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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

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 the annexures to the submissions of the plaintiff.

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PART V: ARGUMENT

5. The plaintiff's two objections to the validity of s 16 of the *International Arbitration Act 1974* (Cth) (the **Act**), in so far as it gives effect to the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**), should be rejected. The objections run counter to the law's longstanding recognition of the desirability of encouraging effective private commercial arbitration and the continually evolving role of the courts in supporting the efficacy of such arbitration.

(a) Arbitration under the Model Law is a process undertaken voluntarily by agreement between commercial parties. The award, once made, becomes the source of the parties' rights and liabilities. (*See paras 6-11 below.*)

(b) The grounds in the Model Law for setting aside or refusing to enforce an award allow the courts to ensure that the parties are held to their agreement (but only to their agreement), and that this agreement is lawful and not otherwise contrary to public policy. (*See paras 12-14 below*).

(c) Although these grounds are different from those that existed in some States in 1901, none of the historical grounds of challenge were "unwavering" features of the law. Nor is modification of the grounds of challenge available in 1901 contrary to any constitutional requirement of the rule of law. (*See paras 15-26 below.*)

(d) The courts' role under s 35 of the Act is to determine whether the preconditions for enforcement (or grounds for refusing enforcement) are met. This is an independent adjudicative function in respect of a clearly identified "matter". The plaintiff's argument that courts must have jurisdiction over the underlying substantive commercial dispute is contrary to the history and function of the courts in relation to commercial arbitration. (*See paras 27-35 below.*)

(e) For these reasons, the Model Law (as given effect by the Act) does not confer judicial power on arbitral tribunals. Nor does it impair the institutional integrity of enforcing courts. (*See paras 36-38 below.*)

A. Arbitration is a voluntary arrangement between commercial parties

6. The decision to submit future disputes to arbitration is a voluntary one. As Allsop J stated in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,[1] the Model Law deals with the resolution of disputes between commercial parties in an international or multinational context, "where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute resolution".

7. There are good reasons why the parties may wish to make such an agreement, and why Parliament would encourage them to do so. It has never been the policy of the law to discourage parties from agreeing to have disputes about private rights resolved by arbitration.[2] International commercial disputes will often arise between parties who come from very different legal systems, for whom an ordered efficient dispute resolution mechanism is of the utmost importance.[3] The Model Law is widely used and allows commercial parties to turn to arbitration in full confidence that the award made by the arbitral tribunal will be enforceable throughout the world.[4]

8. This Court has long distinguished between an arbitration that is based on an agreement of the parties, and a court proceeding that is based on the exercise of sovereign power. In *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission*,[5] the Court drew this distinction in the following terms:

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1 (2006) 157 FCR 45 at 94 [192] (with Finn and Finkelstein JJ agreeing). See also *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 311-312 (Brennan CJ, Gaudron and McHugh JJ), 321-323 (Toohey and Gummow JJ) (considering a domestic arbitration); *Hi-Fert v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 at 14 (Emmett J, with Branson J agreeing).

2 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652 (Rich, Dixon, Evatt and McTiernan JJ). However, apart from statute, the parties could always approach the courts before an award had been made: at 653.

3 See e.g. *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 94-95 [192] (Allsop J, with Finn and Finkelstein JJ agreeing); see also *Traxys Europe v Balaji Coke Industry (No 2)* (2012) 201 FCR 535 at 555 [90] (Foster J).

4 Second Reading Speech to the International Arbitration Amendment Bill 2009 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009 at 12790.

5 (2001) 203 CLR 645 at 658 [31] (the Court). See also *Australian Boot Trade Employés Federation v Whybrow & Co* (1910) 10 CLR 266 at 281-282 (Griffith CJ); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 444 (Griffith CJ), 452 (Barton J); *Attorney-*

> Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.

9. This is not to assert that the arbitral function involves purely matters of private contract law—the arbitral power intersects at various points with the exercise of public authority[6]—but to emphasise the source of the parties' obligations and the arbitrator's power, where the parties have entered into an arbitration agreement and appointed an arbitrator pursuant to that agreement to resolve their commercial dispute.[7] The fact that an arbitrator's award requires the exercise of judicial power for its enforcement is true of any rights sourced in contract.[8]

10. The reference in art 35(1) of the Model Law to enforcing an "arbitral award" reflects the fact that the award, once made, becomes the source of the parties' rights and obligations. Fletcher Moulton LJ explained in *Doleman & Sons v Ossett Corporation*[9] that "the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award, so that ... [t]he original rights of the parties have disappeared, and their place has been taken by their rights under the

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General (Cth) v Breckler (1999) 197 CLR 83 at 110-111 [43]-[44] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

6 Cf plaintiff's submissions, paras 38-39; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261-262 [18]-[20] (French CJ, Gummow, Crennan and Bell JJ).

7 It is immaterial that the Model Law places some constraints on what terms can be agreed between the parties in the submission to arbitration. The terms of many contracts are affected by law (such as contracts for the sale of goods), but that does not change the voluntary nature of the relationship.

8 Cf plaintiff's submission, para 39; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261 [19].

9 [1912] 3 KB 257 at 267. See also *Bulk Chartering v T&T Metal Trading* (1993) 31 NSWLR 18 at 34 (Sheller JA, with Handley JA agreeing): where parties have undertaken to give effect to the determination embodied in an award, the award, when made, imposes a new obligation as a substitute for the original cause of action under the contract; *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 653 (Rich, Dixon, Evatt and McTiernan JJ); *Commings v Heard* (1869) LR 4 QB 669 at 673 (Lush J). A possible qualification is if the parties agree that the arbitrator should ascertain an existing liability in a money claim, without agreeing that the award will impose a new obligation in substitution: see *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 653, explaining *Allen v Milner* (1831) 2 Cr & J 47 [149 ER 20]; see also *Bloemen Ltd v Gold Coast City* [1973] AC 115 at 124 (PC); *Commings v Heard* (1869) LR 4 QB 669at 673. Even then, there is authority that the parties cannot contradict the arbitrator's decision as to the amount due: *Adler v Soutos (Hellas) Maritime (the "Argo Hellas")* [1984] 1 Lloyd's Rep 296 at 302 (Leggatt J); *BP Chemicals v Kingdom Engineering* [1994] 2 Lloyd's Rep 373 at 377 (Judge Havery).

award". The language of an "award" being enforceable as a court order has existed since at least the *Arbitration Act 1889* (UK) 52 & 53 Vic, c 49 (the **1889 Act**).[10] In common with the 1889 Act, s 35 of the Act requires the leave of the relevant court to enforce an award.[11]

11. Nothing in the Model Law changes the usual position that the rights created by an arbitral award operate only as between the parties to the arbitration agreement.[12] Taking the examples raised in para 51 of the plaintiff's submissions in turn:

(a) A liquidator's rejection of a proof of debt may only be referred to arbitration to raise a defence that the debtor company would have had.[13] The effect of arbitrating that claim on third parties is simply practical and consequential, in that it affects the amount available for distribution between creditors.

(b) An award "in the nature of an injunction" would only bind the parties to the arbitration agreement—a third party who was unaware of the award would not be in contempt of any court order giving effect to the award.[14]

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10 See also s 18 of the *Judgments Act 1838* (UK) 1 & 2 Vic, c 110 which provided the first summary method of obtaining execution of certain awards as though they were judgments: F Russell, *A Treatise on the power and duty of an arbitrator and the law of submissions and awards* (5th ed, 1878) at 615-616; *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1 at 29 (Jacobs J).

11 Section 12 of the 1889 Act provided: "An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect". The *Arbitration Act 1892* (NSW) contained a provision to like effect (s 11); however, as at 1901, neither Victoria nor Queensland had enacted similar provisions: see *Supreme Court Act 1890* (Vic), ss 141-160; *Interdict Act 1867* (Qld). Victoria did not adopt such a provision until 1910: *Arbitration Act 1910* (Vic), s 13.

12 On the usual position, see e.g. *Bloemen Ltd v Gold Coast City* [1973] AC 115 at 126 (PC); *Command Energy Pty Ltd v Fletcher Construction Australia Ltd* [2000] VSC 367 at [16] (Byrne J). Note that s 7(4) of the Act extends the right to apply for a stay of court proceedings to a person claiming "through or under" a party; such an extension has been a feature of arbitration statutes since at least the *Common Law Procedure Act 1854* (UK) 17 & 18 Vic, c 125, s 11.

13 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 342-343 (Brennan and Dawson JJ, with Toohey J agreeing on this point).

14 See by analogy *R v Dovey; Ex parte Ross* (1979) 141 CLR 526 at 533 (Gibbs J, with Mason J agreeing): an order under the *Family Law Act 1975* (Cth) preventing a husband from exercising his voting power in a company in a certain way "is not directed to the company and does not bind it", even though the practical effect of the order is that the company will not sell certain matrimonial property. Generally a third party to whom an injunction does not apply is only in contempt if the third party, knowing the terms of the injunction, wilfully assists the person to whom it was directed to disobey it. In this situation, the third party will have independently obstructed justice: *Z Ltd v A-Z* [1982] 1 QB 558 at 578, 579 (Eveleigh LJ); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [30] (Gaudron, McHugh, Gummow and Callinan JJ); *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 571-572 [121] (the Court).

(c) The effect, if any, of an arbitrator's award on contribution from a joint tortfeasor turns on the proper construction of the contribution legislation, and whether the arbitral award means that a tortfeasor is "liable" for those purposes.[15] There is no analogy with the Act nor the Model Law.

B. Articles 34 to 36 hold the parties to their voluntary, lawful obligation

12. Articles 34 to 36 of the Model Law supply the means of enforcing an obligation that was voluntarily entered into – to abide the arbitrator's award. Here, the parties agreed (**AB 27**):

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

13. The voluntary and contractual nature of the obligation to submit to arbitration is crucial in understanding the role of the courts in supervising the arbitrator's decision. Under the Model Law, the courts ensure (among other things) that:

(a) the arbitrator has been chosen in accordance with the contract (art 34(2)(a)(iv); art 36(1)(a)(iv));[16]

(b) the arbitrator has stayed within the limits of the function conferred by the contract (art 34(2)(a)(iii); art 36(1)(a)(iii));

(c) the arbitrator has enabled each party to present its case (art 34(2)(a)(ii); art 36(1)(a)(ii));

(d) the agreement to submit to arbitration is valid under the law chosen (art 34(2)(a)(i); art 36(1)(a)(i));

(e) the subject-matter is capable of settlement by arbitration (art 34(2)(b)(i); art 36(1)(b)(i)); and

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15 See *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 221 (Windeyer J); *James Hardie & Coy v Seltsam Pty Ltd* (1998) 196 CLR 53 at 65 [26] (Gaudron and Gummow JJ).

16 Article 34 of the Model Law sets out the grounds on which an award can be set aside, and art 36 sets out the grounds on which a court can refuse to recognise or enforce an award. See also s 8(5) of the Act in relation to "foreign awards" (i.e. awards made outside Australia).

(f) the enforcement of the award is not contrary to public policy[17] (art 34(2)(b)(ii); art 36(1)(b)(ii)).

14. In short, the grounds in arts 34 and 36 enable the courts to ensure that parties are held to their agreement to submit to arbitration (but only to their agreement), and that this agreement is lawful and not otherwise contrary to public policy.[18] This gives effect to general principles of contractual law – as Lord Mustill stated in *Channel Group v Balfour Beatty Ltd*,[19] "those who make agreements for the resolution of disputes must show good reasons for departing from them".

C. No denial of any constitutionally mandated role of the courts

10 (i) Arbitration law in continual state of evolution

15. Contrary to the plaintiff's submissions,[20] there is no constitutional difficulty if, as the plaintiff contends, the avenues for reviewing or challenging awards are more limited under the Model Law than they were at 1901.

16. Historical practice may establish that a measure is judicial in nature or can otherwise be validly exercised by courts.[21] However, a measure is not contrary to Ch III simply because it has no readily apparent analogue in pre-1901 legislation.[22] The

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17 In this context, "public policy" is defined fairly narrowly as matters going to the "fundamental, core questions of morality and justice in that jurisdiction": *Traxys Europe v Balaji Coke Industry (No 2)* (2012) 201 FCR 535 at 560 [105] (Foster J); see also *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier*, 508 F 2d 969 (1974) at 973-974. However, s 19 of the Act gives an extended meaning to "public policy", embracing cases of fraud or corruption and breach of the rules of natural justice.

18 *Contra* the plaintiff's description of the art 36 grounds as "process-based": plaintiff's submissions, para 71.

19 [1993] AC 334 at 353. See also *Huddart Parker Ltd v Ship Mill Hill* (1950) 81 CLR 502 at 509 (Dixon J): "A guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it", quoting *Metropolitan Tunnel and Public Works Ltd v London Electric Railway Co* [1926] Ch 371 at 389 (Scrutton LJ).

20 Plaintiff's submissions, paras 57-63.

21 See e.g. *Saraceni v Jones* [2012] HCA 38 at [2] (Gummow, Hayne and Bell JJ); *R v Davison* (1954) 90 CLR 353 at 369 (Dixon CJ and McTiernan J), 382 (Kitto J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373 (Kitto J), 387 (Menzies J), 394 (Windeyer J).

22 See *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 553 [11]-[12] (Gummow J).

Constitution does not stereotype the legislative power of the Commonwealth to the legislative provisions that existed in 1901.[23]

17. The plaintiff contends that the Act (as it gives effect to the Model Law) deprives the courts of their "traditional supervisory function", referring to three mechanisms that existed in England and parts of Australia in 1901 for courts to supervise the decisions of arbitrators.[24] Yet the laws in England (and Australia) dealing with arbitration were being continually revised throughout the 19th and 20th centuries.[25] This continually evolving legislation was much too unstable to give rise to any "unwavering" features of the law that could ground any essential characteristics for the purposes of the Constitution.[26] Moreover, some of the mechanisms on which the plaintiff relies were not available in Victoria (at least) at the time of federation.

18. Taking the mechanisms referred to in para 61 of the plaintiff's submissions in turn:

(a) The discretionary power to stay court proceedings brought in contravention of an agreement to arbitrate was first conferred by s 11 of the *Common Law Procedure Act 1854* (UK) 17 & 18 Vic, c 125 (the **1854 Act**), and continued by s 4 of the 1889 Act.[27] Although that power was discretionary, these provisions were interpreted as imposing a burden on a plaintiff to show why an arbitration agreement should not be enforced.[28] Moreover, s 1(1) of the *Arbitration Clauses (Protocol) Act 1924* (UK) 14 & 15 Geo 5, c 39 provided

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23 See *Storey v Lane* (1981) 147 CLR 549 at 558 (Gibbs CJ, with Mason, Wilson and Brennan JJ agreeing), discussing the legislative power with respect to "bankruptcy and insolvency" in s 51(xvii) of the Constitution. Accordingly, the fact that the Model Law deals differently with challenging an arbitrator's award from the laws that existed in 1901 is only the start of the enquiry: see *Singh v Commonwealth* (2004) 222 CLR 322 at 385 [159], 398 [199]-[200] (Gummow, Hayne and Heydon JJ), discussing the meaning of "alien" in s 51(xix) of the Constitution.

24 Plaintiff's submissions, paras 61 and 62.

25 This history is usefully summarised in Sir Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed, 1989) (**Mustill and Boyd (2nd ed)**), Ch 29.

26 Cf the description of the requirement of unanimity in jury trials in *Cheatle v The Queen* (1993) 177 CLR 541 at 552 (the Court); see also at 550 ("the common law ... consistently and unequivocally insisted upon the requirement of unanimity").

27 See Mustill and Boyd (2nd ed) at 443, 446. As at 1901, Victorian, New South Wales and Queensland courts had a discretionary power to stay proceedings brought in contravention of an agreement to arbitrate: *Supreme Court Act 1890* (Vic), s 152; *Arbitration Act 1892* (NSW), s 3; *Interdict Act 1867* (Qld), s 9.

28 Mustill and Boyd (2nd ed) at 446.

for a mandatory stay in the case of "non-domestic" awards covered by that Act.[29]

Thus the discretionary power to stay proceedings was of relatively recent vintage at 1901, and mandatory stay provisions for at least some non-domestic arbitrations were introduced by 1924. Section 7(2) of the Act provided for mandatory stays of proceedings on its enactment in 1974, shortly before the British Parliament made similar provision in s 1(1) of the *Arbitration Act 1975* (UK) c 3.

(b) The facility of an arbitrator to state a special case to a court, as to the whole or part of an award, was first created by the 1854 Act.[30] The 1889 Act added a power of the court to require an arbitrator to state a case, on a question of law only.[31]

Again, the facility to state a case was relatively recent in 1901. After increasing criticism[32] it was abolished in the United Kingdom by the *Arbitration Act 1979* (UK) c 42, and replaced by a limited provision for an appeal on a question of law (see s 1 of that Act).

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29 Section 1(1) provided: "Notwithstanding anything in the [1889 Act], if any party to a submission made in pursuance of an agreement to which the said protocol applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings, and **that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, shall make an order staying the proceedings.**" (emphasis added)

30 Section 5 of the 1854 Act provided: "It shall be lawful for the Arbitrator upon any compulsory Reference under this Act, or upon any Reference by Consent of Parties where the Submission is or may be made a Rule or Order of any of the Superior Courts of Law or Equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his Award, as to the whole or any Part thereof, in the Form of a Special Case for the Opinion of the Court, and when an Action is referred, Judgment, if so ordered, may be entered according to the Opinion of the Court."

31 Section 19 of the 1889 Act provided: "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, **and shall, if so directed by the Court or a judge,** state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference." (emphasis added) The *Arbitration Act 1892* (NSW) contained a provision to like effect (s 16); however, as at 1901, courts in Victoria and Queensland could not compel the statement of a special case on a question of law: see *Supreme Court Act 1890* (Vic), ss 141-160; *Interdict Act 1867* (Qld). Victoria did not adopt such a provision until 1910: *Arbitration Act 1910* (Vic), s 19.

32 Mustill and Boyd (2nd ed) at 454.

Moreover, it was only the 1889 Act which enabled a party unilaterally to approach a court seeking its intervention in an arbitration, and then only for the purpose of giving the court's opinion on a question of law. At least in Victoria and Queensland, there was no such provision at all in 1901.

(c) The courts' common law power to review an award on the ground of error of law on the face of the award has a "long history",[33] which dates since at least *Kent v Elstob*[34] in 1802.

However, as Lord Diplock stated on behalf of the Privy Council in *Max Cooper & Sons Pty Ltd v University of New South Wales*,[35] this jurisdiction survived as an "anomaly of legal history", and operated haphazardly because the court's ability to exercise it depended on whether the arbitrator had chosen to set out in the actual award the reasoning on which it was based. Moreover, as his Lordship stated, two members of the Court of Common Pleas had expressed regret in 1857 that this jurisdiction had survived.[36] Commentators have stated that the jurisdiction had been unpopular for a substantial period even before 1901, and that the rules for determining whether an error was "on the face" of the award were highly technical.[37] There were also questions as to how this jurisdiction applied when the dispute referred to the arbitrator was a question of law.[38]

19. To summarise, both the discretion whether to stay proceedings commenced contrary to an arbitration agreement, and the power of a court to require an arbitrator to state a case lacked in 1901 the longevity necessary for them to be regarded as essential features of the judicial process for which the Constitution provides. The latter power

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33 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 264 [32] (French CJ, Gummow, Crennan and Bell JJ).

34 (1802) 3 East 18 [102 ER 502]; see Mustill and Boyd (2nd ed) at 439.

35 [1979] 2 NSWLR 257 at 261. See also *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 586 (Isaacs J).

36 *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257 at 261, referring to *Hodgkinson v Fernie* (1857) 3 CB (NS) 189 at 202 (Williams J), 205 (Willes J) [140 ER 712 at 717, 718]. See also *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 258 (Barwick CJ, with McTiernan J agreeing).

37 Mustill and Boyd (2nd ed) at 448.

38 See *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 581-582 (Knox CJ and Gavan Duffy J), 585-586 (Isaacs J), 590 (Rich J), 590-591 (Starke J).

did not even exist in some States in 1901. The power to review errors of law apparent on the face of an award was of longer standing, but was anomalous and unsatisfactory and was subject to criticism before 1901. In these circumstances the mere existence of certain powers in 1901 provides insufficient support to imply constitutional entrenchment of any particular jurisdiction with respect to arbitral awards.

(ii) Article 36 grounds not contrary to rule of law

20. Nor do the relatively limited grounds which the Model Law provides for challenging the legal correctness of an award undermine the rule of law.[39] There is no constitutional requirement that the courts must be able to review the legal correctness of awards made from a voluntary submission to arbitration.

21. Cases such as *Kirk v Industrial Court (NSW)*[40] are concerned with the exercise of public, non-consensual power. The supervisory jurisdiction of State Supreme Courts is the mechanism for determining and enforcing the limits on the exercise of State executive and judicial power.[41] The reference in *Kirk* to "islands of power" was directed at the unsupervised exercise of State executive and judicial power.[42] Equally, the plaintiff is not assisted by the statement in *Marbury v Madison*[43] that the courts' duty is to say what the law is. While the courts "declar[e] and enforc[e] the law which determines the limits of the power conferred by statute upon administrative decision-makers",[44] they have no necessary constitutional function in determining the limits of power of privately appointed arbitrators.

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39 Cf plaintiff's submissions, paras 77-81. It may be accepted that the Constitution is framed against an assumption of the rule of law: see e.g. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512-513 [102]-[103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). However, considerable caution must be exercised before giving the rule of law "an immediate normative operation" in applying the Constitution: *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ).

40 (2010) 239 CLR 531.

41 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 551 at 580-581 [98].

42 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 551 at 581 [99], *contra* plaintiff's submissions, para 78.

43 (1803) 1 Cranch 137 at 177 [5 US 87 at 111], cited in plaintiff's submissions, para 78.

44 See *Enfield City v Development Assessment Corporation* (2000) 199 CLR 135 at 152-153 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

22. The courts have never asserted a power, corresponding to their supervisory jurisdiction over inferior courts and tribunals, to determine the limits of the powers of arbitrators.[45] If there is an analogy with the court's supervision of inferior courts and tribunals, it starts and finishes with the power to grant relief for error on the face of the award, rather than any kind of "jurisdictional" error.

23. The authority of an arbitrator depends on the voluntary choice of the parties to submit a dispute to arbitration. Arbitrators do not exercise executive power (nor any regulatory power that could be called "public" in some extended sense).[46] Thus, although historically an arbitral award could be reviewed on the ground of error on the face of the award, any analogy with review of decisions of an inferior court must be treated with caution.[47] Indeed, Lord Diplock (who drew that analogy[48]) described the jurisdiction to review private arbitral awards for error on the face of the award as "confessedly anomalous",[49] and commentators have suggested that its rationale is not entirely clear.[50]

24. Under the Model Law, the arbitral tribunal decides the dispute in accordance with any rules of law that may be chosen by the parties as applicable (art 28(1)). At the same time, the effect of arts 5, 34 to 36 is that a court cannot refuse to recognise an

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45 *R v National Joint Council for the Craft of Dental Technicians (Disputes Committee); Ex parte Neate* [1953] 1 QB 704 at 707-708 (Lord Goddard CJ); *Bremer Vulkan v South India Shipping* [1981] AC 909 at 978-979 (Lord Diplock, with Lord Edmund-Davies and Lord Russell agreeing); see also *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 398 [6] (Spigelman CJ), 410 [73] (Basten JA).

46 Cf *R v Panel on Take-Overs & Mergers; Ex parte Datafin* [1987] QB 815, esp at 847. Some commentators suggest that governmental involvement (such as a scheme of co-regulation) is necessary but not sufficient for a non-statutory body to be exercising "public" power: M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009) at [3.280].

47 In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at 7 [18], the Singapore High Court stated that there was "no appropriate analogy between administrative and arbitral tribunals" in concluding that an arbitral award could not be set aside on grounds analogous to *Wednesbury* unreasonableness or irrationality.

48 *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257 at 261.

49 *Bremer Vulkan v South India Shipping* [1981] AC 909 at 978 (with Lord Edmund-Davies and Lord Russell agreeing); his Lordship described its survival as an "anomaly of legal history" in *Max Cooper* itself: [1979] 2 NSWLR 257 at 261.

50 The different possible analyses are set out in Mustill and Boyd (2nd ed) at 439 (n 16). *Re Jones and Carter's Arbitration* [1922] 2 Ch 599 held that the High Court has "inherent jurisdiction" to set aside awards that have an error of law on the face of the record: at 604, 605 (Lord Sterndale MR), 606 (Warrington LJ), 607 (Younger LJ). However, Lord Diplock later held that the High Court had only the powers granted by statute (albeit conferred by reference to the powers of the superior courts of common law, principally the Court of Queen's Bench): *Bremer Vulkan v South India Shipping* [1981] AC 909 at 979.

award simply on the basis that the arbitral tribunal has made an error of law. There is nothing anomalous with this result.

(a) Reading the Model Law as a whole, the parties have agreed to abide the arbitral tribunal's opinion on legal, as well as factual, issues.[51] There is no inherent objection to a non-judicial body forming opinions about legal issues (subject to the enforcement issues discussed below).[52] The law governing the arbitration could be foreign law (although it is not in the present case), which is a question of fact in an Australian court.[53] Moreover, awards made under the Model Law might be enforced in more than one country, where the courts might take different views of what the governing law requires. There is every reason to enable the parties to agree on an arbitral process to resolve legal issues.

(b) In any event, review for error of law on the face of the record of an inferior court or tribunal is itself not constitutionally entrenched.

25. There is no comparison between the position under the Act and the scenario posed in *Commodity Futures Trading Commission v Schor*,[54] relied on by the plaintiff. The United States Supreme Court stated in *Schor* that there would be separation of power concerns if non-Article III tribunals were established "to handle the entire business of the Article III courts without any Article III supervision or control, and ... without evidence of valid and specific legislative necessities".[55] That statement concerned

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51 Indeed, there is provision for the parties to agree that the arbitral tribunal is to act *ex aequo et bono* (from equity and conscience) or as *amiable compositeur* (which permits waiver of a strict interpretation of the law to the extent necessary to reach a more equitable solution): Model Law, art 28(3). On these expressions, see e.g. *Yesodei Hatorah College Inc v Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622 at [61]-[69] (Croft J); see also *Woodbud Pty Ltd v Warea Pty Ltd* (1995) 125 FLR 346 (NSW Supreme Court) at 355-356 (Young J).

52 See, in the context of industrial arbitration, *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666 (the Court).

53 See *Neilson v Overseas Projects Corporation* (2005) 223 CLR 331 at 370 [115] (Gummow and Hayne JJ), 391 [185] (Kirby J), 415 [261] (Callinan J). On the different policy considerations that arise with international arbitrations: see S Boyd, "'Arbitrator not to be bound by the Law' Clauses" (1990) 6 *Arbitration International* 122 at 128; A Tweeddale and K Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) at [2.29].

54 (1986) 478 US 833 at 855, cited in plaintiff's submissions, para 78.

55 *Commodity Futures Trading Commission v Schor* (1986) 478 US 833 at 855.

tribunals established by Congress (such as the Commodity Futures Trading Commission considered in *Schor*).[56]

26. But, in any event, the regime under the Act and the Model Law meets the *Schor* standard. Under the Model Law, arbitral tribunals may only deal with issues that are capable of settlement by arbitration (arts 34(2)(b)(i) and 36(1)(b)(i)). The Model Law provides for courts to ensure that arbitral tribunals stay within the limits of the function lawfully conferred on them by agreement (see para 12 above). There are "valid and specific necessities" in these disputes being resolved by an arbitral tribunal agreed by the parties (see para 7 above).

10 **D. No requirement that courts be given jurisdiction over substantive dispute**

27. Contrary to the plaintiff's submissions,[57] no constitutional difficulty arises from the fact that courts that enforce an arbitral award do not have jurisdiction over the substantive dispute that led to the award being made.

28. The role of courts in reviewing awards has always been more confined than that of the arbitrator. Generally the award, once made, will be the source of the parties' rights and obligations.[58] Even when courts were reviewing awards for errors on their face, they were not re-making the decision.[59] In no sense have the courts delegated judicial power to an arbitrator.[60]

(i) The s 35 "matter" is whether the award should be enforced

20 29. In a proceeding under s 35 of the Act to enforce an award, the relevant "matter" is whether the award is to be enforced or whether enforcement should be refused.[61] In

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56 In the United States, it is permissible for at least some federal judicial power to be exercised by "legislative" or "Article I" courts, rather than courts established under Art III of the United States Constitution: see e.g. R H Fallon, D J Metzler and D L Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (5th ed, 2003) at 362-418; J E Pfander, "Article I Tribunals, Article III Courts, and the Judicial Power of the United States" (2004) 118 *Harvard Law Review* 643.

57 Plaintiff's submissions, paras 69-70.

58 See above n 9.

59 Indeed, some commentators have stated that this jurisdiction was crude in its operation, because the award would need to be set aside and the entire arbitration begun again: Mustill and Boyd (2nd ed) at 448.

60 *Contra* plaintiff's submissions, para 75.

61 See *Traxys Europe v Balaji Coke Industry (No 2)* (2012) 201 FCR 535 at 553 [75] (Foster J), discussing enforcement under s 8 of the Act.

determining whether the preconditions for enforcement are met, and whether a ground for refusing to enforce has been made out, the court will find facts, determine the law, and apply the facts in the usual way.

30. The court need not be empowered to determine the underlying commercial dispute.

(a) A Commonwealth law may validly confer jurisdiction on a court to determine only some of the issues in dispute between the parties.[62]

(b) Often, including in this case, the subject-matter of the underlying dispute would not be within the scope of federal judicial power.[63] Although the enforcement of an award under s 35 of the Act raises a federal matter, that does not mean that the underlying dispute is also in federal jurisdiction.[64]

(c) Similarly, Australian courts enforce foreign judgments under the *Foreign Judgments Act 1991* (Cth), without venturing into the merits of the original dispute underlying the relevant judgment and regardless of whether they might have had jurisdiction to decide that dispute.[65]

(ii) *Totani* and *Brandy* are distinguishable; *Breckler* is applicable

31. The decision in *South Australia v Totani*[66] is distinguishable. Indeed, Gummow J in that case expressly contrasted the Act with the State law under consideration.[67] The basic vice of the State law in *Totani* was that it created the appearance that the Supreme Court was merely the instrument of the executive government.[68] By

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62 *Abebe v Commonwealth* (1999) 197 CLR 510.

63 The issues in dispute are claims arising under the contract: see final award dated 23 December 2010, paras 19-40. [**AB 27-32**]

64 By analogy, where service of process is effected under a Commonwealth law, this does not mean that the entire subject-matter of the proceedings is within federal jurisdiction: see *Flaherty v Girgis* (1987) 162 CLR 574 at 597-598 (Mason ACJ, Wilson and Dawson JJ). As noted, the matter "arising under" s 35 of the Act for the purposes of s 76(ii) of the Constitution is whether an award is to be enforced.

65 See *Foreign Judgments Act 1991* (Cth), ss 6-7; *South Australia v Totani* (2010) 242 CLR 1 at 64 [136] (Gummow J).

66 (2010) 242 CLR 1, cited in plaintiff's submissions, paras 70-73.

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

68 *South Australia v Totani* (2010) 242 CLR 1 at 20 [1], 52 [81]-[82] (French CJ), 66 [142] (Gummow J), 89-90 [229]-[230] (Hayne J), 160 [436] (Crennan and Bell JJ), 172-173 [479]-[481] (Kiefel J). However, decisional independence is not confined to interference from the executive government: at 43 [62] (French CJ).

contrast, there is no question here of the Act impinging on the independence of the courts from the executive government.

32. Instead, the courts' role is to enforce voluntary, contractual obligations to submit disputes to arbitration. There is a long history of courts enforcing arbitral awards as judgments of the court.[69] Under arts 34 and 36 of the Model Law, the courts can ensure that an arbitral tribunal was properly appointed; the arbitral tribunal has stayed within the limits of the function conferred by the agreement; each party had an opportunity to present their case; and the agreement is lawful and not contrary to public policy (see para 13 above). It does not compromise the decisional independence of the courts to enforce an award when these conditions are met.[70] Validity does not turn on the relative size or complexity of the task of the arbitral tribunal as compared to that of the court.[71] The plaintiff's arguments assume that the courts must be given a role in the underlying contractual dispute once an award has been made, but that assumption flies in the face of the history and function of the courts in relation to commercial arbitration.

33. There is also no analogy with the law considered in *Brandy v Human Rights and Equal Opportunity Commission.*[72] The Commission in that case was exercising compulsory powers, and its authority did not depend on the agreement of the parties.

34. A closer comparison is the law considered in *Attorney-General (Cth) v Breckler.*[73] As with an arbitral tribunal, the Superannuation Complaints Tribunal only had jurisdiction over parties who had submitted to its jurisdiction by choice.[74] The

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69 See above n 10 and accompanying text.

70 See *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 233 [208] (Gummow J): "The reasoning in *Kable* might be applicable where, for example, legislation of a State obliged its Supreme Court to enforce as if it were its own judgment an executive or legislative determination of a nature which was at odds with the fundamentals of the judicial process." See also *South Australia v Totani* (2010) 242 CLR 1 at 48 [70] (French CJ).

71 *South Australia v Totani* (2010) 242 CLR 1 at 35-36 [43] (French CJ), 80-81 [199]-[200] (Hayne J).

72 (1995) 183 CLR 245. *Contra* plaintiff's submissions, para 86.

73 (1999) 197 CLR 83.

74 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110-111 [43]-[44] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

plaintiff's arguments[75] that the decision to submit to arbitration is not similarly voluntary should not be accepted (see paras 6-11 above).

35. The availability in *Breckler* of collateral review should be understood in the context where members of the Superannuation Complaints Tribunal were officers of the Commonwealth within s 75(v) of the Constitution and performed functions conferred by a Commonwealth Act.[76] That factor strengthened the case for validity, but was not decisive.

E. Plaintiff's two objections should be rejected

36. For the reasons set out above, the plaintiff's two objections to the validity of the Act should be rejected.

37. First, the Act does not confer judicial power on arbitral tribunals. The tribunal's jurisdiction is based on voluntary agreement. Although an arbitral tribunal does form opinions about existing rights and liabilities, its award is only enforceable through a subsequent exercise of judicial power by a court. This case comes squarely within the principle in *CFMEU* set out in para 8 above.

38. Second, the Act does not impair the institutional integrity of enforcing courts.

(a) The impairing of institutional integrity describes the "less stringent"[77] limit on the power of State legislatures to confer functions on State courts. This limit has a different source from the limit on the Commonwealth's power to confer functions on courts.[78] There is no constitutionally required separation of judicial power at the State level.[79]

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75 Plaintiff's submissions, para 91.

76 See *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 97 [1], 107-108 [35], 111-112 [46]-[47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

77 *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [43] (French CJ and Kiefel J), citing *Baker v The Queen* (2004) 223 CLR 513 at 554 [51] (McHugh, Gummow, Hayne and Heydon JJ).

78 The limit on the Commonwealth conferral of functions on courts derives from the constitutional separation of federal judicial power, whereas the limit on the State conferral of functions on State courts derives from the need to maintain those courts as suitable repositories of federal judicial power: *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [43], 209 [45] (French CJ and Kiefel J); *South Australia v Totani* (2010) 242 CLR 1 at 81 [201], 86 [221] (Hayne J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ). Admittedly, the *Kable* doctrine does have "common foundation" with the separate limit

(b) Under the Model Law, the courts ensure that the arbitral tribunal acted lawfully, stayed within the scope of the arbitration agreement, and provided procedural fairness. This is an independent adjudicative function. Enforcing an award which meets these requirements does not undermine the institutional integrity of the courts (see paras 32-35 above).

(c) There is no constitutional requirement that the courts must be able to review arbitral awards made between consenting parties on the grounds of legal error. Fundamentally different considerations arise between reviewing the product of a voluntary agreement to settle disputes, and reviewing the exercise of non-consensual powers conferred by statute (see paras 20-24 above).

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

39. It is estimated that approximately 20 minutes will be required for the presentation of oral submissions for the Attorney-General for Victoria.

Dated: 26 October 2012

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on the Commonwealth's power to confer functions on federal judges as *persona designata*: *Wainohu v New South Wales* (2011) 243 CLR 181 at 228 [105] (Gummow, Hayne, Crennan and Bell JJ).

79 See e.g. *Wainohu v New South Wales* (2011) 243 CLR 181 at 212 [52] (French CJ and Kiefel J); *South Australia v Totani* (2010) 242 CLR 1 at 45 [66] (French CJ); *K-Generation Pty Ltd v Liquor Licensing Court (SA)* (2009) 237 CLR 501 at 529 [88] (French CJ), 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). The States have enacted legislation in substantially the same terms as the Model Law, which applies to domestic commercial arbitrations: see e.g. *Commercial Arbitration Act 2011* (Vic), esp Pt 8.