FEDERAL COURT OF AUSTRALIA

DHI22 v Qatar Airways Q.C.S.C (No 3) [2024] FCA 351

File number(s):	NSD 837 of 2022
Judgment of:	**HALLEY J**
Date of judgment:	10 April 2024
Catchwords:	**PRIVATE INTERNATIONAL LAW** – where second respondent asserts immunity under s 9 of the *Foreign States Immunities Act 1985* (Cth) (**FSI Act**) – whether second respondent is a separate entity within the meaning of s 3(1) of the FSI Act – whether second respondent is an agency or instrumentality of the State of Qatar – whether second respondent is not a separate entity entitled to immunity because it was not exercising inherently governmental or sovereign functions – second respondent is a separate entity entitled to immunity under the FSI Act **PRIVATE INTERNATIONAL LAW** – whether the commercial transactions exception to foreign State immunity in s 11 of the FSI Act is made out – whether proceeding "concerns" a commercial transaction – where necessary to consider substance of case pleaded and conduct giving rise to claims – whether conduct can be properly characterised as a commercial, trading, business, professional or industrial or like transaction – exception to foreign State immunity not made out. **TORTS** – originating application advancing claims in negligence, assault, battery and false imprisonment – interlocutory application by second respondent to set aside service and the originating application and the further amended statement of claim in so far as they advance claims against second respondent on the basis of foreign State immunity – service and originating documents set aside
Legislation:	*Foreign States Immunities Act 1985* (Cth) s 3, Pt II, ss 9, 11, 13, 22, Pt IV, ss 32, 38 *Human Rights Act 1998* (UK) *Convention for the Protection of Human Rights and Fundamental Freedoms*, done at Rome 4 November 1950, 213 UNTS 222, art 6 *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montreal on 28 May

	1999, 2242 UNTS 309
Cases cited:	*Alcom Ltd v Republic of Colombia* [1984] AC 580 *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777 *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266 *DHI22 v Qatar Airways Q.C.S.C (No 2)* [2024] FCA 348 *DSG Holdings Australia Pty Ltd v Helenic Pty Ltd* (2014) 86 NSWLR 293; [2014] NSWCA 96 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31; [2015] HCA 43 *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* (2023) 111 NSWLR 550; [2023] NSWCA 134 *I Congreso del Partido* [1978] QB 500 *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240; [2012] HCA 33 *PT Garuda International Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393; [2011] FCAFC 52 *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd* (2004) 185 FLR 48; [2004] VSC 262 *Zhang v Zemin* (2010) 79 NSWLR 513; [2010] NSWCA 255
Division:	General Division
Registry:	New South Wales
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	147
Date of hearing:	6 December 2023
Counsel for the Applicants:	Dr C Ward SC with Mr R Reynolds
Solicitor for the Applicants:	Marque Lawyers
Counsel for the Second Respondent:	Mr T Brennan SC with Ms C Winnett

Solicitor for the Second Respondent:	Gilbert + Tobin

ORDERS

NSD 837 of 2022

BETWEEN:	**DHI22** First Applicant
	DHJ22 Second Applicant
	DHK22 (and others named in the Schedule) Third Applicant
AND:	**QATAR AIRWAYS GROUP Q.C.S.C** First Respondent
	QATAR CIVIL AVIATION AUTHORITY Second Respondent
	QATAR COMPANY FOR AIRPORTS OPERATION AND MANAGEMENT Third Respondent

ORDER MADE BY:	**HALLEY J**
DATE OF ORDER:	**10 APRIL 2024**

THE COURT ORDERS THAT:

1. The order made on 6 October 2022 granting leave to the applicants to serve the originating application and the statement of claim on the second respondent be set aside pursuant to s 38 of the *Foreign States Immunities Act 1985* (Cth).
2. The further amended originating application filed on 23 May 2023 and the further amended statement of claim filed on 23 May 2023, in so far as they make claims against the second respondent, be set aside pursuant to s 38 of the *Foreign States Immunities Act 1985* (Cth).
3. The applicants are to pay the costs of the second respondent, as taxed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

HALLEY J:

A. INTRODUCTION

1 On the evening of 2 October 2020, the applicants boarded a Qatar Airways aircraft (**aircraft**) for a flight to Sydney (QR908) at the Hamad International Airport (**Doha Airport**). Earlier that evening a newborn baby was discovered in a rubbish bin, within a toilet cubicle, in the terminal of the airport. An investigation was immediately launched by police officers of the Ministry of Interior of Qatar (**MOI**) in an attempt to locate the mother of the baby.

2 As part of that investigation, the applicants and all other female passengers, were required to disembark the aircraft and four of the applicants were required to undergo intimate and invasive medical examinations (**invasive examinations**). The stated purpose of the invasive examinations was to determine whether they had just given birth and were thus the mother of the baby. The invasive examinations were conducted by a nurse in an ambulance on the tarmac, in the immediate vicinity of the aircraft.

3 On 31 October 2020, the Foreign Ministry of the State of Qatar and the Department of Foreign Affairs and Trade of Australia published a joint statement in which the Deputy Prime Minister and Minister of Foreign Affairs of Qatar expressed his deepest sympathies for the women impacted by the invasive examinations conducted at the Doha Airport and stated that the incident is "considered a violation of Qatar's laws and values, and that the officials involved have been referred to the Public Prosecution Office" (**Joint Statement**).

4 Each of the five applicants has sought in these proceedings to bring claims against the first respondent (**Qatar Airways**), the second respondent, the Qatar Civil Aviation Authority (**QCAA**) and the third respondent (**MATAR**) in negligence, and claims for assault and false imprisonment. In addition, the first, third and fourth applicants have sought to bring claims against Qatar Airways under the *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montreal on 28 May 1999, 2242 UNTS 309 (**Montreal Convention**), and claims for battery against the QCAA and MATAR.

5 On 30 November 2023, the Court heard applications by (a) the applicants for leave to amend the further amended statement of claim in the form annexed to their application (**proposed**

2FASOC), (b) the first respondent, Qatar Airways for, inter alia, summary judgment, and (c) the third respondent, MATAR, to set aside service of the originating documents on it.

6 Those applications have been determined in a separate judgment: *DHI22 v Qatar Airways Q.C.S.C (No 2)* [2024] FCA 348.

7 By an amended interlocutory application dated 28 June 2023, and in reliance on s 38 of the *Foreign States Immunities Act 1985* (Cth) **(FSI Act**), the QCAA seeks by that application (**QCAA application**) to set aside:

(a) an order made on 6 October 2022 granting the applicants leave to serve the originating documents in these proceedings on the QCAA (**Service Order**); and

(b) those originating documents, insofar as they make claims against the QCAA.

8 The QCAA application was heard on 6 December 2023.

9 These reasons for judgment address the QCAA application.

10 The principal issues raised for determination are:

(a) is the QCAA a separate entity for the purposes of s 22 of the FSI Act; and

(b) does the commercial transaction exception in s 11 of the FSI Act apply to preclude the QCAA from foreign State immunity?

11 For the reasons that follow, I have concluded that the first question must be answered "yes" and the second question must be answered "no".

B. CLAIMS ADVANCED AGAINST THE QCAA

12 The material facts in relation to what the applicants have described as the "**Incident**" giving rise to their causes of action against the QCAA and the other respondents are pleaded in the further amended statement of claim (**FASOC**) at [9] to [21].

13 The applicants advanced their submissions in opposition to the QCAA's application by reference to the proposed 2FASOC. Given that I have not otherwise granted leave to file the proposed 2FASOC and I am satisfied that the amendments sought to be advanced in the proposed 2FASOC are not material to a determination of the QCAA application, I have outlined the applicants' case against the QCAA by reference to the FASOC.

14 By way of summary, the applicants allege that they were directed initially by the Qatar Airways flight crew and subsequently by "armed and unarmed persons in dark uniforms" to disembark the aircraft into a departure lounge and then onto the tarmac where they were then, in the case of four of the five applicants, subjected to the invasive examinations by a nurse in an ambulance before being permitted to reboard the aircraft.

15 The negligence claims are advanced against the QCAA on the basis that as the supervisor, operator and manager of the Doha Airport, it owed each of the applicants, as passengers on a departing flight, a duty of care to take all reasonable steps to avoid or minimise the risk of the applicants suffering harm while on the premises of the Doha Airport: FASOC at [36].

16 The applicants contend that by reason of the conduct alleged in the FASOC at [12] to [21], including "the conduct of its agents and employees and of persons akin or analogous to employees", the QCAA breached its duty of care to each of the applicants: FASOC at [37].

17 The particulars provided of the alleged breach of the duty of care in the FASOC at [43D] were all directed at conduct with respect to the Incident. They fell into the following categories:

(a) failing to take any or any adequate steps to determine the reason for the disembarkation request, to provide the applicants with any or any adequate explanation for the request, and to prevent the applicants being disembarked (particulars (i), (ii), (iv));

(b) directing the applicants to disembark the aircraft into the departure lounge, onto the tarmac and into the ambulance and to undergo an "intimate, invasive examination or inspection" (particulars (i), (iii), (v), (vi), (vii) and (ix));

(c) failing to take any or any adequate steps to prevent the disembarkation of the applicants and the invasive examinations from taking place (particulars (iii), (v) and (viii));

(d) authorising MATAR to direct the applicants to disembark the aircraft into the departure lounge, onto the tarmac, into the ambulance and to undergo an "intimate, invasive examination or inspection" (particulars (i), (iii), (vi), (vii) and (ix)); and

(e) failing to supervise adequately MATAR in its response to the Incident (particulars (x) and (xi)).

18 The applicants also advance claims for assault, battery or false imprisonment in the FASOC against the QCAA arising out of the Incident: FASOC at [39]-[40], [41]-[42] and [43].

19 The claims are advanced on basis that the "persons in dark uniforms", the "armed, uniformed persons" and the "female who appeared [to the applicants] to be a nurse" were variously characterised as "agents or employees or persons akin or analogous to employees" of the QCAA.

20 No material facts are pleaded, and no particulars are provided, as to how it is alleged that the "persons in dark uniforms", the "armed, uniformed persons" and the "female who appeared [to the applicants] to be a nurse" were acting as agents or employees or "persons akin or analogous to employees" of the QCAA.

21 Alternative claims of assault, battery and false imprisonment in relation to the Incident are advanced by the applicants against the QCAA on the basis that it authorised the tortious conduct of persons who "were agents or employees of MATAR or persons who were akin or analogous to employees" of MATAR: FASOC at [40A], [42A] and [43A].

22 It is alleged in the FASOC at [32] that:

> As the supervisor of [MATAR], the [QCAA] is liable for the tortious acts and/or omissions of [MATAR] that were authorised by the [QCAA], and for its negligent supervision of [MATAR].

23 No other material facts are pleaded, and no particulars are provided, in the FASOC as to how it is alleged that the QCAA could be liable for any alleged tortious conduct of any agents or employees or "persons akin or analogous to employees" of MATAR. Moreover, no material facts are pleaded and no particulars are provided in the FASOC of the alleged authorisation by the QCAA of the tortious acts or of the alleged negligent supervision of MATAR.

24 In the absence of such material facts and particulars, it is difficult to see how the claims for assault, battery and false imprisonment against the QCAA could succeed. For present purposes, however, it is not necessary to resolve any the deficiencies in the pleading of these causes of action. The critical issue for present purposes is that all of the claims advanced against the QCAA in the FASOC, including the intentional torts, are with respect to the Incident.

C. EVIDENCE

25 The QCAA relies on the following evidence in support of its application:

(a) an affidavit of Saad Abdullah AL-Mahmoud affirmed on 26 January 2023, the Ambassador of the State of Qatar to Australia. He gives evidence that the QCAA is an

organ or instrumentality of the government of Qatar that regulates civil aviation in Qatar, and that the State of Qatar claims foreign State immunity in these proceedings on the QCAA's behalf;

(b) an affidavit of Mohamed Faleh Al Hajri affirmed on 26 January 2023, the Acting President of the QCAA. He describes the QCAA's structure, and governance and its public funding arrangements and functions;

(c) an affidavit of Dr Islam Chiha affirmed on 26 January 2023, and an expert report prepared by Dr Chiha, an Assistant Professor of Public Law at Qatar University College of Law, Doha, Qatar. He gives expert evidence concerning aspects of Qatari law that are relevant to the interlocutory application, including the nature of public laws and how they are made in Qatar, and the legal status, governing laws and functions of the QCAA;

(d) an affidavit of Amr Hossam El-Din sworn on 7 August 2023, and an expert report prepared by Mr Hossam El-Din, a Legal Consultant and Head of the Arbitration Department at Al Sulaiti Law Firm in Doha, Qatar. His areas of expertise include aviation law, and he has advised and conducted litigation concerning the operation of Qatari public utility projects. He gives expert evidence concerning additional aspects of Qatari law relevant to the status and powers of the QCAA, including the laws providing for the status of the Doha Airport and the financing laws governing the QCAA; and

(e) an affidavit of Thomas Riddell, solicitors for the first and third respondents, affirmed on 8 November 2023.

26 The applicants rely on the following evidence:

(a) affidavits of Damian Sturzaker, solicitor for the applicants, affirmed on 20 March 2023 and 27 October 2023;

(b) an affidavit of Dr Wolfgang Peter Babeck, a solicitor who was a passenger on board Qatar Airways flight QR908 to Sydney on 2 October 2023, affirmed on 17 March 2023;

(c) affidavit of Ioannis Metsovitis, Senior Vice-President of Operations at MATAR, affirmed on 19 July 2023; and

(d) affidavits of each of the applicants variously affirmed on 15 March 2023 and 16 March 2023.

D. BACKGROUND

27 The QCAA is a public entity of the State of Qatar. It was established in 2001 by the Decree-Law No 16 of 2001 (since repealed) to carry out functions that had previously been performed by the Civil Aviation Department in the Ministry of Transport and Communications. Its staff members are public employees.

28 The operations, responsibilities and functions of the QCAA are now governed by **Law No 15** of 2002 on Civil Aviation as Amended, and **Amiri Decision 66** of 2018 on the Reorganization of the Civil Aviation Authority, which is itself a public law.

29 Article 3 of Amiri Decision 66 provides that the QCAA has its own legal personality and is "affiliated to the Ministry of Transport and Communications". The QCAA comprises the various administrative units created by Art 9. It is managed by a President, appointed by an Amiri Decision: Art 7 of Amiri Decision 66.

30 Pursuant to Art 2 *bis* of Law No 15, the QCAA is relevantly required to act "in coordination with the competent authorities" in the State of Qatar to:

> develop and implement the required regulations, bylaws, measures to protect civil aviation from unlawful interference … in ways that ensure the safety of passengers … and visitors of civil aviation facilities … and shall develop and implement a system to respond immediately to any security threats.

31 The QCAA's responsibilities also include:

(a) the "organization of the civil aviation and civil aerodromes" of the State of Qatar;

(b) ensuring the "enforcement of the effective provisions of the Chicago Convention and its Annexes";

(c) supervision and oversight of air navigation services and airports;

(d) developing and implementing the "State Safety Program that aims to achieve an acceptable level of safety"; and

(e) preparing a "National Civil Aviation Security Program" to meet the State of Qatar's "obligations under the Chicago Convention and its Annexes".

32 The administrative units of the QCAA created by Art 9 of Amiri Decision 66 are also given specific duties and responsibilities.

33 Article 6 of Amiri Decision 66 provides that the Minister of Transport and Communications (**Minister**) is responsible for the QCAA's overall performance. The Minister is required to propose the QCAA's annual estimated budget and provide an annual report to the Council of Ministers about the status of the QCAA. The financial resources of the QCAA consists of funds allocated to it by the State of Qatar, and other resources approved by the Council of Ministers, based on the Minister's proposal. The QCAA's budget is affiliated to the Ministry of Transport and Communications.

E. SEPARATE ENTITY

E.1. Statutory provisions and legal principles

34 Section 38 of the FSI Act provides:

> Where, on the application of a foreign State or a separate entity of a foreign State, a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to the foreign State or entity is inconsistent with an immunity conferred by or under this Act, the court shall set aside the judgment, order or process so far as it is inconsistent.

35 If the criteria of s 38 are satisfied, the Court must set aside the inconsistent judgment, order or process. The use of the word "shall" makes clear the provision is not discretionary.

36 For the purposes of s 38, the Service Order is an order of a Court made in a "proceeding", and the originating documents are each a "process" of the Court issued in a "proceeding".

37 Section 9 of the FSI Act provides that a "foreign State is immune from the jurisdiction of the courts of Australia in a proceeding", except as provided by or under the FSI Act.

38 A "foreign State" is relevantly defined in s 3(1) of the FSI Act to mean "a country the territory of which is outside Australia" which is "an independent sovereign State". Section 3(3) relevantly provides that this expression also includes "the executive government or part of the executive government of a foreign State … including a department or organ of the executive government of a foreign State", but "does not include … a separate entity of a foreign State".

39 The FSI Act was preceded by the Australian Law Reform Commission's 1984 report, "Foreign State Immunity" (**ALRC Report**). As the plurality stated in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240; [2012] HCA 33 (***Garuda HCA***) at [7] (French CJ, Gummow, Hayne and Crennan JJ), the purpose of the FSI

Act was stated in the explanatory notes for the proposed legislation, contained in an appendix to the ALRC Report, as being:

> [T]o reflect the more restrictive view of the common law immunity which had been taken in other countries and adopted in legislation.

40 As Nettle and Gordon JJ observed in ***Firebird*** *Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31; [2015] HCA 43 at [173], although the ALRC Report cannot displace the clear meaning of the FSI Act, "it assists in ascertaining the legislative context and purpose and the particular mischief that the legislation is seeking to remedy". The ALRC Report has been described by the New South Wales Court of Appeal as forming "a vital part" of the context within which the exception to immunity in s 14(3) of the FSI Act must be interpreted: *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* (2023) 111 NSWLR 550; [2023] NSWCA 134 at [43] (Bell CJ).

41 The ALRC Report recommended that Australia follow the basic approach of the United Kingdom legislation to the position of "separate entities". The United Kingdom legislation distinguished between any department or executive organ of the government, on the one hand, and separate entities, on the other: ALRC Report at [72].

42 The ALRC Report recommended that entities in the first category (a department or organ of the executive government) be "assimilated to the foreign State for all purposes": at [73]. In contrast, it stated that in considering the issue of whether entities in the second category (separate entities) are entitled to foreign State immunity, "it is expected that a court would consider whether the entity is exercising governmental functions on behalf of the foreign state": at [72].

43 The immunity provided to a foreign State is extended by s 22 of the FSI Act to "separate entities" of a foreign State by applying Pt II of the FSI Act (which includes s 9) in the same manner in which it applies to a foreign State. A person can thus claim immunity pursuant to s 9 of the FSI Act if it is a separate entity of a foreign State for the purposes of s 3(1) of the FSI Act.

44 Section 3(1) of the FSI Act provides that a separate entity of a foreign State is:

> [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.

45 Neither "agency" nor "instrumentality" is defined in the FSI Act.

46 The most recent consideration of the meaning of these expressions at appellate level was the decision of the Full Court of this Court in *PT Garuda International Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393; [2011] FCAFC 52 (***Garuda FCAFC***), which was relevantly concerned with foreign State immunity claims made by PT Garuda Indonesia Ltd (**Garuda**). The Full Court's reasoning on these expressions was not overturned by the High Court in *Garuda HCA* because the appeal was argued before the High Court on the basis that Garuda was a "separate entity" of Indonesia, as the Full Court had found in *Garuda FCAFC*.

47 In *Garuda FCAFC*, Lander and Greenwood JJ held that "agency" and "instrumentality" were distinct concepts: at [30], [35], Rares J disagreeing at [99]-[101]. Their Honours stated that the difference between them lay "in their constitution": *Garuda FCAFC* at [36].

48 Their Honours concluded that an "instrumentality" is a body or an individual "created by the State as an instrumentality" of the State, "for the purpose of carrying out functions on behalf of the State". They considered that such an entity "is not available to carry out any functions for any other State, person or corporation": *Garuda FCAFC* at [36]-[37]. Their Honours also found at [38]:

> An instrumentality is not necessarily an agency of the State because it may be invested by the State with powers which allow it to function separately and apart from the State and indeed outside of any direct control of the State or its executive.

49 By contrast, an "agency" need not have been created by the State itself (although it may have been), as "[a] natural person or a corporation may create a body which may be adopted by the State as an agency": *Garuda FCAFC* at [39] (Lander and Greenwood JJ). Their Honours continued:

> The State might adopt the person or corporation exclusively or it might create a shared agency with some other State, person or corporation.

50 Their Honours concluded, however, that agencies and instrumentalities within the FSI Act both "serve some governmental purpose" of the State, that may be commercial in nature, "whilst not being departments or organs of the executive government of the foreign State": *Garuda FCAFC* at [41]. Their Honours emphasised:

> For an instrumentality its sole purpose must be to perform functions on behalf of the State. For an agency its purpose must be to perform within the terms of its agency functions on behalf of the State which has created the agency.

51 The Full Court in *Garuda FCAFC* stated that determining whether an entity was an instrumentality or agency of a foreign State and thus a separate entity for the purposes of s 3(1) of the FSI Act was a question of fact in each case: *Garuda FCAFC* at [108] (Rares J), [48] (Lander and Greenwood JJ agreeing).

52 The correct approach to be undertaken by the Court was described by Rares J at [128] as:

> [T]o consider, on the whole of the evidence, whether the person is acting for, or being used by, the foreign State as its means to achieve some purpose or end of that State in the relevant circumstances.

53 Their Honours, Lander and Greenwood JJ stated at [48] that the following factors are relevant to a determination of whether a natural person or corporation is a separate entity:

> [I]n determining that question regard will have to be had to ownership, control, the functions which the natural person or corporation perform, the foreign State's purposes in supporting the natural person or corporation and the manner in which the natural person or corporation conducts itself or its business.

54 The Full Court provided the following guidance as to how to apply those factors.

55 *First*, the "most relevant factor in determining whether a natural person or corporation is an agency or instrumentality is whether that body is carrying out the foreign State's functions or purposes". If it is not, it is likely not an agency or instrumentality of the foreign State: *Garuda FCAFC* at [42]-[43] (Lander and Greenwood JJ).

56 *Second*, ownership cannot be determinative of the question or the sole criterion because (a) a natural person has no "owner", and (b) an instrumentality will "usually be created by legislation" and, in many cases, will not have "an owner": *Garuda FCAFC* at [44].

57 *Third*, it is not essential for the person or entity to be "controlled by a foreign State". Control, like ownership, is an important factor, but it is not determinative. It is not necessary to prove that the foreign State has day-to-day management control over the purported separate entity: *Garuda FCAFC* at [45]-[46] (Lander and Greenwood JJ), [124]-[126] (Rares J). Such a requirement would "assimilate the position of a corporation to an organ of the foreign State, contrary to the exclusion of such a body in the express words of the definition": at [124] (Rares J).

58 *Fourth*, the person or entity claiming that it is a "separate entity" of a foreign State bears the burden of proving that it has this status: *Garuda FCAFC* at [49] (Lander and Greenwood JJ), [177], [180] (Rares J).

E.2. Submissions

E.2.1. Submissions of the QCAA

59 The QCAA submits that the evidence on which it relies comfortably establishes that the QCAA is a separate entity of a foreign State and thus entitled to the immunity conferred by s 9 of the FSI Act.

60 The QCAA submits that the evidence of Dr Chiha relevantly establishes that (a) the QCAA is a public authority, (b) its status as a public authority means it enjoys a "public personality" that is "subject to governmental control and supervision prescribed by the law", (c) the tasks conferred on it by Law No 15 and Amiri Decision 66 are governmental in character, and (d) as a public authority the QCAA has "always been subject to control by the Government of Qatar in the performance of its functions".

61 The QCAA submits, most relevantly for present purposes, that the evidence of Mr Hossam El-Din establishes that (a) all facilities, buildings and equipment used or overseen in an administrative sense by the QCAA are public property of the State of Qatar, (b) the Doha Airport is one of the public properties administered as a public utility by the QCAA, (c) although the QCAA is entitled under the Qatari statutory framework to receive funds for use of the facilities of the Doha Airport, including charges for air traffic control services, those funds are "public funds which are the property of the State of Qatar", and can only be used "in accordance with the budget approved by the government of Qatar", and (d) Art 19 of Law No 2 of 2015 on the Issuance of the State Financial System Law "prohibits the QCAA from seeking additional funding unless unforeseen circumstances necessitate it and it aligns with the public interest, as outlined in the approved budget".

62 Finally, the QCAA submits that the evidence of Mr Al Hajri establishes that the QCAA's operations in practice align with the legal regime described above because (a) the QCAA is "the body which manages civil aviation in Qatar", (b) the QCAA receives a budget allocation from the Ministry of Finance, (c) the Minister of Finance represents the QCAA at the Council of Ministers and the QCAA formally reports to the Minister on a regular basis (weekly, for operational matters such as issues with air traffic control, and monthly, to provide updates on

matters such as issues discussed by the QCAA in its international representative activities), (d) the QCAA also informs and seeks the Minister's direction on matters as and when required by the Minister, (e) the QCAA participates in the development of International Civil Aviation Organisation standards and practices on behalf of Qatar and represents Qatar in other multilateral and regional civil aviation conferences, forums and meetings, and (f) the QCAA "is empowered to issue and enforce regulations to implement the provisions of the law".

E.2.2 Submissions of the applicants

63 The applicants accept that the QCAA may be a separate entity for some purposes but submit that the QCAA was not exercising inherently governmental or sovereign functions (or purposes) of the State of Qatar in relation to the Incident and is therefore not entitled to immunity as a "separate entity" of the State of Qatar, as defined in s 3(1) of the FSI Act, for present purposes.

64 The applicants submit that in determining whether an entity is an "agency or instrumentality", it was intended that the Court would "consider whether the entity is exercising governmental functions on behalf of the foreign State", citing the ALRC Report at [72]. They submit that expectation accords with international law. The applicants submit that the rule of customary international law, recognising the restrictive doctrine of immunity, is that a foreign State is entitled to immunity only in respect of its inherently governmental or sovereign acts, citing ***Benkharbouche*** *v Embassy of the Republic of Sudan* [2019] AC 777 at [37], [52]-[53] (Lord Sumption JSC). The definitions of "agency" and "instrumentality" ought, so far as their language permits, to be construed in conformity with this rule of customary international law, particularly where the FSI Act implements or codifies Australia's obligations under international law.

65 The applicants therefore submit that in determining whether a person or entity is an "agency" or "instrumentality" within the meaning of s 3(1) of the FSI Act, the Court should consider whether, in respect of the relevant conduct, the person or entity was exercising inherently governmental functions on behalf of the foreign State. They submit that this formulation is similar but different to those in *Garuda FCAFC*. The applicants submit that their contended formulation, which looks to the State's functions, rather than purposes, is consistent with the ALRC Report and with customary international law which looks to the character of the relevant conduct rather than to the State's purpose.

66 The applicants submit that in considering whether the QCAA was exercising inherently governmental or sovereign functions, the relevant conduct is the alleged "tortious, unlawful and apparently criminal treatment" of which the applicants complain.

67 The applicants submit that it was no part of the functions or purposes of the QCAA or the State of Qatar to subject the applicants to "tortious, unlawful and apparently criminal treatment". They submit that the Incident "was egregious and involved conduct that was quickly disavowed by the Foreign Ministry of the State of Qatar". They point to the Joint Statement in which Qatar's Deputy Prime Minister and Minister of Foreign Affairs stated that the "incident is considered a violation of Qatar's laws and values" and that "the officials involved have been referred to the Public Prosecution Office".

68 The applicants contend:

> Not only is there nothing inherently governmental or sovereign about the sexual assault of female passengers for reward departing an airport, the applicants submit that the doctrine of foreign State immunity as recognised in Australia will never extend to immunity in relation to an illegal sexual assault amounting to a fundamental breach of the human rights of the applicants.

E.2.3. Submissions in reply of the QCAA

69 The QCAA submits that the applicants' contention is untenable as a matter of law. It submits that the applicants' construction of the FSI Act runs contrary to the statutory text and intermediate appellate court authority, in particular, the decision of the Court of Appeal of the Supreme Court of New South Wales in ***Zhang*** *v Zemin* (2010) 79 NSWLR 513; [2010] NSWCA 255, in which a similar contention in relation to acts of torture by a State was rejected. It submits that the reasoning of Spigelman CJ in *Zhang* was correct and governs the "inherently governmental or sovereign" acts enquiry sought to be advanced by the applicants, as made clear by the following matters.

70 *First*, the applicants' argument impermissibly conflates the first stage of the statutory analysis (whether the general immunity from jurisdiction in s 9 applies) with the second (whether that general immunity is cut down by an exception set out in s 10 to s 20 of the FSI Act).

71 *Second*, and relatedly, the applicants' argument would render one or more of the exceptions in s 10 to s 20 of the FSI Act otiose or incapable of coherent application. It submits, by way of example, that the "personal injury" carve out in s 13, would be rendered redundant. As drafted, s 13 only exempts tortious claims for personal injury from foreign State immunity if the

relevant acts or omissions giving rise to the injury occurred in Australia. It submits that if the applicants' argument were accepted, a State body could not be a "separate entity" if it subjected a person to tortious treatment in any jurisdiction. This would have a necessary consequence of denying foreign State immunity for all tortious personal injuries suffered by persons, not just to torts occurring in the forum State's territory.

72 *Third*, the applicants' analysis is inconsistent with the policy reflected in the ALRC Report. There, the ALRC explained that, whilst it would be relevant to demonstrate as a general proposition that a body exercises governmental functions (such as immigration control), there is "no formal requirement" for the body to "show that it is exercising "sovereign authority"".

73 *Fourth*, the applicants' "inherently governmental or sovereign acts" analysis is not supported by the Full Court's analysis in *Garuda FCAFC*. It submits more broadly, the outcome of *Garuda FCAFC* is inconsistent with the proposition for which the applicants contend. On the applicants' analysis, there is nothing "inherently governmental" about the operation of an airline, but Garuda, the means by which the State of Indonesia engaged in that activity, was still held to be a "separate entity".

74 *Fifth*, the reasoning of the Supreme Court of the United Kingdom in *Benkharbouche* does not assist the applicants. The Court was addressing in that decision whether sections of the *Human Rights Act 1998* (UK) were incompatible with Art 6 of the European Convention on Human Rights 1950 because they were inconsistent with customary international law. It was not simply applying the United Kingdom's legislation in accordance with its terms.

75 *Sixth*, the applicants' proposition that conduct is not "inherently governmental or sovereign" if it concerns in some way a fundamental breach of human rights is wrong because it conflates the characterisation of the official's act as "public" or "official" with questions of its moral illegitimacy.

76 Finally, and in any event, the principle proffered by the applicants is not an accepted part of customary international law.

E.3. Consideration

E.3.1. The applicants' exercise of governmental function requirement

77 As a general proposition, it is entirely unexceptional that a Court would consider whether an entity was exercising governmental functions on behalf of a foreign State, for the purpose of

determining whether that entity was an agency or instrumentality within the meaning of "separate entity" for the purposes of the FSI Act. So much is clear from the ALRC Report and the rule of customary international law, that a foreign State is entitled to immunity only in respect of its inherently governmental or sovereign acts: *Benkharbouche* at [37] and [52]-[53] (Lord Sumption giving the judgment of the United Kingdom Supreme Court). Further, it is well settled that the FSI Act ought, so far as its language permits, to be construed in conformity with this rule of customary international law, particularly where the FSI Act implements or codifies Australia's obligations under international law: *Firebird* at [44] (French CJ and Kiefel J) and [134] (Gageler J).

78 The applicants' contention, however, that the QCAA was not a separate entity for the purposes of s 9 and s 22 of the FSI Act because it was not relevantly "exercising inherently governmental or sovereign functions" in relation to the Incident, is untenable for the following reasons.

79 *First*, the conduct of which the applicants complain occurred in the course of a police operation conducted by the MOI. That was on any view conduct that had the character of an "inherently governmental or sovereign act". A police operation seeking to locate a person who had committed an apparent crime under Qatari law of abandoning a newborn baby in a toilet cubicle necessarily involved a range of different activities, including interviewing potential witnesses and suspects. Those interviews could be pursued in a variety of ways, some relatively unobstructive and others more so. It is also readily apparent that the manner in which interviews of potential witnesses and suspects are conducted may involve breaches of relevant regulations or laws and give rise to criminal offences or breach fundamental human rights.

80 *Second*, and in any event, any contention that an entity cannot be a separate entity of a foreign State to the extent that it engages in conduct that is unlawful or in breach of human rights is contrary to the statutory text and intrinsic materials.

81 The ALRC Report recommended at [65], in the context of the underlying principles of foreign state immunity identified in Chapter 3 of the report:

> Accordingly the proposed Australian legislation should provide that a foreign state is immune except as provided in the legislation. The exceptions should be designed so as to reflect not a single governmental/commercial dichotomy but rather the full range of considerations outlined in Chapter 3.

82 The form of "restrictive immunity" recommended in the ALRC Report, and adopted by the Parliament, was one pursuant to which s 9 of the FSI Act granted an absolute immunity

"[e]xcept as provided by or under this Act". Specific exceptions to the absolute immunity from jurisdiction are then set forth in s 10 to s 20 of the FSI Act. None of these exceptions stipulates that an entity cannot be a "separate entity" for the purposes of the immunity in s 9, read together with s 22 of the FSI Act, if it engages in unlawful conduct or the conduct is in breach of human rights.

83 *Third*, such a contention is inconsistent with appellate authority. In *Zhang*, Spigelman CJ, with whom McClennan JA agreed, stated at [149]:

> The provision of a higher degree of certainty in this area of the law was a principal objective of the legislation as enacted. The means by which this was done, as indicated above, was to enact the traditional form of absolute immunity, subject to clearly stated exceptions. Section 9 should be so interpreted. Accordingly, the introductory words of s 9 affirmed the traditional position at common law — being absolute immunity — subject to the adoption of restrictive immunity in the respects, and only in the respects, set out in the Act itself. **Certainty would be undermined by inviting disputation about the legitimacy or otherwise of official conduct**. Similarly, certainty would be undermined if the legislative regime could have an ambulatory operation, in order to accord with subsequent developments in international law.
>
> (Emphasis added.)

84 After referring to statements to similar effect by Lord Wilberforce in the House of Lords in *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 at 272, and by Goff J at first instance in *I Congreso del Partido* [1978] QB 500, Spigelman CJ then stated at [152]-[153]:

> I agree with Lord Wilberforce that an important "purpose of the doctrine of State immunity", both at common law and as enacted by the *Foreign States Immunities Act* (Cth), is to **"prevent … issues" such as whether a foreign State was in breach of its obligations under international law "being canvassed in the courts" of the forum**. That is what s 9 affirmed to be law applicable in Australia. In this respect also, the *Foreign States Immunities Act* (Cth) did not change the common law.
>
> The *Foreign States Immunities Act* (Cth) established a definitive statement of the immunity, and a comprehensive statement of exceptions, to be applied by Australian courts. In my opinion, **it is not possible to infer an additional exception from international law, either directly or by means of narrowly construing the text** of the *Foreign States Immunities Act* (Cth).
>
> (Emphasis added.)

85 To similar effect, Allsop P (as his Honour then was), stated in *Zhang* at [169]:

> With respect, an analysis that seeks to say torture is not a public act or not an official act or not an exercise of sovereign authority **conflates the characterisation of the official's act as "public" or "official" with questions of its moral illegitimacy**. Torture (defined by Article 1 of the Torture Convention as acts inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity) is not to be regarded as a morally legitimate official act

> or exercise of public power. To the contrary, it is recognised by the Torture Convention and international law as sufficiently morally reprehensible as to warrant the application of criminal law under the laws of State Parties and under a universal criminal jurisdiction as a crime against humanity. It is a gross abuse of public power. **This does not deny that it is carried out in an official or public capacity. It makes such acts as carried out in an official capacity subject to criminal prosecution.**
>
> (Emphasis added.)

E.3.2. Separate entity

86 I am otherwise satisfied, as submitted by the QCAA, that the evidence on which it relies comfortably establishes that, at least as a general proposition, the QCAA is a separate entity of a foreign State and thus entitled to the immunity conferred by s 9 of the FSI Act. As submitted by the QCAA, that evidence establishes the following matters.

87 *First*, the QCAA carries out functions of the State of Qatar. It is used by Qatar as its means to achieve governmental objectives of that State. These objectives are the development, coordination and regulation of Qatar's civil aviation and meteorology sectors. These objectives are achieved through regulation of safety and security and the supervision and oversight of air navigation services and airports.

88 *Second*, the QCAA has no "owner". It is established by law, and all of its purposes and functions as set out under its empowering laws are public purposes and functions.

89 *Third*, the facilities, buildings and other property used or overseen by the QCAA in an administrative sense are public property and its finances are public funds that are also the property of the State of Qatar.

90 *Fourth*, the government of Qatar has supervision and substantial control over the operations of the QCAA, because (a) it obtains its funds by allocation from the State of Qatar, and through other resources approved by the Council of Ministers, (b) the QCAA may only use its funds in accordance with the budget approved by the government of Qatar, (c) the Minister exercises a supervisory role over the QCAA and the QCAA seeks direction from the Minister, and (d) the QCAA is required and does in practice report to the Minister and through the Minister to the government of Qatar.

91 *Fifth*, the ambassador of the State of Qatar to Australia gives evidence that the QCAA is an organ or instrumentality of the government of Qatar that regulates civil aviation in Qatar in accordance with the framework established by the Chicago Convention and pursuant to Law

No 15 and Amiri Decision 66. In my view, where a senior representative of the government of the foreign State (by way of example, a Minister or Ambassador) gives evidence concerning the relationship between the State and the entity, and/or the State's purpose or end that it pursues through the entity, that can be an important consideration in support of the conclusion that the entity is an "agency" or "instrumentality" of the State: cf *Garuda FCAFC* at [170], [174], [179] (Rares J).

F. COMMERCIAL TRANSACTION EXCEPTION

F.1. Overview

92 The second basis on which the applicants seek to resist the claim by the QCAA for foreign State immunity rests on the commercial transaction exception in s 11 of the FSI Act.

F.2. Statutory provisions and legal principles

93 The ALRC Report recognised that there were two broad approaches to distinguishing immune and non-immune transactions by foreign States. The first, common law approach, involved a single distinction between public and private transactions of foreign States. The second approach involved a "more complex set of distinctions, based on multiple criteria not reducible to any formula": ALRC Report at [46].

94 The ALRC Report noted the difficulties with the single criterion approach. In particular, it noted that the term "commercial", as the key element in a rule of restrictive immunity, had a number of defects, including that there were some acts that were neither governmental nor commercial, while other acts might be both governmental and commercial or have inextricably mixed governmental or commercial elements. Accordingly, the ALRC Report favoured the second broad approach, which was for legislation to contain specific rules for specific categories or classes of case: at [52].

95 Section 11 of the FSI Act relevantly provides:

> **Commercial transactions**
>
> (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.
>
> …
>
> (3) In this section, ***commercial transaction*** means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

(a) a contract for the supply of goods or services;

(b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and

(c) a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange.

96 Section 22 of the FSI Act provides that the commercial transaction exception applies equally to a foreign State immunity claim made by a "separate entity".

97 That particular forms of commercial transaction specified in s 11(3)(a) to s 11(3)(c) does not limit the generality of the definition of "commercial transaction" in s 11(3): *Garuda HCA* at [38] (French CJ, Gummow, Hayne and Crennan JJ).

98 The words "in so far as" in s 11(1) indicate that, as to part, the proceeding may not concern a commercial transaction. In other words, the provision is capable of applying to a proceeding which is only partly concerned with a commercial transaction: *Garuda HCA* at [11] (French CJ, Gummow, Hayne and Crennan JJ); *Firebird* at [177] (Nettle and Gordon JJ)).

99 The High Court in *Firebird* stated at [202] (Nettle and Gordon JJ):

> The exception to immunity provided for in s 11(1) in relation to a proceeding which concerns a commercial transaction rests on the basic principle that a foreign State should not be immune from the jurisdiction of Australian courts in a commercial matter within the ordinary jurisdiction of Australian courts.

F.3. Submissions of the applicants

100 The applicants submit that the QCAA is not immune in the proceeding as the proceeding concerns a commercial or a like activity in which the QCAA has engaged. They submit that a personal injury claim that does not come within the tort exception in s 13 of the FSI Act because the causative act or omission did not occur in Australia, may come within the s 11 commercial transaction exception because these provisions are to be read disjunctively.

101 The applicants submit that the commercial or a like activity in which the QCAA has engaged, was operating and managing the Doha Airport (and contracting for MATAR to operate and manage the Doha Airport under its supervision) for the use of passengers for reward on commercial airlines such as the applicants. They advance the following submissions in support of that proposition.

102 *First*, by reason of Art 23 of Amiri Decision 66 of 2018, the QCAA's Department of Airport Affairs (**DAA**) has the duty to operate and manage, and to attract commercial investments to benefit and develop, international and local aerodromes including Doha Airport.

103 *Second*, the functions of the QCAA include entering "contracts with companies or entities who conduct similar activities to achieve the Authority's objectives" after Ministerial proposal and approval, and the DAA has a duty to "[p]ropose draft aerodrome operation and maintenance agreements" and to monitor, evaluate and report on them.

104 *Third*, and relatedly, the QCAA has entered a contract with MATAR for the latter to operate and manage Doha Airport under the supervision of the QCAA.

105 *Fourth*, it would appear from the affidavit evidence of Mr Metsovitis that pursuant to that contract, MATAR's functions, as operator of Doha Airport, include (a) managing all commercial lease agreements involving Doha Airport facilities, (b) promoting the commercial uses of Doha Airport to prospective tenants, (c) collecting all charges and fees incurred by users of Doha Airport, and (d) providing aviation security services by contracting staff from private companies.

106 *Fifth*, MATAR has promoted Doha Airport as a leading commercial airport for passengers for reward.

107 *Sixth*, Qatar Airways operates a commercial airline and each of the applicants was a passenger for reward on its flight to Sydney on 2 October 2020.

F.4. Submissions of the QCAA

108 The QCAA submits that the applicants' attempt to rely on the commercial transaction exception to foreign State immunity neither captures the conduct in issue in the proceeding nor engages with the tests that the Court is required to apply in determining whether the applicants have discharged their onus of proving that s 11 of the FSI Act is satisfied.

109 The QCAA submits that the determination of whether the commercial transaction exception applies in the present case can be conveniently broken down into two stages.

110 *First*, the Court must determine whether the proceeding "concerns" a commercial transaction. It submits that this requires the Court to identify the "substance of the case pleaded" against the foreign State or separate entity by looking "at the source of the rights in issue" in the

proceeding, citing *Firebird* at [202] (Nettle and Gordon JJ) which encompassed "the conduct which gave rise to the claims for contravention and relief", citing ***CCDM** Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266 (Jackman J).

111 The QCAA submits that its conduct that gave rise to the claims for contravention and relief can be summarised as follows:

> In its supervision, operation and management of Hamad International Airport and in its supervision of MATAR (the contracted manager and operator of the airport), the QCAA: (a) failed to prevent the applicants from being: required to exit the aircraft; directed to a departure lounge into a lift and lobby near the tarmac and into an ambulance on the tarmac; and subjected to invasive physical examination at that location; (b) failed to supervise adequately MATAR's response to the newborn baby allegedly found in a bathroom in the airport terminal, and steps taken vis-à-vis the applicants following that discovery; and or (c) committed the acts described in (a), either vicariously through its employees or as principal through its agents.

112 The QCAA submits that none of this conduct "concerns" the operation and management of a commercial airport for the use of fare paying passengers. It submits that (a) the applicants seek damages primarily arising from searches to which they were subjected during a policing response to the Incident by the MOI, and (b) there is no basis in the pleading for contending that this has anything to do with a "commercial transaction".

113 *Second*, the Court then considers whether the alleged commercial transaction constituting the source of the rights in the proceeding is properly characterised as "a commercial, trading, business, professional or industrial or like transaction into which the foreign State [or separate entity] has entered or a like activity in which the State [or separate entity] has engaged".

114 The QCAA submits that its management of the Doha Airport, and its contracting of MATAR to undertake that work, does not constitute commercial activity. It submits that the applicants attempt to rely on (a) obligations of the QCAA to attract commercial investments to benefit the Doha Airport, (b) MATAR being a private entity that does "commercial things", and (c) that the applicants were travelling on a commercial airline, fail to have regard to the QCAA's statutory purposes in managing the Doha Airport. It submits these most notably are to "protect civil aviation from unlawful interference … in ways that ensure the safety of passengers [and] visitors of civil aviation facilities", and to "advance Civil Aviation and Meteorology sectors to the best standards in terms of efficiency, accuracy and to ensure civil aviation safety in the field of air transport".

115 The QCAA submits that its fulfilment of its legislative role as a civil aviation regulator, including through its operation of the Doha Airport, cannot be said to amount to "commercial" activity. It submits that its conduct in supervising MATAR is necessarily governmental in character even if some of the acts that MATAR undertakes may be commercial. Further, and in any event, it submits that the commercial aspects of MATAR's role are entirely separate from the impugned acts in issue in the proceeding.

F.5. Consideration

116 In my view, as submitted by the QCAA, the determination of whether the commercial transaction exception applies in the present case raises two questions.

117 *First*, does the proceeding "concern" a commercial transaction for the purposes of s 11(1) of the FSI Act?

118 The connecting term "concerns" "connotes a relationship between the proceeding and a commercial transaction": *Firebird* at [187] (Nettle and Gordon JJ). That relationship contemplates that there is an "underlying commercial transaction involved in the dispute", or, put another way, that the proceeding seeks to "enforc[e] … [a] claimant's rights arising from a commercial transaction": *Firebird* at [79], [188] (French CJ and Kiefel J).

119 To determine whether the connection required by s 11(1) is present, it is necessary to consider the "substance of the case pleaded" against the foreign State or separate entity: see *Garuda HCA* at [24] (French CJ, Gummow, Hayne and Crennan JJ).

120 The conduct the subject of the case pleaded against Garuda was that it and other airlines had entered into anti-competitive arrangements and understandings to impose surcharges on commercial freight services to Australia: *Garuda HCA* at [24].

121 In *Garuda FCAFC*, the Full Court held that Garuda was not immune from this Court's jurisdiction. Although the Full Court accepted that Garuda was a separate entity of a foreign State for the purposes of the FSI Act, the Full Court found that the proceeding concerned a "commercial transaction" within the meaning of s 11: *Garuda FCAFC* at [54] (Lander and Greenwood JJ), [227] (Rares J).

122 Justice Rares stated at [200]:

> The definition of "commercial transaction" in s 11(3) does not simply comprehend transactions. It contains words of extension that considerably broaden its operation.

> This follows from the section's use of the words "or a like activity in which the State has engaged and, without limiting the generality of the foregoing". The literal meaning of the classes of transactions and "like activity" to which s 11(3) refers is wide and general.

123 Justice Rares noted that the commercial transaction exception should be construed to promote the object and purpose underlying the FSI Act. He stated that this was to give effect to the doctrine of restrictive immunity, which itself "was intended to allow foreign States to be brought before municipal courts at the suit of persons who traded with them": *Garuda FCAFC* at [207], [208]. Justice Rares observed at [215] that the ALRC had conceived that the scope of the commercial transaction exception was "very broad". His Honour stated at [219]:

> The restrictive theory of State immunity is concerned, relevantly, to assimilate, as much as possible, the position of a foreign State to that of any other person who engages in commercial or like dealings, or associated activity, with others.

124 Justices Lander and Greenwood agreed with Rares J that the commercial transaction exception applied to Garuda (at [54]), stating at [61]-[62]:

> Shortly put, s 45 [of the *Trade Practices Act*] makes it unlawful for a corporation to make a contract or arrangement or arrive at an understanding, a provision of which would be likely to have the effect of substantially lessening competition, or to give effect to such a provision.
>
> It seems to us that a contract arrangement or understanding of that kind is a commercial transaction within the meaning of s 11(3) whether it is a transaction which contravenes s 45 of the *Trade Practices Act* or otherwise.

125 Before the High Court, Garuda challenged the Full Court's finding that the proceeding concerned a commercial transaction within the meaning of s 11 of the FSI Act. Garuda argued that the exception did not apply as the proceeding did not seek to vindicate any private law right in respect of any freight contract. It submitted that the ACCC did not plead the terms of any contract, did not seek any remedy with respect to any contract and no party to any contract was joined in the proceeding. The High Court rejected this submission, stating at [41]-[42] (French CJ, Gummow, Hayne and Crennan J):

> This postulated dichotomy between private and public law as controlling the meaning of "concerned" in s 11(1) should not be accepted.
>
> The definition of "commercial transaction" fixes upon entry and engagement by the foreign State. It does not have any limiting terms which would restrict the immunity conferred by ss 9 and 22 to a proceeding instituted against the foreign State by a party to the commercial transaction in question. Further, it should be emphasised that the definition does not require that the activity be of a nature which the common law of Australia would characterise as contractual. The arrangements and understandings into which the ACCC alleges Garuda entered were dealings of a commercial, trading and business character, respecting the conduct of commercial airline freight services to

> Australia. The definition of a "commercial transaction" is satisfied.

126 The term "concerns" in s 11(1) of the FSI Act requires the Court to "look to the source of rights in issue in the proceeding": *Firebird* at [135] (Gageler J).

127 In *CCDM*, Jackman J explained by reference to the reasoning of the High Court in *Garuda HCA* that the "source of rights in issue in the proceeding" for the purposes of s 11(1) of the FSI Act is the alleged conduct which gave rise to the right to the relief that was sought. His Honour stated that in *Garuda HCA*, the source of the relevant rights was thus not the *Trade Practices Act 1974* (Cth) that Garuda had allegedly contravened, but rather "the alleged conduct of the airline in contravention of that statute", being the conduct which gave rise to the right to the relief sought: *CCDM* at [111]. The conduct in Garuda as explained above was the entry into price fixing arrangements and understandings with other airlines with respect to the carriage of air freight to Australia.

128 In the present case, the conduct giving rise to the claims for contravention and relief was the alleged involvement by the QCAA in the police operation conducted by the MOI that culminated in the invasive examinations of the first to fourth applicants, and its failure to take steps to prevent (a) the applicants from being directed to disembark the aircraft and onto the tarmac, and (b) the invasive examinations from taking place. That is the "substance of the case pleaded" against the QCAA.

129 *Second*, can the alleged commercial transaction constituting the source of the rights in the proceeding be properly characterised as "a commercial, trading, business, professional or industrial or like transaction into which the foreign State [or separate entity] has entered or a like activity in which the State [or separate entity] has engaged", within the meaning of s 11(3) of the FSI Act? The expression "like activity" refers back to the concept of "a commercial, trading, business, professional or industrial or like transaction": *CCDM* at [114].

130 In ***Wells Fargo*** *Bank Northwest National Association v Victoria Aircraft Leasing Ltd* (2004) 185 FLR 48; [2004] VSC 262, Dodds-Streeton J said at [106]-[107]:

> The term "commercial transaction" is widely defined in s 11 to bear a meaning beyond "commercial" proper, as it expressly includes not only a "commercial" transaction but extends to a "trading, business, professional or industrial or like" transaction. The ALRC Report stated that "the object of the definition of "commercial" in the context of jurisdiction was to focus on the nature of a specific transaction".
>
> The term "commercial", is used in distinction from "non-commercial", and must be given content. The group of defining qualities in the "generality" of s 11(3)

> significantly omit criteria such as "political", "diplomatic", "governmental", "intelligence" "foreign policy" or "domestic". No doubt other significant fields of human activity are omitted.

131 There is a measure of circularity in the definition of a "commercial transaction" in s 11(3) of the FSI Act. A "commercial transaction" is stated to be a "commercial, trading, business, professional or industrial or like transaction" and three non-exclusive examples are provided. The examples provided are (a) contracts for the supply of goods or services, (b) loan agreements or other transactions for the provision of finance, and (c) guarantees or indemnities of financial obligations, other than employment contracts or bills of exchange. What is otherwise meant by "commercial" is not specified except to the extent that the other language in s 11(3) provides a necessary context and informs the meaning to be given to "commercial".

132 Consistent with the requirement to construe the words of a statute harmoniously (see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70]; *DSG Holdings Australia Pty Ltd v Helenic Pty Ltd* (2014) 86 NSWLR 293; [2014] NSWCA 96 at [92] (Leeming JA)), in construing the definition of a "commercial transaction" for the purposes of s 11(3) of the FSI Act, it is appropriate to look to the definition of the related term "commercial property" in s 32(1) and s 32(3) in Pt IV of the FSI Act. Those sections provide that "commercial property" is "property, other than diplomatic or military product, that is in use by the foreign State concerned substantially for commercial purposes". The definition of "commercial property" is thus inextricably linked to a "substantial use" by a foreign State for "commercial purposes". The purposive link is express in these sections, unlike s 11(3). Nevertheless, it demonstrates an evident legislative intention to direct attention to "purpose" in determining whether something can be characterised as "commercial".

133 In that context, the following reasoning of Nettle and Gordon JJ in *Firebird* at [229]-[230], although addressing the exception to immunity in s 32(1) and s 32(3) of the FSI Act, is instructive:

> 229 On that basis, Bathurst CJ concluded that although Nauru Airlines engages in some commercial activities including flights on a charter basis, the funds in the Airline Leasing Accounts were not used for commercial purposes, because:
>
> > "[T]he primary purpose of the investment in Nauru was to provide aircraft services to what would otherwise have been an isolated community. In these circumstances it does not seem to me that the moneys in the bank account [are] used for purposes which, whether by loans or other investment, could be said to be for commercial purposes."

> 230 With respect, that conclusion was correct. As Bathurst CJ deduced, funding Nauru Airlines was part of Nauru's ordinary governmental functions of providing an otherwise isolated Nauruan community with aircraft services. The fact that the airline, as opposed to Nauru, may have engaged in commercial activities was beside the point. The purpose of the loans was not to generate profits but to ensure that the people of Nauru were provided with air transportation.

134 Their Honours were considering the character of the funds in an account that the State of Nauru used to provide government loans to Nauru Airlines. Their Honours focused not on the nature of the activity being conducted by the airline using the loans made by the Nauru government, but rather the reason why the government was providing the funding to the airline.

135 In *Firebird*, Nettle and Gordon JJ contrasted the approach in Pt IV of the FSI Act with the approach of the English Court of Appeal in *Alcom Ltd v Republic of Colombia* [1984] AC 580. Their Honours explained at [223]:

> It is different under the purpose-based approach which applies under Pt IV of the Immunities Act. In determining whether property is held by a foreign State for a commercial purpose, it is necessary to bear in mind the individual circumstances of the foreign State. What may properly be regarded as a commercial purpose in the context of one foreign State's circumstances may well be considered a governmental purpose in the context of another state's circumstances. That point was made by Steele J in *Carrato v United States* [(1982) 141 DLR (3d) 456] in relation to the Canadian approach to the commercial activity exception to immunity from jurisdiction (which requires the court to consider both the nature of the act and also its purpose). As Steele J said: "acts that some persons might normally consider to be commercial are not so when they are done in the performance of a sovereign act of State". An activity can also be multi-faceted and so, for the purposes of the commercial activity test of immunity from jurisdiction, "it is necessary to consider which aspect of that activity is most relevant to the proceedings". Parity of reasoning dictates that the same is true of purpose.
>
> (Footnotes omitted.)

136 In order to address the question of whether the impugned activity falls within the commercial transaction exception in s 11(3) of the FSI Act, it is necessary to characterise the particular acts that the claimant for foreign State immunity is alleged to have done.

137 In the present context, the aspect of the impugned activity that is most relevant to the proceedings is the QCAA's alleged participation in, or failure to prevent, the police investigation conducted by the MOI culminating in the invasive examinations in the ambulance on the tarmac.

138 Further, as Nettle and Gordon JJ explained in *Firebird* at [228], in approving the reasoning of Bathurst CJ in the Court of Appeal of the New South Wales Supreme Court:

> Hence, as his Honour said, where funds are to be used for the purpose of government administration, performance of a government's civic duties and functions to its citizens or the advancement of the community, "the fact that that object is achieved by entering into commercial transactions [does not mean] that the funds are used for commercial purposes.
>
> (Footnotes omitted.)

139 In the present case, the MOI police operation was conducted in purported performance of the State of Qatar's civic duties to maintain law and order. More specifically, it was conducted for the purpose of identifying and potentially prosecuting a woman who had allegedly committed a criminal offence by abandoning a newborn baby in a toilet cubicle in the terminal of the Doha Airport.

140 In my view, the QCAA's alleged participation in, or failure to prevent, the police investigation conducted by the MOI culminating in the invasive examinations in the ambulance on the tarmac cannot plausibly be characterised as conduct falling within the commercial transaction exception within s 11(3) of the FSI Act. The conduct did not have the character of a "commercial, trading, business, professional or industrial or like transaction".

141 Nor, contrary to the applicants' submissions, is it sufficient to demonstrate that the conduct in issue in the proceeding formed part of some broader commercial activity.

142 In *Wells Fargo*, Dodds-Streeton J said at [108]-[109]:

> In my opinion, if a transaction is substantially, essentially or predominantly of a political, diplomatic, governmental or intelligence or like character, it is not a "commercial transaction" despite the fact that it incorporates, or possibly incorporates, some elements of the specified transactions in s 11(3)(a)-(c).
>
> Whether or not the transactions in s 11(3)(a)-(b) are ipso facto commercial, the incorporation of only subsidiary or minor "commercial, trading, business, professional, industrial or like" elements in a transaction which is predominantly one of a political, diplomatic, governmental or intelligence character, or an admixture of those elements, in my view will not render it a "commercial transaction". Immunity would not be lost pursuant to s 11 of the Act.

143 In *CCDM*, the relevant issue was whether India's conduct in annulling a commercial agreement constituted a "like activity" within the meaning of s 11(3) of the FSI Act. The applicants in *CCDM* submitted that the Annulment should be construed as a "like activity" to a commercial transaction because it "operated with respect to" a commercial transaction. Justice Jackman did not accept that contention.

144 Moreover, Jackman J concluded at [120]:

> In the present case, the Annulment was made by the body vested with the highest form of executive policy-making in India, and was stated to be for reasons of public policy. Such an act of State cannot be characterised as a "like activity" to "a commercial, trading, business, professional or industrial or like transaction" within the meaning of s 11(3). It certainly bears no resemblance to any of the non-exhaustive list of commercial transactions in s 11(3). There is no evidence that the Annulment satisfied the definition of "commercial transaction" in s 11(3), let alone sufficient evidence for the Applicants to have discharged their onus of proof.

145 His Honour also noted that "the repudiation of a commercial agreement by a State is not necessarily a commercial activity and may well be made as an act of State for reasons which are not at all commercially based": at [119].

146 The QCAA's alleged participation in, or failure to prevent, the MOI police investigation were distinct acts of a separate entity of a foreign State. That conduct could not be brought within the commercial transaction exception on the basis that the applicants were fare paying passengers on a commercial airline and the relevant conduct took place on the premises of an international commercial airport.

G. DISPOSITION

147 The Service Order is to be set aside, and the further amended originating application and the FASOC insofar as they advance claims against the QCAA are to be set aside.

I certify that the preceding one hundred and forty-seven (147) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley.

Associate: 

Dated: 10 April 2024

SCHEDULE OF PARTIES

NSD 837 of 2022

Applicants

Fourth Applicant:	DHL22
Fifth Applicant:	DHM22