Court.



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Dated: 4 November 2011



Foreign States Immunities Act 1985

Act No. 196 of 1985

This compilation was prepared on 21 February 2003
taking into account amendments up to Act No. 141 of 1987

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting,
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Contents

Part I—Preliminary	1
1 Short title [<i>see</i> Note 1]	1
2 Commencement [<i>see</i> Note 1]	1
3 Interpretation	1
4 External Territories	3
5 Act to bind Crown	3
6 Savings of other laws	4
7 Application	4
8 Application to courts	4
Part II—Immunity from jurisdiction	5
9 General immunity from jurisdiction	5
10 Submission to jurisdiction	5
11 Commercial transactions	7
12 Contracts of employment	7
13 Personal injury and damage to property	9
14 Ownership, possession and use of property etc.	9
15 Copyright, patents, trade marks etc.	9
16 Membership of bodies corporate etc.	10
17 Arbitrations	10
18 Actions <i>in rem</i>	11
19 Bills of exchange	12
20 Taxes	12
21 Related proceedings	12
22 Application of Part to separate entities	13
Part III—Service and judgments	14
23 Service of initiating process by agreement	14
24 Service through the diplomatic channel	14
25 Other service ineffective	15
26 Waiver of objection to service	15
27 Judgment in default of appearance	15
28 Enforcement of default judgments	16
29 Power to grant relief	17
Part IV—Enforcement	18
30 Immunity from execution	18
31 Waiver of immunity from execution	18
32 Execution against commercial property	19
33 Execution against immovable property etc.	19
34 Restrictions on certain other relief	20
35 Application of Part to separate entities	20

Part V—Miscellaneous	21
36 Heads of foreign States	21
37 Effect of agreements on separate entities	21
38 Power to set aside process etc.	21
39 Discovery	22
40 Certificate as to foreign State etc.	22
41 Certificate as to use	23
42 Restrictions and extensions of immunities and privileges	23
43 Regulations	24
Schedule	25
Form 1	25
Form 2	26
Notes	27

An Act relating to foreign State immunity

Part I—Preliminary

1 Short title [see Note 1]

This Act may be cited as the *Foreign States Immunities Act 1985*.

2 Commencement [see Note 1]

The provisions of this Act shall come into operation on such day as is, or such respective days as are, fixed by Proclamation.

3 Interpretation

(1) In this Act, unless the contrary intention appears:

agreement means an agreement in writing and includes:

- (a) a treaty or other international agreement in writing; and
- (b) a contract or other agreement in writing.

Australia when used in a geographical sense, includes each of the external Territories.

bill of exchange includes a promissory note.

court includes a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions or powers.

diplomatic property means property that, at the relevant time, is in use predominantly for the purpose of establishing or maintaining a diplomatic or consular mission, or a visiting mission, of a foreign State to Australia.

foreign State means a country the territory of which is outside Australia, being a country that is:

- (a) an independent sovereign state; or

Section 3

- (b) a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state.

initiating process means an instrument (including a statement of claim, application, summons, writ, order or third party notice) by reference to which a person becomes a party to a proceeding.

law of Australia means:

- (a) a law in force throughout Australia; or
- (b) a law of or in force in a part of Australia;

and includes the principles and rules of the common law and of equity as so in force.

military property means:

- (a) a ship of war, a Government yacht, a patrol vessel, a police or customs vessel, a hospital ship, a defence force supply ship or an auxiliary vessel, being a ship or vessel that, at the relevant time, is operated by the foreign State concerned (whether pursuant to requisition or under a charter by demise or otherwise); or
- (b) property (not being a ship or vessel) that is:
 - (i) being used in connection with a military activity; or
 - (ii) under the control of a military authority or defence agency for military or defence purposes.

proceeding means a proceeding in a court but does not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution.

property includes a chose in action.

separate entity, in relation to a foreign State, means a natural person (other than an Australian citizen), or 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), who or that:

- (a) is an agency or instrumentality of the foreign State; and
- (b) is not a department or organ of the executive government of the foreign State.

- (2) For the purposes of the definition of *separate entity* in subsection (1), a natural person who is, or a body corporate or a corporation sole that is, an agency of more than one foreign State shall be taken to be a separate entity of each of the foreign States.
- (3) Unless the contrary intention appears, a reference in this Act to a foreign State includes a reference to:
 - (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.
- (4) A reference in this Act to a court of Australia includes a reference to a court that has jurisdiction in or for any part of Australia.
- (5) A reference in this Act to a commercial purpose includes a reference to a trading, a business, a professional and an industrial purpose.
- (6) A reference in this Act to the entering of appearance or to the entry of judgment in default of appearance includes a reference to any like procedure.

4 External Territories

This Act extends to each external Territory.

5 Act to bind Crown

This Act binds the Crown in all its capacities.

Section 6

6 Savings of other laws

This Act does not affect an immunity or privilege that is conferred by or under the *Consular Privileges and Immunities Act 1972*, the *Defence (Visiting Forces) Act 1963*, the *Diplomatic Privileges and Immunities Act 1967* or any other Act.

7 Application

- (1) Part II (other than section 10) does not apply in relation to a proceeding concerning:
 - (a) a contract or other agreement or a bill of exchange that was made or given;
 - (b) a transaction or event that occurred;
 - (c) an act done or omitted to have been done; or
 - (d) a right, liability or obligation that came into existence;before the commencement of this Act.
- (2) Section 10 does not apply in relation to a submission mentioned in that section that was made before the commencement of this Act.
- (3) Part III and section 36 do not apply in relation to a proceeding instituted before the commencement of this Act.
- (4) Part IV only applies where, by virtue of a provision of Part II, the foreign State is not immune from the jurisdiction of the courts of Australia in the proceeding concerned.

8 Application to courts

In the application of this Act to a court, this Act has effect only in relation to the exercise or performance by the court of a judicial power or function or a power or function that is of a like kind.

Part II—Immunity from jurisdiction

9 General immunity from jurisdiction

Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

10 Submission to jurisdiction

- (1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.
- (2) A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia.
- (3) A submission under subsection (2) may be subject to a specified limitation, condition or exclusion (whether in respect of remedies or otherwise).
- (4) Without limiting any other power of a court to dismiss, stay or otherwise decline to hear and determine a proceeding, the court may dismiss, stay or otherwise decline to hear and determine a proceeding if it is satisfied that, by reason of the nature of a limitation, condition or exclusion to which a submission is subject (not being a limitation, condition or exclusion in respect of remedies), it is appropriate to do so.
- (5) An agreement by a foreign State to waive its immunity under this Part has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement.
- (6) Subject to subsections (7), (8) and (9), a foreign State may submit to the jurisdiction in a proceeding by:
 - (a) instituting the proceeding; or
 - (b) intervening in, or taking a step as a party to, the proceeding.

Section 10

- (7) A foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that:
- (a) it has made an application for costs; or
 - (b) it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity.
- (8) Where the foreign State is not a party to a proceeding, it shall not be taken to have submitted to the jurisdiction by reason only that it has intervened in the proceeding for the purpose or in the course of asserting an interest in property involved in or affected by the proceeding.
- (9) Where:
- (a) the intervention or step was taken by a person who did not know and could not reasonably have been expected to know of the immunity; and
 - (b) the immunity is asserted without unreasonable delay;
- the foreign State shall not be taken to have submitted to the jurisdiction in the proceeding by reason only of that intervention or step.
- (10) Where a foreign State has submitted to the jurisdiction in a proceeding, then, subject to the operation of subsection (3), it is not immune in relation to a claim made in the proceeding by some other party against it (whether by way of set-off, counter-claim or otherwise), being a claim that arises out of and relates to the transactions or events to which the proceeding relates.
- (11) In addition to any other person who has authority to submit, on behalf of a foreign State, to the jurisdiction:
- (a) the person for the time being performing the functions of the head of the State's diplomatic mission in Australia has that authority; and
 - (b) a person who has entered into a contract on behalf of and with the authority of the State has authority to submit in that contract, on behalf of the State, to the jurisdiction in respect of a proceeding arising out of the contract.

11 Commercial transactions

- (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.
- (2) Subsection (1) does not apply:
 - (a) if all the parties to the proceeding:
 - (i) are foreign States or are the Commonwealth and one or more foreign States; or
 - (ii) have otherwise agreed in writing; or
 - (b) in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind.
- (3) In this section, *commercial transaction* means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:
 - (a) a contract for the supply of goods or services;
 - (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
 - (c) a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange.

12 Contracts of employment

- (1) A foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia.
- (2) A reference in subsection (1) to a proceeding includes a reference to a proceeding concerning:
 - (a) a right or obligation conferred or imposed by a law of Australia on a person as employer or employee; or
 - (b) a payment the entitlement to which arises under a contract of employment.

Section 12

- (3) Where, at the time when the contract of employment was made, the person employed was:
- (a) a national of the foreign State but not a permanent resident of Australia; or
 - (b) an habitual resident of the foreign State;
- subsection (1) does not apply.
- (4) Subsection (1) does not apply where:
- (a) an inconsistent provision is included in the contract of employment; and
 - (b) a law of Australia does not avoid the operation of, or prohibit or render unlawful the inclusion of, the provision.
- (5) Subsection (1) does not apply in relation to the employment of:
- (a) a member of the diplomatic staff of a mission as defined by the Vienna Convention on Diplomatic Relations, being the Convention the English text of which is set out in the Schedule to the *Diplomatic Privileges and Immunities Act 1967*; or
 - (b) a consular officer as defined by the Vienna Convention on Consular Relations, being the Convention the English text of which is set out in the Schedule to the *Consular Privileges and Immunities Act 1972*.
- (6) Subsection (1) does not apply in relation to the employment of:
- (a) a member of the administrative and technical staff of a mission as defined by the Convention referred to in paragraph (5)(a); or
 - (b) a consular employee as defined by the Convention referred to in paragraph (5)(b);
- unless the member or employee was, at the time when the contract of employment was made, a permanent resident of Australia.
- (7) In this section, permanent resident of Australia means:
- (a) an Australian citizen; or
 - (b) a person resident in Australia whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia.

13 Personal injury and damage to property

A foreign State is not immune in a proceeding in so far as the proceeding concerns:

- (a) the death of, or personal injury to, a person; or
 - (b) loss of or damage to tangible property;
- caused by an act or omission done or omitted to be done in Australia.

14 Ownership, possession and use of property etc.

- (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.

15 Copyright, patents, trade marks etc.

- (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns:
 - (a) the ownership of a copyright or the ownership, or the registration or protection in Australia, of an invention, a design or a trade mark;

Section 16

- (b) an alleged infringement by the foreign State in Australia of copyright, a patent for an invention, a registered trade mark or a registered design; or
 - (c) the use in Australia of a trade name or a business name.
- (2) Subsection (1) does not apply in relation to the importation into Australia, or the use in Australia, of property otherwise than in the course of or for the purposes of a commercial transaction as defined by subsection 11(3).

16 Membership of bodies corporate etc.

- (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns its membership, or a right or obligation that relates to its membership, of a body corporate, an unincorporated body or a partnership that:
- (a) has a member that is not a foreign State or the Commonwealth; 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;
- being a proceeding arising between the foreign State and the body or other members of the body or between the foreign State and one or more of the other partners.
- (2) Where a provision included in:
- (a) the constitution or other instrument establishing or regulating the body or partnership; or
 - (b) an agreement between the parties to the proceeding;
- is inconsistent with subsection (1), that subsection has effect subject to that provision.

17 Arbitrations

- (1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration, including a proceeding:

- (a) by way of a case stated for the opinion of a court;
 - (b) to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or
 - (c) to set aside the award.
- (2) Where:
- (a) apart from the operation of subparagraph 11(2)(a)(ii), subsection 12(4) or subsection 16(2), a foreign State would not be immune in a proceeding concerning a transaction or event; and
 - (b) the foreign State is a party to an agreement to submit to arbitration a dispute about the transaction or event;
- then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made.
- (3) Subsection (1) does not apply where the only parties to the agreement are any 2 or more of the following:
- (a) a foreign State;
 - (b) the Commonwealth;
 - (c) an organisation the members of which are only foreign States or the Commonwealth and one or more foreign States.

18 Actions *in rem*

- (1) A foreign State is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim in connection with the ship if, at the time when the cause of action arose, the ship was in use for commercial purposes.
- (2) A foreign State is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim against another ship if:
 - (a) at the time when the proceeding was instituted, the ship that is the subject of the action *in rem* was in use for commercial purposes; and

Section 19

- (b) at the time when the cause of action arose, the other ship was in use for commercial purposes.
- (3) A foreign State is not immune in a proceeding commenced as an action *in rem* against cargo that was, at the time when the cause of action arose, a commercial cargo.
- (4) The preceding provisions of this section do not apply in relation to the arrest, detention or sale of a ship or cargo.
- (5) A reference in this section to a ship in use for commercial purposes or to a commercial cargo is a reference to a ship or a cargo that is commercial property as defined by subsection 32(3).

19 Bills of exchange

Where:

- (a) a bill of exchange has been drawn, made, issued or indorsed by a foreign State in connection with a transaction or event; and
 - (b) the foreign State would not be immune in a proceeding in so far as the proceeding concerns the transaction or event;
- the foreign State is not immune in a proceeding in so far as the proceeding concerns the bill of exchange.

20 Taxes

A foreign State is not immune in a proceeding in so far as the proceeding concerns an obligation imposed on it by or under a provision of a law of Australia with respect to taxation, being a provision that is prescribed, or is included in a class of provisions that is prescribed, for the purposes of this section.

21 Related proceedings

Where, by virtue of the operation of the preceding provisions of this Part, a foreign State is not immune in a proceeding in so far as the proceeding concerns a matter, it is not immune in any other proceeding (including an appeal) that arises out of and relates to

the first-mentioned proceeding in so far as that other proceeding concerns that matter.

22 Application of Part to separate entities

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.

Part IV—Enforcement

30 Immunity from execution

Except as provided by this Part, the property of a foreign State is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award or, in Admiralty proceedings, for the arrest, detention or sale of the property.

31 Waiver of immunity from execution

- (1) A foreign State may at any time by agreement waive the application of section 30 in relation to property, but it shall not be taken to have done so by reason only that it has submitted to the jurisdiction.
- (2) The waiver may be subject to specified limitations.
- (3) An agreement by a foreign State to waive its immunity under section 30 has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement.
- (4) A waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates the property as property to which the waiver applies.
- (5) In addition to any other person who has authority to waive the application of section 30 on behalf of a foreign State or a separate entity of the foreign State, the person for the time being performing the functions of the head of the State's diplomatic mission in Australia has that authority.

32 Execution against commercial property

- (1) Subject to the operation of any submission that is effective by reason of section 10, section 30 does not apply in relation to commercial property.
- (2) Where a foreign State is not immune in a proceeding against or in connection with a ship or cargo, section 30 does not prevent the arrest, detention or sale of the ship or cargo if, at the time of the arrest or detention:
 - (a) the ship or cargo was commercial property; and
 - (b) in the case of a cargo that was then being carried by a ship belonging to the same or to some other foreign State—the ship was commercial property.
- (3) For the purposes of this section:
 - (a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and
 - (b) property that is apparently vacant or apparently not in use shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.

33 Execution against immovable property etc.

Where:

- (a) property:
 - (i) has been acquired by succession or gift; or
 - (ii) is immovable property; and
 - (b) a right in respect of the property has been established as against a foreign State by a judgment or order in a proceeding as mentioned in section 14;
- then, for the purpose of enforcing that judgment or order, section 30 does not apply to the property.

Section 34

34 Restrictions on certain other relief

A penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court.

35 Application of Part to separate entities

- (1) This Part applies in relation to a separate entity of a foreign State that is the central bank or monetary authority of the foreign State as it applies in relation to the foreign State.
- (2) Subject to subsection (1), this Part applies in relation to a separate entity of the foreign State as it applies in relation to the foreign State if, in the proceeding concerned:
 - (a) the separate entity would, apart from the operation of section 10, have been immune from the jurisdiction; and
 - (b) it has submitted to the jurisdiction.

Part V—Miscellaneous

36 Heads of foreign States

- (1) Subject to the succeeding provisions of this section, the *Diplomatic Privileges and Immunities Act 1967* extends, with such modifications as are necessary, in relation to the person who is for the time being:
 - (a) the head of a foreign State; or
 - (b) a spouse of the head of a foreign State;as that Act applies in relation to a person at a time when he or she is the head of a diplomatic mission.
- (2) This section does not affect the application of any law of Australia with respect to taxation.
- (3) This section does not affect the application of any other provision of this Act in relation to a head of a foreign State in his or her public capacity.
- (4) Part III extends in relation to the head of a foreign State in his or her private capacity as it applies in relation to the foreign State and, for the purpose of the application of Part III as it so extends, a reference in that Part to a foreign State shall be read as a reference to the head of the foreign State in his or her private capacity.

37 Effect of agreements on separate entities

An agreement made by a foreign State and applicable to a separate entity of that State has effect, for the purposes of this Act, as though the separate entity were a party to the agreement.

38 Power to set aside process etc.

Where, on the application of a foreign State or a separate entity of a foreign State, a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to the

Section 39

foreign State or entity is inconsistent with an immunity conferred by or under this Act, the court shall set aside the judgment, order or process so far as it is so inconsistent.

39 Discovery

- (1) A penalty by way of fine or committal shall not be imposed in relation to a failure or refusal by a foreign State or by a person on behalf of a foreign State to disclose or produce a document or to furnish information for the purposes of a proceeding.
- (2) Such a failure or refusal is not of itself sufficient ground to strike out a pleading or part of a pleading.

40 Certificate as to foreign State etc.

- (1) The Minister for Foreign Affairs may certify in writing that, for the purposes of this Act:
 - (a) a specified country is, or was on a specified day, a foreign State;
 - (b) a specified territory is or is not, or was or was not on a specified day, part of a foreign State;
 - (c) a specified person is, or was at a specified time, the head of, or the government or part of the government of, a foreign State or a former foreign State; or
 - (d) service of a specified document as mentioned in section 24 or 28 was effected on a specified day.
- (2) The Minister for Foreign Affairs may, either generally or as otherwise provided by the instrument of delegation, delegate by instrument in writing to a person his or her powers under subsection (1) in relation to the service of documents.
- (3) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Minister.
- (4) A delegation under subsection (2) does not prevent the exercise of the power by the Minister.