Client Alert

September 2023

Australia: Garuda Indonesia and foreign state immunity- An explainer

In brief

On 14 June 2023, the New South Wales Court of Appeal handed down its decision finding that P.T. Garuda Indonesia Ltd (**Garuda**) was entitled to rely on immunity pursuant to s14(3) of the *Foreign State Immunities Act 1985 (Cth)* (**FSIA**) to resist a winding up application brought by aircraft lessor Greylag Goose Leasing 1446 Designated Activity Company and Greylag Goose Leasing 1410 Designated Activity Company (**Greylag**). The decision can be accessed here: https://www.caselaw.nsw.gov.au/decision/188b317713bdf648ce259247. Baker McKenzie acted for Garuda (with counsel Emma Beechey appearing).

Authors

Maria O'Brien
Partner
+61 2 8922 5222
maria.obrien
@bakermckenzie.com

Ian Innes
Partner
+61 7 3069 6217
ian.innes
@bakermckenzie.com

Suami Campos
Senior Associate
+61 2 8922 5394
suami.campos
@bakermckenzie.com

Background

Garuda is, of course, the national airline of Indonesia, and is a foreign company registered in Australia pursuant to Part 5B.2 of the *Corporations Act 2001* (Cth) (Corporations Act).

Like so many airlines, Garuda was challenged by COVID, and undertook a restructure by the Indonesian PKPU (short for *Penundaan Kewajiban Pembayaran Utang*) process in Indonesia in 2022, which was approved by its creditors and homologated by the Indonesian Commercial Court on 27 June 2022.

Greylag was an aircraft lessor to Garuda, which on 15 June 2022 served a demand on Garuda in Australia pursuant to s585 of the Corporations Act and subsequently, on 15 August 2022, filed an application to wind up Garuda in the Supreme Court of New South Wales.

On 21 September 2022, Garuda filed a motion in the winding up application invoking foreign state immunity pursuant to the FSIA, seeking orders declaring that, by virtue of the FSIA, the Court has no jurisdiction over Garuda in respect of the subject matter of the proceeding, and that the originating process filed by Greylag be set aside.

The FSIA

The FSIA was enacted in 1985. It derives substantially from the recommendations of the Australian Law Reform Commission report of 1984 entitled *Foreign State Immunity* (**ALRC Report**), a report produced with Professor James Crawford as Commissioner in Charge which surveyed the modifications that had been made by legislation in common law jurisdictions to absolute foreign state immunity.

Section 9 of the FSIA provides the general immunity from jurisdiction for foreign States. It provides, that, “except as provided by or under this Act, a foreign State is immune from jurisdiction of the courts of Australia in a proceeding.”

“Foreign State” is defined in s3(1) as “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.”

Section 22 of the FSIA extends the general immunity conferred by s9 of the FSIA to a separate entity of a foreign State, such that a separate entity is immune from the jurisdiction of the courts of Australia in a proceeding, in the same way as a foreign State is immune. Section 3(1) provides that a "separate entity" in relation to a foreign State includes a body corporate (other than a body corporate that has been established by or under a law of Australia) that is "an agency or instrumentality of the foreign State" and is not "a department or organ of the executive government of the foreign State".

While the FSIA has various exceptions to foreign state immunity, the one relied on by Greylag is that in s14(3)(a). Section 14 of the FSIA is headed '**Ownership, possession and use of property etc**' and provides (our emphasis added):

> (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."

The decision of Hammerschlag CJ in Eq at first instance

It was common ground at first instance that Garuda is a separate entity of a foreign State, and so has general immunity from the jurisdiction of the Australian courts in a proceeding unless an exception in the FSIA applies.

As noted above, the only exception on which Greylag relied before Hammerschlag CJ in Eq was the exception in s14(3)(a) of the FSIA, which provides that "a foreign State is not immune in a proceeding in so far as the proceeding concerns … the winding up of a body corporate" (noting that in the earlier decision of *PT Garuda Indonesia v ACCC* [2012] HCA 33 (***Garuda v ACCC***), the High Court had held that the "commercial transaction" exception in s11 of the FSIA applied in that case - which concerned breaches of Part IV of the *Trade Practices Act 1974* (Cth) - such that Garuda was not entitled to immunity under the FSIA in respect of the ACCC's claim).

On 28 November 2022, Hammerschlag CJ in Eq made orders setting aside Greylag's winding up application on the basis that the exception in s14(3)(a) of the FSIA did not apply and the winding up application was inconsistent with the immunity conferred on Garuda by the FSIA.

Hammerschlag CJ in Eq found that the words in the chapeau to s14(3) refer to the *object* of the immunity (being either the foreign State or separate entity), whereas the body corporate referred to in s14(3)(a) is *someone different*, namely the body corporate the winding up of which the proceedings concern. He found that the construction advanced by Greylag was "not a sensible way to read" s14(3) and that it imported to the legislature the unlikely intention to refer to the same person in two different ways. Further, Hammerschlag CJ in Eq observed that had the legislature intended to suscept the foreign State or separate entity to a winding up by the Supreme Court, where no other exception to the immunity provided by the FSIA applies, it would clearly have said so. Finally, his Honour observed that it was not necessary to examine the outer reaches of s14(3), but that it would operate with respect to recovery of property belonging to the corporation being wound up, to judicial determination of alleged voidable transactions to which the foreign State was party, and to make the foreign State amendable to have to attend a compulsory examination.

The decision of the Court of Appeal

Greylag sought leave to appeal to the New South Wales Court of Appeal and was heard on 26 May by a bench consisting of Bell CJ and Justices Meagher and Kirk. On 14 June 2023, leave to appeal was granted, but the appeal dismissed unanimously, the Chief Justice referring to this "important and skillfully argued case" in doing so.

The appeal judgment was written by Bell CJ who cited Nettle and Gordon J in *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31; [2015] HCA 43 (***Firebird***) at [173] on the relevance of the ALRC Report:

> *"the ALRC report is significant because, although it cannot displace the clear meaning of the [FSIA], it assists in ascertaining the legislative context and purpose and the particular mischief that the legislation is seeking to remedy"*

noting that the FSIA had been before the High Court on 3 occasions (in *Firebird*, in *Garuda v ACCC* and in *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l* (2023) 97 ALJR 276; [2023] HCA 11 (**Kingdom of Spain**)) and that all three of these High Court decisions made extensive reference to the ALRC Report (although none had been specifically concerned with s14 of the FSIA).

The Chief Justice was concerned with a contextual reading of s14(3)(a), rather than a narrow reading, discussing the principles of statutory construction at some length.

His Honour noted that s14(3) is concerned with a variety of types of judicial proceedings which involve questions of property including potential claims in respect of property, citing the comparable provision in the *State Immunity Act 1978* (UK) and the 16th edition of *Dicey, Morris & Collins: on the Conflict of Laws* (2022, Sweet & Maxwell) as follows:

> *"A State is not immune as respects proceedings relating to an interest arising by way of succession, gift or bona vacantia in movable or immovable properly, nor does any interest of a State in property prevent exercise of any jurisdiction relating to the estates of the deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts."*

In concluding that the body corporate being referred to in s14(3)(a), which is not otherwise defined in the FSIA should be understood and interpreted as referring to a body corporate "in and of the Commonwealth", with the effect that the expression "winding up of a body corporate" in s14(3)(a) cannot refer to Garuda - or, as Hammerschlag CJ in Eq put it, the foreign state is the subject and not the object of s14(3)(a)) - Bell CJ observed that:

> *"….the purpose of s14(3) and indeed the whole of s14 emerges with clarity from the ALRC Report which forms a vital part of the context within which s14(3) must be interpreted….. reference to the ALRC Report makes plain that the legislative reforms recommended by it in partial implementation of a restrictive view of sovereign immunity were in no way intended to subject a foreign body corporate which the FSIA, by operation of s22, treated as having the benefits of a foreign State's immunity, to winding up proceedings in Australia."*

His Honour observed that the consequence of Greylag's argument would be that the head of a foreign State or of a political subdivision of a foreign State falls within the extended definition of a foreign State and so would be amenable to bankruptcy proceedings in Australia, a construction or consequence which, the Chief Justice observed, garners no support whatsoever from the ALRC Report or from commentaries on cognate provisions in other countries.

The Chief Justice discussed the genesis of the ALRC Report in some detail, noting that one type of matter identified in the ALRC Report as appropriate for derogation from immunity concerned "title to immoveable property within the jurisdiction, the administration of local trust funds or the law relating to *local companies*" on the basis that "the local courts may be the only appropriate local forum".

He observed that the ALRC Report addressed what became s14 of the FSIA under the heading "Ownership, Possession and Use of Property" in the following terms (with detailed supporting citations including comparable overseas statutory provisions):

> "[116] *Immovable Property*. It is generally accepted that there should be no immunity in actions arising out of the ownership by the foreign state of immovable property in the forum state. This is, of course, subject to the inviolability of diplomatic and consular premises under the Vienna Conventions. The immovable property exception to the general rule of immunity derives from the private international law rule giving courts of the forum paramount if not exclusive jurisdiction to decide title to such property. If foreign state immunity acts as a bar to the exercise of this jurisdiction it is likely that no court, even in the foreign state, will be able to determine the issue. All the overseas legislation removes immunity in this way except the State Immunity Act 1982 (Canada). It is recommended that the proposed legislation follow the general trend. It should 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. Such a provision should be interpreted broadly. As the Explanatory Report to the European Convention on State Immunity notes, its equivalent provision, art 9, is intended to cover such things as actions for nuisance and occupier's liability, and actions requiring the repair or demolition of dilapidated property.
>
> [117] *Movable Property*. In addition to the immovable property exception, the common law has long recognised a further exception relating to movable property, based on a similar rationale to the immovable property exception. 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. 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"

and concluded that it is tolerably clear that all sources he cites were directed towards a circumstance where a State had or claimed an interest in property that fell to be administered in a local court, whether the form of the administration was the administration of a deceased estate or a trust, the judicial administration of the affairs of a person of unsound mind in the exercise of a local's court's protective jurisdiction, or the orderly winding up and administration of an individual or a corporation's affairs.

Further, his Honour noted, none of the relevant statutory provisions referred to in either [116] or [117] of the ALRC Report lendsany support to the submission, as advanced by Greylag, that a corporate emanation of a foreign state (or indeed a head of a foreign state) could be made the subject of winding up, insolvency or bankruptcy proceedings in Australia.

His Honour concluded (at [72-73]) that:

> *"Had what would have been a quite radical legislative initiative been recommended and intended, namely that a corporate or personal emanation of a foreign state be rendered susceptible to winding up, insolvency or bankrupt proceedings, one would have expected the thorough and scholarly ALRC Report of Professor Crawford to have gone into the merits of such a legislative initiative in considerable detail. There is no hint in the ALRC Report that such a reform was intended or recommended, and [116] and [117] of the ALRC Report in particular lend no support to that view.*
>
> *In that context, part of the contextual significance of the ALRC Report lies in what it does not say."*

Where to from here?

Greylag has filed an application seeking leave to appeal to the High Court of Australia. That application is yet to be determined.

Contact Us

Maria O'Brien
Partner
+61 2 8922 5222
maria.obrien
@bakermckenzie.com

Ian Innes
Partner
+61 7 3069 6217
ian.innes
@bakermckenzie.com

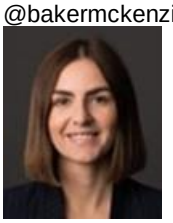
1

Gavin Rakoczy
Partner
+61 2 8922 5462
gavin.rakoczy
@bakermckenzie.com

Peter Lucarelli
Partner
+61 3 9617 4407
peter.lucarelli
@bakermckenzie.com

Suami Campos
Senior Associate
+61 2 8922 5394
suami.campos
@bakermckenzie.com

Phoebe Martin
Senior Associate
+61 2 8922 5710
phoebe.martin
@bakermckenzie.com



Paris Galea
Senior Associate
+61 7 3069 6238
paris.galea
@bakermckenzie.com

Barbara Dimovska
Associate
+61 2 8922 5431
barbara.dimovska
@bakermckenzie.com