HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

P.T. GARUDA INDONESIA LTD APPELLANT

AND

AUSTRALIAN COMPETITION & CONSUMER COMMISSION RESPONDENT

P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission
[2012] HCA 33
7 September 2012
S343/2011

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC with C H Withers for the appellant (instructed by Norton White)

S J Gageler SC, Solicitor-General of the Commonwealth with T M Howe QC and D J Roche for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission

Public international law – Foreign State immunity – Sections 11(1) and 22 of *Foreign States Immunities Act* 1985 (Cth) ("Act") together provide that a separate entity of a foreign State is not immune from jurisdiction in a proceeding that concerns a "commercial transaction" – Respondent commenced proceedings against appellant for conduct allegedly contrary to Pt IV of *Trade Practices Act* 1974 (Cth) – Whether appellant immune under Act from exercise of jurisdiction – Whether civil penalty proceeding concerns a "commercial transaction".

Words and phrases – "commercial transaction", "conferral of jurisdiction", "jurisdiction", "sovereign immunity ".

Constitution, s 51(xxix).
Foreign States Immunities Act 1985 (Cth), ss 3(1), 9, 10, 11, 22, 38, 40.
Judiciary Act 1903 (Cth), s 39B.
Trade Practices Act 1974 (Cth), Pt IV.

1 FRENCH CJ, GUMMOW, HAYNE AND CRENNAN JJ. The appellant ("Garuda") argued this appeal on the uncontested footing that it is a "foreign corporation" within the meaning of s 51(xx) of the Constitution. The controversy turns on its character as an emanation of the Republic of Indonesia.

2 Ninety five point five per cent of the issued shares in Garuda are owned directly by the Republic of Indonesia, the minority shareholding is held by government controlled corporations associated with Indonesian airports, and at the relevant times four of the five members of its Board of Commissioners were senior officials of the Indonesian government. That state of affairs is said to attract Pt II of the *Foreign States Immunities Act* 1985 (Cth) ("the Act") and thereby to render Garuda "immune" from the exercise of jurisdiction of the Federal Court of Australia in a proceeding for contravention of Pt IV of the *Trade Practices Act* 1974 (Cth) ("the TPA")[1] instituted against it in 2009 by the respondent ("the ACCC").

3 A judge of the Federal Court (Jacobson J) dismissed a motion by Garuda that the proceeding be stayed or dismissed[2]. The Full Court (Lander, Greenwood and Rares JJ) granted Garuda leave to appeal but dismissed the appeal[3].

4 For the reasons which follow the appeal by Garuda to this Court should be dismissed.

The common law

5 In the Restatement Third of the Foreign Relations Law of the United States, adopted in 1986[4], it is said with reference to the rule of absolute immunity and the development of a more restrictive view of immunity:

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1 Part IV of the TPA is now embedded in Pt IV, Div 2 of the *Competition and Consumer Act* 2010 (Cth) but the TPA continues to apply to unconcluded proceedings: Item 7 of Sched 7 to the *Trade Practices Amendment (Australian Consumer Law) Act (No 2)* 2010 (Cth).

2 *Australian Competition and Consumer Commission v P.T. Garuda Indonesia Ltd* (2010) 269 ALR 98.

3 *P.T. Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393.

4 *Restatement of the Law: the Foreign Relations Law of the United States*, 3d, (1986), vol 1, Ch 5, Sub-Ch A.

> "Until the twentieth century, sovereign immunity from the jurisdiction of foreign courts seemed to have no exceptions. However, as governments increasingly engaged in state-trading and various commercial activities, it was urged that the immunity of states engaged in such activities was not required by international law, and that it was undesirable: immunity deprived private parties that dealt with a state of their judicial remedies, and gave states an unfair advantage in competition with private commercial enterprise."

6 To this it may be added that in *Playa Larga (Owners of cargo lately laden on board) v I Congreso del Partido (Owners)*[5] Lord Wilberforce observed that the "restrictive theory" had developed from the willingness of states to enter into commercial and other private law transactions and added:

> "It appears to have two main foundations: (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions."

The scheme of the Act

7 The Act was preceded in 1984 by a comprehensive Report[6] ("the Report") by The Law Reform Commission ("the LRC")[7]. In Ch 2 of the Report, the LRC traced the development of common law doctrine from the rule of absolute immunity to a more restrictive view of immunity. The Report followed the enactment of legislation in the United States and the United Kingdom and preceded that in Canada, to which reference will be made below. The Outline contained in the Explanatory Notes for the proposed legislation, which is contained in Appendix A to the Report, identified the purpose of the proposed Australian legislation as being to reflect the more restrictive view of the common law immunity which had been taken in other countries and adopted in legislation.

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5 [1983] 1 AC 244 at 262.

6 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984).

7 Professor James Crawford was the Commissioner in Charge.

8 Part II of the Act (ss 9-22) is headed "Immunity from jurisdiction". These provisions do not affect any immunity or privilege conferred by or under other federal laws including the *Consular Privileges and Immunities Act* 1972 (Cth), the *Defence (Visiting Forces) Act* 1963 (Cth), and the *Diplomatic Privileges and Immunities Act* 1967 (Cth). This is the effect of s 6 of the Act. However, the general provision in s 9 is exhaustive of the common law and indicates that statute provides the sole basis for foreign state immunity in Australian courts[8]. This is an important consideration for Garuda in this litigation. It is only by bringing itself within the operation of the Act that Garuda can establish a claim to immunity.

9 Section 9 provides:

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

10 What is "a foreign State" within the meaning of s 9 and by what means is it to be identified? The term "foreign State" is defined in s 3(1) so as to identify "an independent sovereign state" and "a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state". Section 40 gives effect to what has been called "the one voice principle" respecting foreign State recognition[9]. A certificate under s 40 by the responsible Minister that a specified country is, or was on a specified day, "a foreign State", or that a specified territory is or is not, or was or was not, part of a foreign State, is admissible as evidence of the facts and matters stated in it; moreover, the certificate is conclusive of those facts and matters.

11 The conferral of immunity by s 9 is expressly subject to other provisions made by the Act. The critical provision is s 11(1):

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8 A similar point, with reference to the United States legislation, the *Foreign Sovereign Immunities Act* of 1976, 28 USCS §§1602-1611, was made by the Supreme Court in *Argentine Republic v Amerada Hess Shipping Corp* 488 US 428 at 434, 443 (1989). Cf, with respect to an ambiguity in the scheme of the *State Immunity Act* 1978 (UK), the doubts expressed by Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 at 1584-1585; [2000] 3 All ER 833 at 843-844.

9 See *Chow Hung Ching v The King* (1948) 77 CLR 449 at 467; [1948] HCA 37; Collins, "Foreign Relations and the Judiciary", (2002) 51 *International and Comparative Law Quarterly* 485 at 487-493; Triggs, *International Law*, 2nd ed (2011) at [5.108].

> "A foreign State is not immune in a proceeding *in so far as* the proceeding concerns a commercial transaction." (emphasis added)

The phrase "in so far as" indicates that, as to part, the proceeding may not concern a commercial transaction. The present appeal, however, has been argued on an "all or nothing" basis.

12 At common law, a question would be presented whether Garuda could be identified with Indonesia as a "foreign State" for the purposes of s 11(1)[10]. However, by force of the specific provision made by s 22, s 11(1) applies to "a separate entity of a foreign State". The term "separate entity" is relevantly defined in s 3(1) as a body corporate, not established under Australian law, which is an agency or instrumentality of a foreign State but is not a department or organ of the executive government thereof. No provision is made by s 40 for the issue by the Minister of a certificate respecting status as a "separate entity".

13 A claim to "immunity" from "jurisdiction" will be a matter "arising under" a federal law, within the meaning of s 76(ii) of the Constitution, and thus attract the exercise of federal jurisdiction. The subject matter of Pt II of the Act itself relates to the conduct of foreign relations and so to "external affairs" within the meaning of s 51(xxix) of the Constitution. There appears to be no dispute respecting these basic propositions.

"Immunity" from "jurisdiction"

14 However, something more should be said immediately concerning the term "jurisdiction", to identify that from which Garuda claims "immunity" under the Act. "Jurisdiction" is a generic term used in a variety of senses, some of which relate to matters of geography, some to persons and procedures, and others to constitutional and judicial structures and powers such as those sourced in Ch III of the Constitution.

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10 *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 393-394; *Baccus SRL v Servicio Nacional Del Trigo* [1957] 1 QB 438 at 466-468, 472; *Grunfeld v United States of America* [1968] 3 NSWR 36 at 37.

15 It was said in the joint reasons in *Lipohar v The Queen*[11] that:

> "'Jurisdiction' may be used (i) to describe the amenability of a defendant to the court's writ and the geographical reach of that writ, or (ii) rather differently, to identify the subject matter of those actions entertained by a particular court, or, finally (iii) to locate a particular territorial or 'law area'[12] or 'law district'[13]."

16 Thus, a court may be seised of jurisdiction in the sense of the subject matter of a particular proceeding, whether it be an action in contract or tort at common law or, as here, for contravention of a statutory norm of conduct, or it be an appellate process of a particular kind, such as that identified in s 73 of the Constitution. Because, as Katz J pointed out in *Khatri v Price*[14], any Australian court is a court of limited jurisdiction in this sense, it has been said that the court must be satisfied that its jurisdiction has been properly invoked. So, in *Cockle v Isaksen*[15] this Court entertained argument by an intervener challenging the competency of an appeal in circumstances where both parties accepted that the appeal was competent.

17 However, in s 9 and elsewhere in the Act the term "jurisdiction" is used not to identify the subject matter of a proceeding, but the amenability of a defendant to the process of Australian courts[16]. The notion expressed by the term "immunity" is that the Australian courts are not to implead the foreign State, that is to say, will not by their process make the foreign State against its will a party

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11 (1999) 200 CLR 485 at 517 [79]; [1999] HCA 65. See also *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 394-395 [68]-[71]; [2004] HCA 20.

12 An expression used by the Court in *Laurie v Carroll* (1958) 98 CLR 310 at 331; [1958] HCA 4 with respect to New South Wales and Victoria. See also *Breavington v Godleman* (1988) 169 CLR 41 at 77, 97, 107; [1988] HCA 40.

13 An expression used by Wilson and Gaudron JJ in *Breavington v Godleman* (1988) 169 CLR 41 at 87.

14 (1999) 95 FCR 287 at 289-290.

15 (1957) 99 CLR 155 at 161; [1957] HCA 85.

16 See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 23 [10], 35 [53]; [2002] HCA 27.

to a legal proceeding[17]. Thus, the immunity may be understood as a freedom from liability to the imposition of duties by the process of Australian courts[18].

18 In the Report, under the heading "Foreign State Immunity not Immunity from Substantive Law", the LRC emphasised that in this frame of discourse the term "immunity from jurisdiction" is not concerned with the authority enjoyed by courts with respect to particular subject matters and parties[19]. Rather, the term reflects the common law antecedents explained by Dixon J in *Chow Hung Ching v The King*[20]. His Honour referred to the authority of the executive branch to bind the nation in the conduct of affairs with other nations and then referred to the "recognition and effect" which the common law gave to "the immunity or privilege from local jurisdictions and laws" which is accorded by the executive to the sovereigns of friendly foreign nations. The term "privilege" better conveys the notion that the special position so enjoyed with respect to curial process is not absolute but may be waived by the party entitled to the privilege. Section 10 of the Act provides that a foreign State is not immune in a proceeding to which it has submitted to the jurisdiction in accordance with that section; s 22 extends the operation of s 10 to entities such as Garuda.

19 It has been said that while the immunity of the domestic sovereign was "based on the historic principle that no court has power to command the King", that of a foreign sovereign is founded, as a matter of favour and of comity between nations, on an implied consent "to a relaxation of the complete jurisdiction which each [sovereign] naturally enjoys within his own territory"[21]. Nevertheless, some analogy is provided by the character in English common law of Crown immunity in respect of actions in contract and tort. Did the immunity not only deny adjudication of claims against the Crown but go further and deny the very existence of the contract or commission of the wrong? The issue was resolved by acceptance by the common law that a contract had been made and

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17 *Compania Naviera Vascongado v SS Christina* [1938] AC 485 at 489-490; *Van Heyningen v Netherlands Indies Government* [1949] St R Qd 54 at 60.

18 Stone, *Legal System and Lawyers' Reasonings*, (1964) at 145-147.

19 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 1.

20 (1948) 77 CLR 449 at 477-478.

21 *Ulen & Co v Bank Gospodarstwa Krajowego* (*National Economic Bank*) 24 NYS 2d 201 at 204 (1940).

broken and a wrongful act committed, but the immunity rendered imperfect the rights thereby engendered in the plaintiff[22].

20 Section 38 of the Act confers a power, upon application, to set aside a judgment, order or process, as follows:

> "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 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."

21 Further, special provision is made by s 27 for the entry of default judgments. A judgment in default of appearance shall not be entered against a foreign State or against a "separate entity" of a foreign State unless the court is satisfied that, in the proceeding, the foreign State or separate entity is not immune.

22 If the foreign State or separate entity has appeared and waived any immunity, or has asserted its immunity, the issue of immunity will have either disappeared or fallen for adjudication. If there is no appearance, then it will be for the court to be satisfied under s 27 as to the absence of immunity before entry of any default judgment which is sought. It is not a correct construction of the Act that even without an application under s 38 to set aside service, or an application under s 27 for a default judgment, the court must of its own motion satisfy itself that the defendant could not establish immunity[23].

The proceeding by the ACCC

23 It is convenient to say something more respecting the elements of the claim pleaded by the ACCC in that proceeding. The ACCC alleged that Garuda was a body corporate incorporated pursuant to the laws of Indonesia which carried on business in Australia, provided air freight services to and from Australia, was registered as a foreign company pursuant to Pt 5B.2 of the *Corporations Act* 2001 (Cth), and was both a trading corporation and a foreign corporation within the meaning of s 4 of the TPA.

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22 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 542-545; [1997] HCA 29.

23 cf *Zhang v Zemin* (2010) 79 NSWLR 513 at 523, 541-542.

24 The substance of the case pleaded was 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.

25 The ACCC relied upon s 86 of the TPA and s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth) for the conferral of jurisdiction on the Federal Court. The ACCC claimed relief in respect of alleged price fixing, market sharing and other anti-competitive conduct between October 2001 and September 2006 in contravention of s 45 of the TPA, read with s 45A. The remedies sought were injunctive relief under s 80 of the TPA, declaratory relief under s 21 of the *Federal Court of Australia Act* 1976 (Cth), and pecuniary penalties pursuant to s 76 of the TPA.

26 Modern regulatory laws have created various contraventions which are not dealt with by criminal process[24]. The recovery of pecuniary penalties was a remedy well established in federal law when the Act was introduced. In addition to the provision made in s 76 of the TPA, provision for recovery of penalties for breaches of awards was made by s 119 of the *Conciliation and Arbitration Act* 1904 (Cth), and civil penalties had been imposed under the customs legislation since the enactment of the *Customs Act* 1901 (Cth), although there was controversy as to their proper characterisation[25].

27 The injunction sought against Garuda was in the following terms:

> "An injunction restraining the respondent for a period of seven years from the date of the order from making, arriving at, or giving effect to, any contract, arrangement or understanding with any of its competitors for the supply of air freight services, containing provisions which have the effect of fixing, controlling or maintaining the price or any part of the price at which it or any of them will supply those services in competition with each other unless:

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24 Australian Law Reform Commission, *Principled Regulation, Federal, Civil and Administrative Penalties in Australia*, Report No 95, (2002) at [2.16].

25 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; [2003] HCA 49.

2.1 the said contract, arrangement or understanding does not involve or relate to the supply of air freight services to or from Australia;

2.2 the said contract, arrangement or understanding is necessary for the purpose of interlining between two or more carriers in the course of supplying air freight services; or

2.3 the respondent is specifically authorised to do so under section 88 [of the TPA]."

28 The motion filed by Garuda on 5 November 2009 sought an order that the proceeding be dismissed or stayed. On the appeal to this Court, Garuda seeks an order that service be set aside pursuant to s 38 of the Act. Section 38 would authorise that course if this Court were satisfied that the Federal Court process was inconsistent with an immunity conferred by or under the Act.

The issue on the appeal

29 Reference already has been made to the provisions of Pt II of the Act and to the general conferral of immunity upon a foreign State from the jurisdiction of Australian courts in a "proceeding". This term does not include "prosecution for an offence" (s 3(1)). In ordinary parlance "prosecution" identifies the instigation and conduct of a curial proceeding which commences with an accusation of a crime and involves the trial of that accusation concluding with a conviction or acquittal, and may include a committal proceeding[26]. The committal is a *sui generis* procedure but one closely related to the exercise of judicial power[27]. There is no indication that in s 3(1) "prosecution" is used in a non-technical sense[28].

30 It was not in the interests of Garuda to submit that the proceeding by the ACCC, at least in so far as pecuniary penalties were sought under s 76 of the TPA, was a "prosecution", and thus not within the scope of the immunity provisions of the Act, and the ACCC did not submit that it was engaged in a prosecution of Garuda.

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26 *Shepherd v Griffiths* (1985) 7 FCR 44 at 51-53.

27 *R v Murphy* (1985) 158 CLR 596 at 616; [1985] HCA 50.

28 cf *Mohamed Amin v Jogendra Kumar Bannerjee* [1947] AC 322 at 331.

31 Jacobson J held that, in the absence of sufficient evidence, Garuda was not a "separate entity" within the meaning of the Act. The Full Court disagreed and decided that Garuda was a "separate entity". However, the Full Court held that the proceeding fell within the exclusion provision in s 11, as it concerned a "commercial transaction". It is that holding which Garuda challenges in this Court. There is no notice of contention by the ACCC, and it argued the appeal on the footing that Garuda was a "separate entity".

32 The precise issue, as identified correctly by counsel for the ACCC in this Court, looks first to the application to foreign corporations of the substantive norms of conduct required by Pt IV of the TPA, secondly to the provisions conferring jurisdiction on the Federal Court to entertain the proceeding by the ACCC for contravention of those norms by a foreign corporation, and then asks to what extent the exercise of this jurisdiction is qualified with respect to that foreign corporation by engagement of the immunity provisions of the Act.

Foreign authorities

33 Before the Full Court there was extensive citation of decisions from other jurisdictions with legislation comparable to the Act. These included the decision of the Supreme Court of the United States in *Saudi Arabia v Nelson*[29], and that of the Supreme Court of Canada in *Kuwait Airways Corporation v Republic of Iraq*[30]. In this Court reference also was made to the decision of the Supreme Court of the United Kingdom in *NML Capital Ltd v Republic of Argentina*[31]. However, it appeared to be common ground that there was limited assistance to be derived from those decisions. The legislation in the United States, the United Kingdom and Canada is differently expressed and has been applied in different circumstances.

34 Two further points should, however, be made. The first is that both *Kuwait Airways* and *NML Capital* concerned the recognition in the forum of judgments obtained elsewhere against a foreign State. No consideration is given in these reasons to any issues concerning the interaction between the Act and the *Foreign Judgments Act* 1991 (Cth).

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29 507 US 349 (1993).

30 [2010] 2 SCR 571.

31 [2011] 2 AC 495.

35 Secondly, in the United States, issues of foreign state immunity have, on occasion, become entangled with other doctrines. One is the "political question doctrine" which derives from the constitutional requirement in Art III of a "Case" or "Controversy"[32] and denies justiciability to the review of the foreign policy of the "political branches" of government. Another is the "act of State doctrine" developed from the dictum of Fuller CJ in *Underhill v Hernandez* that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory"[33].

36 In *Spectrum Stores Inc v Citgo Petroleum Corp*[34], the Court of Appeals for the Fifth Circuit, in affirming the decision of the District Court, held that it was "the political question" and "act of state" doctrines which denied the justiciability of a claim by gasoline retailers of price fixing, in contravention of the Sherman Act and the Clayton Act, by United States firms working in concert with OPEC member nations[35]. On a motion for summary dismissal, the District Court had declined to consider the application of the *Foreign Sovereign Immunities Act* of 1976 ("FSIA")[36]. The Court of Appeals observed[37]:

> "We note that a 'commercial activity' exception to this sovereign activity may obtain with respect to application of the FSIA when, for example, a foreign sovereign enters into 'a joint venture contract with oil companies for the exploration, production, and sale on the world market of oil and gas,' thus acting 'not as a regulator of a market, but in the manner of a private player within it.'[38] However, we agree with the Ninth

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32 *Baker v Carr* 369 US 186 at 198 (1962); Chemerinsky, *Federal Jurisdiction*, 5th ed (2007), §2.6.4.

33 168 US 250 at 252 (1897). See further, *Moti v The Queen* (2011) 86 ALJR 117 at 129-130 [46]-[52]; 283 ALR 393 at 406-408; [2011] HCA 50.

34 632 F 3d 938 at 951 (2011).

35 See also Areeda and Hovenkamp, *Anti-Trust Law*, 3rd ed (2006), vol 1B, ¶274; Fugate, *Foreign Commerce and the Anti-Trust Laws*, 5th ed (1996), vol 1, §2.26.

36 *In re Refined Petroleum Products Antitrust Litigation* 649 F Supp 2d 572 at 598 (2009).

37 632 F 3d 938 at 955, fn 16 (2011).

38 *Connecticut Bank of Commerce v Republic of Congo* 309 F 3d 240 at 264 (5th Cir 2002) (internal quotation marks and citations omitted).

Circuit that, under current precedents, '[t]he act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity.'[39] Neither the Supreme Court nor any circuit have adopted a commercial activity exception to the act of state doctrine, and we decline to do so today."

Conclusions

37 The term "commercial transaction" as it appears in s 11(1) is defined in s 11(3) as meaning:

> "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."

38 The express statement in s 11(3) "without limiting the generality of the foregoing" precludes resort to the *ejusdem generis* principle to limit the generality of the preceding words in the definition of "commercial transaction". In *Leon Fink Holdings Pty Ltd v Australian Film Commission*[40], Mason J said of the statute under consideration there:

> "In this case the words 'without limiting the generality of the foregoing' evince an intention that the general power should be given a construction that accords with the width of the language in which it is expressed and that this construction is not to be restricted by reference to the more specific character of that which follows. The clause therefore operates to negative the restrictive implication which might otherwise have been

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39 *Int'l Ass'n of Machinists & Aerospace Workers v OPEC* 649 F 2d 1354 at 1360 (9th Cir 1981) (noting that the two doctrines "address different concerns and apply in different circumstances").

40 (1979) 141 CLR 672 at 679; [1979] HCA 26.

derived from the presence of the specific power to lend contained in par (a)."

39 Section 11(1) denies the immunity in a proceeding, otherwise conferred on an entity such as Garuda by s 9 and s 22, by stating that there is no immunity "in so far as" this proceeding "concerns" what is "a commercial transaction". The term "concerns" is not further explicated by the text of the Act[41].

40 Garuda accepts that the proceeding may involve an investigation "at an evidentiary level" into contracts for carriage of freight by Garuda, from which to infer purpose or likely anti-competitive effect, or the giving effect to the impugned arrangement or understanding within the meaning of the provisions of the TPA. However, Garuda submits that it is critical for the operation of s 11(1) of the Act that the ACCC does not plead the terms of any such contract, nor seek any remedy by way of variation, rescission, compensation or otherwise with respect to any of the contracts for the carriage of freight by Garuda. Further, it is said to be critical that no party to any such contract, or person claiming to have suffered loss by reason thereof, joins in the proceeding.

41 In sum, the submission for Garuda is that the proceeding does not seek to vindicate any "private law right" in respect of any freight contract and that, absent this, s 11(1) of the Act does not apply to deny immunity. This postulated dichotomy between private and public law as controlling the meaning of "concerned" in s 11(1) should not be accepted.

42 The definition of "commercial transaction" fixes upon entry and engagement by the foreign State. It does not have any limiting terms which would restrict the immunity conferred by s 9 and s 22 to a proceeding instituted against the foreign State by a party to the commercial transaction in question. Further, it should be emphasised that the definition does not require that the activity be of a nature which the common law of Australia would characterise as contractual. The arrangements and understandings into which the ACCC alleges Garuda entered were dealings of a commercial, trading and business character, respecting the conduct of commercial airline freight services to Australia. The definition of a "commercial transaction" is satisfied.

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41 The provision in FSIA, 28 USCS §1605(a)(2), asks whether "the action is based upon a commercial activity"; s 3(1) of the *State Immunity Act* 1978 (UK) denies immunity "as respects proceedings relating to ... a commercial transaction"; and in Canada s 5 of the *State Immunity Act* RSC 1985, c S-18, s 3, is in similar terms to the United Kingdom provision.

43 The Federal Court proceeding "concerned" a commercial transaction, within the meaning of s 11(1), in an immediate sense. This is apparent from the relief sought. The ACCC seeks declarations that the arrangements and understandings contravene Australian law, pecuniary penalties, and injunctive relief against the giving of effect to the arrangements and understandings.

Orders

44 The appeal should be dismissed with costs.

45 HEYDON J. This appeal concerns the construction of the *Foreign States Immunities Act* 1985 (Cth) ("the Act").

Background

46 The issue turns on the meaning of s 11 of the Act. That issue is to be determined in the context of an application for relief arising from alleged contraventions of s 45 of the *Trade Practices Act* 1974 (Cth) ("the TP Act"). That application has been brought in the Federal Court of Australia.

47 The Full Court of the Federal Court of Australia found that the appellant was a "separate entity", as that phrase is defined in s 3(1) of the Act. It was thus an agent or instrumentality of Indonesia, but not an organ of Indonesia itself. The respondent does not challenge that finding. Nor, for its part, does the appellant contend that the proceeding in the Federal Court of Australia is a prosecution. Thus it is common ground that the application in the Federal Court of Australia brought by the respondent against the appellant is a "proceeding", as that word is defined in s 3(1) of the Act.

48 Section 9 confers a general immunity from jurisdiction on foreign States. Section 22 extends that immunity to separate entities of those States. It follows that by reason of ss 9 and 22 of the Act, the appellant is immune from the jurisdiction of the Federal Court of Australia in the proceeding, unless the proceeding "concerns a commercial transaction" within the meaning of s 11(1), as defined in s 11(3)[42].

49 The Statement of Claim filed by the respondent in the proceeding alleges that the appellant has made numerous arrangements or arrived at numerous understandings containing particular provisions. It does not allege that these arrangements or understandings are contracts. Hence the alleged arrangements or understandings do not of themselves answer the description given in s 11(3)(a) – "a contract for the supply of goods or services". And the proceeding does not concern the commercial transactions described in s 11(3)(b) (agreements to do with the provision of finance) or s 11(3)(c) (guarantees or indemnities in respect of certain financial obligations).

50 The respondent's case is divisible into two limbs. The first limb is that the alleged arrangements or understandings called for the appellant to enter contracts with its customers to provide air freight services on particular terms, which terms are reflected in the contracts the appellant actually entered. The second is that the examples given in pars (a)-(c) of s 11(3) do not limit the generality of the words which precede them. Among those words are "a commercial, trading … or like transaction". Those words indicate that "commercial transactions" extend

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42 See above at [11] and [37].

beyond contractual transactions. The alleged arrangements or understandings are therefore "commercial transactions" even though they are not pleaded as contracts. Each of these two limbs support the submission that the proceeding concerns a "commercial transaction". That submission is correct. It is convenient to take the two limbs in turn.

The first limb: commercial transactions as described in s 11(3)(a)

51 The proceeding "concerns a commercial transaction" within the meaning of s 11(3)(a) for the following reasons.

52 *What the Statement of Claim alleges.* The Statement of Claim alleges that the appellant breached two provisions of the TP Act – ss 45(2)(a)(ii) and 45(2)(b)(ii). Section 45(2)(a)(ii) relevantly proscribed the *making* of an arrangement, or the *arriving at* an understanding, where a provision of the arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market. Section 45(2)(b)(ii) proscribed *giving effect* to a provision of an arrangement or understanding if that provision has the purpose of, or has or is likely to have the effect of, substantially lessening competition in a market.

53 The Statement of Claim alleges that s 45(2)(a)(ii) was contravened because the appellant allegedly *made* arrangements or *arrived at* understandings containing provisions by which the appellant would impose surcharges on, or otherwise fix a component of the price for, the supply of air freight services from Indonesia to Australia under contracts to be entered between the appellant and its customers. The Statement of Claim also alleges that s 45(2)(b)(ii) was contravened. It alleges that the appellant *gave effect* to the provisions of the arrangements or understandings by imposing those surcharges in air freight services contracts which the appellant entered with its customers. Those contracts are contracts for the supply of services. They are therefore "commercial transactions" because they answer the description in s 11(3)(a). In part, the Federal Court proceeding "concerns" these commercial transactions. Had they not been entered, no s 45(2)(b)(ii) contravention could be established. Section 45(2)(b)(ii) required that the provisions of the arrangement or understanding be put into effect.

54 The fact that the proceeding concerns the air freight services contracts between the appellant and its customers in this way does not emerge clearly from the Statement of Claim itself. But it emerges clearly from particulars which the respondent has supplied by letter.

55 The Statement of Claim, dated 2 September 2009, alleges that on or about 9 May 2003, the appellant made an arrangement or arrived at an understanding with other international airlines containing a provision that required the parties to impose or re-impose fuel surcharges of specified amounts "on the supply of *air*

freight services from Indonesia" to particular destinations (emphasis added). The Statement of Claim alleges that the provision:

> "had the purpose and had the effect and was likely to have the effect of fixing or controlling or maintaining a component of the price charged by [the appellant] and a component of the price charged by the other parties to the [arrangement or understanding] for the supply of *air freight services* including the supply of *air freight services* to Australia in competition with each other". (emphasis added)

The Statement of Claim alleges that s 45A of the TP Act applied to the provision. The Statement of Claim also alleges that the appellant "gave effect to the provision … by imposing a fuel surcharge from Indonesia" of specified amounts "on the supply of *air freight services* from Indonesia" to the particular destinations (emphasis added).

56 *What the particulars allege.* In terms, the allegations in the Statement of Claim say nothing about contracts. But by letter dated 21 January 2010, the respondent supplied the following particulars:

> "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, re-imposition, levying, application or 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*." (emphasis added)

These particulars were filed after the appellant had filed a notice of motion seeking an order dismissing or staying the proceeding.

57 *The appellant's arguments on the first limb.* The appellant referred to these particulars contemptuously as "boot-strapping". That description is apt. But the respondent is bound by the particulars. They do assist in defining the issues. And that definition of the issues is central to the question in this Court: what does the proceeding "concern"?

58 The appellant made more substantive criticisms of the reasoning set out above[43]. The appellant submitted that it confuses the appellant's allegedly

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43 See above at [52]-[53].

contravening conduct, namely reaching and giving effect to arrangements or understandings, with the subject matter of those arrangements or understandings. The appellant submitted that their subject matter – the duty to insert particular terms into commercial transactions, namely the contracts between the appellant and its customers – was a matter of factual background only. The appellant pointed out that the Statement of Claim does not allege breach of the contracts. The appellant also pointed out that the parties to the contracts were not parties to the proceeding. It submitted:

> "[C]entral 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.
>
> The [respondent] 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 s 45 of the [TP Act]."

The appellant also submitted that the Statement of Claim does not plead the terms of the air freight services contracts.

59 That last submission is without merit. The Statement of Claim pleads those terms so far as the price of air freight services is concerned. That is all that is necessary for the respondent's purposes in the proceeding. It is true that the parties to the air freight services contracts other than the appellant are not parties to the proceeding. But they do not have to be. The appellant is a party, and that is sufficient. Nor does it matter that the Statement of Claim does not allege breach of the contracts. The making of the contracts is central to the respondent's s 45(2)(b)(ii) case that the appellant gave effect to provisions of the arrangements or understandings. Indeed, certain types of breach by the appellant's customers could weaken or nullify that case. That is because they could raise a question mark over whether the appellant had in fact given effect to the provisions. It is not correct to describe the making of the contracts as merely the "subject matter" of the arrangements or understandings or as "the factual background" to the proceeding. If the contracts had not been made, half of the respondent's case – the s 45(2)(b)(ii) allegation – would collapse.

60 The appellant accepted that its case would be weaker if the respondent had confined itself to the remedies also available to private litigants. In particular, it accepted that its case would be weaker if the respondent had merely sued for monetary remedies on behalf of persons allegedly injured by the appellant's conduct. And it accepted that its case would be weaker still if those persons had

sued for damages in their own right. But the appellant submitted that even those persons would be vindicating a statutory norm of conduct which Australia seeks to apply to persons anywhere in the world to protect Australian markets, and that s 11 should not be construed to extend so widely. Cascading analysis of that kind, however, and the concessions that resulted from it, did considerably weaken the strict dichotomy between private and public litigation on which the appellant's submissions rested.

61 The appellant's submission that a dispute between parties in a contractual relationship is central to the meaning of "commercial transaction" is also incorrect. The characterisation of an agreement as a "commercial transaction" occurs primarily at the point of time at which it is made, not at the latest moment in its history. At the inception of a transaction there is a contemplation of peaceful agreed performance, not of disputes about breach. Therefore a proceeding could concern a "commercial transaction" even though neither party was disputing the existence of the transaction or alleging breach by the other.

62 The appellant made another, related, complaint. It was that the statutory language was too unclear to indicate that "the exceptions to immunity might subject foreign states to punishment at the suit of an Australian regulator for breach of Australian antitrust norms, contrary to international law". The appellant submitted:

> "[T]he Act was passed in an international context of concern about long-arm reach of US antitrust legislation threatening Australia's national interests and sovereign control over commodity exports (specifically uranium), most prominently in connection with civil proceedings in the US against and a grand jury investigation of Westinghouse. A series of Acts [led] to a 1982 agreement with the US on co-operation in antitrust matters, providing for a framework of co-operation, ultimately buttressed by the *Foreign Proceedings (Excess of Jurisdiction) Act* 1984. Parliament in 1985, when legislating to embody the commercial transaction exception that had developed at common law and was now reflected in statute in the UK and the US, could hardly have intended to authorise Australian Courts, at the suit of Australian regulators, to inflict punishment on foreign states for their conduct, outside Australia, said to be in breach of Australia's statutory norms of anti-trust conduct. Such a choice would have radically departed from norms of international law and courted swift retaliatory action."

Orally, counsel for the appellant added that not only does the proceeding seek relief punishing Indonesia, but, by pursuing it, Australia seeks "an edict that Indonesia must not engage in defined conduct for seven years unless Indonesia comes to the Australian regulator and persuades it that there is a net public benefit to Australia." That submission refers to an exception in the injunctive relief claimed if the appellant obtains an authorisation from the respondent. To

complain of "punishment" does not sit well in the mouth of a litigant that has chosen not to advance the point – probably doomed but perhaps arguable – that the proceeding is a prosecution. The appellant's remark that its impugned conduct allegedly occurred "outside Australia" overlooks a critical fact. It was conduct which allegedly involved giving effect to a provision in relation to the supply of air freight services from Indonesia to Australia. It was conduct which allegedly affected markets in Australia. Further, the appellant made no specific attempt to demonstrate that s 11 of the Act is in breach of contemporary public international law. The appellant did refer to what Lord Watson said in *Huntington v Attrill*[44] about prosecuting crimes. But it accepted that the Federal Court case is not a prosecution.

63 It is necessary to deal with the appellant's reliance on Australian opposition to "long arm" United States jurisdiction to support a narrow construction of s 11. The *Foreign Proceedings (Excess of Jurisdiction) Act* 1984 (Cth) was the result of a recommendation in a report on *Australian-United States' Relations: The Extraterritorial Application of United States Laws*. The report was prepared by the Parliamentary Joint Committee on Foreign Affairs and Defence. Its purpose was to propose legislation calculated to repair damaged relations between Australia and the United States[45]. The report noted that s 5 of the TP Act "extends to 'the engaging in conduct outside Australia by persons in relation to the supply by those persons of goods or services to persons within Australia'." But it went on: "Australia, however, unlike the United States, does not attempt to regulate foreign commerce on the basis purely of an alleged adverse effect upon Australia's trade."[46] That is, the Parliamentary Joint Committee saw the United States legislation which had excited Australian opposition and prompted the enactment of the 1984 Act as reaching much further than the TP Act. The enactment of the 1984 Act was thus entirely consistent with the construction of s 11 of the Act proposed by the respondent and accepted above.

64 The appellant stressed the coercive impact which the TP Act has on foreign States in Federal Court of Australia proceedings. A difficulty for the appellant is that it is not a foreign State. It is a "separate entity" of Indonesia. Indonesia would be immune from the jurisdiction of the Federal Court even if the

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44 [1893] AC 150 at 156. See now *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 41-42; [1988] HCA 25.

45 See the Minister's Second Reading Speech: Australia, House of Representatives (Hansard), 1 March 1984 at 254.

46 Parliament of the Commonwealth of Australia, Joint Committee on Foreign Affairs and Defence, *Australian-United States' Relations: the Extraterritorial Application of United States Laws*, (1983) at [5.9].

proceeding concerned a commercial transaction because of s 11(2)[47]. But the appellant is not Indonesia.

65 The appellant referred to various passages in the Australian Law Reform Commission Report on *Foreign State Immunity*. That report was published in 1984. It recommended that the common law and statutory rules governing foreign State immunity be replaced by a Commonwealth statute. The Act is the legislative response to that report. However, the report does not appear to isolate for consideration or to answer the precise question which this appeal raises: can a regulatory arm of one government enforce its local laws concerning commerce against an agent or instrumentality of another and sidestep the immunity created in s 9 of the Act? And what the report does say does not assist the appellant. There are passages, admittedly expressed in general terms, which suggest that no distinction between the private enforcement of private rights and State enforcement of regulatory regimes underlies s 11 of the Act. The report, after referring to certain arguments, states[48]:

> "they do not point to a single distinction between immune and non-immune cases as appropriate or necessary, whether it is a distinction between 'private' and 'public' law, or between 'commercial' and 'governmental' transactions."

The report also states[49]:

> "All the recent overseas legislation applies only to civil proceedings; criminal matters are specifically excluded. It is recommended that the same position be taken in the Australian legislation. Problems arising with the application of penal or regulatory legislation to foreign states cannot be resolved through the application of any general formula, but depend on the particular legislation in question."

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47 Section 11(2)(a)(i) provides:

> "Sub-section (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 …".

48 Australia, Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at xv.

49 Australia, Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 100-101 [161] (footnote omitted).

Thus the report saw the question of whether immunity should attach to regulatory proceedings as a matter to be resolved in the relevant legislation. The relevant legislation here, the TP Act, applies to foreign corporations like the appellant. The report also says[50]:

> "In practice, it is unlikely that claims to immunity by separate entities will succeed, as most entities do not perform in Australia the sort of activities that entitle foreign States to immunity."

The report further says[51]:

> "So far as a specific commercial transaction exception is concerned, the guiding principle should be 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 theme was sounded again[52]:

> "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."

In short, the report designedly did not recommend that the Act employ any measure which would assist the appellant's arguments. Rather, it suggested that the legislature resolve the problem in other statutes with specific applications. The statute that applies here, the TP Act, does not accord agents or instrumentalities of foreign States any relevant immunity.

66 The appellant advanced various arguments for giving the word "concerns" a narrow meaning. One argument was that "concerns" is "far from being the most expansive word that could have been used" to denote the necessary relationship between a proceeding and a commercial transaction. Another was based on statutory context. The appellant noted that s 11 was one of a series of exceptions to the general conferral of immunity in s 9 of the Act. It argued that the importance of the immunity meant that the exceptions should be construed

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50 Australia, Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 136.

51 Australia, Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at xviii.

52 Australia, Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) at 51 [90] (footnote omitted).

narrowly. A third argument was that the carefully delimited exceptions should be construed sufficiently narrowly to permit their mutual harmonious operation.

67 Let it be assumed, without deciding, that the conclusion to which these arguments are directed is correct – that "concerns" is narrow in meaning. Even so, the connection between the proceeding and the contracts by which the appellant gave effect to the provisions of the arrangements or understandings is sufficiently close to fall within the word "concerns".

68 Whether "concerns" bears a wide or narrow meaning, there is nothing in s 11 or in any other provision of the Act to support the distinctions the appellant sought to draw between public and private rights, between proceedings brought by a regulator and proceedings brought by beneficial objects of the regulating legislation, and between specific statutory norms and general law norms.

69 The appellant submitted that where the Act provided that it extended to public law rights and obligations the language to that effect was clear: for example, s 12(2) ("a right or obligation conferred or imposed by a law of Australia on a person as employer or employee") and s 20 ("an obligation imposed … under a provision of a law of Australia with respect to taxation"). The appellant submitted that there was no clear language to this effect in s 11. The submission must fail. Section 11 is perfectly general. Its terms are more than sufficient to capture obligations that are not of a private law character.

70 The appellant also submitted that s 11(2)(a)(ii) indicated that a proceeding by a regulator could not "concern" a commercial transaction. That provision contemplates the possibility of the parties to a proceeding agreeing in writing that a separate entity of a foreign State may be immune in a proceeding even though the proceeding "concerns" a commercial transaction. The appellant submitted that it was impossible to contemplate the respondent agreeing in writing to give a separate entity immunity. It might be unusual, but it is possible. The respondent might enter an agreement of this kind with a separate entity in order to obtain its co-operation in pursuing litigation against other suspected contraveners.

71 Both parties relied on particular foreign decisions. In fairness, they did not press that reliance strongly. Those decisions are of no utility in resolving the present controversy. The statutes under consideration in those decisions are insufficiently similar to the Act, and the issues under consideration in those decisions are insufficiently similar to the present issue.

72 It is sufficient to satisfy the s 11(3)(a) description of a proceeding concerning "a contract for the supply of … services" if an element of a claim made in the relevant proceeding depends on the existence of a term in a commercial contract. Here, the respondent's s 45(2)(b)(ii) case depends on the existence of the pricing terms in the air freight services contracts between the appellant and its customers.

The second limb: commercial transactions under s 11(3) more generally

73 The second limb of the respondent's argument is correct for a similar reason. Section 11(3) is satisfied because an element of a claim made in the proceeding is the existence of terms in commercial transactions or like activities – the alleged arrangements or understandings. The function of arrangements or understandings of the kind it is said the appellant entered into is to improve the trading or commercial position of the parties, at least in the perception of those parties. The Statement of Claim alleges transactions which are extremely elaborate and complicated. They boil down to arrangements or understandings which had the purpose and effect of price fixing. The Statement of Claim alleges meetings of the minds of traders about trade. These are "trading" or "commercial" activities. They are "commercial" or "trading" transactions. That is so even though they may not have contractual force. And it is so even though they are transactions which, in both ordinary usage and legal parlance, are in restraint of trade. The expression "commercial transactions" is not limited to those transactions which promote trade.

74 The opening words of s 11(3) are not limited to contracts. The appellant did not deny that if it and the other airlines had entered a contract allegedly in contravention of s 45, it would be a commercial transaction. If a contract in contravention of s 45 is capable of being a commercial transaction, non-contractual arrangements or understandings are capable of being "a commercial, trading … transaction … or a like activity". Indeed, the appellant expressly conceded this.

75 The principal arguments advanced by the appellant against this second limb of the respondent's argument were considered and rejected above[53]. Accordingly, even if the arrangements and understandings had not been put into effect in the air freight services contracts, they would still have been "commercial transactions" within the meaning of s 11(3).

Orders

76 The submissions of the appellant must be rejected. The appeal should be dismissed with costs.

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53 See above at [57]-[71].