IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S178 of 2012

BETWEEN:

TCL AIR CONDITIONER (ZHONGSHAN) CO LTD
Plaintiff

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and

THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA
First Defendant

CASTEL ELECTRONICS PTY LTD
Second Defendant

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SUBMISSIONS OF THE ATTORNEY-GENERAL OF SOUTH AUSTRALIA (INTERVENING)

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Basis of Intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes as of right under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

30 **Part III: Why leave to intervene should be granted**

3. Not applicable.

Part IV: Constitutional and Legislative provisions

4. It is not necessary to add to the statement of applicable statutory provisions set out in Annexure A to the Plaintiff's submissions.

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Part V: Argument

5. South Australia intervenes to make submissions only on the first of the two issues identified by the Plaintiff[1], namely, whether the IAA, including the application of the "UNCITRAL Model Law on International Commercial Arbitration" (**Model Law**) by the IAA, substantially impairs the institutional integrity of the Federal Court of Australia, and, by implication, of State courts exercising jurisdiction conferred under s 18(3) read with s 16 of the IAA and Art 6 of the Model Law. South Australia makes no submission on the second of the two issues identified by the Plaintiff, namely, whether the IAA, by operation of Articles 5 and 34 to 36 of the Model Law, read with s7 and Part III of the IAA, impermissibly vests the judicial power of the Commonwealth in arbitral tribunals.

6. The basis for the Plaintiff's case is that the Federal Court's integrity is undermined by the Model Law's conscription of the Federal Court to "facilitate arbitration and ... enforce arbitral awards".[2] The Plaintiff's argument relies, in part, on the reasoning of this Court in *Totani v South Australia*[3] and *Wainohu v New South Wales*[4] but substitutes a decision of the executive in *Totani* and an eligible judge in *Wainohu* with an arbitral award in this case as the touchstone for invalidity.

7. South Australia submits that the Plaintiff's recourse to the analysis underlying *Totani* and *Wainohu* is misplaced. Neither the IAA nor the application of the Model Law by s 16 of the IAA impairs the institutional integrity of the Federal Court. This is so for four interrelated reasons.

8. First, unlike the legislative scheme in *Totani*, the "decisional independence" of the Federal Court is preserved by Articles 34, 35 and 36. There is neither a legislative conscription of the Court to give effect to the decision of another branch of government nor an absence of judicial discretion. Accordingly, the "decisional independence" aspect of the principle underlying the concept of institutional integrity is not impugned by the Model Law.

9. Second, the enforcement of arbitral awards, as a mechanism to uphold the parties' private contractual agreement to submit disputes to arbitration cannot be equated with the very different legislative schemes in *Totani* and *Wainohu. Totani* conscripted the courts to give

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1 Plaintiff's written submission at [3(a)].
2 Plaintiff's written submissions at [3(a)].
3 (2010) 242 CLR 1.
4 (2011) 243 CLR 181.

effect to declarations of the executive (which could give rise to penal sanctions) in the absence of a judicial determination of the validity of the declaration.[5] *Wainohu* conscripted "eligible judges" as *persona designata* to make administrative decisions without the need to give reasons.[6] The schemes in *Totani* and *Wainohu* are radically different from the scheme contained in the IAA and the Model Law which is engaged by voluntary agreement.[7]

10. Third, the enforcement of arbitral awards forms part of the historical functions and processes of courts. The enforcement mechanism given legislative effect by the IAA does not alter those historical functions and processes in such a manner as to impugn the institutional integrity of courts.

11. Fourth, the reliance on the anterior decision of an arbitral award not made in the exercise of judicial power as the factum upon which the enforcement mechanism of the IAA, when coupled with the judicial discretion reposed in the Court by the IAA, operates as an unexceptional antecedent to the exercise of judicial power consistent with the institutional integrity of courts.

A Institutional integrity and Chapter III

12. What is meant by the term "institutional integrity" was made plain by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission,*[8] where their Honours stated:

> ...as is recognised in *Kable [v Director of Public Prosecutions (NSW)]*, *Fardon v Attorney-General (Qld)* and *North Australian Aboriginal Legal Aid Service Inc v Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.[9]

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5 *South Australia v Totani* (2010) 242 CLR 1 at 52-53 [82]-[83] (French CJ), 65-66 [139]-[144] (Gummow J), 84-90 [214]-[230] (Hayne J), 159-160 [431]-[436] (Crennan and Bell JJ), 168-170 [464]-[470] (Kiefel J).

6 *Wainohu v New South Wales* (2011) 243 CLR 181 at 219 [68] (French CJ and Kiefel J), 229-230 [109] (Gummow, Hayne, Crennan and Bell JJ).

7 *Dobbs v National Australia Bank Limited* (1935) 53 CLR 643 at 653-654.

8 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

9 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (footnotes omitted).

However, their Honours went on to note:

> It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.[10]

13. The institutional integrity of Ch III courts and State courts in which the judicial power of the Commonwealth is vested is to be understood by reference to a number of factors that map the scope and nature of judicial power, the latter being a concept not susceptible to precise definition.[11] Indeed, as Hayne J observed in *Attorney-General (Cth) v Alinta*, it is not possible to refine the concept of judicial power to a single combination of necessary or sufficient factors.[12] Likewise, it is to be accepted that "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes."[13] As French CJ observed in *K-Generation Pty Ltd v Liquor Licensing Court*:

> The question whether functions, powers, or duties cast upon a court are incompatible with its institutional integrity as a court will be answered by an evaluative process which may require consideration of a number of factors.[14]

Decisional independence

14. Of the factors to be considered in the evaluative process, it is to be accepted that "decisional independence" is critical to the integrity of Ch III courts. As French CJ stated[15] in *Totani*:

> At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities. Decisional independence is a necessary condition of impartiality. Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process. The open-court principle,

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10 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64] (Gummow, Hayne and Crennan JJ) (footnotes omitted).

11 *The Queen v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 (Windeyer J); *R v Davison* (1954) 90 CLR 353 at 366 (Dixon CJ and McTiernan J); *The Queen v Quinn; Ex parte Consolidated Food Corp* (1977) 138 CLR 1 at 15 (Aickin J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189 (The Court).

12 *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542 at 577 [93] (Hayne J; Gleeson CJ and Gummow J agreeing); *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 163 [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

13 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 618 [104] (Gummow J); see also, *International Finance Trust Company v NSW Crime Commission* (2009) 240 CLR 319 at 352-353 [50] (French CJ); *South Australia v Totani* (2010) 242 CLR 1 at 47-48 [69] (French CJ).

14 (2009) 237 CLR 501 at 530 [90] (French CJ); *International Finance Trust Company v NSW Crime Commission* (2009) 240 CLR 319 at 352-353 [50] (French CJ).

15 *South Australia v Totani* (2010) 242 CLR 1 at 43 [62].

> which provides, among other things, a visible assurance of independence and impartiality, is also an "essential aspect" of the characteristics of all courts, including the courts of the States.[16]

His Honour went on to note:

> The question indicated by the use of the term "integrity" is whether the court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court. So much is implicit in the constitutional mandate of continuing institutional integrity. By way of example, 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.[17]

History

15. Further, the evaluative process also requires analysis of the methods and standards which have characterised the exercise of judicial power historically. As Gummow and Crennan JJ stated in *Thomas v Mowbray*, "legislation which requires a court exercising federal jurisdiction to depart in a significant degree from the methods and standards which have characterised the exercise of judicial power in the past may be repugnant to Ch III".[18] Thus, a predominant focus of the evaluative process with respect to methods and standards of Ch III courts and State courts in which the judicial power of the Commonwealth is vested is the historical practice of courts with respect to the particular activity under scrutiny.

Legislation operating on anterior decisions

16. In addition to decisional independence and analysis of methods and standards which have characterised the exercise of judicial power historically, it may be added that legislation operating on anterior decisions not made in the exercise of judicial power does not, without more, have the effect of operating to convert the anterior decision into a decision of a court, as noted by Gummow J in *Re Macks; Ex parte Saint.*[19] It is to be accepted that if the IAA operated so that an arbitral award was deemed to be an order of a Ch III court, invalidity would ensue.[20] As is demonstrated below, that is not the case here and the

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16 *South Australia v Totani* (2010) 242 CLR 1 at 43 [62] (French CJ) (footnotes omitted).

17 *South Australia v Totani* (2010) 242 CLR 1 at 48 [70] (French CJ) (footnotes omitted).

18 (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ).

19 *Re Macks; Ex Parte Saint* (2000) 204 CLR 158 at 232 [208] (Gummow J); *Re Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243 (Stephen J), 248, 249 (Mason J).

20 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

Plaintiff's reliance upon *Brandy v Human Rights and Equal Opportunity Commission*[21] is of no assistance.

17. For the reasons identified below, evaluation of the manner in which the IAA "enlists the judicial power of the Commonwealth in aid of the operation of the arbitration system established by the s 16 and the Model Law"[22] establishes that the institutional integrity of Ch III courts and State courts in which the judicial power of the Commonwealth is vested is not impugned by the IAA.

B Application to Model Law

Decisional independence preserved

18. Article 35 of the Model Law provides for the enforcement of awards subject to the exceptions identified in Art 36, which vests discretion in the court to refuse enforcement of an award. The court's discretion may be triggered in one of two ways: (a) by a party opposing the enforcement of an award (Art 36(1)(a)); or (b) by the court itself (Arts 36(1)(b) and 36(2)).

19. The grounds relevant to the exercise of the discretion conferred on the court by Art 36(1)(a) exercisable "at the request of the party against whom [the award] ... is invoked" are extensive and go to subject-matter jurisdiction,[23] validity of the arbitration agreement[24] and natural justice.[25] The grounds relevant to the exercise of the discretion conferred on the court by Art 36(1)(b) are subject-matter jurisdiction[26] and public policy.[27] The ambit of the court's discretion to refuse to recognise or enforce an award on "public policy" grounds is further identified in (but not limited by) s19, which provides that an "award is in conflict with, or is contrary to, the public policy of Australia if"[28] the award was induced or affected by fraud or corruption[29] or if a breach of the rules of natural justice occurred in connection with the making of the award.[30] In all cases where a court is exercising power under Art 36

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21 (1995) 183 CLR 245.
22 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 262 [22] (French CJ, Gummow, Crennan and Bell JJ).
23 Model Law Art 36(1)(a)(iii).
24 Model Law Art 36(1)(a)(i) (including legal capacity).
25 Model Law Art 36(1)(a)(ii), (iv) and (v).
26 Model Law Art 36(1)(b)(i).
27 Model Law Art 36(1)(b)(ii).
28 IAA s 19.
29 IAA s 19(a).
30 IAA s 19(b).

or is otherwise engaged in an activity identified in s39(1) of the IAA, it is required to have regard to the matters specified in s39(2); namely, that arbitration is an efficient, impartial, enforceable and timely method to resolve commercial disputes and awards are intended to provide certainty and finality.

20. Considered as a whole, the provisions of the IAA and the Model Law reserve to a court the discretion to satisfy itself of key matters such as subject-matter jurisdiction, legal capacity and procedural regularity. So understood, there are two potential infirmities that the Model Law does not permit to be the subject of review by a court: review for error of law and merits review. The latter is wholly unexceptional. It is common place to restrict review rights to questions of law. The former is to be understood in its proper context. The Plaintiff seeks to elevate the awards of arbitrators made pursuant to private contractual arrangements to the status of decisions made in the exercise of public rights by executive decision-makers, tribunals and courts. Arbitral awards cannot be equated with the exercise of power in public law. There is no constitutional imperative to submit alternative dispute resolution mechanisms such as arbitrations to judicial oversight. Where decisions involving public law rights are made in the exercise of executive or statutory power there must be remedies available at public law to ensure the legality of those decisions. But awards made in the exercise of private rights following referral by mutual consent is of an entirely different character.[31]

21. Nothing stated in *Westport Insurance Corporation v Gordian Runoff Ltd* is to the contrary.[32] The link between the task performed by arbitrators and the statutory scheme is not to the point. The consensual submission of a dispute to arbitration and an award made as a consequence do not engage the power of the state in the same sense as instituting proceedings in a court or submitting to a decision-maker pursuant to a process provided by the state. In such circumstances:

> The fundamental consideration in this field of discourse was emphasised by Brennan J in *Attorney-General (NSW) v Quin*. His Honour pointed out, and with reference to the judgment of Marshall CJ in *Marbury v Madison*, that an essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers. Of course, Marshall CJ was immediately concerned with questions of constitutional validity. But neither in its terms nor its context was his "grand conception" so limited as to exclude control over administrative interpretation of legislation.

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31 *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 585-586 (Isaacs J); 590 (Rich J); 591 (Starke J).

32 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261-262 [19]-[20] (French CJ, Gummow, Crennan and Bell JJ).

> However, there is a distinction to be drawn here. In Australia, the point is emphasised by the distinct provisions in ss 75(iii), 75(v) and 76(i) of the Constitution for actions against the Commonwealth, relief by mandamus, prohibition and injunction against officers of the Commonwealth, and matters arising under the Constitution or involving its interpretation. It has been expressed as follows:
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> > "'[T]here is in our society,' as Professor Jaffe says, 'a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures.'[60] But judicial review of administrative action stands on a different footing from constitutional adjudication, both historically and functionally. In part no doubt because alternative methods of control, both political and administrative in nature, are available to confine agencies within bounds, there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather, the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act." [33]

Where, pursuant to an arbitration agreement, the parties determine the applicable law and submit by agreement certain subject matters to arbitration there arises no exercise of public power in the *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc*[34] sense in the conduct of the arbitration culminating in an award that demands the superintendence of the judiciary.[35]

22. The Model Law does not conscript the Federal Court to give effect to declarations of the executive as in *Totani* nor does it vest any power in Federal Court judges to make administrative decisions as in *Wainohu*. As is made clear immediately below, the Model Law replicates the core features of the forms of review of arbitral awards available at common law historically and adopts an unexceptional legislative course in doing so.

Historical practices of courts

23. Courts have been involved in the recognition and enforcement of arbitral awards from the late 17th century.[36] The relevant received legislation[37] was the Imperial Parliament's 1698

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33 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ); see also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 668-669 [45]-[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ)

34 [1987] 1 QB 815.

35 *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815.

36 See Henry Horwitz and James Oldham 'John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century' (1993) 36 *The Historical Journal* 137.

37 *Australian Courts Act 1828: An Act to provide for the Administration of Justice in New South Wales and Van Diemen's Land* (1828) 9 Geo 4, c. 83 s 24; *An ordinance to facilitate the adoption of the Laws of England in the Administration of Justice in South Australia* 6 & 7 Vict. 1843, No. 2, s 2; *Supreme Court Ordinance* 14 Vict. No. 15 (1861) (WA) s 4.

Act for determining differences by Arbitration[38]. The British Parliament amended that legislation by the *Arbitration Act 1889* (UK) (**1889 Act**). Many of the States enacted similar legislation prior to Federation. Sections 11 and 12 of the 1889 Act provided for the enforcement of arbitral awards. With respect to finality, s 11 provided:

> (1) Where an arbitrator or umpire has misconducted himself, the Court may remove him.
>
> (2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the order.

24. Prior to Federation, the South Australian Parliament enacted the *Arbitration Act 1891* (SA) (**South Australian Act**) which was in similar terms to the 1889 Act. The South Australian Act was intended to be a "codification of the law so far as it referred to all classes of arbitration". The Attorney-General noted during the second reading speech:

> Very frequently through an excessive exercise of authority the awards of arbitrators or umpires were set aside, and the whole work of investigating claims was set aside on the ground of irregularity with the arbitrators. It frequently happened that before effect could be given to the agreement of the arbitrators the Supreme Court had to decided in the matter, and again a good deal of uncertainty prevailed at times as to whether an agreement by which the parties in dispute agreed to proceed to arbitration was sufficiently binding to compel the person to go to arbitration and to exclude the Supreme Court or other Courts from having jurisdiction. ...In the first instance it would make it compulsory on the parties who had agreed to arbitrate to stand by their agreement; in the second place it would enable the Court to correct any errors in the defective procedure of the arbitrators; and, finally, it would give ready machinery for compelling the observance of the award that had been arrived at.[39]

25. Section 9 of the South Australian Act is in the same terms as s 11 of the Imperial Act set out above.

26. The position in South Australia prior to Federation was generally consistent with the position in other States at Federation. New South Wales had enacted the *Arbitration Act 1892* (NSW), ss10 and 11 of which provided for enforcement in the same terms as South Australia. Prior to the enactment of the *Arbitration Act 1910* (Vic), Victoria relied upon the 17th century English legislation (9 Will III c15 ("An Act for Determining Differences by Arbitration")). Sections 12 and 13 of the *Arbitration Act 1910* (Vic) were in the same terms as the South Australian Act. Western Australia had enacted the *Arbitration Act 1895* (WA), ss 13 and 14 of which is in similar, though not identical, terms to that in South Australia, Victoria and New South Wales. Tasmania had enacted the *Arbitration Act 1892* (Tas) ss13 and 14 of which were in similar terms to the 1889 Act. Queensland was slightly different in

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38 *An Act for determining differences by Arbitration* (1698) 9 Will. III c15.

39 South Australia House of Assembly, *Parliamentary Debates,* 18 August 1891, page 747, The Attorney General, The Hon R Homburg.

that the *Interdict Act 1867* (Qld) provided for a system akin to registration which was then enforceable via contempt proceedings.

27. Thus, at the time of Federation, the recognition and enforcement of arbitral awards was a customary function of State courts. The grounds upon which a court may refuse to recognize or enforce an award specified in the Model Law are consistent with historical practice and the methods and standards applied by courts in recognizing and enforcing arbitral awards.

28. With respect to review at common law, it was accepted that review extended to error of law on the face of the record. However, as a majority of this Court had observed in *Melbourne Harbour Trust Commissioners v Hancock*[40] once a question of law or fact had been entrusted to an arbitrator, the award was conclusive and could not be reviewed for legal error.[41] The effect of the majority's conclusion in *Melbourne Harbour Trust* has recently been referred to as "going too far."[42] To the extent that voluntary submission to arbitration amounts to a waiver of all rights, so much may be accepted. However, the IAA and the Model Law do not compel recognition or enforcement in all cases. The Model Law preserves the ability of a party to challenge, or a court to review, on the grounds of subject-matter jurisdiction, natural justice and conformity with public policy.

29. Accordingly, the legislative scheme adopted in the Model Law provides a statutory scheme which largely mirrors common law review rights. Assuming the IAA falls within a head of Commonwealth legislative power, it can hardly be objectionable for the Commonwealth Parliament to legislate for review in a manner consistent with the common law as it has developed over the past three centuries. While the common law must conform to the Constitution,[43] there is no constitutional imperative derived from Ch III of the Constitution which necessitates judicial oversight of arbitral awards made pursuant to private agreement by the parties. In light of the history of judicial review of arbitral awards at common law and the unexceptional approach to judicial scrutiny adopted in the Model Law, there is no foundation for the argument, derived from *Kirk v Industrial Relations*

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40 (1927) 39 CLR 570.

41 *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 585-586 (Isaacs J); 590 (Rich J); 591 (Starke J).

42 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 262 [22] (French CJ, Gummow, Crennan and Bell JJ).

43 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566 (The Court).

Commission (NSW),[44] that the Model Law establishes an island of power immune from judicial scrutiny. History underlies the principle that Ch III does not require all exercises of coercive power[45] to be sourced in judicial power. So too does history inform in the present case so as to deny the proposition that Ch III requires oversight of arbitral awards made pursuant to contract.

30. An arbitral tribunal is not an institution of permanence and does not form part of the integrated Australian judiciary. Any decision made by an arbitral tribunal has no binding force upon another arbitral tribunal or court. An award and related reasons do not serve as precedent. There is then, in the exercise of arbitral power, no island of power concerned in the administration of the common law or a law of the Commonwealth or a State that must be amenable to the supervisory jurisdiction of a State Supreme Court as superintended by this Court in order that such supervisory jurisdiction and superintendence fulfill their constitutional role.

Award is anterior decision

31. Reliance on an anterior decision not made in the exercise of judicial power as the factum upon which the enforcement mechanism of the IAA operates is unexceptional. As this Court has noted, courts have long been involved in the enforcement of both foreign judgments and arbitral awards "in which the significant element is some anterior decision or determination not made in the exercise of the federal judicial power."[46]

32. Courts have long been involved[47] in the enforcement at common law of judgments of foreign courts with limited review rights.[48] In *Godard v Gray*,[49] for example, the Court of Queen's Bench accepted that the French tribunal made an error in the construction of an English contract and that error was material and that it affected the tribunal's ultimate finding. However, the Court held:

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44 (2010) 239 CLR 531.

45 *R v Bevan; Ex parte Elias & Gordon* (1942) 66 CLR 452; *R v Cox; Ex parte Smith* (1945) 71 CLR 1; see also *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 597-598 [57]-[58]; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28, 32 (Brennan, Deane and Dawson JJ) 55 (Gaudron J); *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

46 *South Australia v Totani* (2010) 242 CLR 1 at 64 [136] (Gummow J).

47 *Williams v Jones* (1845) 13 M & W 627 at 633 and 634; 153 ER 262, 265.

48 *Godard v Gray* (1870) 6 LR 139 at 149.

49 (1870) 6 LR 139.

> ... it [is] no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.[50]

The Court went on to deny the ability to review the foreign judgment on the basis of an error of law.

33. The limited review rights at common law find similar expression in the *Foreign Judgments Act 1991* (Cth). In both cases courts enforce foreign judgments in the absence of the capacity to impugn the judgment on the basis of error of law.

34. In the present case, neither the IAA nor the Model Law operates so as to make an arbitral award an order of court upon registration.[51] Rather, the award is to be recognised[52] by the court as a fact upon which judicial power is subsequently exercised, subject to Art 36. So understood, the determination by the arbitrator is the "criterion by reference to which legal norms are imposed"[53] and enforcement may be obtained. Thus, the award "constitutes the factum by reference to which"[54] the Model Law "operates to confer curially enforceable rights and liabilities."[55] The Model Law thus adopts a familiar statutory technique to provide for the recognition and enforcement of arbitral awards so as to avoid "conscripting" the court.

C Conclusion

35. Neither the IAA nor the Model Law that it gives effect to impugns the integrity of Ch III courts. The courts retain the decisional independence and operate in a manner consistent with historical functions and processes of courts. History does not suggest that courts must have a general supervisory function in relation to arbitral awards. Indeed, history indicates otherwise. The IAA operates such that the award is the factum upon which enforcement proceedings may be taken, which is an unexceptional use of a familiar technique preceding the exercise of enforcement proceedings.

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50 *Godard v Gray* (1870) 6 LR 139 at 149.

51 Cf *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

52 Model Law Art 35(1).

53 *Attorney-General (Cth) v Breckler* 197 CLR 83 at 111 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

54 *Attorney-General (Cth) v Breckler* 197 CLR 83 at 111 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) referring to *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378 (Kitto J).

55 *Attorney-General (Cth) v Breckler* 197 CLR 83 at 111 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

Part VI: Estimate of time for oral argument

36. South Australia estimates that 30 minutes will be required for the presentation of oral argument.

Dated 30 OCTOBER, 2012

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