

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

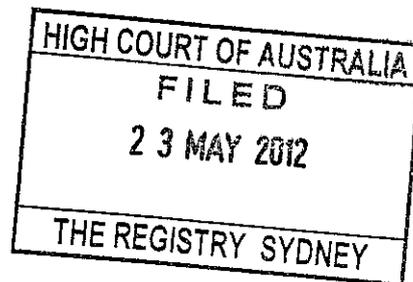
NO S 343 OF 2011

On appeal from
the Federal Court of Australia

BETWEEN: **P T GARUDA INDONESIA LTD ARBN**
000 861 165
Appellant

AND: **AUSTRALIAN COMPETITION &
CONSUMER COMMISSION**
Respondent

**RESPONDENT'S SUPPLEMENTARY SUBMISSIONS CONCERNING THE
HISTORY OF CIVIL PENALTY PROCEEDINGS**



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1. These submissions reply to the Supplementary Submissions filed by Garuda on 16 May 2012 (GS).

CIVIL PENALTIES IN AUSTRALIA

2. Further to paragraph [2] of GS, s 119 of the *Conciliation and Arbitration Act 1904* (Cth) (considered by the Full Court of the Federal Court in *Gapes v Commercial Bank of Australia Limited* (1979) 27 ALR 87) is another example of a civil penalty in Australia at the time of the passage of the *Foreign States Immunities Act 1985*.
- 10 3. At paragraph [3] of GS, reference is made to s 76(f) of the *Trade Practices Act 1974* making provision for imposition of fines for contraventions of Part IV. As recognized in the last sentence of GS at [3], s 76 has always referred to pecuniary penalties rather than fines.
4. At paragraph [4] of GS, reference is made to the introduction of criminal offences for certain kinds of anti-competitive behaviour. It should be noted that these offences did not replace pre-existing civil contraventions (for instance, there now exists both a criminal and civil regime for dealing with cartel conduct).

THE UNITED KINGDOM

5. In addition to the Office of Fair Trading (GS at [6]), several other regulatory agencies in the UK are authorised to impose civil penalties, including:
 - 20 5.1. the Occupational Pensions Regulatory Authority (pursuant to the *Pensions Act 1995*, s 10);
 - 5.2. the Financial Service Authority (pursuant to the *Financial Services and Markets Act 2000*, ss 64, 66, 91, 123 and 206); and
 - 5.3. HM Customs and Excise (pursuant to the *Finance Act 1994*, ss 8 and 9).

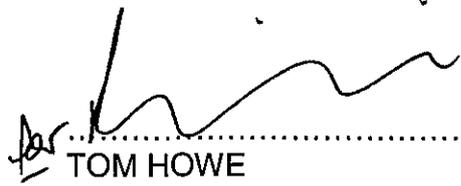
THE UNITED STATES OF AMERICA

6. Although Federal anti-trust laws do not make provision for civil penalties in relation to price-fixing (GS at [11] and [12]), civil penalties are available in respect of other types of conduct: see, for example, 15 U.S.C § 18a in relation to merger notifications (GS [15(b)]), and 15 U.S.C § 45(m) (in relation to unfair or deceptive acts or practices).
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7. Furthermore, beyond the anti-trust context, civil penalties are a long-standing feature of the Federal regulatory landscape. For example, as at 1979 it was estimated that there were 348 statutory civil penalties enforced by 27 Federal departments and agencies, supporting regulatory commands over a variety of subjects including: carriers and broadcasters; safety standards for consumer

products, workplaces, vessels and vehicles; liquidity requirements for banks; and pollution abatement requirements.¹

8. At the state level, 'it is common for state antitrust laws to include provisions for civil penalties', including in relation to price-fixing: see H First, 'The Case for Antitrust Civil Penalties', (2009) 76 *Antitrust Law Journal* 127 at 137 - 139; Cal Bus & Prof Code § 17206 (a) and (d), and NY Gen Bus Law § 342-a.
9. American States have also passed laws providing for civil penalties in other contexts: see, for example, Del Code Ann Tit 5 § 3355 (Supp. 1990) and NY Bus Corp Law § 1605.

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¹ See C Diver, 'The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies', (1979) 79 *Columbia Law Review* 1435 at 1438.