IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S343 of 2011

BETWEEN:

PT GARUDA INDONESIA LTD
ARBN 000 861 165
Appellant

AUSTRALIAN COMPETITION & CONSUMER COMMISSION
Respondent

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APPELLANT'S SUPPLEMENTARY SUBMISSIONS CONCERNING THE HISTORY OF CIVIL PENALTY PROCEEDINGS

(filed pursuant to leave granted at the hearing on 8 May 2012)

I. Overview

20 1. These submissions address questions raised by the Court at the hearing of this appeal on 8 May 2012 concerning:

(a) whether the statutory concept of civil penalty proceedings existed at the time of the passage of the Foreign States Immunities Act 1985 either in Australia, Europe or the United States; and

(b) The method of enforcement of antitrust norms in Australia, Europe and the United States.

II. Competition Proceedings in Australia

2. The origin of civil penalties in Australia was discussed in the Australian Law Reform Commission's Report, No. 95, *Federal Civil & Administrative Penalties in Australia* at

30 pp.75-77. The report notes that civil penalties have been available in prosecutions pursuant to the *Customs Act* 1901 since that legislation was introduced (at [2.53]). Civil penalties have been available under Part IV of the Trade Practices Act since

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that legislation was enacted in 1974 (at [2.54]). Civil penalty provisions were first introduced into the Corporations Law in 1993 (at [2.57]).

3. The civil penalty regime that exists under the Competition and Consumer Act 2010 had its origins in the Trade Practices Act 1974, which included in s 76(f) the power to impose fines for contraventions of Part IV of the Act (at that stage, $50,000 for individuals and $250,000 for corporations). Section 77 of the Act, which has the heading "Civil action for recovery of pecuniary penalties", entitled the (then) Trade Practices Commission to institute proceedings in the Federal Court for recovery on behalf of the Commonwealth of pecuniary penalties provided for in s 76.

4. Amendments to Division 1 of Part IV the Trade Practices Act which came into law in 2009 have made it a criminal offence to engage in certain kinds of anti-competitive behaviour (including horizontal price fixing).

III. Competition Proceedings in England

5. In 1973, the Fair Trading Act (UK) established the Office of Fair Trading, headed by a Director General of Fair Trading. The Restrictive Trade Practices Act was passed in 1976 and empowered the Director General of Fair Trading to seek to enjoin parties to an anti-competitive agreement from acting in accordance with its terms. The legislation did not include a power to impose penalties. In 1980 the powers of the OFT were extended by the Competition Act to investigate anti-competitive practices (s 3). It entitled the Secretary of State, following an investigation by the Director General, to prohibit a person from engaging in anti-competitive practices. None of that legislation provided for the imposition of pecuniary penalties by a court.

6. In 1998, the Competition Act was passed, which included a new prohibition on anti-competitive behaviour (s 1) and empowered the Direct General of Fair Trading to impose penalties in respect of infringements of the prohibition of up to 10% of turnover of the undertaking concerned (s 36). Parties who have been issued with a

penalty may appeal to the Competition Commission, established under Chapter IV of the Competition Act (s 46(3)(g)).

7. In 2002, the Enterprise Act (UK) was passed. It included in Part 6 a new "cartel offence", which makes it an offence for an individual to dishonestly agree with one or more persons to engage in certain kinds of (horizontal) anti-competitive conduct and provides for penalties of up to 5 years imprisonment.

IV. Competition Proceedings in Europe

8. The Treaty of Rome of 1957 establishing the European Community ("the EC Treaty") (also described as the Treaty on the Functioning of the European Union) came into force on 1 January 1958. Article 211 of the EC Treaty empowers the European Commission to enforce compliance with the provisions of the EC Treaty, including competition laws provided for by the EC Treaty. Article 101 of the EC Treaty (formerly Article 81) prohibits all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

9. The Commission has extensive powers to investigate contraventions of Article 101 and to make findings of fact. See Bellamy & Child, *European Community Law of Competition* (2001) at pp 878-879, 883. The Commission has the power to prohibit conduct by parties to a horizontal price fixing agreement (*Id.* at p. 922). It is also entitled pursuant to Article 15(2)(a) of Regulation 17 (done at Brussels on 6 February 1962) to impose fines upon undertakings which have "intentionally or negligently" infringed Article 101 of the Treaty. Article 15(2)(a) provides:

> *The Commission may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently: (a) they infringe Article 85 (1) or Article 86 of the Treaty or (b) they commit a breach of any obligation imposed pursuant to Article 8 (1).*

10. Decisions by the Commission are subject to appeal to the Court of First Instance and the European Court of Justice.

V. Competition Proceedings in the United States

11. In the United States, section 1 of the Sherman Antitrust Act 1890 proscribes any contract, combination or conspiracy in restraint of trade or commerce among the states of the United States or with foreign nations (15 USCA § 1). Any party making any such contract or engaging in any such combination or conspiracy is guilty of a felony, punishable by fines or imprisonment. Corporate officers and directors who authorise or take part in any violation of the Sherman Act are subject to criminal sanctions under the s 14 of Clayton Act (15 USCA § 24).

12. Section 1 of the Sherman Act is also enforceable through civil actions brought by the Department of Justice seeking to restrain a contravention of the Act (see 15 USCA § 4). It provides:

> ***Section 4. Jurisdiction of courts; duty of United States attorneys; procedure***
> *The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.*

13. Private parties are given extensive enforcement powers through s 4 of the Clayton Act to bring private actions in the federal courts to enjoin violations (15 USCA § 26) and to seek damages for three times the amount of injuries sustained as a result of a Section 1 violation (15 USCA § 15).

14. The US Supreme Court recognised as early as 1938 in its decision in *Helvering v Mitchell* (1938) 303 US 391 of the need to distinguish three types of civil recovery

actions, namely (a) actions by the executive without judicial sanction to recover money penalties, (b) judicially imposed sanctions which did not have the character of punishment (as on the facts of the case there, where a failure to pay tax lead to an obligation to pay an additional 50% penalty) and (c) judicially imposed sanctions to pay money which did have the character of punishment (which in the US constitutional context would render the proceeding, even though civil in form, sufficiently criminal in substance to attract the protection of provisions such as the double jeopardy protections of the Fifth Amendment).

15. Examples of civil proceedings falling into the third category (outside the area of price fixing) include:

(a) the Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1) which makes it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business and empowers the United States Department of Justice or Securities Exchange Commission to bring a civil action in court seeking the imposition of fines on those who contravene its prohibitions;

(b) the Hart-Scott-Rodino Antitrust Improvements Act 1976 (15 U.S.C. § 18a) ("the HSR Act"), which imposes prohibitions on certain kinds of mergers, acquisitions or transfers of securities or assets without approval by the United States Federal Trade Commission or Department of Justice. Again, the Department of Justice is the enforcement agency and may bring a civil antitrust action seeking the imposition of fines for a contravention of the HSR's Act approval requirements;

(c) the Federal Civil Aviation Act 1958, which imposes numerous obligations on operators of aircraft and provides for the imposition of fines on persons who violate any provision of Title III, V, VI or XII of that Act. The Act confers authority on the Administrator of the Act (the Federal Aviation Administration) to

impose fines, the collection of which is undertaken by the Department of Justice.

VI. Summary

16. The power to impose penalties for contraventions of statutory prohibitions against anti-competitive conduct did not exist in the United Kingdom until 1998. It has existed in Europe since the EC Treaty came into force in 1958 (although fines imposed by the European Commission are not described as "civil penalties"). In the United States, contraventions of the Sherman Act are punished through criminal proceedings for the imposition of fines and imprisonment, however the Department of Justice may also seek to restraint anti-competitive conduct through civil proceedings. Such proceedings involve injunctive relief only and not the imposition of fines. The concept of civil penalties existed in the United States (outside of the horizontal price-fixing context) long before the Trade Practice Act was passed in 1974.

16 May 2012

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