Form 27A
(rule 44.02.2)

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S178 of 2012

BETWEEN:

TCL AIR CONDITIONER (ZHONGSHAN) CO LTD

Plaintiff

and

THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA

First Defendant

CASTEL ELECTRONICS PTY LTD

Second Defendant

PLAINTIFF'S SUBMISSIONS

PART I: CERTIFICATION FOR PUBLICATION ON INTERNET

1 It is certified that these submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2 This is an application for an order to show cause why prohibition should not issue to restrain the Judges of the Federal Court of Australia ("**first defendant**") from enforcing arbitral awards made in relation to a dispute between the plaintiff and the second defendant pursuant to the *International Arbitration Act 1974* (Cth) ("**IAA**"). Should Murphy J make any orders before this application is determined in the Court, the application may also concern why a writ of certiorari should not issue to quash his Honour's judgment in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*[1] ("***Castel***") and any subsequent judgment.

3 This application raises the following questions:

(a) first, whether the IAA, including by its application of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), by enlisting the Federal Court of Australia in an arrangement to facilitate arbitration and then enforce the resulting arbitral awards, substantially impairs the institutional integrity of the Federal Court of Australia; and

(b) secondly, whether the IAA, by operation of arts 5 and 34 to 36 of the Model Law, read with s 7 and Part III of the IAA, impermissibly vests the Commonwealth judicial power on arbitral tribunals.

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1 (2012) 201 FCR 209.

Filed on behalf of: The Plaintiff
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PART III: CERTIFICATION OF COMPLIANCE WITH S 78B OF JUDICIARY ACT

4 The plaintiff filed and served notices in accordance with s 78B of the *Judiciary Act 1903* (Cth) ("**Judiciary Act**") on 4 July 2012.

PART IV: CITATIONS

5 The decision of Murphy J is *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.

PART V: FACTS

Contract and agreement to arbitrate

6 On 29 December 2003, the plaintiff, a company whose place of business was and remains the People's Republic of China, entered into a written agreement with the second defendant, a company whose place of business was and remains Victoria, pursuant to which the plaintiff agreed to supply air conditioners to the second defendant on certain terms and conditions (AB 129). This agreement, which was amended on 29 May 2007 (AB 132), was called the General Distribution Agreement ("**GDA**") (AB 129). By art 12(i) of the GDA, the parties relevantly agreed:

> *"In case there is any breach of the provisions under this AGREEMENT by either party during the effective period of this AGREEMENT, the parties hereto shall first of all try to settle the matter in question as soon and amicable [sic] as possible to mutual satisfaction or if not so settled within 60 days such matters will be referred to arbitration in Territory for resolution."* (AB 130).

7 That was the full extent of provision in the GDA regarding the arbitration of disputes.

Arbitration

8 In July 2008, the second defendant submitted its claims against the plaintiff under the GDA to arbitration in Australia. Those claims, totalling over $30 million, were to the effect that the plaintiff had breached the GDA. The plaintiff counter-claimed. The claims were purely contractual in nature (AB 27). The parties agreed that the substantive law to be applied to the dispute was that of Victoria (AB 27).

9 Following a 10 day hearing in September 2010, an Arbitral Tribunal comprising three members (Dr G Griffith AO QC, the Hon A Goldberg AO QC and Mr P Riordan SC) made an award on 23 December 2010 upholding the second defendant's claims and directing the plaintiff to pay the second defendant $3,369,351 within 28 days, and also upholding the plaintiff's counter claim and directing the second defendant to pay it $209,036 within 28 days (AB 135). The Arbitral Tribunal's award included written reasons (AB 15). On 27 January 2011, the Arbitral Tribunal awarded the second defendant $732,500 in costs (AB 137). This award also included written reasons (AB 111) ("**Arbitral Awards**").

Enforcement proceedings

10 On 18 March 2011, the second defendant commenced proceedings on an ex parte basis in the Federal Court of Australia (VID218 of 2011) seeking to enforce the Arbitral Awards (AB 121) ("**Enforcement Proceedings**"). This was the first case in Australia in which enforcement had been sought in an Australian court pursuant to art 35 of the Model Law. The plaintiff opposed that application, including on the basis that the Federal Court of Australia did not have jurisdiction under art 35 of the Model Law, and made further applications (VID224 and VID317 of 2011) to set aside each of the Arbitral Awards pursuant to art 34 of the Model Law (AB 184, 198).

11 On 23 January 2012 in proceedings VID218 of 2011, Murphy J held that the Federal Court had jurisdiction under art 35 of the Model Law to enforce the Arbitral Awards: *Castel* (AB 154). The plaintiff did not raise a constitutional objection to jurisdiction before Murphy J. No orders have yet been made to give effect to that judgment.

12 From 23 to 26 April 2012, Murphy J heard the balance of the applications, comprising the plaintiff's applications to set aside the Arbitral Awards and the second defendant's application to enforce them. His Honour's judgment is presently reserved (AB 12).

PART VI: ARGUMENT

Overview

13 These submissions first outline the operation of the IAA including the Model Law. Five preliminary points are then made, relating respectively to the source of an arbitral tribunal's power and its status; the nature of the task the Arbitral Tribunal performed in this case; the precise mechanism by which enforcement is achieved under art 35 of the Model Law; the limited exceptions to enforceability of arbitral awards; and the exclusion of the court's traditional supervisory jurisdiction with respect to arbitral awards. These points lay the foundation for the contentions that the IAA, through the Model Law: (a) substantially impairs the institutional integrity of the Federal Court of Australia; and (b) impermissibly vests Commonwealth judicial power in arbitral tribunals by making their awards binding and conclusive.

14 In summary, the plaintiff's case is that whilst historically parties could, by agreement, delegate the quintessentially judicial function of determination of contractual disputes to private arbitral tribunals, the process was limited by the parties' agreement and willingness to continue the arbitral process, together with a level of judicial supervision before any judicial power was enlisted in support to enforce. The IAA takes arbitration beyond the agreement of the parties, removes the supervision of the courts and mandates enforcement on the basis of a fiction, namely that there is a valid and binding award so deemed by the IAA. The IAA then brings to the aid of arbitration the power of the judiciary to ultimately quell the dispute between the parties, without any substantive involvement by the court in the resolution of that controversy, no matter how egregious the errors of law on the face of the award and no matter what limitations were placed on the parties' agreement. In so doing, the IAA impairs the institutional integrity of federal courts, and impermissibly vests Commonwealth judicial power on arbitral tribunals.

Operation of the IAA

Introduction and amendment of IAA

15 At the time of the original enactment of the IAA on 9 December 1974, it was known as the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth). It was intended to give effect to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in New York in 1958 by the United Nations Conference on International Commercial Arbitration ("**New York Convention**").

16 In 1989, following the enactment of the *International Arbitration Amendment Act 1989* (Cth) ("**Amending Act**"), the Act was renamed the IAA and provisions were introduced to give domestic effect to the Model Law. The IAA was amended again in 2010, primarily to give effect to the 2006 amendments to the Model Law and to overcome perceived difficulties with the IAA and the manner in which it was applied by some courts ("**2010 Amendments**").

17 The objects of the IAA are set out in s 2D. They relevantly include the facilitation of the recognition and enforcement of arbitral awards made in relation to international trade and commerce (s 2D(c)) and giving effect to the Model Law (s 2D(e)).

18 Part II (ss 3 to 14) of the IAA is concerned with the enforcement of "*foreign awards*", that is, awards made in a New York Convention country other than Australia and gives effect to Australia's obligations under the New York Convention. For the purpose of the present application it is not necessary to consider the operation of Part II in further detail.

19 Part III (ss 15 to 30A) of the IAA, which is presently relevant, is concerned with the powers of arbitral tribunals, court assistance for arbitrations, and the enforcement of international commercial arbitral awards which fall outside of the New York Convention, including awards that have been made in Australia. These were referred to by Murphy J in *Castel* as *"non-foreign awards"* to distinguish them from *"domestic awards"* which are made in purely domestic commercial arbitrations to which the relevant State or Territory Commercial Arbitration Act applies.

20 Division 2 of Part III applies the Model Law as the law in Australia subject to certain modifications. Section 16(1) of the IAA gives the Model Law the force of law in Australia subject to Part III of the IAA and incorporates it by Schedule 2.

21 Prior to the 2010 Amendments, parties could opt out of the Model Law and rely instead upon a relevant State or Territory Commercial Arbitration Act. This allowed parties to avail themselves of the procedures then contained in those Acts, including for questions of law to be determined by the Supreme Court or for an *"appeal"* on *"any question of law arising out of an award"*.[2] The amended s 21 of the IAA, which excludes State and Territory law where the Model Law applies, removes the ability to opt out of the Model Law.

The Model Law

22 The relevant provisions of the Model Law are as follows. By art 1(1), the Model Law applies to "*international commercial arbitration*". An "*arbitration*" is defined in art 2(a) as "*any arbitration whether or not administered by a permanent arbitral institution*". Article 1(3) sets out the circumstances in which an arbitration is to be regarded as "*international*", and relevantly includes where "*the parties to an arbitration agreement have their businesses in different States*" at the time of entry into the agreement. According to endnote 2 to art 1(1), the term "*commercial*" should be given a "*wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not ...*".

23 By art 1(2), the provisions of the Model Law (except arts 8, 9, 17H, 17I, 17J, 35 and 36) apply only where the place of arbitration is that of "*this State*", which is the State in which the arbitration takes place.

24 Article 5 of the Model Law ousts the jurisdiction of the courts subject to limited exceptions, providing: *"[i]n matters governed by this Law, no court shall intervene except where so provided in this Law."* Article 6 confers a limited power upon specified courts to intervene for the purpose of exercising certain functions (being those functions referred to in arts 11(3), 11(4), 13(3), 14 and 16(3)) and setting aside final awards on certain limited grounds in accordance with art 34(2). Section 18(3) of the IAA specifies the "*courts*" for the purpose of the functions referred to in arts 13(3), 14, 16(3) and 34(2) as being the Supreme Court of the State or Territory where the arbitration has or will be conducted or

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2 See, eg, *Commercial Arbitration Act 1984* (NSW) (Repealed), ss 38 and 39.

the Federal Court of Australia.[3] For the purpose of these submissions a court within the meaning of art 6 will be called a "**specified court**". The only other permissible role for courts under the Model Law is to enforce "*interim measures*" pursuant to arts 17H and 17I and final awards pursuant to arts 35 and 36.

25 By art 8, the Model Law directs a court in which an action has been brought but where an "*arbitration agreement*"[4] applies, to refer the parties to arbitration, if a party so applies. A court may only refuse to do so if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 7(2) of the IAA is to the same effect, and also applies in this case by virtue of s 7(1)(d), since the plaintiff is domiciled in the People's Republic of China, a New York Convention country.

26 Chapter III of the Model Law provides machinery to assist in the formation of the arbitral tribunal. It provides for the composition of an arbitral tribunal (art 10), the appointment of arbitrators (art 11) and a procedure for challenging an arbitrator's appointment (arts 12 and 13) where those matters have not been agreed by the parties. Chapter III also provides for the termination of an arbitrator's appointment (art 14) and the appointment of a substitute arbitrator (art 15).

27 Of present significance, Chapter III of the Model Law enlists the enforcement powers of the specified court to resolve certain problems concerning the formation of the arbitral tribunal. These include for a specified court to "*decide on the challenge*" to an arbitrator (art 13(3)),[5] and to "*decide on the termination of the mandate*" where an arbitrator becomes *de jure* or *de facto* unable to perform his functions or unduly delays and fails to withdraw, or the parties fail to agree on his termination (art 14(1)). Articles 13(3) and 14(1) provide that the court's decisions described above "*shall be subject to no appeal*".

28 Chapter IV of the Model Law gives an arbitral tribunal the power to rule on its own jurisdiction (art 16). Where an arbitral tribunal rules as a preliminary question that it has jurisdiction, an objecting party may apply to a specified court to "*decide the matter.*" Such a decision cannot be appealed (art 16(3)).

29 Chapter IVA of the Model Law, which was adopted by UNCITRAL in 2006, confers a range of powers upon an arbitral tribunal to order "*interim measures*". Article 17(1) empowers an arbitral tribunal, at the request of a party, to grant "*interim measures*" upon satisfaction of the criteria set out in art 17A. A party may apply to the arbitral tribunal for an interim measure without notice to the other party (art 17B(1)). Articles 17D to 17G confer a range of powers upon an arbitral tribunal relevant to interim measures, such as the power in art 17E to require a party to provide security.

30 Article 17H makes provision for the recognition and enforcement by a court of "*interim measures*". Article 17I(1) sets out a limited number of grounds upon which a court may refuse to enforce an interim measure. Articles 17H and 17I substantially mirror the enforcement provisions in arts 35 and 36.

31 In addition to empowering an arbitral tribunal to order interim measures, the Model Law in art 17J also gives the "*same power*" to a court to do so. Under art 17J, the court "*shall*

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3 For arts 11(3) and 11(4), however, ss 18(2) and (3) of the IAA have the effect that the relevant "*court*" is the Australian Centre for International Commercial Arbitration, which is the body prescribed by Regulation 4 of the *International Arbitration Regulations 2011* (Cth).

4 Section 16(2) of the IAA adopts the "*option 1*" definition of "*arbitration agreement*" in art 7, which relevantly, is *"an agreement by the parties to submit to arbitration of all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship ...".* By art 7(2), the agreement must be in writing.

5 Although, while this application is proceeding, the arbitral tribunal may continue the arbitral proceedings and make an award.

exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration".

32 Chapter V of the Model Law makes detailed provision for the conduct of arbitral proceedings. By art 18, the parties shall be treated with equality and be given a "*full opportunity*" to present their cases (which by s 18C of the IAA is defined to be a "*reasonable opportunity*"). Articles 19 to 27 lay out the rules of procedure, unless the parties have otherwise agreed on the procedure, including on the exchange of statements of claim and defences, oral hearings and evidence. Article 27 empowers an arbitral tribunal or a party (with the arbitral tribunal's approval) to request the court's assistance in taking evidence and the court "*may execute the request within its competence and according to its rules on taking evidence.*"

33 Chapter VI of the Model Law makes provision for how the award is to be made and for termination of arbitral proceedings. Article 28 requires the tribunal to "*decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute*". However, where the parties have failed to agree the law to be applied, art 28(2) authorises the arbitral tribunal to determine the law to apply by resort to the conflict of laws rules it considers to be appropriate. Article 29 provides that where there is more than one arbitrator, any decision of the arbitral tribunal shall be by majority unless the parties otherwise agree. Article 30 provides for the arbitral tribunal to make an arbitral award on agreed terms in the event of settlement, which has the same effect as an award on the merits of the case. Article 31 requires an award to be in writing signed by the arbitrator or arbitrators. The award must state the reasons upon which it is based unless the parties have agreed to dispense with reasons or it is an award under art 30. Pursuant to art 32(1), the final award operates to terminate the arbitral proceedings. Further, under art 32(2), the arbitral tribunal may issue an order terminating the arbitration in certain defined circumstances. Article 33 confers a limited right upon the parties to seek from the tribunal minor non-substantive corrections of an arbitral award or interpretation of part of the award.

34 Chapter VII of the Model Law makes provision for an award to be set aside in a limited number of grounds by a specified court, which mirror the grounds upon which the Court may, under art 36 of the Model Law, refuse to enforce the award. Article 34(1) provides that "*[r]ecourse to a court against an arbitral award may be made only*" by an application in accordance with art 34. There is no allowance for a parties' contrary agreement such that, read with art 5 of the Model Law and s 21 of the IAA, the parties are unable to agree to expand the grounds of review for a court. Additionally, art 34(3) imposes a time bar for the making of an application to set aside an award which the court has no discretion to extend (which follows from the broad ouster of the court's jurisdiction by art 5).

35 Chapter VIII of the Model Law provides for the recognition and enforcement of arbitral awards to which the New York Convention does not apply. Instead, New York Convention awards are enforced under Part II of the IAA. Article 35(1) requires awards to be "*recognized as binding*" and authorises a party to apply to a "*competent court*" to enforce the award. Article 35(1) then directs the court to enforce the award subject to arts 35 and 36. The only requirement imposed by art 35 is that the party must furnish an original or copy of the award. Article 36, discussed in further detail below, then sets out a limited number of bases upon which the court may refuse to enforce the award.

IAA machinery provisions for the conduct of arbitration

36 Returning now to the IAA, Division 3 of Part III creates certain additional machinery for the conduct of arbitrations to which the Model Law applies. The first set of provisions (being those identified in s 22(2)) apply to all arbitral proceedings unless the parties expressly exclude them. The second set of provisions (being those identified in s 22(3))

apply only if the parties expressly agree that they will apply. Some of the provisions give additional powers to the arbitral tribunal (for example, to order security for costs (s 23K), to order a person to inspect evidence or perform experiments (s 23J), to order interest up to the making of the award (s 25), to order interest on a debt under the award (s 26) and to order costs (s 27)). Some of the provisions empower the parties and a tribunal to enlist the courts to facilitate the arbitration (for example, by issuing subpoenas (s 23(3)) or ordering a person to attend for examination or production of documents (s 23A(3))).

Introductory points

37 Before turning to outline the specific constitutional objections to the enforcement regime under the Model Law, five preliminary points may conveniently be made.

Point one: arbitral tribunals are hybrid authorities sourced in private and public power

38 The first point is that arbitral tribunals under the Model Law are not creatures purely of private agreement. The Model Law plays a role in their constitution, confers various powers upon them, prescribes aspects of their procedure and also aspects of the process of award-making, including a requirement to give reasons. The Model Law also empowers the parties and the arbitral tribunal to call in aid the courts in various respects during the process of arbitration. Further, arbitral proceedings can affect the rights of third parties as a result of the co-option of court powers for the purpose of the conduct of the arbitral proceedings. Thus, a third party may be subpoenaed for the purpose of arbitral proceedings (s 23). It is therefore "*going too far to conclude that performance of the arbitral function is purely a private matter of contract, in which the parties have given up their rights to engage in judicial power, and is wholly divorced from the exercise of public authority.*"[6]

39 An arbitral tribunal is a hybrid authority appointed through the joint action of the parties and the State and whose functions and powers are partly conferred by private agreement and partly by legislation. Moreover, in a real sense the arbitral tribunals depend for their successful operation on the courts bringing to bear their enforcement powers at various points in the arbitral process where the parties or third parties will not otherwise cooperate.

Point two: many hallmarks of the judicial power

40 The second point is that, leaving aside matters of enforcement for the moment, the power exercised by the Arbitral Tribunal in this case featured many of the hallmarks of the judicial power. The Arbitral Tribunal was called upon to decide a controversy between parties,[7] being a purely contractual dispute, by determining their existing rights and obligations[8] by way of making findings of fact[9] and applying the law to those facts (rather

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6 *Westport Insurance v Gordian Runoff* (2011) 244 CLR 239 ("***Westport***"), 261 [20] (French CJ, Gummow, Crennan and Bell JJ).

7 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

8 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 ("***Alexander***"), 463 (Isaacs and Rich JJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Dean, Dawson, Toohey, Gaudron and McHugh JJ).

9 *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Dean JJ); *South Australia v Totani* (2010) 242 CLR 1 ("***Totani***"), 63 [131] (Gummow J).

than policies or discretions).[10] The trial of actions for breach of contract is historically regarded as the province of the judicial power.[11]

41 It is not useful to assert that the Arbitral Tribunal exercised some sort of generic "arbitral power".[12] What the arbitral power involves will vary according to the task conferred upon the arbitrator and the processes and procedures by which he or she fulfills that task. Thus in *Waterside Workers' Federation of Australia v JW Alexander Ltd*,[13] Griffith CJ said that "*the epithet 'arbitral', which is used as if its use were on some points conclusive, is not a term of art*" and said it was an "*obvious fallacy*" to assert that judicial power and arbitral power are mutually exclusive. As was noted by Deane, Dawson, Gaudron and McHugh JJ in *Brandy v Human Rights and Equal Opportunity Commission* ("***Brandy***"),[14] arbitral powers may also involve the determination of existing rights and obligations. Such is the present case.

42 In *Dobbs v National Bank of Australasia Ltd*[15] it was stated that an award operated to create "*new*" obligations in substitution for the original cause of action. That does not mean that the arbitrator was not determining existing rights and liabilities. It means that when the award was coupled with a contractual promise to abide by the award, a new set of rights and obligations were created.[16] In a like manner, a court's order creates new rights and obligations in substitute of the original cause of action but by the determination of existing rights and obligations.

Point three: mechanism by which court "enforces" under art 35 of the Model Law

43 The third point raises for consideration the precise mechanism by which courts enforce arbitral awards under art 35 of the Model Law, and thus, the nature of the enforcement proceeding before them. No provision of the IAA operates to specifically vest jurisdiction in any Australian court for the purposes of enforcement under art 35. The expression "*competent court*" used in art 35 is not defined (although in *Castel,* [57], Murphy J held that the Federal Court was a "*competent court*" since s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) conferred it with jurisdiction in any matter arising under a federal law.[17]) (AB 172). The plaintiff does not accept the correctness of that decision, but for present purposes, will proceed upon the assumption that it was correct.

44 Further, neither the Model Law nor the IAA more generally make provision for how an award is to be enforced by a "*competent court*" under art 35 of the Model Law. The

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10 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ); *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, 290 (Dixon CJ).

11 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J); *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11 (Jacobs J).

12 Cf *Alexander* (1918) 25 CLR 434, 463 – 4 (Isaacs and Rich JJ) in the specific context of the arbitration of awards under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), where arbitration was directed towards the making of industrial awards and was more akin to a legislative power of creating new rights.

13 (1918) 25 CLR 434, 446 (Griffith CJ).

14 (1995) 183 CLR 245, 268 (Deane, Dawson, Gaudron and McHugh JJ).

15 (1935) 53 CLR 643, 653-4 (Rich, Dixon, Evatt, and McTiernan JJ).

16 Awards determining the existence of a debt, however, were not considered to create new rights or liabilities, rather the original action on the debt remained to the extent the award was unsatisfied (*Allen v Milner* (1831) 2 Cr & J 47 [149 ER 20, 21-2]; *F J Bloemen Pty Ltd v Council of the City of Gold Coast* [1973] 1 AC 115 ("***Bloemen***"), 124).

17 See also Justice Steven Rares, "The Federal Court of Australia's international arbitration list" (FCA) [2011] *FedJSchol* 17.

Federal Court Rules 1976 ("**Old FCR**"), which applied at the time that the Enforcement Proceedings were commenced, also provided no specific guidance (and similarly, the *Federal Court Rules 2011* ("**FCR**") at rr 28.41 - 28.50 provide no guidance now).

45 Where no procedure is provided for the exercise by a court of its jurisdiction, Order 1 r 9 of the Old FCR provided for a party to seek guidance on the correct procedure. Had the second defendant so applied, it is most likely that for enforcement under art 35, the Court would have directed the application of the procedure specified for the rules for the enforcement of awards under s 8 (foreign awards) and s 35 ("**Investment Convention Awards**").[18] Such an approach is consistent with the "*policy decision*" identified in the *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*[19] that "*the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should closely follow the New York Convention*".[20] Both procedures, prescribed by Order 68 rules 4 and 6 respectively of the Old FCR, were short form procedures that permitted applications to made on an ex parte basis.[21]

46 Moreover, the order that the second defendant sought (that the Court enforce the Arbitral Awards "*as if each were a judgment of the Federal Court of Australia*") is most likely the appropriate order to seek under art 35 of the Model Law. This follows from s 54(1) of the *Federal Court of Australia Act 1976* (Cth) ("**FCA**"), which gives the Court the power to make an order in terms of an award.[22] Section 54(2) of the FCA provides that, subject to s 54(3), "an *order so made is enforceable in the same manner as if it had been made in an action in the Court*".

47 However, there is an important difference between a court-ordered arbitration under s 53A of the FCA and an international commercial arbitration, and that is that an award made under the former process is amenable to full review by the Court in accordance with s 53AB of the FCA, while an award made by an arbitral tribunal under the Model Law is not.

48 If, for the purposes of art 35 of the Model Law, the Court did make an order in accordance with s 54(1) of the FCA, then what it would do is duplicate the orders made by the Arbitral Tribunal. In substance, therefore, the Court is treating the arbitral award "as if" it was an order of the Court and makes orders in terms of the award.[23] This may include awards which provide relief in the form of specific performance, a declaration or an injunction.[24]

49 The above analysis shows that the Court is not enforcing any implied agreement by the parties to abide by the arbitral award. That is to proceed on the basis of a fiction. The express words of art 35 are clear: the court is enforcing the award.

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18 Cf *Browne v Commissioner for Railways* (1935) 36 SR (NSW) 21, 29.

19 Note that s 17 of the IAA provides that UNCITRAL documents may be used for the purpose of interpreting the Model Law.

20 UNCITRAL Secretariat, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* (2007) < http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf>, [50].

21 The FCR similarly provide for ex parte applications (r 28.44(3)).

22 See *Castel*, 221, [58].

23 In the context of enforcement under s 8 of the IAA, see *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535, ("*Traxys*"), 551 [68] - [72] and the authorities referred to therein.

24 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206, 237 (Stephen J) and 246-7 (Mason J); *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC 169, [44].

50 That the Court is not enforcing any sort of implied agreement to abide by the award is made patent by the fact that the Court is required to enforce the award notwithstanding that the award may have been made on the basis of a legal error apparent on its face. Unless expressly stated in the arbitration agreements, parties are not taken to have agreed to abide by an award infected by legal error on its face.[25] Authorities holding to the effect that in enforcing an award, the court was enforcing an agreement to abide by that award[26] must be regarded with caution and due appreciation of the fact that the principle was stated at a time when the court exercised a supervisory jurisdiction over the award (which, as will be explained below, has now been removed).

51 Any suggestion that the enforcement of an award is merely enforcement of a contractual promise to abide is inapposite also because it ignores the fact that court enforcement of an award can affect the rights of third parties. A liquidator's rejection of a proof of debt in the winding up of a company can be a matter referred to arbitration depending upon the ground for rejection.[27] Yet the determination of that arbitration will affect the interests of the general body of creditors and contributories. Similarly, where an award in the nature of an injunction is converted into a court order, it may implicate third parties such as banks who unwittingly take steps in contravention of an injunction. Query too whether a determination of liability as between A and B in an award thereby entitles B to seek contribution from C, with the award being conclusive as to the question of A's liability to B.[28]

Point four: limited exceptions to enforceability

52 The fourth point is that the grounds upon which a court may refuse to enforce an award under art 36 of the Model Law (or set aside an award under art 34) are limited and essentially relate only to the fairness of the conduct of the arbitration. They are not concerned with the substantive outcome.[29]

53 The legislative intention is that the exceptions be narrowly confined. In the second reading speech to the Bill which introduced the Model Law, the then Attorney-General said the Model Law "*will limit judicial intervention and supervision of an arbitration to a greater degree than under present Australian law*".[30] This is consistent with the approach taken in other jurisdictions to the exceptions to enforcement found within the New York Convention or the Model Law.[31]

54 The clear legislative direction in s 39(2)(b) of the IAA also stands against a wide construction of the exceptions in art 36. Section 39(2)(b) directs that a court exercising

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25 *Kelantan Government v Duff Development Co* [1923] AC 395, 409; *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570, 586 (Isaacs J).

26 Cf *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753, 765; *Bloemen*, [1973] 1 AC 115, 126.

27 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332.

28 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 211-12 (Dixon CJ, McTiernan, Webb, Fullagar, Taylor JJ); *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213, 221 (Windeyer J); *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53, 65 (Gaudron and Gummow JJ).

29 *Sui Southern Gas Co Ltd v Habribulla Coastal Power Co (Pte) Ltd* [2010] 3 SCR 1, 8 [20]-[21], 12 [37].

30 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1988, 2399 (Lionel Bowen).

31 See, eg, *Scherk v Alberto-Culver Co* 417 US 506, 516-7 (1974); *CBI NZ Ltd v Badger Chiyoda* (1989) 2 NZLR 669, 682-3; *Desputeaux v Éditions Chouette (1987) Inc* [2003] 1 SCR 178, [68]; *Sui Southern Gas Co Ltd v Habribulla Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1, 13 [47]-[48]; *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] SGHC 166, [54].

certain functions, including those of enforcement under arts 35 and 36 of the Model Law, must have regard to both the objects of the Act and the "*fact*" that *"arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes"* and that *"awards are intended to provide certainty and finality"* (emphasis added).

55 Further, the "public policy" exception in art 36(1)(b)(ii) does not confer a wide review jurisdiction upon a court. Section 19 of the IAA declares that an award conflicts with the "*public policy*" of Australia if the award (or interim measure) was induced or affected by fraud or corruption or if a breach of the rules of natural justice occurred in the making of the award.

56 The balance of authority favours a narrow reading of the "public policy" exception. In *Parsons & Whittemore Overseas Co, Inc v Société Générale D L'Industrie Du Papier*, the Court said the public policy ground should be construed "*narrowly*" and enforcement denied "*only where enforcement would violate the forum state's most basic notions of morality and justice*".[32] To similar effect, in *Traxys Europe SA v Balaji Coke Industry Pty Ltd (No 2),* Foster J said that public policy involved concepts "*fundamental to our notions of justice*".[33] In *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*, Foster J emphasised that it is not against public policy to enforce an award "*without examining the correctness of the reasoning or the result reflected in the award*".[34]

Point five: extinguishment of the courts' traditional supervisory role

57 The fifth point is that the Model Law has extinguished the court's traditional review function over awards. There has been specific facility for the judicial enforcement of awards since at least the time of the *Arbitration Act 1698* (UK) (**"1698 Act"**),[35] but until the domestic enactment of the Model Law, it was limited by affording significant autonomy to parties to revoke submissions to arbitration coupled with court supervisory power over the awards.

58 The 1698 Act allowed parties, through their agreement, to have their submissions made a rule of the court and, subsequently, to enforce any award made by way of attachment. Yet the court could set aside an award where there was an error of law on its face or in reasons found on papers accompanying the award.[36] Similar jurisdiction to set aside awards vested with the courts of equity without any need for the submission to be made a rule of court.[37]

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32 508 F 2 d 969, 974 (2nd Cir, 1974). See also *United Mexican States v Marvin Roy Feldman Karpa* IIC 159 (2003) [87] (Ontario Superior Court of Justice).

33 *Traxys* (2012) 201 FCR 535, 557 [96].

34 *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 121, [126] and see also [132]; *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274, 306 (5th Cir, 2004).

35 9 &10 Will 3, c 15. Prior to this statute, English courts enforced awards made in arbitrations which were made a rule of court (see *Veale v Warner* (1845) 1 WMS Saund 326, 327 [85 ER 468, 471] or, in certain circumstances, by an action on the award or by way of an order for specific performance (Francis Russell, *A Treatise on the Power and Duty of an Arbitrator and the Law of Submissions and Awards* (1891, 7th ed) 539-42, 562-7 (**"Russell"**)). For an historical account of the 1698 Act and its use, see Henry Horwitz and James Oldham, "John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century" (1993) 36(1) *The Historical Journal* 137.

36 *Kent v Elstob* (1802) 3 East 18, 20-21 [102 ER 502, 503-4]; *In re Webb* (1818) 8 Taunt 443 [129 ER 455]; *Nichols v Roe* (1834) 3 My & K 431, 439 [40 ER 164, 167].

37 See Russell, above n 35, 701-3.

The 1698 Act became part of the law of the Australian colonies upon the enactment of the *Australian Courts Act 1828* (UK).[38]

59 Even after the 1698 Act, the courts would not enforce voluntary submissions to arbitration and the authority of the arbitrator could be revoked by either party before the making of the award; it being considered that the parties could not, by agreement, oust the jurisdiction of the Court.[39] It is in that context that the limitations on reviews of error of law not contained on the face of the award (which, at that time, need not have contained any reasons),[40] are to be construed. A party wary of an arbitrator not deciding according to law could revoke the submission before an award was made.[41]

60 The arbitration statutes of England changed throughout the 19th Century and the Australian colonies generally enacted corresponding changes, each change providing for greater enforceability of the arbitral process whilst balancing with sufficient judicial supervision. The *Civil Procedure Act 1833* (Imp)[42] made irrevocable a submission to arbitration which was made a rule of court unless leave was granted. The *Common Law Procedure Act 1854* (Imp)[43] allowed submissions to be made a rule of court even when the parties did not stipulate as much in the agreement, but it also introduced a "case stated" procedure, allowing the arbitral tribunal to refer questions of law to the courts for determination.[44] The *Arbitration Act 1889* (Imp)[45] gave certain awards the effect of a judgment and conferred power on a court (in its discretion) to stay proceedings without making a submission a rule of court. Yet, the "case stated" procedure was strengthened, with courts able to compel arbitrators to state a case.[46] Throughout, courts retained their jurisdiction to set aside or remit awards which contained errors of law on their face.[47] Similar provision to the 1889 Act was found in the *Arbitration Act 1902* (NSW) and in Victoria in its *Arbitration Acts* of 1910, 1915, 1928 and 1958.

61 In respect of the enactments around the time of Federation, therefore, the courts maintained supervisory powers[48] because first, they had a discretion as to whether to stay court proceedings in light of an arbitration clause;[49] second, there was facility for an arbitrator to state a special case to a court;[50] and third, the court could review errors of law on the face

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38 9 Geo 4, c 83, s 24. See *Crooke v Swords* (1868) 5 WW & A'B 136, 139; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 207 [23] (French CJ), 224 [79] (Gummow, Hayne, Heydon and Crennan JJ).

39 *Vynior's Case* (1572-1616) 8 Co Rep 80 [77 ER 595]; *Kill v Hollister* (1799) 1 Wils KB 129 [95 ER 532]; *Doleman & Sons v Ossett Corp* [1912] 3 KB 257, 267-8.

40 See *Westport* (2011) 244 CLR 239, 264-5 [32] (French CJ, Gummow, Crennan and Bell JJ).

41 *Hodgkinson v Fernie* (1857) 3 CB NS 189, 200 [140 ER 712, 716].

42 3 & 4 Wm IV, c 42.

43 17 & 18 Vict, c 125.

44 *Hodgkinson v Fernie* (1857) 3 CB NS 189 [140 ER 712].

45 52 & 53 Vict, c 125.

46 An arbitrator's refusal would amount to misconduct: *Czarnikow v Roth, Schmidt and Co* [1922] 2 KB 478.

47 *Westport* (2011) 244 CLR 239, 264-6 [32]-[34] (French CJ, Gummow, Crennan and Bell JJ).

48 See generally *Czarknikow v Roth, Schmidt & Co* [1922] 2 KB 478, 487-8 (Scrutton LJ).

49 See *Huddart Parker Ltd v The Ship "Mill Hill" and Her Cargo* (1950) 81 CLR 502, 509; *GWJ Blackman and Co SA v Oliver Davey Glass Co Pty Ltd* [1966] VR 570, 575.

50 *Arbitration Act 1902* (NSW), s 19; *Arbitration Act 1958* (Vic), s 19; *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478; *Carr v The President, Councillors and Ratepayers of the Shire of Wodonga* (1924) 34 CLR 234, 238-9 (Knox CJ and Starke J); *Henry v Uralla Municipal Council* (1934) 35 SR (NSW) 15, 26.

of the award.[51] With the enactment of the *Arbitration Act 1979* (UK), the common law jurisdiction to set aside awards for error of the law on the face of the award was supplanted by a statutory jurisdiction to do so by way of "appeal" on any question of law arising out of an award made on an arbitration agreement.[52] Similar provision was made in s 38 of the *Commercial Arbitration Act 1984* (NSW). Otherwise, these three features remained largely in place in the Uniform Commercial Arbitration Acts enacted throughout the States and Territories in the 1980s and 1990s, which governed international arbitrations until the enactment of the Model Law in Australia.

62 With the enactment of the Model Law, the IAA has deprived the courts of their traditional supervisory function in relation to arbitral awards. There is no facility for the arbitrator or party to state a case to the court, even if the parties so agreed. The court has no ability to review the award for error on the face of the record (art 5), even if the agreement seeks to provide for such review. This is coupled with the mandatory stay requirements in the IAA (s 7 and art 8), whereas previously the courts had a discretion (absent a clause that expressed arbitration as a condition precedent to a cause of action arising).[53]

63 It follows that art 36 of the Model Law requires the Court to give effect to an award even in the case of legal error on the face of the award, notwithstanding anything to the contrary in the parties' arbitration agreement. This is in contrast to the position in England and Wales, where the courts retain their jurisdiction to determine preliminary "questions of law" or hear "appeals" on "questions of law" with respect to international arbitrations applying the laws of England and Wales unless otherwise agreed by the parties.[54]

First objection: substantial impairment of institutional integrity of the court

64 Articles 5, 6, 8, 35 and 36 of the Model Law, as applied by s 16 of the IAA and, where applicable, read with s 7 and Part III of the IAA, are invalid because they substantially undermine the institutional integrity of the enforcing courts. Those courts are co-opted into providing assistance during the course of the arbitral proceeding and in enforcing the resulting awards but are denied decisional independence, any scope for reviewing substantively the matter referred to arbitration, and the ability to act in accordance with the judicial process.

65 This ground of constitutional invalidity finds its source in the rule stated by Gummow, Hayne and Crennan JJ in *Forge v ASIC* (2006) 228 CLR 45 ("***Forge***") at 76 that:

> *"if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respects those defining characteristics which mark a court apart from other decision-making bodies".*

66 In *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 530, French CJ said that whether functions, powers or duties cast upon a court are incompatible with its institutional integrity "*will be answered by an evaluative process which may require consideration of a number of factors*". Legislation that requires a court exercising federal

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51 *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570, 590-1 (Starke J); *Henry v Uralla Municipal Council* (1934) 35 SR (NSW) 15, 23-5 and 29.

52 *Arbitration Act 1979* (UK), c 42, s 1(1) and (2).

53 *Scott v Avery* (1856) 5 HLC 811 [10 ER 1121].

54 *Arbitration Act 1996* (UK), c 23, ss 45, 69, 82. See, for example, *Reliance Industries Ltd v Enron Oil and Gas India Ltd* [2002] 1 Lloyd's Rep 645.

jurisdiction to "*depart to a significant degree from the methods and standards which have characterised judicial activities*" may undermine the institutional integrity of the court.[55]

67 The features which combine to lead to the conclusion of invalidity in this case are the fact that the court is conferred with jurisdiction to enforce the award but is prevented by arts 5, 8, 35 and 36 from performing an independent adjudicative function. Further, the court's powers are co-opted at various points during the arbitral process without it being fully seized of the dispute. So far as process of enforcement of the final award is concerned, a party may apply on an ex parte basis and use a short form procedure in order that the Court may simply re-state the arbitral tribunal's award but do so in the cloak of a court order. At the same time, the court is deprived of its traditional supervisory jurisdiction in relation to awards.

68 Enforcement is a quintessential exercise of judicial power. It is well-established that judicial power must be exercised in accordance with the judicial process.[56] The "*essential features*" of the judicial process were identified by Gaudron J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ("***Polyukhovich***") at 704 as including "*the determination of legal rights, obligations or consequences by the ascertainment of the facts as they are and as they bear on the matter for determination, and the identification of the applicable law, followed by application of that law to those facts.*"[57]

69 As noted above, in enforcing the award, the court will in all likelihood simply restate the "orders" made by the arbitral tribunal. In other words, the court will adopt those orders as its own orders. But that process is entirely divorced from fact-finding, the identification of relevant legal principles and the application of those principles to the facts as found. The judicial power has been exercised without the judicial process.

70 Thus, the court has not independently adjudicated the matter and yet has given its judicial imprimatur to the outcome of the arbitration. As such, its decision is lacking what French CJ described in *Totani* as "*decisional independence*".[58] French CJ said, "*a law which requires that a court give effect to a decision of an executive authority, as if it were a judicial decision of the court, would be inconsistent with the subsistence of judicial decisional independence.*"[59] For "executive authority" may be substituted "arbitral tribunal". While French CJ accepted that the Parliament could select any factum or legislative "trigger" it wanted upon which the Court would be called to adjudicate, this did not "*authorise a law which subjects court in reality or appearance to direction ... as to the content of judicial decisions.*"[60]

71 It is no answer in the present case that the court has the ability to consider a limited number of process-based exceptions in art 36 of the Model Law. As French CJ said in *Totani*, "*the fact that the impugned legislation provides for an adjudicative process does not determine the question whether it impairs the institutional integrity*" of the court.[61] The concern is upon assessing the substance of the adjudicative process.

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55 *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ); *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319 ("***International Finance Trust***"), 353 [52] (French CJ).

56 *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 208 [73] (Gaudron J).

57 See also *Nicholas v The Queen* (1998) 193 CLR 173, 187-188 [19] (Brennan CJ), 208 [73]-[74] (Gaudron J).

58 *Totani* (2010) 242 CLR 1, 43 [62].

59 Ibid, 48 [70].

60 Ibid, 49 [71].

61 Ibid, 51 [78].

72 In *Totani*, the objectionable character of the law was that the court was called upon to make an order whenever it was satisfied that a defendant was a member of an organisation that has been declared by the Attorney-General. Thus, while the court did have a genuine decision to make, it was by and large deprived of its traditional adjudicative function in reaching that decision and was reliant on the Attorney-General's declaration. French CJ found that the impugned law "*represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process*".[62] Gummow J found that the law caused the court to depart from a significant degree from traditional judicial methods, including ascertainment of facts.[63] The same principle was applied by Crennan and Bell JJ, who then said:[64]

> *"Legislation which draws a court into the implementation of government policy, by confining the court's adjudicative process so that the court is directed or required to implement legislative or executive determinations without following ordinary judicial processes, will deprive that court of the characteristics of an independent and impartial tribunal – 'those defining characteristics which mark a court apart from other decision-making bodies'".*

73 Crennan and Bell JJ found that the law required the Court to exercise judicial power after "undertaking an adjudicative function that is so confined, and so dependent on the Executive's determination in the declaration, that it departs impermissibly from the ordinary judicial processes of an independent and impartial tribunal".[65]

74 The substance of the enforcement process under art 35 of the Model Law is that the court is enlisted to make the same order as that made by the arbitral tribunal unless one of a limited range of process-focussed exceptions applies. The court must take the award as a given and to that extent is denied its traditional adjudicative role in relation to the fact-finding and applying the law to ascertain the rights and liabilities of the parties. Instead, the court is dependent upon the findings of the arbitral tribunal and its identification of the relevant legal principles and their application to the facts as found.

75 In a real sense, the judicial process has been wholly delegated to the arbitral tribunal but the court has retained no substantive supervision over that process. In contrast, where the judicial power of order-making is delegated to non-judicial officers of the court, it is necessary that the exercise of power by that officer be subject to appeal or review by a judge of the court.[66]

76 The fact that the court's traditional supervisory power over arbitral awards has been ousted by combined operation of arts 5, 34, 35 and 36 of the Model Law means that the court can be made to enforce an award notwithstanding that an error of law appears on the face of the record. In other words, the court is required to give its judicial imprimatur to an award notwithstanding its legal flaws.[67]

77 This cuts across the court's historical function in super-intending arbitrations. Thus, in *Max Cooper v University of NSW* [1979] 2 NSWLR 257, Lord Diplock remarked at 261 that the common law ability of the court to set aside an arbitrator's award for error on the

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62 Ibid, 52 [82].

63 Ibid, 63 [131], referring to *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ), also referred to in *International Finance Trust* (2009) 240 CLR 319, 353 [52] (French CJ).

64 *Totani* (2010) 242 CLR 1, 157 [428], referring to *Forge* (2006) 228 CLR 45, 76 [63] and 78 [68] (Gummow, Hayne and Crennan JJ).

65 *Totani* (2010) 242 CLR 1, 160 [436].

66 *Harris v Caladine* (1991) 171 CLR 84, 95 (Mason CJ and Deane J), 151 (Gaudron J).

67 See P B Rutledge, 'Arbitration and Article III' (2008) 61(4) *Vanderbilt Law Review* 1189, 1200-1201.

face of the record was *"analogous to that which it asserted over inferior tribunals by use of the prerogative writ of certiorari"*. Just as purporting to remove the Supreme Court's supervisory jurisdiction over inferior courts was held to undermine a defining characteristic of that court in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (**"Kirk"**) at 566 [55], so does the removal of the court's super-intending function in the case of arbitral awards.[68]

78 The IAA takes away from the courts their core province and duty *"to say what the law is"* in a constitutional system reliant upon the separation of judicial power for the maintenance of the rule of law.[69] The exposition of the law, as it concerns the controversy between the parties to the arbitration agreement, is left to the arbitral tribunal. The court adopts the determination of the tribunal by making it its own without any ability to assess and, if necessary, correct, the law which was applied. For sectors of society where transnational contracts and arbitration agreements are the norm, the IAA serves to support a "phalanx of non-[Chapter] III tribunals"[70] resolving controversies involving "basic rights"[71] by applying principles of law in finally determining existing rights and liabilities with minimal court intervention. The IAA allows tribunals to become "islands of power immune from supervision and restraint".[72]

79 Added to these objections is the manner in which the court is called upon to exercise its enforcement power. The procedure is short-form and as occurred in the present case, will most likely be initiated ex parte, thereby reducing the opportunity of the party against whom it is sought to enforce the award to raise grounds of objection to enforcement.

80 What must also be considered in the overall evaluative process is that at various points in the overall arbitral process (as identified at paragraphs 24, 31, 32 and 36 above[73]) the court is enlisted to assist the conduct of the arbitral proceedings. When viewed in combination with the court's enforcing role, the overall conclusion is that the court has been co-opted as the arbitral tribunal's junior partner.

81 It is noteworthy that Parliament, through the Model Law, does not directly make an award binding or enforceable; rather, it requires the Court to "recognise" the award as binding and enforce it accordingly.[74] Having already conferred powers and functions on a tribunal which is required to act judicially, the addition of a direct conclusive effect of the award may more clearly invest arbitral tribunals with the judicial power of the Commonwealth. Parliament has instead enlisted federal courts in an attempt to do what it otherwise constitutionally could not. Yet in so doing they have undermined the courts' independence, their ability to determine what the law is, and, ultimately, their institutional integrity.

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68 Cf *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 86 ALJR 862, 880 [82]; 289 ALR 1, 23; [2012] HCA 25 (Heydon J).

69 *Marbury v Madison* (1803) 5 US 87, 111 (Marshall CJ); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Abebe v Commonwealth* (1999) 197 CLR 510, 560 [137] (Gummow and Hayne JJ).

70 *Commodity Futures Trading Commission v Schor* (1986) 478 US 833, 855 (O'Connor J for Burger CJ, White, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ).

71 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11-12 (Jacobs J).

72 *Kirk* (2010) 239 CLR 531, 581 [99].

73 And see *Westport* (2011) 244 CLR 239, 262 [22] (French CJ, Gummow, Crennan and Bell JJ).

74 This is in contrast to s 8 of the IAA, which provides that a *foreign award* is *"binding by virtue of this Act"*.

Second objection: Impermissible conferral of Commonwealth judicial power on arbitral tribunals

82 Articles 5, 8, 34, 35 and 36 of the Model Law, as applied by s 16 of the IAA, are also invalid because they impermissibly effect a conferral of Commonwealth judicial power on a non-Ch III court.[75]

83 In *Brandy* at 267, Deane, Dawson, Gaudron and McHugh JJ pointed to the difficulty of formulating a comprehensive definition of judicial power "*not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic.*"[76] One necessary, but not sufficient, indicator of the judicial power is the determination of existing rights and duties by way of fact-finding and the application of legal principles to the facts as found. As noted at paragraph 40 above, the Arbitral Tribunal did make its determinations in this way and exhibited many hallmarks of the judicial power. However, when such a determination is binding and authoritative (that is, enforceable), then it is beyond doubt that judicial power has been exercised: "*a power to make a binding determination as to legal rights and liabilities arising under an award or an agreement is, of its nature, judicial power.*"[77]

84 For the reasons set out below, an arbitral tribunal's award is made enforceable without the need for any independent exercise by the court of judicial power. As such, the arbitral tribunal's determinations are conclusive with the result that it has been impermissibly vested with the judicial power of the Commonwealth.

85 It is has been accepted that it is not a necessary feature of the judicial power that the tribunal in question itself be able to enforce the determination using its own machinery.[78] It is enough that the tribunal's determination can be enforced through the use of the court's machinery without independent intervention of the court. In *Brandy*, it was the lack of independent adjudication by the Federal Court that led to the conclusion that enforcement lay in the hands of the Commission rather than in the Court.[79]

86 The legal operation of the IAA upon a determination of an arbitral tribunal cannot relevantly be distinguished from the legal operation of the *Racial Discrimination Act 1975* (Cth) ("**RDA**") in *Brandy* that gave rise to invalidity. In *Brandy*, s 25ZAB(1) provided that upon registration of a determination by the Commission in the Federal Court, the determination had effect "*as if*" it was an order of the Court but no action could be taken to enforce that deemed order before the 28 day "*review period*". Only a respondent was entitled to seek a review and in some instances would not, meaning that once the 28 day review period elapsed, the deemed order was enforceable as though it were an order of the Court. Thus, s 25ZAB(1) provided for automatic enforcement, subject to a limited exception. Articles 35 and 36 of the Model Law work in the same way since they direct the Court to make an order. Upon application by a party and lodgment of the award, the

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75 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

76 *Brandy* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ). See also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188-189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, and McHugh JJ); *Brandy* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ).

77 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 ("***CFMEU***"), 657 [26]. See also *R v Davison* (1954) 90 CLR 353, 369 (Dixon CJ and McTiernan J); *Brandy* (1995) 183 CLR 245, 258 (Mason CJ, Brennan and Toohey JJ) and at 268 (Deane, Dawson, Gaudron and McHugh JJ).

78 *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J); *Brandy* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ).

79 *Brandy* (1995) 183 CLR 245, 260 (Mason CJ, Brennan and Toohey JJ); 270 (Deane, Dawson, Gaudron and McHugh JJ).

Court must enforce the award unless a ground of exception exists in art 36. Just as there would be no review in some cases under the RDA, so there are no applicable exceptions under art 36 in relation to some awards. Those awards are therefore automatically enforceable (nothing turns on the fact that in *Brandy*, the determinations were automatically registered in the court, while in the present case, a party seeking enforcement must lodge the award). While in contrast to *Brandy*, the Court is required to take action (that is, make an order itself), it is not independent action.

87 A further indicator of the fact that the Parliament has vested the Commonwealth judicial power in arbitral tribunals is the fact that the IAA excludes, to a large measure, the supervision of the courts, making the arbitral tribunals the custodians of their own jurisdiction and giving conclusiveness to their awards.[80]

88 While it is the case that there was no federal cause before the Arbitral Tribunal (the dispute relating purely to a matter of contract) and it applied the law of Victoria to the dispute, that does not deprive the power exercised by the Arbitral Tribunal of its "Commonwealth" element. The sovereign power of the Commonwealth is supplied by the fact that the IAA provides for: (a) the arbitral tribunal to resolve the dispute to the exclusion of the courts (art 8 and s 7); (b) a number of the arbitral tribunal's procedures powers in the conduct of the arbitration (Ch.IV to VI of the Model Law and Div. 3 of Pt.III of the IAA); and (c) the binding nature of the award (art 35).

89 The present case is distinguishable from Breckler where it was held that the *Superannuation (Resolution of Complaints) Act 1993* (Cth) ("***Complaints Act***") did not make determinations of the Superannuation Complaints Tribunal ("**Tribunal**") binding. The manner by which determinations of the Tribunal were to be enforced was different to the enforcement mechanism at issue in both *Brandy* and the present case.

90 In *Breckler*, the majority gave three reasons for the conclusion that the Parliament, by the Complaints Act, had not vested the Commonwealth judicial power in the Tribunal. None of these reasons is applicable in the present case.

91 The first two reasons (at 110) depended upon the proposition that the trustees had voluntarily submitted themselves to the jurisdiction of the Tribunal and thus no "sovereign" power was brought to bear.[81] The trustees expressly, and in unqualified terms, committed themselves to abide by the Tribunal's determination (both in cl.1.2 of the superannuation trust deed and by electing to become "*regulated superannuation funds*" which involved submission to the regulatory regime, including the Tribunal). Thus, the compulsion derived from their own private agreement.[82] The same may be said of the situation in *CFMEU* where the parties to a certified agreement promised in cl.22(b) to "*abide by any decision determined by the [Commission] which relates to a dispute at the Gordonstone Mine.*"[83] In that case, the Court held that the judicial power was not engaged where "*the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person and to accept the decision of that person as binding upon them*" (emphasis added).[84] There are two points of distinction in the present case. First, any

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80 *Attorney-General for the Commonwealth v Breckler* (1999) 197 CLR 83 ("***Breckler***"), 111-112 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); 126-127 [84] and 130 [92] (Kirby J); *Attorney-General (Commonwealth) v Alinta Ltd* (2008) 233 CLR 542, 579 [100] (Hayne J).

81 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

82 MA Perry, 'Chapter III and the Powers of Non-Judicial Tribunals: *Breckler* and Beyond' in G Williams and A Stone (eds), *The High Court at the Cross Roads*, (Federation Press, 2000), 156.

83 See also *Alexander* (1918) 25 CLR 434, 444 (Griffith CJ).

84 CFMEU (2001) 203 CLR 645, 658 [30] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

implied agreement to abide by the award is not unqualified (see paragraphs 50 to 51 above). Secondly, in the present case, it is an Act of Parliament which makes the award binding. This is a situation where "*an Act of the Parliament directly imposes an obligation upon a [party] to submit to the jurisdiction of a tribunal and abide by its decisions*" and so involves an exercise of sovereign power.[85]

92 The third reason of the majority in *Breckler* was that the legislative regime for enforcement involved an "*independent exercise of judicial power*" in contrast to the situation in *Brandy*.[86] The determination was a mere "factum" by reference to which the legislation operated to confer curially enforceable rights and liabilities.[87] In *Breckler*, the Court independently adjudicated in order to enforce. For example, under s 315 of the Supervision Act, the Commissioner or an affected party could apply to the court for an injunction requiring the trustee to give effect to the determination. Nothing in the Act operated to constrain the ordinary process of the court in relation to an injunction or to exclude the ability of the court to consider whether the determination was invalid (for example, if it was affected by legal error of a jurisdictional nature). Here, the direct legal operation of art 35 of the Model Law is to make the award itself binding. For the reasons outlined in paragraphs 68 to 78, an enforcing court lacks "decisional independence" under the Model Law.

PART VII: LEGISLATION

93 The relevant legislation is the *International Arbitration Act 1974* (Cth), set out in **Annexure A** to these submissions.

PART VIII: ORDERS SOUGHT

94 The plaintiff seeks orders that:

(a) A writ of prohibition be directed to the first defendant to restrain it from granting relief sought by the second defendant in Federal Court proceeding no.VID218 of 2011 to enforce arbitral awards dated 23 December 2010 and 27 January 2011 in respect of the dispute between the plaintiff and second defendant.

(b) The second defendant pay the plaintiff's costs.

95 In the event that Murphy J makes orders prior to the determination of this matter, the plaintiff seeks a further order that a writ of certiorari issue directed to the first defendant to quash the decision of Murphy J in *Castel* and any further decision in that matter.

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85 Perry above, 82, 156.

86 *Breckler* (1999) 197 CLR 83, 111 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

87 See also *Breckler* (1999) 197 CLR 83, 111 [45] (Gleeson CJ, Gaudron, McHugh, Gummow Hayne and Callinan JJ) and 132-133 [97]-[100] (Kirby J).

PART IX: ESTIMATED TIME FOR ARGUMENT

96 The plaintiff estimates that the time for presentation of oral argument (including reply) is 3 hours.

Dated: 5 October 2012

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