

**P.T. GARUDA INDONESIA LTD v. AUSTRALIAN COMPETITION & CONSUMER COMMISSION (S343/2011)**

Court appealed from: Full Court of the Federal Court of Australia  
[2011] FCAFC 52

Date of judgment: 19 April 2011

Date special leave granted: 7 October 2011

The Australian Competition and Consumer Commission ("ACCC") commenced separate proceedings against PT Garuda Indonesia Ltd ("Garuda"), Malaysian Airline System Berhad ("MAS") and its wholly owned subsidiary, Malaysian Airlines Cargo Sdn Bhd ("MAS Cargo"). The ACCC alleged that each airline was party to price fixing, market sharing and entering into anti-competitive cartels with other airlines. The ACCC alleged that that cartel conduct contravened s 45 of the *Trade Practices Act* 1974 (Cth) ("the Act"). It therefore sought injunctions, declarations and civil pecuniary penalties against the airlines.

On 2 June 2010 Justice Jacobson held that none of the airlines was a separate entity of a foreign State within the meaning of s 3(1) of the *Foreign States Immunities Act* 1985 (Cth) ("the Immunities Act"). His Honour also held that if any of the airlines had been a separate entity, they would have been entitled to claim immunity from the jurisdiction of the Court under section 9 of that Act. This was because their cartel conduct was outside the exception from immunity (concerning commercial transactions or activities) created by s 11(3) of the Immunities Act.

Garuda (and the other airlines) each applied for leave to appeal from Justice Jacobson's judgment that none of them was entitled to immunity under the Immunities Act. For its part, the ACCC filed a notice of contention, challenging his Honour's conclusion that the alleged cartel conduct was not within the meaning of a "commercial transaction" in s 11(3) of the Immunities Act.

On 19 April 2011 the Full Federal Court unanimously dismissed the airlines' appeals. Justice Rares (with whom Justices Lander and Greenwood broadly agreed) held that Justice Jacobson had erred in holding that the definition of "separate entity" required a foreign State to both own and exercise a tangible level of day-to-day control over the corporation in question. His Honour held that Garuda is a State owned airline, established on a corporate model, under [Indonesian] Law No 19 for State owned companies. It is the means by which Indonesia carries on an airline business. It followed therefore that Garuda was a separate entity of Indonesia.

Justice Rares further held that the definition of "commercial transaction" in s 11(3) of the Immunities Act should be given its natural and ordinary meaning. So too should the expression "in so far as the proceeding concerns a commercial transaction" in s 11(1).

In this matter, the ACCC had alleged that each airline had offered its cargo freight services at prices determined by reference to an antecedent arrangement with members of a price fixing cartel. Such alleged conduct was part and parcel of the airline's ordinary commercial transactions with its consumers. It was also an activity of a commercial or trading kind, designed to maximise the cartel participants' profits at the expense of other market participants. Such conduct, if proved, was clearly a commercial transaction within s 11. It followed therefore that the airlines' claim to immunity from the jurisdiction of the Court failed.

The grounds of appeal are:

- The Court erred in concluding that the proceeding brought against Garuda by the Respondent is a proceeding concerning a commercial transaction within the meaning of section 11 of the Act with the result that Garuda was not immune from the exercise of jurisdiction by the Federal Court at [52] –[67] (Lander and Greenwood JJ) and [195] – [228] (Rares J).
- The Court should have held that the commercial transaction exception to Garuda's immunity under the Act does not apply.