

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

GREYLAG GOOSE LEASING 1410 DESIGNATED
ACTIVITY COMPANY & ANOR

APPELLANTS

AND

P.T. GARUDA INDONESIA LTD

RESPONDENT

*Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda
Indonesia Ltd*
[2024] HCA 21
Date of Hearing: 7 March 2024
Date of Judgment: 5 June 2024
S135/2023

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

P D Herzfeld SC with C Trahanas for the appellants (instructed by
K&L Gates)

S J Maiden KC with E L Beechey for the respondent (instructed by Baker
McKenzie)

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd

Private international law – Foreign State immunity – Immunity from jurisdiction – Proceedings for winding up of body corporate registered as foreign company – Where appellants commenced proceeding for winding up of respondent under Pt 5.7 of *Corporations Act 2001* (Cth) – Where respondent sought order that originating process be set aside on basis that court lacked jurisdiction by operation of ss 9 and 22 of *Foreign States Immunities Act 1985* (Cth) ("Act") – Where common ground that respondent an agency or instrumentality of Republic of Indonesia and accordingly a "separate entity" within meaning of Act and entitled to immunity from jurisdiction unless applicable exception from immunity – Where appellants rely on exception in s 14(3)(a) read with s 22 of Act – Where s 14(3)(a) of Act provides that "[a] foreign State is not immune in a proceeding in so far as the proceeding concerns ... bankruptcy, insolvency or the winding up of a body corporate" – Where by operation of s 22 of Act, s 14(3)(a) applies "in relation to a separate entity of a foreign State" as it applies "in relation to the foreign State" – Whether exception from immunity in s 14(3)(a) read with s 22 applies to proceeding for winding up of body corporate that is separate entity of foreign State.

Words and phrases – "agency or instrumentality", "exception from immunity", "foreign State", "immunity from jurisdiction", "legislative history", "purpose and context", "separate entity", "winding up".

Corporations Act 2001 (Cth), Pt 5.7, Pt 5B.2, Div 2.

Foreign States Immunities Act 1985 (Cth), ss 3(1), 3(3), 9, 11, 14(3), 16, 22.

1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. This appeal concerns the immunity from the jurisdiction of an Australian court conferred on a separate entity of a foreign State by ss 9 and 22 of the *Foreign States Immunities Act 1985* (Cth) ("the Immunities Act").

2 The question in the appeal is whether the exception from the immunity for which provision is made in ss 14(3)(a) and 22 applies to a proceeding for the winding up under Pt 5.7 of the *Corporations Act 2001* (Cth) ("the Corporations Act") of a separate entity of a foreign State that is a body corporate registered as a foreign company under Div 2 of Pt 5B.2 of the Corporations Act (a "Part 5.7 proceeding"). For the reasons which follow, the answer is that the exception has no application.

3 The consequence is that, unless and to the extent that another exception is applicable, the immunity from jurisdiction conferred by ss 9 and 22 of the Immunities Act excludes the jurisdiction of an Australian court to entertain a Part 5.7 proceeding for the winding up of a separate entity of a foreign State that is registered as a foreign company under Div 2 of Pt 5B.2 of the Corporations Act.

Facts and procedural history

4 P.T. Garuda Indonesia Ltd ("Garuda") is a company incorporated in the Republic of Indonesia and is the national airline of the Republic of Indonesia. Garuda is registered as a foreign company under Div 2 of Pt 5B.2 of the Corporations Act. Garuda is for that reason a "Part 5.7 body" within the meaning of the Corporations Act.

5 Greylag Goose Leasing 1410 Designated Activity Company and Greylag Goose Leasing 1446 Designated Activity Company (together "Greylag Goose") are companies incorporated in Ireland which lease aircraft to Garuda.

6 Greylag Goose made demands on Garuda for the payment of amounts of US\$193,003,254.55 and US\$244,968,492.29 said to be owed by Garuda.

7 By originating process filed in the Supreme Court of New South Wales, Greylag Goose subsequently commenced a Part 5.7 proceeding seeking orders that Garuda be wound up "on the basis that [Garuda] is unable to pay its debts or otherwise that it is just and equitable to do so".

8 In seeking orders for the winding up of Garuda on the first basis identified in the originating process, Greylag Goose relied on s 583(c)(i) of the Corporations Act in combination with s 585(a) of the Corporations Act. Section 583(c)(i) allows for a Part 5.7 body to be wound up "if the Part 5.7 body is unable to pay its debts". Section 585(a) provides for a Part 5.7 body to be "taken to be unable to pay its

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debts" if the Part 5.7 body has failed within a specified period to meet a statutory demand for payment of a debt made by a creditor.

9 In seeking orders for the winding up of Garuda on the alternative basis identified in the originating process, Greylag Goose relied on s 583(c)(ii) of the Corporations Act. Section 583(c)(ii) allows for a Part 5.7 body to be wound up "if the Court is of opinion that it is just and equitable that the Part 5.7 body should be wound up".

10 By notice of motion filed in the Part 5.7 proceeding, Garuda sought an order that the originating process be set aside on the basis that the Supreme Court lacked jurisdiction by operation of ss 9 and 22 of the Immunities Act. On the hearing of that notice of motion, it was common ground that Garuda is an agency or instrumentality of the Republic of Indonesia and is on that basis a separate entity of a foreign State within the meaning of the Immunities Act. That remains common ground. Hence, it was and is common ground that Garuda is entitled to the immunity from jurisdiction conferred on a separate entity of a foreign State by ss 9 and 22 of the Immunities Act in the Part 5.7 proceeding unless an exception to that immunity can be established to be applicable.

11 Greylag Goose's sole answer to the immunity from jurisdiction relied on by Garuda was and remains that the exception for which provision is made in ss 14(3)(a) and 22 of the Immunities Act applied to the Part 5.7 proceeding. Greylag Goose did not and does not argue, by reference to any transaction underlying either of the two debts in respect of which Greylag Goose had demanded payment or otherwise, that the Part 5.7 proceeding "concern[ed] a commercial transaction" such that the exception to the immunity from jurisdiction for which provision is made in ss 11 and 22 of the Immunities Act applied to the proceeding. Nothing in these reasons for judgment should be taken to express any view as to whether the proceeding might be capable of bearing that characterisation.

12 At first instance, Hammerschlag CJ in Eq rejected the argument of Greylag Goose that the exception in ss 14(3)(a) and 22 of the Immunities Act applied to the Part 5.7 proceeding.¹ His Honour accordingly set aside the originating process on the basis that the Supreme Court lacked jurisdiction to hear and determine the

1 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2022] NSWSC 1623 at [12], [14], [17].

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Part 5.7 proceeding by operation of ss 9 and 22 of the Immunities Act in the absence of an applicable exception.²

13 The order setting aside the originating process was upheld on appeal to the Court of Appeal of the Supreme Court of New South Wales by Bell CJ, with whom Meagher and Kirk JJA agreed.³ This appeal is by special leave from that decision.

The Immunities Act

14 This Court has examined the legislative history and structure of the Immunities Act in three past decisions.⁴ The earliest of those past decisions happens also to have concerned Garuda and to have proceeded similarly upon an acceptance that Garuda was a separate entity of a foreign State within the meaning of the Immunities Act.⁵

15 Without rehearsing the detail of those prior examinations of the Immunities Act, it is necessary in addressing the question raised in the appeal to recall that the purpose of the Immunities Act was "to set out in clear and accessible form the law relating to the jurisdiction of Australian courts over foreign states, their agencies and instrumentalities".⁶ It is necessary also to recall that the Immunities Act was enacted on the recommendation of the Australian Law Reform Commission

2 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2022] NSWSC 1623 at [22]-[26], [36]-[37].

3 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* (2023) 111 NSWLR 550 at 555 [13], 569 [79]-[80].

4 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240; *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31; *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292.

5 See *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 243 [1], 251 [31].

6 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 August 1985 at 141; Australia, House of Representatives, *Foreign States Immunities Bill 1985*, Explanatory Memorandum at 2.

("the ALRC") in a comprehensive report ("the ALRC Report")⁷ to which was appended a draft Bill for the Immunities Act.

16 The ALRC Report drew on what was then a recent interim report of the International Law Commission ("the ILC") on "Jurisdictional Immunities of States and Their Property" ("the 1983 ILC Interim Report").⁸ The work then being done by the ILC would later culminate in its 1991 Draft Articles on Jurisdictional Immunities of States and Their Property which, with some amendments, would come to be incorporated into the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted by the General Assembly of the United Nations in 2004.⁹

17 The provisions of the Immunities Act that are of present relevance are contained within Pt II of the Act. Part II is headed "Immunity from jurisdiction" and comprises ss 9 to 22. The lead provision is s 9, headed "General immunity from jurisdiction". The section 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". The "proceeding" to which the section refers extends to any application for the making of an order in civil jurisdiction.¹⁰ The "immunity" from "jurisdiction" which the section confers is not an immunity from substantive law but is to be "understood as a freedom from liability to the imposition of duties by the process of Australian courts".¹¹

18 Sections 10 to 21 of the Immunities Act create exceptions to the general immunity from jurisdiction which s 9 confers. Together, they "set out exhaustively

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

8 Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), UN GAOR, 38th sess, Supp No 10, UN Doc A/38/10, reproduced in *Yearbook of the International Law Commission* (1983), vol 2(2) at 17.

9 See Fox and Webb, *The Law of State Immunity*, 3rd ed (rev) (2015), ch 9.

10 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at 48 [36], 71 [135].

11 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 247 [17].

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the circumstances in which the general rule of immunity is to be relaxed".¹² Like s 9, ss 10 to 21 are addressed to the immunity from jurisdiction of a "foreign State". Apart from s 10, which is headed "Submission to jurisdiction", each is expressed in terms that a foreign State is not immune in a proceeding in so far as the proceeding concerns one or more identified subject-matters. For present purposes, it is necessary to note the subject-matters of only some of them.

19 The subject-matter of the exception created by s 11 of the Immunities Act is identified in s 11(1) as "a commercial transaction". That expression is defined in s 11(3) to mean "a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged" but to exclude "a contract of employment" or "a bill of exchange". Those are the distinct subject-matters of the exceptions created by ss 12 and 19 respectively.

20 The various subject-matters of the exception created by s 14 of the Immunities Act are indicated by the heading to that section: "Ownership, possession and use of property etc". The section provides:

- "(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

12 Australia, House of Representatives, *Foreign States Immunities Bill 1985*, Explanatory Memorandum at 8.

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- (b) the administration of a trust, of the estate of a deceased person or of the estate of a person of unsound mind."

21 The subject-matter of the exception created by s 16 of the Immunities Act is likewise indicated by the heading to that section: "Membership of bodies corporate etc". The section provides:

"(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."

22 Section 22, the operation of which in relation to the exception from immunity created by s 14(3)(a) gives rise to the question in this appeal, is the concluding provision of Pt II of the Immunities Act. Section 22 provides: "The preceding provisions of this Part ... apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State".

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23 The definition of "foreign State" for the purposes of the Immunities Act is:¹³

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

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

24 The import of the use of the expression "foreign State" in the Immunities Act is further elucidated in s 3(3) as follows:

"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."

25 The definition of "separate entity" for the purposes of the Immunities Act is:¹⁴

"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

13 Section 3(1) of the Immunities Act (definition of "foreign State").

14 Section 3(1) of the Immunities Act (definition of "separate entity").

- (b) is not a department or organ of the executive government of the foreign State."

The operation of s 22 of the Immunities Act

26 Through the operation of s 22 of the Immunities Act, s 9 applies in relation to a separate entity of a foreign State as s 9 applies in relation to a foreign State. Through the operation of s 22 of the Immunities Act, s 14(3)(a) likewise applies in relation to a separate entity of a foreign State as s 14(3)(a) applies in relation to a foreign State. The refutation of Greylag Goose's central argument on the appeal concerning the application of s 14(3)(a) in relation to a separate entity of a foreign State lies in a proper understanding of the operation of s 22.

27 Section 14(3)(a) in terms provides that "[a] foreign State is not immune in a proceeding in so far as the proceeding concerns ... bankruptcy, insolvency or the winding up of a body corporate". It is important to recognise that, as the provision applies in relation to a foreign State, the "foreign State" to which the provision refers can only be an entity that is different from the "body corporate" to which the provision refers. Obviously, a foreign State is not a body corporate, and, obviously, a foreign State is incapable of being wound up as a body corporate.

28 Therefore, as s 14(3)(a) applies in relation to a foreign State: the "foreign State" is the object of the exception from immunity; the "body corporate" is an entity other than the foreign State; and the winding up of that other entity is the subject-matter of the exception from immunity.

29 The central argument of Greylag Goose is a textual one. The argument is that, in its application through s 22 in relation to a separate entity, s 14(3)(a) is to be read as providing that "[a separate entity] is not immune in a proceeding in so far as the proceeding concerns ... bankruptcy, insolvency or the winding up of a body corporate". Given that "separate entity" is defined to include "a body corporate" that is an agency or instrumentality of the foreign State, so Greylag Goose's textual argument continues, there is no reason why the "separate entity" to which s 14(3)(a) (on Greylag Goose's reading) refers needs to be an entity different from the "body corporate" to which s 14(3)(a) refers. Textually, Greylag Goose's argument concludes, that means that the body corporate that is the object of the exception from immunity and the body corporate that is the entity the winding up of which is the subject-matter of the exception from immunity can be one and the same.

30 Greylag Goose's textual argument is misconceived. The argument is founded on a wrong understanding of the operation of s 22 of the Immunities Act. Section 22 is not definitional; it is substantive. In providing that the provisions to

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which it refers "apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State", the section does not operate to require the definition of "separate entity" to be read into each of ss 9 to 21 in place of the definition of "foreign State"; it operates to confer on a separate entity of a foreign State the same immunity from jurisdiction as s 9 confers on the foreign State itself.

31 The ALRC Report explained the underlying policy of s 22 to be that "separate entities should be treated in the same way as foreign states for the purposes of the provisions on immunity from jurisdiction".¹⁵ Though the ALRC noted that a "good deal of ... difficulty" would be avoided were an agency or instrumentality having separate legal personality wholly denied immunity, the ALRC took the view that it was "not desirable that Australia be the first country to legislate in terms which say to foreign states that the type of entity through which they have chosen to carry out an activity will determine the availability of immunity".¹⁶ However, if Greylag Goose's argument is correct, whether immunity is available will depend on the type of entity through which a foreign State carries on the activity. If the foreign State were to conduct the relevant activity through a body corporate then it would be amenable to being wound up but if it were to conduct the activity through, for example, a government department then it would not.

32 For the immunity of a separate entity to be equated to the immunity of a foreign State through the operation of s 22 of the Immunities Act, the subject-matter of the exception for which s 14(3)(a) makes provision in its application in relation to a separate entity must be the same as the subject-matter of the exception for which s 14(3)(a) makes provision in its application in relation to a foreign State. The entity that is the object of the exception from immunity – be it a foreign State or a separate entity of a foreign State – cannot be the entity the winding up of which is the subject-matter of the exception from immunity.

33 Therefore, as s 14(3)(a) applies through the operation of s 22 in relation to a separate entity of a foreign State: the separate entity (like the foreign State itself) is the object of the exception from immunity; the "body corporate" is an entity other than the separate entity of the foreign State (just as it is an entity other than

15 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at xx [31].

16 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 38-39 [71].

the foreign State itself); and the winding up of that other entity is the subject-matter of the exception.

34 To accept Greylag Goose's textual argument would be to defy that substantive operation of s 22 of the Immunities Act. To accept the argument would be to countenance a divergence of the scope of the immunity from jurisdiction produced through the application of the exception in s 14(3)(a) to a separate entity in comparison with the scope of the immunity from jurisdiction produced through the application of the same exception to a foreign State. It would lessen the immunity of a separate entity in comparison with the immunity of a foreign State. It would expand the subject-matter of the exception in its application to a separate entity beyond the subject-matter of the exception in its application to a foreign State.

35 Greylag Goose's central textual argument concerning the application of s 14(3)(a) in relation to a separate entity of a foreign State is therefore incapable of being sustained on a proper understanding of the operation of s 22 of the Immunities Act. Greylag Goose's subsidiary arguments are incapable of overcoming that defect. Each subsidiary argument is in any event erroneous for reasons now to be explained.

No legislative endorsement of the argument of Greylag Goose

36 Greylag Goose seeks to derive support for its textual argument from an obiter dicta remark in an unreported ex tempore interlocutory decision of Hayne J, sitting as a single judge of the Supreme Court of Victoria in 1992. The remark was to the effect that it was "strongly arguable" that s 22 operated on s 14(3)(b) of the Immunities Act to exclude the immunity of a separate entity of a foreign State that was the trustee of a trust the administration of which was the subject of a proceeding in the Supreme Court.¹⁷

37 It is by no means clear that the argument then thought to have been strong involved the textual approach which Greylag Goose now argues should be taken to the operation of s 22 on s 14(3)(a). The more natural reading of his Honour's reasons is that he adopted an expansive view of the scope of the subject-matter of the exception from immunity for which s 14(3)(b) provides, which would have

17 *Adeang v The Nauru Phosphate Royalties Trust* (unreported, Supreme Court of Victoria, 8 July 1992) at 5-8.

applied equally were the trustee a separate entity of a foreign State as it would have were the trustee the foreign State itself.¹⁸

38 Be that as it may, Greylag Goose draws too long a bow in arguing that the making of amendments to the Immunities Act in 2009¹⁹ and 2022²⁰ without alteration to s 14(3) can be treated as amounting to a legislative endorsement of whatever construction might be thought to be implicit in the judge's remark. "Whilst it is true that, where an inference can be drawn from the terms in which subsequent legislation has been passed that Parliament itself has approved of a particular judicial interpretation of words in an earlier statute, a court should adhere to that interpretation, the difficulty is in discerning the existence of parliamentary approval".²¹ One judicial swallow does not make a legislative summer.

The structure of Pt II of the Immunities Act

39 Greylag Goose seeks to derive further support for its textual argument concerning the application of s 14(3)(a) of the Immunities Act to a separate entity of a foreign State by advancing the proposition that an "overarching policy" of the exceptions for which ss 10 to 21 provide to the general immunity from jurisdiction which s 9 confers "is that commercial or trading activities conducted by or on behalf of foreign States should not attract an immunity". Greylag Goose asserts that the result sought to be produced by its textual argument is "more consistent" with a policy to that effect.

40 This assertion, that Greylag Goose's textual argument is more consistent with a policy to the effect that commercial or trading activities of foreign States should not attract immunity from jurisdiction, overlooks the reality that the winding up of a body corporate need bear no relationship to any commercial or trading activity of the body corporate to be wound up. So much is illustrated within the context of Pt 5.7 of the Corporations Act by the availability under s 583(c)(ii)

18 See *Adeang v The Nauru Phosphate Royalties Trust* (unreported, Supreme Court of Victoria, 8 July 1992) at 6-7.

19 *Foreign States Immunities Amendment Act 2009* (Cth).

20 *Courts and Tribunals Legislation Amendment (2021 Measures No 1) Act 2022* (Cth).

21 *Flaherty v Girgis* (1987) 162 CLR 574 at 594, quoted in *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177 at 186 [15]. See also at 198-199 [51]-[52].

of the Corporations Act of the "just and equitable" ground for the winding up of a Part 5.7 body, a provision upon which Greylag Goose chose to rely in seeking orders for the winding up of Garuda in the present case.

41 More problematic is Greylag Goose's proposition that the exceptions for which provision is made in ss 10 to 21 of the Immunities Act to the general immunity from jurisdiction conferred by s 9 are manifestations of some overarching unified policy; they are not. The proposition is fundamentally erroneous: it is diametrically opposed to the justification for the enactment of the exceptions advanced by the ALRC in explaining the structure of Pt II of the Immunities Act.

42 The Immunities Act was framed by the ALRC at a time when the so-called "absolute theory" of foreign State immunity was seen to be giving way to a "restrictive theory" of foreign State immunity²² but also when the metes and bounds of the emergent restrictive theory at common law were perceived to be uncertain.²³

43 Against that background, the ALRC noted that there were two broad approaches to distinguishing between circumstances of immunity and circumstances of lack of immunity. One, which coincided with a view of the emergent restrictive theory at common law, was to draw a single distinction between the "public" and "private" dealings of foreign States. The other, adopted in overseas legislation on foreign State immunity and favoured by the ILC, involved "a more complex set of distinctions, based on multiple criteria not reducible to any formula".²⁴

44 The ALRC unambiguously adopted the second of those approaches in the design of the Immunities Act. The ALRC was adamant that the Immunities Act should not adopt "a single distinction between immune and non-immune cases ... whether it is a distinction between 'private' and 'public' law, or between 'commercial' and 'governmental' transactions", but should instead "deal with the various categories or classes of cases that can arise" and "fashion specific rules for

22 See *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at 78-80 [167]-[172].

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

24 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 26 [46].

each category, taking into account the reasons for according immunity or for asserting jurisdiction in that specific context".²⁵ The ALRC explained that "[t]he considerations favouring local jurisdiction (or immunity from it)" were "based on a variety of rules, principles and policies".²⁶

45 Thus, Pt II of the Immunities Act reflected the ALRC's view that Australian legislation should be "designed so as to reflect not a single governmental/commercial dichotomy but rather the full range of considerations" bearing on the appropriateness of conferring immunity from jurisdiction.²⁷ Within the scheme of the Part, commercial transactions were to be treated as "one amongst a number of exceptions"²⁸ to foreign State immunity which were to "reflect more precisely the various considerations governing whether immunity is to be withheld".²⁹

46 Moreover, the various exceptions from immunity for which provision was to be made in ss 10 to 21 of the Immunities Act were to be "read disjunctively" in the sense that a proceeding which did not fall within one exception might fall within another exception if the facts permitted.³⁰ The result is that, save to the extent that the subject-matter of one exception is properly interpreted to exclude the subject-matter of another (as in the case of the express exclusion from the

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

26 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 28 [52].

27 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 35 [65].

28 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at xviii [17], 27 [48].

29 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 50 [88].

30 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 51 [88].

subject-matter of s 11 of the subject-matters of ss 12 and 19), the exceptions "may overlap with each other".³¹

The purpose of s 14(3)(a) of the Immunities Act

47 Finally, Greylag Goose argues that the purpose of s 14(3)(a) is not limited to the purpose of allowing an Australian court to adjudicate on the interests of a foreign State in a bankruptcy, insolvency or winding up. That argument too is refuted by the legislative history.

48 Even when the so-called "absolute theory" of foreign State immunity prevailed in common law jurisdictions, foreign State immunity was not truly absolute. One recognised exception was that a foreign State had no immunity in respect of an interest in land located within the jurisdiction; another exception of long standing was that a foreign State had no immunity in respect of an interest in a trust administered within the jurisdiction.³² The latter exception was explained to "depend essentially on the existence of a trust fund or other item of trust property within the area of jurisdiction of the Chancery courts: given the trust fund or property there is a trust to be administered by the court and it was evidently the belief of the judges who were responsible for the equity jurisdiction that they had a responsibility for administering and in due course determining the rights to such property, even though a foreign sovereign might be known to be a possible or certain claimant to an interest in it".³³ The exception recognised in respect of an interest of a foreign State in a trust administered within the jurisdiction was carried over to the winding up of a company in consequence of which proprietary interests of a foreign State might be affected.³⁴

49 Each of those previously recognised exceptions came to be reflected in the *State Immunity Act 1978* (UK) ("the UK Act"). Section 6(1) of the UK Act

31 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at 55 [62].

32 See *Thai-Europe Tapioca Service Ltd v Government of Pakistan* [1975] 1 WLR 1485 at 1490-1491; [1975] 3 All ER 961 at 965; *The Philippine Admiral* [1977] AC 373 at 392-393.

33 *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582 at 617. See also *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318 at 343-344; *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 397.

34 *In re Russian Bank for Foreign Trade* [1933] Ch 745 at 769-770.

provided that "[a] State is not immune as respects proceedings relating to ... any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or ... any obligation of the State arising out of its interest in, or its possession or use of, any such property". Section 6(3) provided that "[t]he fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts". Equivalent provisions came also to be included in cognate legislation in Singapore³⁵ and Pakistan³⁶.

50 By that time, the European Convention on State Immunity³⁷ ("the European Convention") already provided in Art 10 that "[a] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia*" and in Art 14 that "[n]othing in this Convention shall be interpreted as preventing a court of a Contracting State from administering or supervising or arranging for the administration of property, such as trust property or the estate of a bankrupt, solely on account of the fact that another Contracting State has a right or interest in the property".

51 More elaborate exceptions along similar lines then came to be included in "Draft articles on jurisdictional immunities of States and their property" ("the ILC 1983 Draft Articles") which were provisionally adopted by the ILC and set out in the 1983 ILC Interim Report.³⁸ Article 15 of the ILC 1983 Draft Articles was headed "Ownership, possession and use of property". Paragraph 1 of Art 15 was as follows:

"The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

35 Section 8(1) and (3) of the *State Immunity Act 1979* (Singapore).

36 Section 7(1) and (3) of the *State Immunity Ordinance 1981* (Pakistan).

37 European Convention on State Immunity (1972).

38 Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), UN GAOR, 38th sess, Supp No 10, UN Doc A/38/10, reproduced in *Yearbook of the International Law Commission* (1983), vol 2(2) at 21.

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16.

- (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or
- (b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or
- (c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or
- (d) *any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up*; or
- (e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis."

(emphasis added)

52 In relation to Art 15 of the ILC 1983 Draft Articles as a whole, the 1983 ILC Interim Report explained:³⁹

"The exception was based on the exclusive authority of the courts of the State of the forum to determine legal issues concerning immovable property situated in the forum State. It was also based on the need for the courts of the State of the forum to be able to adjudicate upon conflicting claims to property being administered by those courts. Where the foreign State appeared as one among several claimants endeavouring to assert title to property or a claim to an inheritance, it was natural that the State concerned should be deemed to have consented to the exercise of jurisdiction by a court of the territorial State competent to adjudicate the claim."

39 Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), UN GAOR, 38th sess, Supp No 10, UN Doc A/38/10, reproduced in *Yearbook of the International Law Commission* (1983), vol 2(2) at 20 [92].

53 In relation to sub-paras (c), (d) and (e) of para 1 of Art 15 of the ILC 1983 Draft Articles, the 1983 ILC Interim Report explained:⁴⁰

"Subparagraphs (c), (d) and (e) need not concern or relate to the determination of a right or interest of the State in property, but are included in paragraph 1 to cover the situation in many countries, especially in the common-law systems, where the court exercises some supervisory jurisdiction or other functions with regard to the administration of the estate of a deceased person, a person of unsound mind or a bankrupt; of a company in the event of its dissolution or winding up; or of trust property or property otherwise held on a fiduciary basis. The exercise of such supervisory jurisdiction is purely incidental, as the proceeding may in part involve the determination or ascertainment of rights or interests of all the interested parties, including, if any, those of a foreign State."

54 When the ALRC itself turned to the topic which, borrowing from Art 15 of the ILC 1983 Draft Articles, it labelled "Ownership, Possession and Use of property", against that international background the ALRC chose to address "Immovable Property" and "Movable Property" sequentially in the ALRC Report.

55 Under the heading "Immovable Property", the ALRC recommended that Australian legislation "follow the general trend" to provide that a foreign State "is not immune in proceedings concerning its interest in, or its possession or use of, immovable property in Australia nor any obligation arising out of its interest, possession or use".⁴¹ That is the purpose and effect of s 14(1) of the Immunities Act.

56 Under the heading "Movable Property", the ALRC said this:⁴²

"Where a local court is administering, or supervising the administration of, property it is appropriate that it should be able to adjudicate on all the

40 Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), UN GAOR, 38th sess, Supp No 10, UN Doc A/38/10, reproduced in *Yearbook of the International Law Commission* (1983), vol 2(2) at 37.

41 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 69 [116].

42 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 69 [117] (footnotes omitted).

conflicting claims to such property. Situations where this might arise include bankruptcy, insolvency, the winding up of companies, and the administration of trusts, of estates of deceased persons or of estates of persons of unsound mind. Some of the overseas legislation has explicit provision denying immunity in these situations. It is recommended that the proposed legislation do likewise."

57 In support of the first sentence within that quotation, the ALRC cited the explanation in the 1983 ILC Interim Report for the inclusion of Art 15 of the ILC 1983 Draft Articles already quoted.⁴³ The "overseas legislation" to which the ALRC referred in the penultimate sentence included the United Kingdom, Singaporean and Pakistani legislation to which reference has also been made, as well as Art 14 of the European Convention and sub-paras (c), (d) and (e) of para 1 of Art 15 of the ILC 1983 Draft Articles.⁴⁴

58 In its summary of recommendations, the ALRC repeated the substance of the explanation it had given in relation to movable property, but this time under the heading "Other Property Disputes".⁴⁵

59 In light of that twice-stated explanation in the ALRC Report, it could hardly be clearer that the ALRC did not intend in its framing of s 14(3)(a) of the Immunities Act to adopt or implement a purpose beyond ensuring that an Australian court exercising jurisdiction in a bankruptcy, insolvency or winding up proceeding would be able to adjudicate on the proprietary interests of all the interested parties, including the proprietary interests of a foreign State. It is not to the point that the purpose might have been reflected more clearly in the text of s 14(3)(a) had the ALRC in framing s 14(3)(a) adhered more closely to the language of the UK Act, and cognate Singaporean and Pakistani legislation, or to the language of Art 14 of the European Convention, or sub-para (d) of para 1 of Art 15 of the ILC 1983 Draft Articles. The purpose and context informs the correct reading of the text, noting that the text was framed by the ALRC to give effect to the purpose and was enacted on the recommendation of the ALRC.

43 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 69 [117] fn 131.

44 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 69 [117] fn 132.

45 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at xx [29].

60 Section 16 of the Immunities Act does not point to s 14(3)(a) having any wider purpose. Section 16 was adapted from s 8 of the UK Act which sat comfortably alongside s 6(3) of the UK Act. The justification for inclusion of the exemption for which s 16 provides was separately explained in the ALRC Report in terms that "Australia has an interest in seeing that the internal affairs of bodies set up under its law are capable of supervision by Australian courts" and that "[h]aving elected to participate in such bodies the foreign state can hardly complain when local law is applied to it".⁴⁶ That justification for s 16 provides no basis for treating the purpose of s 14(3)(a) as extending to permit an Australian court to wind up a separate entity which has become registered as a foreign company under Div 2 of Pt 5B.2 of the Corporations Act.

Conclusion

61 Sections 9 and 22 of the Immunities Act render a body corporate that is a separate entity of a foreign State immune from the jurisdiction of an Australian court in a proceeding. Sections 14(3)(a) and 22 create an exception from that immunity. The exception applies to a Part 5.7 proceeding only if and in so far as the proceeding concerns the winding up of another body corporate.

62 The appeal should be dismissed with costs.

46 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 64 [110].

63 GORDON AND STEWARD JJ. The appellants ("Greylag"), incorporated in Ireland, lease aircraft to the respondent ("Garuda"). Garuda, incorporated in the Republic of Indonesia ("Indonesia"), is the national airline carrier of Indonesia. Garuda carries on business in Australia and is registered as a foreign company in Australia under Div 2 of Pt 5B.2 of the *Corporations Act 2001* (Cth).

64 In 2022, Greylag filed an originating process in the Supreme Court of New South Wales seeking orders that Garuda be wound up in insolvency pursuant to s 583(c)(i) or (ii) of the *Corporations Act* "on the basis that [Garuda] is unable to pay its debts or otherwise that it is just and equitable to do so". The originating process was founded on Garuda's failure to meet creditors' demands issued by Greylag under s 585(a) of the *Corporations Act* for payment of two alleged unpaid debts of US\$193,003,255 and US\$224,968,492, relating to its lease of aircraft from Greylag, which gave rise to a deemed insolvency of Garuda under s 583(c)(i), read with s 95A of the *Corporations Act*.

65 Garuda, by notice of motion, sought a declaration that the Supreme Court had no jurisdiction over it by reason of s 9 of the *Foreign States Immunities Act 1985* (Cth) ("FSIA") and also sought an order setting aside Greylag's originating process.

66 Part II of the FSIA, headed "Immunity from jurisdiction", contains ss 9 to 22. Section 9, headed "General immunity from jurisdiction", provides that "[e]xcept as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding". That immunity applies to a separate entity of a foreign State under s 22 of the Act.⁴⁷ A "separate entity", in relation to a foreign State, is defined to mean "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".⁴⁸ "[F]oreign State" is relevantly defined to mean "a country the territory of which is outside Australia, being a country that is ... an independent sovereign state".⁴⁹ There is no dispute that Indonesia is a foreign State and that, in relation to Indonesia, Garuda is a "separate entity" within the meaning of s 3(1) of the FSIA.

47 FSIA, s 22.

48 FSIA, s 3(1) definition of "separate entity" (emphasis added).

49 FSIA, s 3 definition of "foreign State".

67 Greylag sought to resist Garuda's motion by invoking the exception to foreign State immunity in s 14(3)(a) of the FSIA which, when read with s 22, can be expressed as follows:

"A [separate entity] is not immune in a proceeding in so far as the proceeding concerns:

(a) bankruptcy, insolvency or the winding up of a body corporate ..."

Greylag asserted that the Supreme Court proceedings concerned the winding up of a body corporate, namely Garuda, or were proceedings concerning insolvency by reason of Garuda's deemed insolvency under s 583(c)(i) of the *Corporation Act*.

68 The issue in this appeal is whether s 14(3)(a) of the FSIA applies to a proceeding concerning the winding up of a body corporate that is a separate entity of a foreign State where that same body corporate seeks to invoke the immunity provided by s 9, read with s 22 of the FSIA. For the reasons that follow, the answer is yes.

Foreign State immunity

69 The FSIA is now "the sole basis for foreign state immunity in Australian courts".⁵⁰ Prior to its enactment, the entitlement of foreign States to immunity from the jurisdiction of the courts of Australia was governed by the common law.⁵¹ That law, until 1975, was dominated by the "absolute" doctrine of sovereign immunity – namely, that:⁵²

"the courts had no jurisdiction to entertain an action or other proceedings against a foreign State or the head of government or any department of the government of a foreign State; and an action or other proceeding against the property of any of those entities was regarded as an action or proceeding against the entity. ... If a foreign State had an interest in property situated in the jurisdiction, regardless of whether it was proprietary, possessory or of some other nature, an action affecting that interest would be stayed even though it was not brought against the foreign State."

50 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 245 [8]. See also *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at 42 [5], 81 [174].

51 *Firebird* (2015) 258 CLR 31 at 41-42 [5].

52 *Firebird* (2015) 258 CLR 31 at 78 [167] (footnote omitted).

70 However, following a series of English cases in the 1970s,⁵³ there was a "development of common law doctrine from the rule of absolute immunity to a more restrictive view of immunity".⁵⁴ The principal rationale for the restrictive immunity theory was best captured by Lord Wilberforce in the following oft-cited passage from *Playa Larga v I Congreso del Partido*:⁵⁵

"The relevant exception, or limitation, which has been engrafted upon the principle of immunity of states, under the so called 'restrictive theory,' arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. 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."

71 As this Court has explained in earlier proceedings involving *Garuda*, this shift away from the rule of absolute immunity towards the adoption of the restrictive immunity theory was traced in a comprehensive report by the Australian Law Reform Commission ("the ALRC") on which the FSIA was based.⁵⁶ The Outline contained in the Explanatory Notes for the legislation proposed by the ALRC 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".⁵⁷

The scheme of the FSIA

72 As has been explained, s 14(3)(a) is located within Pt II of the FSIA. That Part, headed "Immunity from jurisdiction", is exhaustive of the common law

53 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 9-10 [11] ("ALRC Report").

54 *Garuda* (2012) 247 CLR 240 at 245 [7].

55 [1983] 1 AC 244 at 262.

56 *Garuda* (2012) 247 CLR 240 at 245 [7]; *Firebird* (2015) 258 CLR 31 at 41-42 [5], 81 [173].

57 *Garuda* (2012) 247 CLR 240 at 245 [7]. See also *Firebird* (2015) 258 CLR 31 at 81 [173]; ALRC Report at 129 [2].

doctrine of foreign State immunity and, in s 9, indicates that the FSIA provides the sole basis for foreign State immunity in Australian courts.⁵⁸

73 Section 9 provides that "[e]xcept as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding". As has been observed by this Court previously, the term "jurisdiction" in s 9 and elsewhere in the FSIA:⁵⁹

"is used not to identify the subject matter of a proceeding, but the amenability of a defendant to the process of Australian courts. 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 to a legal proceeding. *Thus, the immunity may be understood as a freedom from liability to the imposition of duties by the process of Australian courts.*"

74 Section 9 is expressly subject to other provisions of the FSIA, namely the exceptions to immunity in ss 11 to 21. These enumerated exceptions generally⁶⁰ reflect the overarching policy that "commercial or trading activities conducted by or on behalf of foreign governments *should not* attract the special jurisdictional immunity enjoyed by foreign States".⁶¹

75 That policy is reflected in s 11 of the FSIA, but not exclusively so. So much is apparent from other enumerated exceptions in Pt II. Section 11 provides the general exclusion from immunity insofar as a proceeding concerns a commercial transaction, but there are also other exceptions which reflect, to varying degrees, an exception for transactions that are likely to be commercial: s 12 (contracts of employment); s 15 (copyright, patents, trade marks etc); s 17 (arbitrations); s 19 (bills of exchange); and s 20 (taxes). This is consistent with, and reflects the adoption of, the ALRC's recommendations. After recognising that other jurisdictions have dealt with "commercial activity" as a single category of

58 *Garuda* (2012) 247 CLR 240 at 245 [8]; *Firebird* (2015) 258 CLR 31 at 41-42 [5], 69 [131], 81 [174].

59 *Garuda* (2012) 247 CLR 240 at 247 [17] (emphasis added; footnotes omitted). See also *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 306 [12].

60 cf, eg, ALRC Report at xv-xvi, 66-67 [113], 67-69 [115].

61 Australia, House of Representatives, *Foreign States Immunities Bill 1985*, Explanatory Memorandum at 2, 8 (emphasis added); Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 August 1985 at 141.

exception, the ALRC Report recommended that "[f]or Australian purposes ... it would be better to subdivide the category of 'commercial activity'. A series of provisions can reflect more precisely the various considerations governing whether immunity is to be withheld."⁶² Section 14 forms part of that series. The exceptions are not mutually exclusive. While they are to be read "disjunctively",⁶³ this Court has observed that they may also overlap.⁶⁴ Before turning to consider s 14(3)(a), one other aspect of Pt II of the FSIA should be noted.

76 The series of provisions of which s 14(3) forms part not only was intended to reflect the overarching policy that commercial or trading activities conducted by foreign governments should *not* attract the special jurisdictional immunity enjoyed by foreign States but also, at the same time, sought to identify when to deny foreign State immunity to an entity with separate legal personality from the foreign State by extending the application of certain exceptions to immunity to a "separate entity". A separate entity, in relation to a foreign State – relevantly defined in s 3(1) as a body corporate (except one established by or under a law of Australia) that is also an agency or instrumentality of the foreign State and is not a department or organ of the executive government of a foreign State – was intended to be less privileged.⁶⁵ The rationale was that the activities of such separate entities "will seldom be of a kind which are immune when performed by the state itself".⁶⁶

Section 14(3)(a)

77 Garuda contended that s 14(3)(a) of the FSIA does not apply to a proceeding in so far as the proceeding concerns the winding up of a body corporate that is a separate entity of a foreign State where that same body corporate seeks to invoke the immunity provided by ss 9 and 22 of the FSIA. That contention should be rejected.

78 The better view, consistent with the context and purpose of s 14(3)(a) and the FSIA generally, is that the term "body corporate" in s 14(3)(a) includes a separate entity of a foreign State, even where it is the same body corporate which asserts immunity under s 9 of the FSIA. Put differently, the exception in s 14(3)(a) applies so as to remove the general immunity conferred by s 9 of the FSIA,

62 ALRC Report at 50 [88]; see also xvi.

63 ALRC Report at 50-51 [88].

64 *Firebird* (2015) 258 CLR 31 at 55 [62]-[63], 69 [131].

65 ALRC Report at 39 [72]-[73].

66 ALRC Report at 39 [73]; see also 51 [89].

and render a body corporate amenable to the jurisdiction of Australian courts, where the relevant proceedings concern the insolvency or winding up of the *same* body corporate as that which asserts immunity under s 9.

Construction of s 14(3)(a)

79 "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose."⁶⁷ Context should be regarded at the first stage of the construction exercise, not merely at some later stage, and it should be taken "in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ... , one may discern the statute was intended to remedy".⁶⁸

80 First, there is nothing in s 14(3)(a) that limits the exception to proceedings where the body corporate being wound up is an entity *other than* a separate entity of a foreign State. In one of its operations, s 14(3)(a) will deny a foreign State immunity where the proceedings concern the insolvency or winding up of a body corporate. In such a case, the body corporate will necessarily be an entity other than the foreign State. But that particular example does not support, let alone entail, a general rule that s 14(3)(a) applies *only* in the winding up of companies unconnected with a foreign State. Or, to put the point in other words, it provides no basis on which to limit the reach of the general words "winding up of a body corporate". Likewise, describing the argument against limiting the reach of those general words as "textual" provides no sound basis for rejecting the construction adopted in these reasons.

81 Second, sub-ss (1) and (2) of s 14 reveal that where the legislature wished to limit exempt proceedings to those concerning an interest of a foreign State in property, it did so explicitly. Those sub-sections focus on "an interest of the State in" certain types of property. By contrast, while the proceedings referred to in sub-s (3) *may* relate to property (for example, the property of a corporation being wound up or the estate of a bankrupt), the provision *is not limited* to proceedings in which a foreign State has or claims an interest in property that falls to be administered in an Australian court in the winding up of a body corporate, or the administration of an individual's or body corporate's affairs. The Parliament could

⁶⁷ *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14]; see also 374 [35]-[37]. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].

⁶⁸ *CIC Insurance* (1997) 187 CLR 384 at 408.

have adopted a similar format to that in s 14(1) and (2) for s 14(3)(a), but it did not.

82 Third, elsewhere in the FSIA, where the Parliament intended to limit the types of bodies corporate to which a provision applied, it did so expressly.⁶⁹ Again, the Parliament could have used a similar drafting mechanism for s 14(3)(a) to exclude separate entities from the "body corporate" referred to in that section, but it did not.

83 The construction of s 14(3)(a) adopted in these reasons is consistent with and reinforces the idea in s 11 that separate entities of foreign States are not immune where they engage in commercial activities, because it enables a creditor to execute a statutory demand against a debtor body corporate that is a separate entity of a foreign State. By contrast, the construction adopted by the courts below and advanced by Garuda before this Court is inconsistent with the overarching policy of the regime created in Pt II, because, if accepted, it would mean that the exception in s 14(3)(a) is inapplicable in the obvious example of the winding up of a body corporate for being unable to pay its commercial debts, simply because that body corporate is a separate entity of a foreign State. The result would be that where, as here, a separate entity of a foreign State carries on business in Australia (and is therefore required to be registered as a foreign company under the *Corporations Act*),⁷⁰ it can, nonetheless, continue to trade in Australia while insolvent without the ability of any of its creditors to insist upon its winding up.

84 To confine s 14(3)(a) in that way – namely, to read it so that the body corporate identified in s 14(3)(a) is an entity different to the foreign State or separate entity referred to in the chapeau to s 14(3) – would also undermine the operation of the ordinary litigation process. Take the example of a claim made by a creditor against a body corporate which was a separate entity of a foreign State, where the claim arose out of a dispute relating to a contract for the supply of goods or services, but where the body corporate was now insolvent. In those circumstances, the creditor could commence proceedings under s 11 against the body corporate to prosecute its claim. However, on Garuda's construction, the creditor could not commence proceedings to seek the body corporate's winding up. As a matter of logic, that would be an odd result.

69 See eg, FSIA, s 3(1) definition of "separate entity" and s 16(1).

70 *Corporations Act*, ss 601CD and 601DD.

85 It would also be at odds with the enforcement regime in Pt IV of the FSIA.⁷¹ As counsel for Garuda accepted during the course of oral argument, Garuda's construction would *not* exclude seizure of a separate entity's assets by the sheriff if the exceptions for execution set out in Pt IV of the FSIA were otherwise enlivened. Section 30 (headed "Immunity from execution") in Pt IV relevantly provides that, except as provided by Pt IV, the property of a foreign State is not subject to any process or order of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award for the arrest, detention or sale of the property. Similarly to s 9, the immunity in s 30 is then subject to a number of exceptions set out in the remainder of Pt IV (ss 31 to 35). Most relevantly for present purposes is s 35, which makes clear that the extent to which Pt IV (and the immunity in s 30) applies to separate entities of foreign States is *limited*. As a threshold issue, if a separate entity is not the central bank or monetary authority of the foreign State, then Pt IV (and the immunity from execution in s 30) does not apply to the separate entity as it applies to the foreign State.⁷² This indicates that Parliament turned its mind to the issue of enforcement against separate entities of foreign States and expressly chose *not* to extend the immunity in s 30 to all separate entities of foreign States generally.⁷³ This, again, is consistent with the principal rationale for the restrictive immunity theory underpinning the FSIA.⁷⁴

86 Applications to wind up a separate entity are relevant to, and may arise in the context of, Pt II or Pt IV of the FSIA. That is, an application to wind up a separate entity can arise either following the non-payment of a statutory demand made by a creditor or following the attempted, but unsuccessful, enforcement by a creditor of a judgment debt separately obtained. The relevant exception to immunity upon which the creditor in question would rely in bringing the application to wind up the separate entity lies in Pt II (either in s 14(3)(a) or possibly s 11).

71 FSIA, s 7(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."

72 FSIA, s 35(1).

73 See also ALRC Report at 71 [119], 73-75 [122]-[123], 76 [125], 84 [138].

74 See [70] above, quoting *Playa Larga* [1983] 1 AC 244 at 262. See also ALRC Report at xvi, 23 [37], 28 [52], 31 [58], 35 [65], 39 [73].

Corporations Act and supervision by Australian courts not displaced

87 Garuda objected to the availability of the winding up of a separate entity on the basis that such a proceeding, or the outcome of it, would expose the foreign State or its separate entity to the supplanting of its management and the alteration of its status, or would interfere with sovereign or governmental activity insofar as the proceeding could involve the potential scrutiny of the operations of the instrumentality of the foreign State by an organ of the Australian State, being an Australian court. That submission is wrong and should be rejected.

88 A separate entity that is involved in commercial activity in Australia has chosen to submit itself to the requirements of the *Corporations Act* by choosing to carry on that business in Australia. Such activities are not immune from jurisdiction. Indeed, in Pt III of the FSIA (headed "Service and judgments"), s 29 addresses the power to grant relief and it relevantly provides that, subject to an exception in relation to employment contracts, "a court may make any order (including an order for interim or final relief) against a foreign State that it may otherwise lawfully make unless the order would be inconsistent with an immunity under" the FSIA.⁷⁵

89 In this context, it must be recalled that the *Corporations Act* is not displaced in whole or in part⁷⁶ and that is unsurprising. The availability of relief under the *Corporations Act* is consistent with the restrictive immunity theory.⁷⁷ Indeed, as we have just seen, if a separate entity is not the central bank or monetary authority of the foreign State, then Pt IV of the FSIA (and the immunity from execution in s 30) does not apply to the separate entity as it applies to the foreign State.⁷⁸ Parliament turned its mind to the issue of relief and then enforcement against separate entities of foreign States in the FSIA and expressly chose *not* to extend the immunity in s 30 to all separate entities of foreign States generally.⁷⁹

75 FSIA, s 29(1).

76 cf, eg, *Corporations Act*, s 186.

77 See [70] and [85] above.

78 See [85] above.

79 See also ALRC Report at 71 [119], 73-74 [122]-[123], 76 [125], 84 [138].

90 It must also be recalled that a foreign company must not carry on business⁸⁰ in Australia unless it is registered under Pt 5B.2 of the *Corporations Act*.⁸¹ A registered foreign company is required to have a registered office in Australia and at least one local agent.⁸² The local agent is answerable for the doing of all acts, matters and things that the foreign company is required by or under the *Corporations Act* to do and, in some circumstances, is personally liable to a penalty imposed on the foreign company for a contravention of the *Corporations Act*.⁸³ A registered foreign company must lodge balance sheets and other documents.⁸⁴ A registered foreign company cannot trade while insolvent.⁸⁵ Pursuant to s 583 of the *Corporations Act*, a Pt 5.7 body (which includes a foreign company registered under Pt 5B.2)⁸⁶ can be wound up on the grounds of insolvency.⁸⁷

91 That is consistent with s 16 of the FSIA which, as the ALRC recommended,⁸⁸ was a specific provision included to address the participation by a foreign State in the membership of a body corporate, an unincorporated association or a partnership which is incorporated or has been established under the law of Australia or is controlled from, or has its principal place of business in, Australia. Section 16 was inserted as a separate exception to ensure that "all the relevant matters are covered, to provide greater precision, and to avoid

80 *Corporations Act*, ss 18-21.

81 *Corporations Act*, ss 601CD and 601DD.

82 *Corporations Act*, ss 601CE, 601CF, 601CT.

83 *Corporations Act*, s 601CJ.

84 *Corporations Act*, s 601CK.

85 *Corporations Act*, s 588G, read with s 9 definition of "company".

86 *Corporations Act*, s 9 definition of "Part 5.7 body".

87 *Corporations Act*, s 601CL(16) read with ss 582(1), 583(c)(i), 585. See also *Ford, Austin & Ramsay's Principles of Corporations Law* (looseleaf), vol 3 at [27.861]-[27.872] in relation to both the Model Law on Cross-Border Insolvency 1997 of the United Nations Commission on International Trade Law, as given effect to in the *Cross-Border Insolvency Act 2008*, s 6 and Sch 1, and its interaction with s 601CL and Pts 5.6 and 5.7 of the *Corporations Act*.

88 ALRC Report at 64 [110].

overworking the language of the commercial transaction provision", namely s 11.⁸⁹ The stated rationale was that:⁹⁰

"Australia has an interest in seeing that the internal affairs of bodies set up under its law are capable of supervision by Australian courts. *Having elected to participate in such bodies the foreign state can hardly complain when local law is applied to it.* The same argument applies, though with slightly less force, where the body is set up under foreign law but is either controlled from Australia or has its principal place of business here."

This idea – that a foreign State that has elected to participate in a body set up under local Australian laws can hardly complain when Australian laws apply to such a body and such a body is capable of supervision by Australian courts – applies with equal, if not greater, force in relation to a separate entity registered as a foreign company in Australia which is deemed insolvent. Such a separate entity should not be permitted to carry on business in Australia.

92 Another reason why objections to the availability of the winding up of a separate entity ought to be rejected is that a separate entity registered in Australia, because it is carrying on business in Australia, is not conducted by a foreign State; it, like any corporation⁹¹ in Australia, is ordinarily conducted by its directors, not its shareholders.⁹² The duties imposed by Div 1 of Pt 2D.1 of the *Corporations Act* upon directors of a corporation – such as the duty of care and diligence⁹³ and the duty to act in good faith in the best interests of the corporation

89 ALRC Report at 64 [110].

90 ALRC Report at 64 [110] (emphasis added; footnote omitted).

91 *Corporations Act*, s 57A, read with s 9 definition of "company".

92 *Corporations Act*, s 198A. See, eg, *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 at 479 [25]; Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 246-255 [7.061]-[7.120]. See also *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 at 38-39; *Melbourne Trust Ltd v Commissioner of Taxes (Vic)* (1912) 15 CLR 274 at 305; *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199 at 218; *Hobart Bridge Co Ltd v Federal Commissioner of Taxation* (1951) 82 CLR 372 at 385; *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 178-179 [18].

93 *Corporations Act*, s 180(1) and (2).

and for a proper purpose⁹⁴ – are also imposed on the directors of a foreign company to the extent that, among other things, their acts or omissions occur in connection with the foreign company carrying on business in Australia.⁹⁵ Similarly, s 588G of the *Corporations Act*, which states that directors have a duty to prevent insolvent trading by a company, applies to the directors of a foreign company registered in Australia.⁹⁶

93 The winding up of a foreign company registered in Australia is directed to and affects that company's status and activities *in Australia*. It was not submitted in this appeal that the winding up would affect the company's status under the laws of its home jurisdiction. To render a separate entity of a foreign State amenable to winding up proceedings where that entity has *chosen* to carry on business (engage in commercial activities) in Australia, and thereby submit itself, its directors and its local agent(s) to the regulatory requirements of the *Corporations Act*, is neither a threat to the dignity of a foreign State, nor an interference with its sovereign functions.⁹⁷ And as was recognised in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl*,⁹⁸ it cannot be assumed that proceedings can be filed against a separate entity of a foreign State in its home jurisdiction or that countries permit enforcement of a debt obtained in another country. These concerns are not new.⁹⁹

94 The difficulty with Garuda's construction is put into sharper relief when one contemplates the not uncommon circumstance of multiple creditors seeking to execute in relation to their debts over the limited property of a body corporate. Counsel for Garuda submitted that, where such a situation arises in relation to a separate entity, the options for creditors would be either to engage in a "race to the court insofar as individual execution is concerned" or pursue the debtor body corporate in its home jurisdiction under its home laws. The first is contrary to the

94 *Corporations Act*, ss 181(1) and 184(1).

95 *Corporations Act*, s 186(a).

96 *Corporations Act*, s 588G, read with s 9 definition of "company".

97 See, eg, *Playa Larga* [1983] 1 AC 244 at 262.

98 (2023) 275 CLR 292 at 318-319 [43]-[44]. See also *The Eleftheria* [1970] P 94 at 99-100; *Reinsurance Australia Corporation Ltd v HIH Casualty and General Insurance Ltd (In liq)* (2003) 254 ALR 29 at 60 [293], 63 [321]; *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2021] 1 All ER 1141 at 1174 [97]; Briggs, *Civil Jurisdiction and Judgments*, 7th ed (2021) at 409 [20.02], 411-413 [22.05].

99 See, eg, ALRC Report at 29-30 [54], 73-74 [122].

provisions of the *Corporations Act* to which Garuda subjected itself when it registered in Australia under that Act as a foreign company; and the second, as we have seen,¹⁰⁰ is far from certain.

95 The winding up of an insolvent company is concerned with ensuring that where "debtors have insufficient or no property to discharge their liabilities", a procedure exists "to ensure an orderly and rateable distribution of that property, if any, among the creditors".¹⁰¹ As this Court said in *G & M Aldridge Pty Ltd v Walsh*,¹⁰² a primary objective of the *Corporations Act* "is that of securing equality of distribution amongst creditors of the same class. The pursuit of that objective has the consequential effect of deterring the 'race to the courthouse' and that, in turn, enhances the prospect of enabling debtors to trade out of their difficulties without undue and discriminatory risk to creditors". That objective would be thwarted if Garuda's construction of s 14(3)(a) were adopted.

96 In support of its construction, Garuda submitted that the purpose of s 14(3)(a) is limited to allowing domestic courts to adjudicate on all conflicting claims to property in a bankruptcy, insolvency or winding up, including claims by a foreign State. As we have seen, aspects of s 14 of the FSIA were the subject of discussion in the ALRC Report,¹⁰³ which referred to both the work of the International Law Commission ("the ILC"), culminating in the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property, and legislation adopted in other countries. Section 14(3)(a), however, is in different terms and is a creature of its own context. A close review of the accompanying commentary on Art 15 of the ILC 1983 Draft Articles, headed "Ownership, possession and use of property", also reveals that while the exception provided therein "*need not* concern or relate to the determination of a right or interest of the State in property",¹⁰⁴ nothing was said to the effect that the exception could not concern or relate to the adjudication of the proprietary interests of a foreign State. And, in any event, even assuming

100 See [93] above.

101 *Ford, Austin & Ramsay's Principles of Corporations Law* (looseleaf), vol 3 at [27.040]. See also *G & M Aldridge Pty Ltd v Walsh* (2001) 203 CLR 662 at 674-675 [29]-[30]; *Re Rafidain Bank* [1992] BCLC 301 at 303.

102 (2001) 203 CLR 662 at 674-675 [29]-[30].

103 ALRC Report at 69-70 [116]-[118].

104 Report of the International Law Commission on the Work of its Thirty-Fifth Session (3 May-22 July 1983), UN GAOR, 38th sess, Supp No 10, UN Doc A/38/10, reproduced in *Yearbook of the International Law Commission* (1983), vol 2(2) at 36-37 (emphasis added).

that is a purpose of s 14(3)(a), that purpose is fulfilled on the construction of s 14(3)(a) which has been described.

Application to heads of foreign States

97 In seeking to confine the construction of s 14(3)(a), Garuda submitted that one, undesirable, consequence of Greylag's construction is that foreign sovereigns and heads of State could be bankrupted in Australia if they were personally present, had a place of business, or were carrying on business in Australia.¹⁰⁵

98 The possibility of bankruptcy of a head of a foreign State is not a reason to limit the construction of s 14(3)(a). Heads of State have immunity under s 9 if they are operating in a *public* capacity.¹⁰⁶ The immunities of the head of a foreign State *acting in their private capacity* are of a different category and are to be determined in accordance with s 36 of the FSIA and the *Diplomatic Privileges and Immunities Act 1967* (Cth). Further, as counsel for Greylag submitted during oral argument, it is difficult to envisage a circumstance in which a foreign head of State could be bankrupted in respect of acts done in their *public* capacity where those acts did not involve a commercial transaction (which would otherwise be the subject of the exception in s 11 of the FSIA). Recourse to "extreme examples and distorting possibilities"¹⁰⁷ is not a basis for confining the proper construction of s 14(3)(a).

99 It is also no objection to Greylag's construction that a foreign State is incapable under Australian law of being wound up. Section 22 of the FSIA should not be taken to require s 14(3)(a) to operate in exactly the same way, in practice, as against a separate entity as it does against a foreign State. Section 22 does not provide that the separate entity is to be equally immune as the foreign State is immune. That is, it does not mandate that the immunity in each case covers or is confined to the same field of operation. It simply provides that when the relevant provisions of Pt II "apply" to a separate entity, that entity is to be treated as if it were a foreign State. How those provisions are to "apply" to the entity depends on the language of each provision.

100 The FSIA expressly recognises that to be so. Unless the contrary intention appears in the Act, a "foreign State" includes a political subdivision of a foreign

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

106 FSIA, s 3(3)(b).

107 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 188 [94], quoting *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32].

State.¹⁰⁸ On the other hand, an agency or instrumentality of a foreign State, but *not* a department or organ of the executive government of the foreign State, can be a separate entity.¹⁰⁹ The FSIA recognises that the Act gives rise to circumstances in which it cannot have any application to certain emanations of a foreign State under Australian law.

101 Section 16 of the FSIA is instructive. Under Australian law, shares can only be held (whether beneficially or non-beneficially) by a natural person, a body corporate or a body politic.¹¹⁰ A political subdivision of a foreign State, although included in the definition as a "foreign State" under s 3(3), is not a natural person, a body corporate or a body politic who can own shares directly and be a member of a company limited by shares as one form of "body corporate" within the chapeau of s 16(1). There can be no complete identity of operation of the Act to what is defined under the Act to be a "foreign State", let alone between a "foreign State" and a "separate entity". And the FSIA expressly recognises that to be so. In any event, as explained earlier, the language of s 14(3)(a) does not compel that the scope of immunity is the same. If that had been intended, that would have been said.

Conclusion and orders

102 For those reasons, the appeal should be allowed with costs. Paragraph 2 of the order of the Court of Appeal of the Supreme Court of New South Wales of 14 June 2023 should be set aside and, in its place, order that:

- (1) the appeal be allowed with costs; and
- (2) the orders of the Supreme Court of New South Wales made on 28 November 2022 be set aside and, in their place, order that the notice of motion filed by the defendant on 22 September 2022 be dismissed with costs.

108 FSIA, s 3(3).

109 FSIA, s 3(1) definition of "separate entity".

110 Subject to a company's Constitution or a Shareholder's Agreement. See, eg, *Corporations Act*, s 231 read with definition of "person" in s 2C of the *Acts Interpretation Act 1901* (Cth). See also *Ford, Austin & Ramsay's Principles of Corporations Law* (looseleaf), vol 2 at [21.080].

EDELMAN J.

Introduction

103 Is a State-owned corporation, whose activity in Australia may be limited to trading and commercial activities, immune under Australian law from being wound up in insolvency and at liberty under Australian law to trade while insolvent, leaving Australian judgment creditors in a race to execution of their judgments on a first come, first served basis?

104 The appellants ("Greylag") are lessors of aircraft to P.T. Garuda Indonesia Ltd ("Garuda"). Greylag seeks to wind up Garuda in insolvency for allegedly unpaid debts or on the basis that it is "just and equitable" for Garuda to be wound up.¹¹¹ The question above appears to be the startling question that is raised by Greylag's appeal. But, ultimately, only a much narrower question needs to be answered on this appeal.

105 The primary judge set aside Greylag's originating process to wind up Garuda on the basis that the originating process was inconsistent with the immunity conferred on Garuda under the *Foreign States Immunities Act 1985* (Cth) ("the Immunities Act"). But the only basis upon which that immunity was contested was s 14(3) of the Immunities Act. The Court of Appeal of the Supreme Court of New South Wales dismissed an appeal which concerned only s 14(3). It has therefore been assumed at all stages in this litigation, including in this Court, that Garuda is a "separate entity of a foreign State" within s 22 of the Immunities Act. It has also been assumed that a proceeding for winding up a corporation based on the failure to pay a debt arising from a commercial contract is not "a proceeding [that] concerns a commercial transaction" within s 11(1) of the Immunities Act.

106 The absence of any dispute about s 11(1) or s 22 does not require interpretation of s 14(3) without reference to the scope of the inextricably interlinked provisions of ss 11(1) and 22. It would not be appropriate in the absence of argument to determine finally the scope of ss 11(1) and 22. But the interpretation of ss 11(1) and 22 is so closely related to s 14(3), and the insolvency consequences arising from a decision in favour of immunity for Garuda are so startling, that the interpretation of ss 11(1) and 22 cannot be ignored or assumed.

107 The meaning of s 14(3) of the Immunities Act also should not be identified by a textual fundamentalism that divorces the words from their context and purpose. Both Garuda and Greylag therefore correctly placed heavy reliance upon the influential report of the Australian Law Reform Commission ("the ALRC

111 *Corporations Act 2001* (Cth), ss 95A, 583(c)(i), 583(c)(ii).

Report")¹¹² which recommended, and contained a draft Bill for, an Act containing a provision in materially the same terms as s 14.

108 Garuda submitted that the purpose of s 14 was relevantly limited to enabling an Australian court to adjudicate upon the proprietary interests of a foreign State in a winding up. The ALRC Report, understood against the history of foreign State immunity that it addressed, reveals that s 14 does have such a purpose. But is that the only purpose of s 14?

109 On one view, the ALRC Report proposed s 14 only as a narrow exception, as Garuda submitted. On another view, however, the ALRC Report proposed s 14 as a wider exception by reference to the same general commercial notions which inform s 11. The ALRC Report treated s 14 as part of a series of provisions dealing with "commercial activity", which included the exception to foreign State immunity in s 11 in respect of proceedings concerning "a commercial transaction".¹¹³ The text of s 14 could support either view. The narrow view might be seen as a development of a confined historical exception concerning bankruptcy and winding up, as well as being consistent with approaches canvassed in the ALRC Report and the lack of any express acknowledgement of a wider purpose by the Australian Law Reform Commission ("the ALRC"). But the broader view is consistent with the overall objective of the series of provisions of which s 14 is part, which is generally to exempt commercial activity from foreign State immunity.

110 If the effect of the narrow view were that every trading corporation that is a separate entity of a foreign State were to be immune from winding up, then the startling insolvency consequences described at the start of these reasons might create a significant inconsistency with the overall objective of the series of provisions of which s 14 is part. It would then be very difficult to confine the purpose of s 14 in this way. However, for the reasons below, there is a real possibility that the proper interpretation of ss 11 and 22 would preclude the potentially startling insolvency consequences raised at the start of these reasons. In that context, the narrow view of the purpose of s 14 adopted by the ALRC should be preferred, consistently with the express terms in which that purpose was expressed by the ALRC Report and with the history of the exception in s 14(3). The appeal should be dismissed.

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

113 ALRC Report at 50-51 [88].

The Immunities Act, Pt II, ss 14 and 22

111 Section 14 of the Immunities Act provides as follows:

"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."

112 Section 22 of the Immunities Act provides:

"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."

113 A "separate entity" is relevantly defined in relation to a foreign State as "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".¹¹⁴

114 *Foreign States Immunities Act 1985* (Cth), s 3(1) ("Immunities Act").

Interpretation without textual fundamentalism

114 If s 14(3) were read without the context of, and purpose described in, the ALRC Report, it could comfortably be understood to apply so that the foreign State is not immune in a proceeding so far as the proceeding concerns the winding up of *any* body corporate and accordingly, by operation of s 22, a separate entity of a foreign State would also not be immune from the winding up of *any* body corporate. Hence, as Greylag submitted, a separate entity of a foreign State that is a body corporate would not be immune from the winding up of any body corporate, including itself.

115 This interpretation is more grammatically and textually consistent with the terms of s 14(3), read with s 22, than the interpretation advanced by Garuda. The interpretation advanced by Garuda is textually strained. That interpretation is that the removal by s 14(3), read with s 22, of the immunity of a separate entity of a foreign State does not extend to the winding up of "any"¹¹⁵ body corporate (which would include the winding up of a body corporate that is also the "separate entity of a foreign State"). On Garuda's interpretation, the winding up of "a" body corporate does not extend to "the particular body corporate which would—absent the operation of the exception—be the object of the immunity".

116 Unless the purpose and context of s 14 are entirely equivocal, the question of interpretation should not be resolved by reference to linguistic nuance. It is true that, in *Taylor v Owners—Strata Plan No 11564*,¹¹⁶ French CJ, Crennan and Bell JJ suggested that a court would not be "justified in reading a statutory provision as if it contained additional words or omitted words" if to do so would make "an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'".¹¹⁷ But this was not a clarion call for textual fundamentalism without regard for context or purpose. Nor did their Honours subordinate the role of context or purpose to the range of literal meanings of the text. Rather, their Honours were saying only that the Parliament communicates to the public through the words of its legislation and those words are usually chosen more carefully than everyday speech acts.

117 Legislative text, context and purpose exist in the same symbiotic relationship as they do for everyday speech acts with the meaning and application

115 Compare *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407 at 417.

116 (2014) 253 CLR 531.

117 (2014) 253 CLR 531 at 548 [38], quoting *Western Bank Ltd v Schindler* [1977] Ch 1 at 18, as cited in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115.

of legislative words to be understood in light of their context and purpose.¹¹⁸ If context and purpose clearly require a variance from the range of literal meanings of the text, then the text can bear even the opposite of its literal meaning(s). Where it is clear from context or purpose that the words were intended to bear a meaning outside their literal range, "there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed".¹¹⁹

The context and purpose of s 14 of the Immunities Act

The general rule and the exceptions

118 Section 14 falls within Pt II of the Immunities Act. Part II begins in s 9 by recognising the general rule of immunity of a foreign State and then recognising a range of exceptions to that general rule. The general rule is concerned with adjudicative authority. It says nothing about any underlying duties or liabilities of the foreign State.¹²⁰

119 As the International Court of Justice has recognised, the general rule of foreign State immunity rests upon a principle of the "sovereign equality of States" but lies in tension with the principle of the sovereignty of each State over events and persons within its territory.¹²¹ The reconciliation of these competing principles "is founded on broad considerations of public policy, international law and comity".¹²² That reconciliation in the Immunities Act is achieved by the range of exceptions to the general rule. Those exceptions were recognised by the Parliament against a long history of uncertainty between the general rule and its exceptions.

118 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. See also *Harvey v Minister for Primary Industry and Resources* (2024) 98 ALJR 168 at 191-193 [106]-[111].

119 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at 1114 [25].

120 Fox and Webb, *The Law of State Immunity*, 3rd ed (2013) at 82.

121 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 at 123-124 [57].

122 See *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 404.

The background to the ALRC Report

120 Two foundational decisions in the nineteenth century, one in the United States¹²³ and one in England,¹²⁴ led some judges in the twentieth century to the view that there existed a theory of "absolute" immunity of a foreign State. In *Compania Naviera Vascongado v Steamship "Cristina"* ("The Cristina"),¹²⁵ Lord Atkin thought that it was "beyond dispute" that foreign State immunity had two aspects. The first was that a foreign sovereign could not be compelled to be a respondent to the proceedings of a domestic court. In other words, a foreign sovereign was immune from being compelled to defend a claim in the courts of another sovereign.¹²⁶ The second aspect was that domestic courts would not seize or detain property (including personal property or property used for commercial purposes) which was in the possession or control of the foreign sovereign.¹²⁷ Lord Wright agreed with the first aspect and thought that the second aspect was a "logical evolution" of the law.¹²⁸

121 It was sometimes said that there were "exceptions" to this absolute immunity, although it might have been debatable whether the examples were exceptions to the two aspects of "absolute" immunity or whether they were merely circumstances that did not fall within either aspect of the "absolute" immunity. In 1975, Lord Denning MR described three of the "exceptions" as: (i) claims "in respect of land situate in England"; (ii) claims in respect of trust funds in England or money lodged in England for the payment of creditors; and (iii) claims for a lien or an arrest of property for debts incurred in England for services rendered in England to the property of a foreign sovereign in England.¹²⁹

123 *The Schooner Exchange v McFaddon* (1812) 11 US 116.

124 *The Parlement Belge* (1880) 5 PD 197, overturning the decision of Sir Robert Phillimore: *The Parlement Belge* (1879) 4 PD 129.

125 [1938] AC 485 at 490.

126 *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373 at 398.

127 *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485 at 490.

128 *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485 at 511.

129 *Thai-Europe Tapioca Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 WLR 1485 at 1490-1491; [1975] 3 All ER 961 at 965-966.

122 Lord Atkin's broad rule involving the two aspects of so-called absolute immunity was generally applied in England and Australia for several decades.¹³⁰ But, perhaps unsurprisingly for a rule whose boundaries are identified by reference to broad considerations of public policy, international law and comity, the second aspect of the so-called absolute immunity theory was always controversial.¹³¹ In *The Cristina*, Lords Thankerton, Macmillan and Maugham, whilst admitting the "absolute exemption" of the person of the sovereign, doubted whether it extended to all property of the sovereign and, in particular, doubted whether it extended to the use of property in "ordinary commerce".¹³² Lord Maugham thought that a general exception for commercial or non-public activity—in the context of a ship that was neither a ship of war nor "a vessel publicis usibus destinata"—should exist together with other "exceptions". One of the other exceptions to which his Lordship referred was:¹³³

"[W]here proceedings are brought and continued for administration of a trust, or an estate, or for the winding-up of a company, even though a foreign Government is interested".

123 There was also uncertainty about the scope of the concept of the foreign State for which the immunity arose and whether it was limited to the body politic itself. In *Baccus SRL v Servicio Nacional del Trigo*,¹³⁴ a majority of the Court of Appeal of England and Wales held that a "foreign State" extended to a department of the State that was incorporated as a separate entity at least where, in the words of Jenkins LJ, the separate entity was a government ministry or department which had functions that were "wholly those of a department of State" and which was incorporated as "purely a matter of governmental machinery".¹³⁵ Similarly, Parker LJ held that the body corporate had foreign State immunity because it was a "department of State" and was "not a company limited by shares in which the

130 *United States of America v Republic of China* [1950] QWN 5 at 7-8; *Thai-Europe Tapioca Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 WLR 1485 at 1493-1494; [1975] 3 All ER 961 at 968; *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373 at 395-396.

131 See Sherman, "Immunity of State Ships Engaged in Commerce" (1922) 20 *Michigan Law Review* 771. See also *Swiss Israel Trade Bank v Government of Salta* [1972] 1 Lloyd's Rep 497 at 502-504.

132 *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485 at 494, 496, 498, 519-520.

133 *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485 at 520.

134 [1957] 1 QB 438.

135 *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438 at 466.

State holds the whole or a controlling interest".¹³⁶ By contrast, Singleton LJ (whose reasoning was later described by Lord Denning MR as "very convincing"¹³⁷) held that there should be no sovereign immunity "if a separate entity is set up and is allowed to trade with its own people conducting its business".¹³⁸

124 During the twentieth century, there was a steady movement worldwide away from the broader, "absolute" theory of foreign State immunity (supported by Lords Atkin and Wright in *The Cristina*) towards the more "restrictive" theory (supported by Lords Thankerton, Macmillan and Maugham in *The Cristina*).¹³⁹ As Lord Denning MR observed in 1977 in *Trendtex Trading Corporation v Central Bank of Nigeria*,¹⁴⁰ the previous 50 years had seen "a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities."

125 With the growth of this "non-sovereign activity" of foreign States in the twentieth century, many States recognised the more restrictive theory based upon a distinction between foreign State immunity concerning the exercise of sovereign power (*ius imperii*) and foreign State immunity concerning the exercise of non-sovereign activities, such as private or commercial activity, by a foreign State (*ius gestionis*).¹⁴¹ In 1972, the preamble to the European Convention on State Immunity recognised that in international law there was "a tendency to restrict the cases in which a State may claim immunity before foreign courts".

126 Against this background, in 1984 the ALRC produced the ALRC Report, under the guidance of Professor James Crawford as Commissioner in Charge. The ALRC recognised that there were "good arguments" for "limiting the scope" of foreign State immunity. But the ALRC observed that the common law was "uncertain in a number of respects". In particular, the ALRC said that the focus of the common law upon "commercial and governmental transactions" meant that there was no guidance "as to when non-commercial torts committed by the foreign state will be immune". The broad common law distinction between governmental

136 *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438 at 473.

137 *Mellenger v New Brunswick Development Corporation* [1971] 1 WLR 604 at 610; [1971] 2 All ER 593 at 597.

138 *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438 at 461.

139 *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373 at 397, 400.

140 [1977] QB 529 at 555.

141 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 at 125 [60].

transactions and commercial transactions was therefore "inappropriate or inadequate to deal with the full range of issues which Australian courts should have power to deal with". So the ALRC said that "Australia should articulate to foreign states more precise rules governing their liability to the jurisdiction of Australian courts".¹⁴²

The ALRC Report

127 One of the uncertainties addressed by the ALRC Report was the extent to which a separate entity should have the same immunity as a foreign State. Clause 22 of the ALRC draft Bill was in relevantly identical terms¹⁴³ to s 22 of the Immunities Act. The ALRC acknowledged the force of the same point that had been made by the majority of the Court of Appeal of England and Wales in *Baccus SRL v Servicio Nacional del Trigo*: it "would be unacceptable to many states" if immunity were denied to a separate entity "simply because it has legal personality distinct from the state".¹⁴⁴ On the other hand, the ALRC also recognised that "it would clearly be unacceptable" to let any foreign entity claim foreign State immunity "however vaguely associated [it is] with the state".¹⁴⁵

128 The words proposed by the ALRC in its draft Bill and adopted in s 22 of the Immunities Act, "a separate entity of a foreign State", did not spell out with precision the extent of connection required with the foreign State before the separate entity would be "of" the foreign State. Nor does the definition of "separate entity" in s 3. But the middle way proposed by the ALRC was intended to reflect the same basic approach as was taken in the United Kingdom and thus intended to cover separate entities which, although not departments of the government which are "assimilated to the foreign state for all purposes",¹⁴⁶ are sufficiently tied to the exercise of core governmental functions:¹⁴⁷

"There will be no formal requirement that the agency show that it is exercising 'sovereign authority', although it should clearly be relevant that the entity is exercising what are on any view governmental functions

142 ALRC Report at xv-xvi, 15.

143 Save for the exclusion of cl 16(1) in cl 22 of the draft Bill rather than the exclusion of s 16(1)(a) as in the Immunities Act.

144 ALRC Report at 38 [71]. See also *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at 559.

145 ALRC Report at 38 [71].

146 ALRC Report at 38 [71].

147 ALRC Report at 39 [72].

(eg immigration control) ... it is expected that a court would consider whether the entity is exercising governmental functions on behalf of the foreign state."

129 In relation to exceptions from the general rule of foreign State immunity, the ALRC did not accept that a *single* exception should be created based on commercial activity. The ALRC observed that a *single* exception based on an open-textured notion of "commercial activity", such as that which was adopted in the United States and Canada,¹⁴⁸ would not give sufficient guidance to the courts. Instead, the ALRC preferred the United Kingdom model of subdividing commercial activity into separate provisions, including commercial transactions, contracts of employment, and industrial and intellectual property, among others.¹⁴⁹ Given the common undercurrent of a concern with commercial activity in the Australian and United Kingdom approaches, it has unsurprisingly been said in this Court that the exceptions in Pt II of the Immunities Act "may overlap with each other".¹⁵⁰

130 One of the exceptions contained in the Immunities Act, which is based on cl 11(1) of the ALRC draft Bill, is (with various exclusions) that "[a] foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction".¹⁵¹ The term "commercial transaction" is defined, in a broad manner with inclusive aspects, in s 11(3). A potentially overlapping exception is the exception in s 14 concerning "Ownership, possession and use of property etc". But the overlap is not complete. For instance, the express terms of s 14 do not confine it to a winding up which is concerned with commercial activity. As senior counsel for Garuda pointed out in oral argument, a winding up might arise on the "just and equitable" basis, such as from a deadlock in management.

The purpose of s 14

131 Section 14 of the Immunities Act is in materially the same terms as the proposed cl 14 in the draft Bill annexed to the ALRC Report. Both have the same heading "Ownership, possession and use of property [et cetera]". The central issue being addressed by s 14 is property rights. The ALRC Report discussion on this proposed exception from foreign State immunity concerning ownership,

¹⁴⁸ See Jewett and Molot, "State Immunity Act—Basic Principles" (1983) 61 *Canadian Bar Review* 843.

¹⁴⁹ ALRC Report at 50-51 [88]; see also at xviii [17].

¹⁵⁰ *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at 55 [62].

¹⁵¹ Immunities Act, s 11(1).

possession and use of property is divided by reference to immovable property and movable property.¹⁵² Section 14 follows the same pattern: s 14(1) is concerned with interests of the State in immovable property; s 14(2) is concerned with interests of the State in gifts of movable property. And s 14(3) might therefore be thought to be concerned with interests of the State in movable or immovable property that is the subject of regimes for distribution.

132 In its discussion of movable property, the ALRC explained the rationale for the provision in cl 14(3) concerning situations of bankruptcy, insolvency, the winding up of companies, and the administration of trusts, of estates of deceased persons or of estates of persons of unsound mind as follows:¹⁵³

"Where a local court is administering, or supervising the administration of, property it is appropriate that it should be able to adjudicate on all the conflicting claims to such property."

133 The terms of this rationale correspond with the history of the exception since at least 1875,¹⁵⁴ referred to by Lord Maugham in the passage discussed above from *The Cristina*.¹⁵⁵ As it has been said of Art 13(a) of United Nations Convention on Jurisdictional Immunities of States and Their Property, which broadly corresponds with s 14(1): Art 13(a) "codifie[d] one of the earliest exceptions to a State's immunity from the jurisdiction of the courts of another State".¹⁵⁶ So too did s 14(3). The ALRC Report referred to the historical exception underlying s 14(3) as one of the "more important" of the exceptions to the general rule of foreign State immunity.¹⁵⁷

152 ALRC Report at 69 [116]-[117].

153 ALRC Report at 69 [117].

154 *Morgan and Gooch v Larivière* (1875) LR 7 HL 423. See also *Strousberg v Republic of Costa Rica* (1881) 44 LT 199 at 201; *In re Russian Bank for Foreign Trade* [1933] Ch 745 at 769-770; *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373 at 392-393.

155 *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485 at 520.

156 Terhechte, "Article 13", in O'Keefe and Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (2013) 225 at 232.

157 ALRC Report at 8.

"[A] foreign state interested in a trust or similar fund within the control of the court or of private parties within the jurisdiction could not plead immunity to prevent due administration of the fund".

134 The rationale expressed by the ALRC was also consistent with the provisions in the United Kingdom, Singapore and Pakistan to which the ALRC referred and which provided that "[t]he fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts".¹⁵⁸ And it was consistent with Art 14 of the European Convention on State Immunity,¹⁵⁹ to which the ALRC also referred¹⁶⁰ and which provided that "[n]othing in this Convention shall be interpreted as preventing a court of a Contracting State from administering or supervising or arranging for the administration of property, such as trust property or the estate of a bankrupt, solely on account of the fact that another Contracting State has a right or interest in the property".

135 The ALRC Report's rationale was also in the same terms as the comments, to which the ALRC referred,¹⁶¹ of the International Law Commission in its interim report on "Jurisdictional immunities of States and their property".¹⁶² As the International Law Commission later explained in its commentary on what became Art 13(c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (corresponding with s 14(3) of the Immunities Act):¹⁶³

"Subparagraph (c) need not concern or relate to the determination of a right or interest of the State in property, but is included to cover the situation in

158 *State Immunity Act 1978* (UK), s 6(3). See, in substantially identical terms, *State Immunity Act 1979* (Singapore), s 8(3) and *State Immunity Ordinance 1981* (Pakistan), s 7(3). See also ALRC Report at 69, fn 132.

159 European Convention on State Immunity (1972).

160 ALRC Report at 69, fn 132.

161 ALRC Report at 69, fn 131.

162 Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), UN GAOR, 38th sess, Supp No 10, UN Doc A/38/10, reproduced in *Yearbook of the International Law Commission* (1983), vol 2(2) at 20 [92].

163 Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries (1991), UN GA, 43rd sess, UN Doc A/46/10, reproduced in *Yearbook of the International Law Commission* (1991), vol 2(2) at 47.

many countries, especially in the common-law systems, where the court exercises some supervisory jurisdiction or other functions with regard to the administration of trust property or property otherwise held on a fiduciary basis; of the estate of a deceased person, a person of unsound mind or a bankrupt; or of a company in the event of its winding-up. The exercise of such supervisory jurisdiction is purely incidental, as the proceeding may in part involve the determination or ascertainment of rights or interests of all the interested parties, including, if any, those of a foreign State."

136 In light of this context, Greylag properly did not deny that *one* purpose of s 14(3) of the Immunities Act was to ensure that an Australian court could adjudicate "on all conflicting claims" in a bankruptcy, insolvency or a winding up, including claims to property over which foreign States or separate entities of foreign States had an interest. But Greylag submitted that s 14(3) had a further purpose. In effect, that further purpose was treated as excluding the general immunity from operation in relation to commercial activity involving the bankruptcy, insolvency, or winding up of corporations.

137 The difficulty with Greylag's submission is that the history of this exception and the ALRC's express treatment of the exception were confined to the limited purpose of ensuring that a court can adjudicate on all conflicting claims to property. However, the ALRC might, impliedly, be thought to have recognised the further purpose, or the further purpose might need to have been recognised to give effect to the overall aims of the ALRC Report, if this Court were to accept that the remarkable insolvency effects to which Greylag referred would arise from Garuda's interpretation. It is necessary to turn to those effects.

The interaction of ss 11, 14(3) and 22 and the consequences of Garuda's interpretation

138 If the only possible exception from foreign State immunity that could apply to Garuda were s 14(3), then the effect of Garuda's interpretation would be that a registered foreign company in the position of Garuda would be able to trade while insolvent unless it were deregistered in Australia, such as where it had voluntarily ceased business.¹⁶⁴ A further effect of allowing such a separate entity to trade while insolvent is that the Immunities Act would have created a regime which Garuda accepted would involve a "race to the court" by creditors for execution against the property of the separate entity on a first come, first served basis, at least unless a creditor could rely upon a debt to wind up the separate entity in the home jurisdiction of the separate entity in order to cause the entity to cease trading in Australia.

164 *Corporations Act 2001* (Cth), s 601CL.

139 These insolvency effects are inconsistent with the central justifications given in the ALRC Report for restricting the scope of foreign State immunity. The first of those justifications was that "the local courts may be the only appropriate forum" with respect to some matters and "the most natural or appropriate forum" with respect to others. The second of those justifications was the orderly resolution of private law disputes. And the third was fairness to litigants.¹⁶⁵ Even assuming that a foreign court would recognise the relevant Australian judgment debt, the foreign court would not be the most natural forum to address the insolvency issues in Australia arising from a judgment debt in favour of creditors in Australia of a corporation trading in Australia. Nor, in these circumstances, would a race to the court by creditors seeking execution, or a winding up in a foreign court if it were possible, promote the orderly resolution of private law disputes. Nor would it be fair to an Australian commercial creditor litigant, in respect of a debt that arose in Australia against a foreign corporation trading in Australia, to leave that litigant to race other creditors to execution or to confine the litigant to any possible remedy in a foreign court.

140 These insolvency effects are also fundamentally contrary to the intention of the ALRC to ringfence "commercial activity" (although not as a unitary concept) from foreign State immunity. They are fundamentally contrary to the "basic principle" stated by the ALRC, albeit at a "high level of generality", that "when a foreign state acts in a 'commercial' matter within the ordinary jurisdiction of local courts it should be subject to that jurisdiction".¹⁶⁶

141 One attempted answer to such concerns, which was relied upon in a notice of contention by Garuda in the Court of Appeal but not in this Court, was that allowing the winding up of a separate entity of a foreign State would undermine the specific form of execution provided for in Pt IV of the Immunities Act. In other words, that contention was that Pt IV of the Immunities Act precluded the winding up of any foreign corporation that was a separate entity within the meaning of s 22. That contention by Garuda was not decided by the Court of Appeal.¹⁶⁷ It was not repeated in this Court.

142 There is also little force in Garuda's attempt to justify these insolvency effects by its submission that it would be a remarkable consequence if the removal of the immunity permitted "the internal management of that foreign government instrumentality [to be] displaced by the order of an Australian court" and "to be scrutinised by the judicial processes of the Australian courts". To the contrary, the

165 ALRC Report at 25-26 [42]-[44].

166 ALRC Report at 51 [90].

167 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* (2023) 111 NSWLR 550 at 563 [50].

ALRC contemplated precisely that possibility, at least where the foreign State was not the only member of the separate entity and where there were strong jurisdictional links to Australia:¹⁶⁸

"Australia has an interest in seeing that the internal affairs of bodies set up under its law are capable of supervision by Australian courts. Having elected to participate in such bodies the foreign state can hardly complain when local law is applied to it. The same argument applies, though with slightly less force, where the body is set up under foreign law but is either controlled from Australia or has its principal place of business here."

143 If Garuda's interpretation of s 14(3) were to have the remarkable insolvency effects that it sought to justify, then, at the very least, there would be serious doubt about that interpretation. It would be strongly arguable that, although the ALRC Report omitted any express reference to a purpose of s 14(3) beyond merely ensuring that an Australian court could adjudicate on all conflicting claims in a bankruptcy, a further purpose to exclude foreign State immunity for commercial consequences (such as winding up) of ownership, possession or use of property in trade or commerce might have been implied in s 14(3) of the Immunities Act as a way of giving effect to the broader justifications of the ALRC for restricting foreign State immunity. But the scope of ss 11(1) and 22 provide reason to doubt whether Garuda's interpretation of s 14(3) does have these effects.

144 Perhaps due to an acceptance by the parties of some of the propositions of law contained in the decision of the Full Court of the Federal Court of Australia in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission*,¹⁶⁹ no substantial submissions were made by the parties in this litigation concerning the operation of s 11(1) or s 22. Garuda accepted on this appeal that the aircraft leases entered into with Greylag were commercial transactions within the common meaning of that term. But Garuda denied that s 11(1) applied in these proceedings and neither the operation of s 11(1) nor s 22 was the subject of substantial argument.

145 Nevertheless, the interpretive role of this Court does not require hemianopsia. A court should interpret a provision with both eyes open to all context, within and outside the legislation. Sections 11(1) and 22 cannot be ignored when interpreting s 14. The issues in this appeal depend upon the concurrent operation of ss 14 and 22. As Garuda recognised, ss 11 and 14 "are in the same Part of the same Act; they are directed toward addressing the same legal problem". And, as explained above, the ALRC considered ss 11 and 14 to be part of a scheme

168 ALRC Report at 64 [110] (footnotes omitted).

169 (2011) 192 FCR 393.

equivalent to a distributed operation of the unitary, open-textured approach to "commercial activity" in the United States and Canada.

146 No authority in this Court requires that ss 11(1) and 22 be interpreted in a manner that would require Garuda's interpretation of s 14(3) to have these startling insolvency effects. For instance, if the meaning and application of a "separate entity of a foreign State" in s 22 (read with the definition in s 3(1)) were confined to corporations in the position of a government department or corporations that were generally serving the functional purposes of a government department, then there might be reason to doubt whether Garuda would be a separate entity within s 22.¹⁷⁰ Alternatively, if a proceeding for winding up a corporation based on the failure to pay a debt arising from a commercial contract were a "proceeding concerning a commercial transaction", then s 11(1) might have the effect that Garuda and other foreign entities like it would have no foreign State immunity in respect of such a proceeding. I am, therefore, satisfied that the elasticity of the concepts of a "commercial transaction" and "a separate entity of a foreign State" provides sufficient reason to doubt the insolvency effects discussed above. For that reason, those effects should not weigh in favour of Greylag's interpretation of s 14(3).

The amendments to the Immunities Act

147 In a new argument made for the first time in oral argument in this Court, Greylag submitted that amendments to the Immunities Act in 2009¹⁷¹ and 2022¹⁷² should be taken as having been based upon its interpretation of s 14(3) due to obiter dicta in an unreported Victorian decision in 1992 that Greylag submitted had adopted its interpretation.¹⁷³ In that decision it was said to be "strongly arguable" that "nothing in [the] terms [of s 14(3)(b)] suggests any limitation" of a kind that would confine the exclusion of foreign State immunity to complaints of breach of

170 See van Aaken, "Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution", in Peters et al (eds), *Immunities in the Age of Global Constitutionalism* (2015) 131 at 147-150.

171 *Foreign States Immunities Amendment Act 2009* (Cth).

172 *Courts and Tribunals Legislation Amendment (2021 Measures No 1) Act 2022* (Cth).

173 *Adeang v The Nauru Phosphate Royalties Trust* (unreported, Supreme Court of Victoria, 8 July 1992) at 6-8.

trust "if, but only if, there were a trust fund or other item of trust property within the jurisdiction of the Court".¹⁷⁴

148 Greylag's argument relied upon the reasons of five members of this Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*¹⁷⁵ who considered that it would be a "strong thing" to depart from an interpretation in a well-known reported decision¹⁷⁶ when an Act had been substantially amended without disturbing the provision interpreted by that decision. But the force of this re-enactment or amendment principle of interpretation depends wholly upon context. The force will depend upon a number of factors including: the clarity with which the principle has been expressed, and is understood to have been expressed, by the decision; how well-known or established the decision is or might be expected to be; and the extent to which extrinsic materials to the re-enactment or amendment make express or implied reference to the decision.¹⁷⁷

149 It is enough to reject this argument to say that the re-enactment or amendment principle of interpretation has no force when the decision said to have been entrenched by the amendments is the obiter dicta, unmentioned in any extrinsic materials, of a single judge who was addressing a different point in an unreported decision of the Supreme Court of Victoria nearly two decades before the first amendment.

Conclusion

150 The appeal should be dismissed with costs.

174 *Adeang v The Nauru Phosphate Royalties Trust* (unreported, Supreme Court of Victoria, 8 July 1992) at 7-8. Compare the previous law in *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582 at 617-618; *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 420.

175 (2018) 264 CLR 1 at 20-21 [52].

176 *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.

177 *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177 at 198-199 [51], 216 [95].