# *Case Note*

## The High Court of Australia's Constructional Choice in *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd*

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***Abstract***

In *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd*, the High Court of Australia made a five to two split decision that the *Foreign States Immunities Act 1985* (Cth) ('*FSI Act*') s 14(3) — an exception to foreign State jurisdictional immunity in proceedings relating to the bankruptcy, insolvency or winding up of a body corporate — operated in a confined way and did not apply to 'separate entities' of a foreign State. The majority further considered s 22 of the Act to substantively confer jurisdictional immunity upon State separate entities. This decision demonstrates the role of extrinsic material in informing the constructional choice presented by generally worded statutory provisions and affirms the importance of the Australian Law Reform Commission's 1984 *Foreign State Immunity* report in interpreting the *FSI Act*. In this case note, I examine the majority and dissenting approaches to the statutory construction of s 14(3) and comment on the potential uncertainty left for creditors of State 'separate entities' in light of the decision.

## I Introduction

In *Greylag Goose v PT Garuda Indonesia* ('*Greylag Goose*'),[1] the High Court of Australia split on the application of an insolvency exception to a foreign State's immunity from jurisdiction in the *Foreign States Immunities Act 1985* (Cth) ('*FSI Act*').[2] By a majority of five to two, the High Court held that the *FSI Act* ss 14(3)(a) and 22 do not apply to a proceeding for the winding up of a body corporate under the *Corporations Act 2001* (Cth) pt 5.7 ('*Corporations Act*') if that body corporate

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1 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* (2024) 98 ALJR 828 ('*Greylag Goose v PT Garuda (HCA)*').

2 *Foreign States Immunities Act 1985* (Cth) ('*FSI Act*').

is a 'separate entity' of a foreign State. This means that the insolvency exception has taken on a narrow meaning, its purpose being limited to allowing Australian courts to adjudicate insolvency disputes in which a foreign State has a proprietary interest. Beyond the case's obvious implications for such entities, it demonstrates how placing emphasis on extrinsic material can lead a court to a constructional choice that, at first glance, appears strained when faced with the plain language of the statute. The case also demonstrates the tension inherent within discussions of State immunity between the requirement to afford foreign States and their emanations due respect for their sovereign equality by extending them immunity, and the desire to retain sovereign territorial control over entities within the jurisdiction. A further practical consequence of *Greylag Goose* is the creation of some uncertainty for creditors of foreign State separate entities, owing to the narrow focus of the High Court on s 14(3) as opposed to the broader commercial transactions exception found within the *FSI Act* s 11.

In *Greylag Goose*, Gageler CJ, Gleeson, Jagot, and Beech-Jones JJ wrote a joint majority judgment, while Edelman J delivered a separate judgment agreeing with the majority. Gordon and Steward JJ issued a joint dissenting judgment. The majority upheld the finding of the New South Wales ('NSW') Court of Appeal[3] and the first instance decision in the NSW Supreme Court.[4] In Part II of this case note, I discuss the appellate context of the High Court's decision, including the decisions at first instance and in the Court of Appeal. In Part III, I explore the division in the High Court on the *FSI Act* ss 14 and 22, the High Court's use of extrinsic material, and the corporate and insolvency considerations that were raised in the decision. In Part IV, I argue that the majority reasoning is a principled, if imperfect, development in the law of foreign State immunity and appropriately aligns with the legislative context of s 14(3). In Part V, I conclude the case note by drawing out the key points of significance from the *Greylag Goose* decision.

## II The Appellate Context of *Greylag Goose*

### A *Background to the Greylag Goose proceedings*

PT Garuda (the respondent in the High Court) is a company incorporated in the Republic of Indonesia and is the national airline of that State. The appellants in the High Court (collectively, 'Greylag Goose') are two companies incorporated in the Republic of Ireland that lease aircraft to PT Garuda.[5] The dispute concerns PT Garuda's alleged failure to pay certain sums, together totalling over USD 437 million under leasing agreements.[6] Greylag Goose had sought orders under the *Corporations Act* for the winding up of PT Garuda on the basis that PT Garuda was unable to pay

3 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* (2023) 111 NSWLR 550 ('*Greylag Goose v PT Garuda (NSWCA)*').
4 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2022] NSWSC 1623 ('*Greylag Goose v PT Garuda (NSWSC)*').
5 *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [5].
6 Ibid 831 [6]–[9].

its debts, and alternatively on the basis that it was just and equitable to do so.[7] By notice of motion, PT Garuda asserted immunity from the jurisdiction of the NSW Supreme Court under the *FSI Act* s 9.[8] Part II of the *FSI Act* recognises certain exceptions to this immunity. It was the construction of a particular exception found in s 14(3) relating to insolvency and winding up that split the High Court.

## B *Relevant Statutory Provisions*

Interpreting the proper 'concurrent operation' of the *FSI Act* ss 14 and 22 was critical to resolving the issues before the High Court.[9] The *FSI Act* s 9 grants a general jurisdictional immunity for foreign States (subject to the pt II exceptions), with s 22 extending that immunity to 'separate entities' of States: '[t]he preceding provisions of this part (other than [certain provisions]) apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State'.[10] In a 2011 decision, the Full Federal Court of Australia found that PT Garuda was a 'separate entity' of a foreign State within the meaning of s 22.[11] This finding was not challenged on appeal (nor in the present proceedings).[12] This 'separate entity' status therefore permitted PT Garuda to assert jurisdictional immunity before Australian courts in accordance with ss 9 and 22, subject to the exceptions in the *FSI Act* pt II. The relevant exception in *FSI Act* s 14 relating to insolvency and winding up proceedings provides:

> **14 Ownership, possession and use of property etc**
>
> …
>
> (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 question before the High Court was whether s 14(3)(a), in referring to 'the winding up of a body corporate', contemplated that 'body corporate' being a separate entity of a State, and hence whether PT Garuda fell within the exception, thus barring it from asserting jurisdictional immunity.

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7 *Corporations Act 2001* (Cth) ss 583(c)(i)–(ii), 585(a) ('*Corporations Act*'); *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [7]–[9].

8 *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [10].

9 Ibid 834 [26] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 855 [145] (Edelman J).

10 *FSI Act* (n 2) s 22. The provisions that are exceptions to s 22 are ss 11(2)(a)(i), 16(1)(a), and 17(3), none of which are relevant to the issues considered by the High Court.

11 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393, 430 [170]–[171] (Rares J, Lander and Greenwood JJ agreeing at 396 [1], 404 [49]) ('*PT Garuda v ACCC (FCAFC)*').

12 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, 255 [47] (Heydon J) ('*PT Garuda v ACCC (HCA)*'); *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [10].

## C *The First Instance Decision*

At first instance, Hammerschlag CJ in Eq answered that question in the negative.[13] PT Garuda is a foreign company registered under the *Corporations Act* pt 5B.2 div 2,[14] and hence was 'indisputably' a body corporate.[15] Greylag Goose argued at first instance that the words 'body corporate' included the foreign State or separate entity referred to in the chapeau of s 14(3), with the indefinite article 'a' demonstrating the legislature's intention to capture such entities.[16] PT Garuda's reply, and the reason with which his Honour ultimately agreed, was that the foreign State and its separate entities *cannot* be the bodies corporate to which s 14(3)(a) makes reference.[17] This was because although a literal reading of the clause might lend itself to the construction advanced by Greylag Goose,[18] such a reading imported an 'unlikely intention to refer to the same person in two different ways'.[19] Further, it was a strained interpretation because it would require the provision to operate against PT Garuda, which 'when practically read … says Garuda has no immunity in winding up proceedings against a body corporate'.[20] His Honour also made reference to the consequence of upholding Greylag Goose's construction with respect to natural persons under the section: namely, that people such as the head of a foreign State could be bankrupted in Australia in circumstances where no other *FSI Act* pt II exception applied.[21] For Hammerschlag CJ in Eq, this added force to the conclusion that the *FSI Act* s 14(3) did not operate against such persons or bodies corporate.[22]

## D *The NSW Court of Appeal Decision*

In the NSW Court of Appeal, Bell CJ, Meagher and Kirk JJA unanimously upheld the first instance decision.[23] The appellants (Greylag Goose) had contended that the plain and literal meaning of s 14(3), as well as the context and purpose of the *FSI Act*, supported their construction.[24] That context and purpose was the restrictive theory of State immunity. Since the critical English cases *Playa Larga v I Congreso del Partido*[25] and *Trendtex Trading Corporation v Central Bank of Nigeria*,[26] the restrictive theory (as opposed to the theory of absolute immunity) has come to define

13 *Greylag Goose v PT Garuda (NSWSC)* (n 4) [17] (Hammerschlag CJ in Eq).
14 Ibid [10].
15 Ibid [12].
16 Ibid [13].
17 Ibid [14], [17].
18 Ibid [21].
19 Ibid [23].
20 Ibid.
21 Ibid [25].
22 Ibid. Cf *Greylag Goose v PT Garuda (HCA)* (n 1) 846–7 [98]–[99] (Gordon and Steward JJ).
23 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 555 [13], 569 [78] (Bell CJ), [79] (Meagher JA), [80] (Kirk JA).
24 Ibid 554–5 [10]–[11] (Bell CJ).
25 *Playa Larga v I Congreso del Partido* [1983] 1 AC 244, 260–2 (Lord Wilberforce) ('*I Congreso del Partido*').
26 *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 558 (Lord Denning MR).

the boundaries of State immunity in contemporary international legal practice.[27] The restrictive theory arose out of States' involvement with commercial and private law transactions and, as expressed by Lord Wilberforce in *I Congreso del Partido*, has two central foundations:

> (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.[28]

The restrictive theory is made reference to in both the Australian Law Reform Commission's 1984 *Foreign State Immunity* report ('*ALRC FSI Report*')[29] on which the *FSI Act* was based,[30] and in the second reading speech of the *FSI Act*.[31] Greylag Goose contended that, in line with this theory, it was the legislature's intention to facilitate the winding up of insolvent entities in Australia, regardless of whether they were a foreign State or separate entity.[32]

Bell CJ disapproved of the construction contended for by Greylag Goose.[33] In coming to this conclusion, his Honour drew upon the leading cases on statutory interpretation to emphasise that the *legal* meaning of a provision is not necessarily its *literal* meaning, with the construction exercise requiring 'full consideration of the language of the statute viewed as a whole and the context, general purpose and policy of the statute or a provision within it, to the extent that that is separately discernible'.[34] Giving effect to the legal meaning, in light of this context, accords with the statutory requirement in the *Acts Interpretation Act 1901* (Cth) s 15AA.[35]

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27 See *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 79 [169] (Nettle and Gordon JJ) ('*Firebird*'); Stefan Kröll, 'Enforcement of Awards' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law: A Handbook* (Nomos/Hart, 2015) 1482, 1486, 1500; Hazel Fox, 'The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 21, 30–1; James Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75(4) *American Journal of International Law* 820, 847–50; Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd rev ed, 2015) 146.

28 *I Congreso del Partido* (n 25) 262 (Lord Wilberforce), quoted in *Firebird* (n 27) 80 [171] (Nettle and Gordon JJ) and *Greylag Goose v PT Garuda (HCA)* (n 1) 840 [70] (Gordon and Steward JJ).

29 See Australian Law Reform Commission ('ALRC'), *Foreign State Immunity* (Report No 24, 1984) ('*ALRC FSI Report*').

30 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 556 [19] (Bell CJ), citing the *FSI Act* (n 2) second reading speech: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 1985, 141 (Lionel Bowen, Attorney-General).

31 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 554–5 [11].

32 Ibid 555 [12].

33 Ibid 555 [13].

34 Ibid 555 [14], citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ); *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1, 10 [26] (Bell P) ('*Sydney Seaplanes*').

35 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 555–6 [15]–[16].

Bell CJ noted (as the High Court has recognised)[36] that the *FSI Act*'s legislative context is, in large part, to be found in the *ALRC FSI Report*.[37] While the Report does make reference to the restrictive theory, his Honour emphasised that the significance of the report extends 'far beyond the purpose of the Act expressed at a very high level of generality'.[38] Instead, the *ALRC FSI Report* was held to support the conclusion that the *FSI Act* was not intended to subject a *foreign* body corporate to winding up proceedings in Australia.[39] Section 14(3) should instead be read to refer to bodies corporate 'in and of the Commonwealth' per the *Acts Interpretation Act 1901* (Cth) s 21(1)(b) (a finding not relied upon by PT Garuda in the High Court).[40] Coupled with the definition of a 'foreign State' under the *FSI Act* s 3(3) (which includes entities such as provinces and executive government organs — entities not subject to bankruptcy or insolvency proceedings), this militated against the conclusion that s 14(3) applies to the State or its separate entities:[41] '[i]t follows that the "proceeding" to which s 14(3) is referring cannot be a proceeding concerning the foreign State's bankruptcy or insolvency … the foreign State is the subject and not the object of s 14(3)(a)'.[42]

According to the NSW Court of Appeal, the better view was that s 14(3) was designed such that State immunity would not prevent the adjudication of conflicting claims to the property of an insolvent corporation where, for example, a State had an interest in the property or company.[43] Bell CJ considered the *ALRC FSI Report* in detail, concluding that the consequence of Greylag Goose's construction would mean that the *FSI Act* implemented a 'quite radical legislative initiative', and to this end '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 … [i]n that context, part of the contextual significance of the ALRC Report lies in what it *does not say*'.[44]

This was the end for Greylag Goose's case in the Court of Appeal (with Meagher and Kirk JJA ultimately agreeing with Bell CJ).[45] Special leave to appeal to the High Court was subsequently granted by Gordon and Jagot JJ.[46]

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36 *Firebird* (n 27) 81 [173] (Nettle and Gordon JJ); *Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292, 306 [11] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ) ('*Infrastructure Services*'); *PT Garuda v ACCC (HCA)* (n 12) 245 [7] (French CJ, Gummow, Hayne and Crennan JJ).

37 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 556–7 [19]–[22].

38 Ibid 561 [43].

39 Ibid 561–2 [44]–[45].

40 Transcript of Proceedings, *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2024] HCATrans 13, 1163–70 (PD Herzfeld SC) ('*Greylag Goose* HCATrans'). See also Greylag Goose Leasing 1410 Designated Activity Co, 'Appellants' Submissions', Submission in *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd*, Case No S135/2023, 7 December 2023, [46]–[49] ('Appellants' Submissions').

41 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 562 [46]–[47].

42 Ibid 562 [47].

43 Ibid 568 [71], [74]–[75], 569 [78].

44 Ibid 568 [75]–[76] (emphasis in original).

45 Ibid 569 [79] (Meagher JA), 569 [80] (Kirk JA).

46 Transcript of Proceedings, *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2023] HCATrans 144, [1] (Gordon and Jagot JJ).

## III The High Court of Australia's Division on Construction

### A *The Decision on the Foreign States Immunities Act 1985 (Cth) ss 14 and 22*

The joint majority of the High Court (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) held that the *FSI Act* s 14(3) exception did not apply to PT Garuda.[47] Their Honours reasoned that because s 14(3) applied in relation to the foreign State, which was hence the *object* of the exception, the 'body corporate' to which s 14(3)(a) refers could only be a different entity whose winding up was the subject-matter of the exception.[48] Greylag Goose's construction (that there was no reason to exclude State entities from the ambit of 'body corporate' referred to in s 14(3)) was said to be dependent upon an incorrect understanding of s 22: '[s]ection 22 is not definitional; it is substantive'.[49] This means that functionally s 22 is not treated as merely reading 'separate entity' into the *FSI Act* pt II regime in place of 'foreign State', but instead that the '*same immunity* from jurisdiction' that the State benefits from is conferred upon the separate entity.[50] The joint majority placed emphasis on a passage in the *ALRC FSI Report* that explained that the policy of s 22 was to ensure that a State's 'separate entities should be treated in the same way as foreign States' when it comes to jurisdictional immunity.[51] This was an issue because Greylag Goose's argument would mean that the availability of s 9 immunity to the separate entity would depend upon the vehicle by which a State carries on a particular activity in the forum: a body corporate could be wound up, whereas a government department could not.[52] This would mean the separate entity would have an attenuated form of jurisdictional immunity when compared to the State, which defied the substantive operation of s 22.[53] Therefore the joint majority analysis of s 22 required the subject matter of s 14(3)(a) to be the same across its application to both foreign States and separate entities such that the 'body corporate' referred to in s 14(3)(a) must be other than the separate entity that was the object of the exception. Like the NSW Court of Appeal, the High Court considered s 14(3)(a) to operate as a limited exception to jurisdictional immunity, designed to deny immunity where a State had an interest in a body corporate other than the State's separate entity being subject to winding up.[54]

This is a difficult construction to grapple with. It does not necessarily accord with the plain language of s 14(3) and so much is acknowledged by the separate judgment of Edelman J, who agreed with the joint majority but acknowledged that PT Garuda's construction was 'textually strained'.[55] His Honour posited two possible constructions of s 14(3) — narrow and broad — and noted that the text of

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47 *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [2] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).
48 Ibid 834 [27]–[28].
49 Ibid 834 [30].
50 Ibid (emphasis added).
51 Ibid 834 [31], quoting *ALRC FSI Report* (n 29) xx [31].
52 *Greylag Goose v PT Garuda (HCA)* (n 1) 835 [31].
53 Ibid 835 [34].
54 Ibid 838–9 [54]–[60] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); *ALRC FSI Report* (n 29) xx [29], 69–70 [116]–[117].
55 *Greylag Goose v PT Garuda (HCA)* (n 1) 849 [115] (Edelman J).

the provision itself could support either view.[56] The narrow construction would be the development of a confined historical exception, whereas a broad construction was more consistent with the 'overall objective of the series of provisions of which s 14 is a part': to generally exempt commercial activity from the immunity regime.[57] Edelman J ultimately agreed with the joint majority that the *ALRC FSI Report* evinced an intention to create a limited exception to ensure that courts can adjudicate conflicting property claims where a State might have an interest in the relevant property.[58] This speaks to the reason for the key divide between the majority and minority: namely, the emphasis placed upon extrinsic material (as will be discussed in Part III(B) below).

In dissenting, Gordon and Steward JJ favoured Greylag Goose's construction.[59] Their Honours held that the reference to 'body corporate' in the *FSI Act* s 14(3)(a) included a foreign State's separate entity.[60] They held that it was more consistent with the context and purpose of the provision for it be read to remove the general immunity conferred by s 9.[61] The text of s 14(3) did not support any basis to limit the general application of the words 'winding up of a body corporate'.[62] This was especially so when compared to sub-ss (1) and (2) of s 14, which were provisions in which the legislature had limited the application of an exception to situations where a foreign State held an interest in property — a manoeuvre not replicated in sub-s (3).[63] Gordon and Steward JJ emphasised a different aspect of the *FSI Act* that was not directly considered by the majority: namely, the Act's deliberate attenuation of immunity for separate entities of foreign States (contrasted with 'organs' or 'departments') in the context of a foreign State's immunity from execution in respect of its property.[64] Part IV of the *FSI Act* governs the immunity from execution of such property, which is conferred by s 30 and is subject to limited exceptions in ss 31–3. However, s 35 explicitly provides that pt IV (including the initial conferral of immunity) only applies to a separate entity if it is a central bank, monetary authority, or if it lost its jurisdictional immunity via waiver under s 10 and submitted to the jurisdiction of the Australian court.[65] Section 35 therefore operates to significantly curtail the immunity claimable over the property of a foreign State's separate entities.[66] As Gordon and Steward JJ identified, this suggests a deliberate attentiveness on the part of the legislature to the circumstances of State separate entities, which in an enforcement context 'expressly chose *not* to extend the immunity in s 30 to all separate entities of foreign States generally'.[67] This accorded

56 Ibid 848 [109] (Edelman J).
57 Ibid.
58 Ibid 853–4 [137].
59 Ibid 840 [68] (Gordon and Steward JJ).
60 Ibid 842 [78].
61 Ibid.
62 Ibid 842 [80].
63 Ibid 842 [81].
64 Ibid 843 [85]. See also *FSI Act* (n 2) s 3(1) (definition of 'separate entity'); *PT Garuda v ACCC (FCAFC)* (n 11) 421 [128] (Rares J).
65 See M Davies, AS Bell, PLG Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2020) 267 [10.41].
66 *Greylag Goose v PT Garuda (HCA)* (n 1) 843 [85] (Gordon and Steward JJ). See *ALRC FSI Report* (n 29) 84 [138].
67 *Greylag Goose v PT Garuda (HCA)* (n 1) 843 [85] (emphasis in original).

with the restrictive theory of immunity and the approach of the ALRC,[68] and the finding that State separate entities were subject to winding up under the provision was 'neither a threat to the dignity of a foreign State, nor an interference with its sovereign functions'.[69]

Gordon and Steward JJ disagreed with the implications of finding that s 22 conferred a substantive immunity. In their Honours' view, while s 22 conferred the same immunity upon a State's separate entities, it should not be understood 'to operate in exactly the same way, in practice, as against a separate entity as it does against a foreign State'.[70] They added that it should not be understood to confer *equal* immunity to the separate entity, and the field of operation of the immunity would necessarily be different: '[t]here can be no complete identity of operation of the Act to what is defined under the Act to be a "foreign State", let alone between a "foreign State" and a "separate entity"… the [*FSI Act*] expressly recognises that to be so'.[71] Gordon and Steward JJ also concluded that on a proper understanding of the restrictive theory of immunity, it was no objection that a bankruptcy of a head of a foreign State might be possible under s 14(3)(a).[72] Their Honours noted that the s 9 immunity applies to those individuals when acting in a *public* capacity — with their private affairs being determined in accordance with the *FSI Act* s 36 and the *Diplomatic Privileges and Immunities Act 1967* (Cth).[73]

## B *Extrinsic Material and the ALRC Foreign State Immunity Report*

The approach of Gordon and Steward JJ demonstrates a fidelity to the text and structure of the *FSI Act*, as well as the underlying policy of the restrictive theory of foreign State immunity. However, their Honours placed less emphasis on the *ALRC FSI Report* and other instruments similar to the *FSI Act* (like the *State Immunity Act 1978* (UK)) when compared with the majority. Rather than demonstrating any error in the majority's reasoning, however, this exhibits more the process of a constructional choice made by the majority and the minority. The phrase 'constructional choice' reflects the 'legal indeterminacy that is avoided only with difficulty in statutory drafting',[74] and the fact that context can reveal that statutory language is 'capable of a range of potential meanings … [t]he choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.[75] This is

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68 Ibid; *ALRC FSI Report* (n 29) 84 [138].
69 *Greylag Goose v PT Garuda (HCA)* (n 1) 845 [93] (Gordon and Steward JJ).
70 Ibid 846 [99] (Gordon and Steward JJ).
71 Ibid 847 [101] (Gordon and Steward JJ).
72 Ibid 846 [98].
73 Ibid.
74 *Momcilovic v The Queen* (2011) 245 CLR 1, 50 [50] (French CJ).
75 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, 557 [66] (Gageler and Keane JJ) ('*Taylor v SP 11564*'). See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 375 [38] (Gageler J); *Friends of Leadbeaters Possum Inc v VicForests* (2018) 260 FCR 1, 15 [44] (Mortimer J). See generally *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551, 589 [71] (Gageler J); Gordon Brysland and Suna Rizalar, 'Constructional Choice' (2018) 92(2) *Australian Law Journal* 81.

an appropriate prism through which to view the divide in the High Court, because both interpretations are reasonable in view of the general drafting of s 14(3).

Being more explicit with his approach to construction, Edelman J unpacked the necessity of having regard to the context and purpose of a provision. In *Taylor v Owners – Strata Plan No 11564*, French CJ, Crennan and Bell JJ considered that the question of whether the Court was justified in reading in or omitting words from statute was 'a judgment of matters of degree'.[76] On the permissible side, correction was appropriate in instances where drafting errors might defeat the object of the provision.[77] What would be impermissible would be a construction that 'fills "gaps disclosed in legislation"'[78] or made insertions '"too much at variance with the language in fact used by the legislature"'.[79] Edelman J emphasised that this latter quote did not signal a 'clarion call for textual fundamentalism without regard for context or purpose'.[80] Instead, the right way to interpret the majority's remarks in *Taylor v SP11564* was to understand that the legislature communicates to the public via the (usually) carefully chosen words found in legislation.[81] Legislative text, context, and purpose exist in a symbiotic relationship, and for Edelman J, 'if context and purpose clearly require a variance from the range of literal meanings of the text, then the text can bear even the opposite of its literal meaning(s)'.[82] In light of this, as well as the purpose explained in the *ALRC FSI Report*, his Honour preferred the narrow construction. In adopting this view, however, Edelman J recognised that PT Garuda (and hence the approach taken by the joint majority and lower courts) presented a strained reading of s 14(3) where it could 'comfortably',[83] without the context of the *ALRC FSI Report*, be read as applying to the winding up of *any* body corporate.[84]

There was marked disagreement in the High Court about the general policy that the *FSI Act* exceptions to jurisdictional immunity. Greylag Goose advanced an argument that the structure of the *FSI Act* pt II exhibited a legislative intent to implement a broad policy of removing immunity for general commercial or trading activities of foreign States.[85] The joint majority called this argument 'fundamentally erroneous' and 'diametrically opposed' to the ALRC's justification for the pt II exceptions.[86] The joint majority held, similar to Bell CJ in the court below, that the ALRC intended to implement a 'more complex set of distinctions' in the pt II exception regime, rather than a blanket governmental/commercial dichotomy.[87] The minority issued a direct parry to the joint majority's unequivocal rejection of the position that the exceptions in pt II reflected a general policy: '[t]hese enumerated exceptions generally reflect the overarching policy that "commercial or trading

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76 *Taylor v SP 11564* (n 75) 548 [38] (French CJ, Crennan and Bell JJ).
77 Ibid.
78 Ibid, quoting *Marshall v Watson* (1972) 124 CLR 640, 649 (Stephen J).
79 Ibid, quoting *Western Bank Ltd v Schindler* [1977] Ch 1, 18 (Scarman LJ).
80 *Greylag Goose v PT Garuda (HCA)* (n 1) 849 [116] (Edelman J).
81 Ibid.
82 Ibid 849 [117].
83 Ibid 849 [114].
84 Ibid 849 [114]–[115].
85 Ibid 836 [39] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).
86 Ibid 836 [41].
87 Ibid 836–7 [43]–[45], quoting *ALRC FSI Report* (n 29) 26 [46].

activities conducted by or on behalf of foreign governments *should not* attract the special jurisdictional immunity enjoyed by foreign States"'.[88] This sharp split demonstrates that while both the majority and minority consulted the *ALRC FSI Report*, the latter view the restrictive theory of foreign State immunity more as a substantive guiding principle underpinning the *FSI Act*.

The drafters of the *ALRC FSI Report* had regard to how other jurisdictions dealt with State immunity and foreign State interests in property in the forum. The report noted that the *State Immunity Act 1978* (UK), *European Convention on State Immunity*,[89] *State Immunity Act 1979* (Singapore), *State Immunity Ordinance 1981* (Pakistan) and International Law Commission's 1983 *Draft Articles on Jurisdictional Immunities of States and Their Property*[90] all contained provisions denying immunity in situations where a forum court is administering or supervising the administration of property in which a State has an interest.[91] The rationale for such a denial was that it is appropriate that the forum courts remain able to adjudicate on all conflicting claims to such property, with the ALRC explicitly identifying 'bankruptcy, insolvency, [and] the winding up of companies' as situations in which the necessity of this exception might be found.[92] Accordingly, it recommended Australia likewise implement such an exception in its *FSI Act*.[93] The joint majority examined the ALRC's thorough assessment of the international development of the exception[94] and concluded that 'it could hardly be clearer that the ALRC did not intend' to adopt anything other than PT Garuda's view of s 14(3).[95] Their Honours were of the view that it was not to the point that Parliament could have been clearer in its framing.[96] It is the ratio decidendi of the High Court that ss 14(3)(a) and 22 create an exception from jurisdictional immunity that will apply to a *Corporations Act* pt 5.7 proceeding only if and insofar as the proceeding concerns the winding up of a body corporate that is not the State's separate entity.[97]

## *An Aside on the Re-Enactment Principle and a 'Judicial Swallow'*

One point that was made clear in both the joint majority judgment and Edelman J's judgment was that there was no legislative endorsement of Greylag Goose's construction. The argument was made on the principle of statutory construction known as the re-enactment principle (sometimes called a presumption): 'where the

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88 *Greylag Goose v PT Garuda (HCA)* (n 1) 841 [74] (emphasis in original) (Gordon and Steward JJ), see also 841–2 [75]–[76]. Cf ibid 836 [41] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

89 *European Convention on State Immunity*, opened for signature 16 May 1972, ETS No 74 (entered into force 11 June 1976).

90 See International Law Commission, *Report of the International Law Commission on the Work of Its Thirty-Fifth Session* (3 May–22 July 1983), UN GAOR, 38th sess, Supp No 10, UN Doc A/38/10, reproduced in Yearbook of the International Law Commission (1983), vol II(2), 21–38.

91 *ALRC FSI Report* (n 29) 69 [117] n 132.

92 Ibid 69 [117].

93 Ibid.

94 *Greylag Goose v PT Garuda (HCA)* (n 1) 837–8 [49]–[57] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

95 Ibid 839 [59]. See also Fox and Webb (n 27) 426, 430; Jrög Philipp Terhechte, 'Article 13' in Roger O'Keefe and Christian J Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 225, 225–7, 229, 232.

96 *Greylag Goose v PT Garuda (HCA)* (n 1) 839 [59] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

97 Ibid 839 [61].

legislature has indicated its approval or disapproval of an interpretation placed upon an Act by the court'.[98] The difficulty in the principle is discerning the existence of parliamentary approval.[99] Supposed approval of a particular judicial interpretation by the legislature is harder to prove than rejection (it is fairly straightforward to discern when a judicial interpretation is reversed by an enactment).[100] The trouble for Greylag Goose was that this argument was made by reference to an unreported *ex tempore* interlocutory decision before a single judge in 1992,[101] giving rise to the joint majority's allusion to the *Nichomachean Ethics*: 'one judicial swallow does not make a legislative summer'.[102] The amendments were made in 2009 and 2022, they did not have a bearing on the relevant provisions, the 1992 judgment cited was not mentioned in the legislative extrinsic materials, and so this argument failed.[103]

## C *Corporate Considerations and 'Startling Insolvency Consequences'?*

One final theme emerging from the High Court's decision in *Greylag Goose* is the discussion of principles applicable to the *Corporations Act* and the 'startling insolvency consequences'[104] that were alleged by Greylag Goose if PT Garuda's interpretation was to be accepted.[105] The minority judges considered there to be force in this submission, concluding that PT Garuda's construction would lead to the result that a separate entity of a foreign State could 'continue to trade in Australia while insolvent without the ability of its creditors to insist on winding up'.[106] Their Honours reasoned that a separate entity, engaging in commercial activity in Australia, has deliberately submitted itself to the requirements the *Corporations Act* in carrying on that business in Australia,[107] and pursuant to s 583 of the Act, a pt 5.7 body (such as PT Garuda) could be wound up on the grounds of insolvency. Winding up such a body corporate in Australia would only affect that company's status within the country, and would not affect its corporate status in its home jurisdiction.[108] Such an understanding also accords with the restrictive theory of immunity and the fact that the operation of the *Corporations Act* is not displaced by the *FSI Act*.[109] Gordon and Steward JJ pointed to the fact that, for example, directors' duties still apply to

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98 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 10th ed, 2024) 142 [3.59]. See *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106–7; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 20–1 [52] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

99 *Greylag Goose v PT Garuda (HCA)* (n 1) 835–6 [38] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *Flaherty v Girgis* (1987) 162 CLR 574, 594. See also *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177, 186 [15] (Kiefel CJ, Keane and Gleeson JJ).

100 Pearce (n 98) 142 [3.59]; *Bushell v Repatriation Commission* (1992) 175 CLR 408, 425 (Brennan J).

101 *Adeang v Nauru Phosphate Royalties Trust* (Supreme Court of Victoria, Hayne J, 8 July 1992).

102 *Greylag Goose v PT Garuda (HCA)* (n 1) 836 [38] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

103 Ibid 835–6 [38]. See also 856 [148]–[149] (Edelman J).

104 Ibid 848 [110] (Edelman J). See also Appellants' Submissions (n 40) [35].

105 *Greylag Goose v PT Garuda (HCA)* (n 1) 847 [103], 848 [110]. See also Appellants' Submissions (n 40) [35].

106 *Greylag Goose v PT Garuda (HCA)* (n 1) 843 [83] (Gordon and Steward JJ).

107 Ibid 844 [88].

108 Ibid 845 [93].

109 Ibid 844 [89].

directors of a foreign company,[110] as well as the duty to prevent insolvent trading by *Corporations Act* s 588G.[111] Their Honours considered the ALRC's rationale for s 11 to similarly apply with great force in the context of insolvency:

> This idea — that a foreign State that has elected to participate in a body set up under local Australian laws can hardly complain when Australian laws apply to such a body and such a body is capable of supervision by Australian courts — applies with equal, if not greater, force in relation to a separate entity registered as a foreign company in Australia which is deemed insolvent. Such a separate entity should not be permitted to carry on business in Australia.[112]

These are significant considerations, and ones not addressed in the joint majority judgment. If they are correct, then in situations where multiple creditors seek to execute in relation to their debts over a State separate entity, the *Corporations Act*'s objective of 'securing equality of distribution amongst creditors of the same class' may be thwarted, and those creditors could face a '"race to the courthouse"' (contrary to the orderly and rateable distribution contemplated by the formal winding up of the entity).[113] However, Edelman J's judgment illuminates both why this may not be the case and why the strained reading of the insolvency exception may not likely be replicated in a future case.

For Edelman J, the concerns about insolvent trading were misplaced; there was a real possibility that the proper application of the *FSI* Act ss 11 and 22 precluded those consequences from eventuating.[114] His Honour noted that if it were the case that such insolvency consequences were the consequence of PT Garuda's submissions, then this would have created a 'significant inconsistency' with the objective of the pt II exceptions.[115] However, the commercial transaction exception found in s 11 was said to 'potentially' overlap with s 14, subject to non-commercial situations such as where just and equitable grounds (eg, management deadlock) arise.[116] This overlap provided one basis for his Honour to conclude that the scope of ss 11(1) and 22 provides a reason to doubt that the serious insolvency consequences advanced by Greylag Goose would be sustained.[117] This finding demonstrates one unusual aspect of the present case: s 11 was not argued by Greylag Goose, leading to a very confined assessment of s 14(3) without regard to the broad commercial transactions exception (which, while it was not necessary to decide, seems to have been thought by Edelman J to capture commercial insolvency).[118] Edelman, Steward, and Beech-Jones JJ each asked counsel for Greylag Goose in oral argument about s 11,[119] and in this respect this case appears to serve as a cautionary tale for creditors of State separate entities who do not attempt to utilise the broad

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110 Ibid 845 [92].
111 Ibid.
112 Ibid 845 [91].
113 Ibid 846 [95], quoting *G & M Aldridge Pty Ltd v Walsh* (2001) 203 CLR 662, 675 [30].
114 *Greylag Goose v PT Garuda (HCA)* (n 1) 848 [110] (Edelman J).
115 Ibid.
116 Ibid 852 [130].
117 Ibid 855 [143], [146].
118 Ibid 855 [146].
119 *Greylag Goose* HCATrans (n 40) 458 (Steward J), 1452–6 (Beech-Jones J) 1703–7 (Edelman J).

commercial transactions exception in s 11. In this case '[a] choice was made'[120] that may have lost Greylag Goose their claim.

## IV Which is the Better 'Constructional Choice'?

The modern purposive approach to statutory interpretation 'by legislative fiat' of the *Acts Interpretation Act 1901* (Cth) s 15AB,[121] begins with the context of a given statutory provision:

> The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.[122]

With this in mind, the majority decision in *Greylag Goose* represents a principled and contextually situated development in the interpretation of the *FSI Act*. All three prior High Court decisions that considered the Act have paid extensive regard to the *ALRC FSI Report*,[123] and for good reason. In an area where the sensitive political consequences of a revocation of sovereign immunity are drawn precisely by the legislature – as they have been in the *FSI Act*, which has as its subject matter 'the foreign relations of Australia as a nation'[124] — reliance upon the Crawford co-authored *ALRC FSI Report* is something to be welcomed in construing the *FSI Act*. It was noted in *Firebird Global Master Fund II Ltd v Nauru* that the *ALRC FSI Report* is 'significant' in helping courts ascertain 'the legislative context and purpose and the particular mischief that the [*FSI Act*] is seeking to remedy'.[125] However, the minority's approach in *Greylag Goose*, which places more emphasis on the *FSI Act*'s treatment of 'separate entities' and the use of the restrictive theory, is compelling. This is particularly so when reading the plain text of the statute and looking to the structure of the *FSI Act*. That being said, when having regard to the extrinsic material relied up on by the majority, it is clear that the intention of the drafters was the limited exception that the majority and the Court of Appeal favoured, and so the decision in *Greylag Goose*, while imperfect, is likely the correct one.

One practical difficulty that emerges from the decision, however, is the majority judgment's silence on the uncertainty with respect to the potential 'startling

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120 Ibid 462 (Steward J), 467 (PD Herzfeld SC).

121 *Sydney Seaplanes* (n 34) 11 [33] (Bell P); *Greylag Goose NSWCA* (n 3) 556 [16] (Bell CJ).

122 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ), quoting *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

123 See *Greylag Goose v PT Garuda (NSWCA)* (n 3) 557–8 [25]–[26] (Bell CJ); *PT Garuda v ACCC (HCA)* (n 12) 245 [7], 247–8 [18] (French CJ, Gummow, Hayne and Crennan JJ); *Firebird* (n 27) 41–3 [5]–[11] (French CJ and Kiefel J), 72–3 [140]–[142] (Gageler J), 81–9 [173]–[198] (Nettle and Gordon JJ); *Infrastructure Services* (n 36) 306 [11], 307–8 [17]–[18] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

124 *Zhang v Zemin* (2010) 79 NSWLR 513, 540 [159] (Allsop P) ('*Zhang v Zemin*').

125 *Firebird* (n 27) 81 [173] (Nettle and Gordon JJ). See also *Greylag Goose v PT Garuda (NSWCA)* (n 3) 557 [22]; *Zhang v Zemin* (n 124) 537–9 [138]–[148] (Spigelman CJ), 540 [158] (Allsop P).

insolvency consequences' alleged by Greylag Goose.[126] Greylag Goose's decision not to plead the much broader commercial transactions exception found in *FSI Act* s 11 confined the issues narrowly, limiting the Court's scope to consider that question. However, counsel for PT Garuda were pushed into a quick submission on s 11 in oral argument:

> EDELMAN J: So, you would then be arguing that — in an abstract claim that is said to be brought within section 11(1), based on a foreign entity's commercial transaction that leads to alleged insolvency, you would say, then, that section 14, because of its specific purpose, covers the field in relation to winding up, even for that specific commercial transaction.
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> [Counsel for PT Garuda]: Yes.[127]

This submission was not taken further and should it come before the courts again, it should be rejected. It has been recognised that while the pt II exceptions to jurisdictional immunity are to be read disjunctively, they do overlap.[128] If it was considered that s 14 covered the field with respect to insolvency situations, it would never be the case that separate entities of a foreign State would be subject to winding up proceedings, and hence could continue to trade while insolvent in Australia. A separate entity is an 'agency' or 'instrumentality' of a foreign State, but those terms are not defined in the *FSI Act*.[129] This was the subject of the previous Full Federal Court decision involving PT Garuda, where Rares J noted that an entity may be a 'separate entity' (and hence benefit from jurisdictional immunity) even for a 'one off-transaction, act or activity' provided the entity is 'acting for, or being used by, the foreign State as its means to achieve some purpose or end of that State'.[130] Given the permissiveness of this definition, it is very likely that a large number of entities might benefit from jurisdictional immunity in this way, increasing the potential scope of the issue. As the separate judgment of Edelman J identified, however, the reality is that the 'elasticity of the concepts of a "commercial transaction" and "a separate entity of a foreign State"' likely cover the majority of commercial situations in which an application for winding up would occur.[131] However, without the majority's weighing in on this issue, the insolvency consequences accepted by the minority remain at large. What is left then, from *Greylag Goose* is a result that is unlikely to be repeated, and a case that showcases the difficulty of raising the spectre of 'dramatic insolvency consequences' in the abstract, without hearing submissions on the reality of those consequences materialising.

The High Court's split, while one concerning construction and the emphasis placed on extrinsic materials, ultimately sounds in a political consequence: how much control does (or should) Australia retain over foreign State-owned corporations within its territory? Can any body corporate that subjects itself to the Australian corporate legislative regime be wound up? For the joint majority, the

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126 *Greylag Goose v PT Garuda (HCA)* (n 1) 848 [110] (Edelman J). See also Appellants' Submissions (n 40) [35].

127 *Greylag Goose* HCATrans (n 40) 1703–9. See also 1711–27.

128 *Greylag Goose v PT Garuda (HCA)* (n 1) 837 [46] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); *Firebird* (n 27) 55 [62] (French CJ and Kiefel J); *ALRC FSI Report* (n 29) 50–1 [88].

129 *FSI Act* (n 2) s 3(1) (definition of 'separate entity').

130 *PT Garuda v ACCC (FCAFC)* (n 11) 421 [128].

131 *Greylag Goose v PT Garuda (HCA)* (n 1) 855 [146] (Edelman J).

answer is no: sovereign immunity has been drawn in a way that precludes absolute oversight over bodies corporate in Australia. For the minority, the *FSI Act*'s limiting of immunity for State separate entities and the practical assumption of risk and legal responsibility that a foreign State undertakes by choosing to carry on business in Australia is sufficient justification to conclude that immunity was not intended to prevent the winding up of those entities. The tension here is as old as State immunity itself. Since foreign State immunity is derived from the sovereign equality of States, 'exceptions to the immunity of the State represent a departure from the principle of sovereign equality [yet] [i]mmunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it'.[132] The degree to which the *FSI Act* favours one or the other, especially when its language is capable of supporting either construction, is ultimately a point upon which reasonable minds might (and have) differed.

## V Conclusion

The High Court's decision in *Greylag Goose* demonstrates the fine constructional split that can occur when presented with statutory provisions drafted in general language. The role of context and extrinsic material continues to be emphasised in cases concerning the *FSI Act* and this is a positive trend because of the sensitivity of the subject matter. The case was ultimately concerned with the operation of an insolvency exception found in the *FSI Act* s 14(3), which was held by the majority to have a very limited scope of operation. That scope permits Australian courts to adjudicate on property disputes in which a State has an interest, in instances of a bankruptcy, insolvency, or the winding up of a body corporate *other* than a State's separate entity. Their Honours also held that the *FSI Act* s 22 operated substantively to require the application of immunity in the same terms as between a State and its separate entity. The dissenting justices placed emphasis on the open language of the provision, the *FSI Act*'s pt IV restriction on immunity for such State entities, and the general restrictive theory of sovereign immunity to conclude that the exception should be read to include foreign State separate entities. The decision may however produce some uncertainty, particularly for the creditors of State separate entities within Australia. I suggest that Edelman J's assessment of the situation, however, likely reduces this risk, in view of the operation of *FSI Act* s 11. This conclusion also demonstrates the general cautionary tale that *Greylag Goose* presents, of a failure to run the broad commercial transactions exception in insolvency suits against State emanations.

[132] *Jurisdictional Immunities of the State (Germany v Italy:Greece intervening) (Judgment)* [2012] ICJ Reports 99, 124 [57]. See also *Greylag Goose v PT Garuda (HCA)* (n 1) 849–50 [119] (Edelman J).