



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M64/2026

BETWEEN:

OIL BASINS LTD
Appellant

ESSO AUSTRALIA RESOURCES PTY LTD (ACN 091 829 819) & ORS
Respondents

10 **FIRST, SECOND AND THIRD RESPONDENTS' SUBMISSIONS**

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The appellant's (**OBL**'s) appeal resolves to the contention that, merely by reason of the choice of New York law by the terms of clause 18 of the **Settlement Agreement**,¹ New York curial law's meaning of "arbitrability" and, in the context of the operation of the *Federal Arbitration Act (FAA)*,² that law's allocation of authority between its courts and arbitrators to finally resolve scope disputes, is to be imported into Australian law and, thereby, applied to the construction and operation of the mandate imposed on
20 an Australian court by s.7 of the *International Arbitration Act 1974 (Cth) (IAA)* to stay its own proceedings in favour of arbitration. That contention only needs to be stated to be rejected.
3. While a New York court (given the FAA) would on such a stay application (absent clear and unmistakable evidence of the delegation of that role to the arbitration), finally determine an arbitrability dispute as to scope, that does not inform, let alone dictate, how an Australian court is to discharge its mandate under s.7 of the IAA to stay its own proceeding to thereafter allow final resolution of a scope dispute in accordance with the UNCITRAL **Model Law** on International Commercial Arbitration.³
4. New York jurisprudence on the criterion required for a court to stay its own proceeding
30 in favour of arbitration is inconsistent with that of the countries that, unlike the United States, have adopted the Model Law, including Australia.
5. **OBL**'s characterisation of the principle in *First Options of Chicago, Inc v Kaplan*, 514 US 938 (1995) is, in any event, wrong. Moreover, if its presumption applied, it has

¹ [ABFM3/9/1024].

² 9 USC §§ 1–16.

³ Contained in Schedule 2 to the IAA.

been rebutted by clear and unmistakable evidence of authority to first rule on scope being delegated to the arbitrators, which includes by the terms of the **Ad Hoc Arbitration Agreement**.⁴

6. Lastly, absent special circumstances, a party that unsuccessfully resists a stay application under s.7 of the IAA should be ordered to pay costs on an indemnity basis.

Part III: Section 78B notices

7. No notices under s.78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Material facts

8. The relevant factual background is succinctly and neutrally described in the reasons for judgment of the primary judge in *Oil Basins Ltd v Esso Australia Resources Pty Ltd* (2025) 78 VR 388 (**PJ**) at [3]–[26] and of the Court of Appeal in *Oil Basins Ltd v Esso Australia Resources Pty Ltd* [2026] VSCA 6 (**CA**) at [5]–[33]. The first to third respondents (**Producers**) emphasise the following facts.
9. *First*, it is not disputed that the IAA applies to the arbitration. It applies because clause 19(a) of the Settlement Agreement provides for “[a]ny dispute ... [to] be determined by arbitration in Melbourne, Victoria, Australia in accordance with the Commercial Arbitration Act 1984 (Vic)”. The seat of the international commercial arbitration – Melbourne – establishes the curial law, reinforced by the express reference to the then current Victorian curial law. Sections 12, 14, 16 and 21 of the IAA, together with art 1(1) of the Model Law, provide that the IAA applies under that curial law.⁵ Section 7 of the IAA then applies, by reason of s.7(1), even in the absence of a commenced arbitration.
10. Clause 8(a) of the Ad Hoc Arbitration Agreement affirms what was in any event the case: that the IAA applies to the arbitration.
11. *Second*, on 22 April 2024, the same day that OBL commenced proceedings in the Supreme Court of Victoria (cf AS [12]), OBL’s solicitors also sent a letter to the arbitral tribunal acknowledging the tribunal’s jurisdictional authority, and the parties’ rights to seek a *de novo* review thereof, but expressed a preference to “*short cut*” that

⁴ [ABFM3/10/1043-1081].

⁵ See also *Commercial Arbitration Act 2011* (Vic) (**2011 CAA**) s 43 as to the reference to the *Commercial Arbitration Act 1984* (Vic). Cf PJ [52].

IAA process by going directly to the Court.⁶ That is, it has always been a matter of convenience, not power, that led OBL to commence the proceeding.

12. Aside from an oblique reference in oral submissions before the primary judge,⁷ OBL has done nothing in the conduct of the Supreme Court proceeding to resile from that position.⁸ Further, it was not until the expert evidence of Professor Gillette was filed on 13 November 2024,⁹ less than two weeks before the hearing of the stay application and almost seven months after OBL commenced the proceeding, that there was any suggestion New York law was of any relevance to the stay application.

10 13. *Third*, despite the numerous shifts in the way the case has been put, OBL has never contended (a) that the IAA does not govern the arbitration; (b) that the parties *expressly* agreed that the IAA, or any part of it, would not apply to the arbitration; or (c) that the Producers have waived their right to rely on s.7 of the IAA or art 16 of the Model Law.

Part V: Argument

Ground 1

14. Contrary to OBL's submissions, both the primary judge and the Court of Appeal *did* construe the arbitration agreement but only to the extent required by the IAA. Section 7(2) of the IAA does not require that the court *must* always finally and conclusively construe the scope of an arbitration agreement before it can order a stay.

The courts below did construe the arbitration agreement

20 15. Ground 1 is built on the false premise that the primary judge granted a stay, and the Court of Appeal affirmed that grant, "*without construing the arbitration agreement at all*" (AS [3], [15], [17], [28], [34]). The courts below did construe the arbitration agreement, including by express reference to, and consideration of, the Settlement Agreement's clauses 5, 6B, 18 and 19 and the Ad Hoc Arbitration Agreement's recital E and clauses 1 and 8.¹⁰

16. This point was made clear at CA [56]–[57], where the Court of Appeal explained and

⁶ [RBFM/1/4].

⁷ See T179 at [RBFM/3/24].

⁸ Including by the terms of OBL's statement of claim filed in the proceeding: [36(c)], [41]–[47], prayers A–D, [ABFM3/11/1092, 1094–1097], and by the terms of OBL's amended statement of claim filed in the proceeding: [36(c)], [41]–[47], prayers A–D, [RBFM/2/13, 15–18]; during the directions hearing on 31 May 2024 (following the issue of the stay application on 20 May 2024), the 12 September 2024 hearing of the appeal from the 31 May 2024 directions hearing, the hearing of the stay application on 26–29 November 2024; and the hearing of OBL's appeal from the grant of the stay.

⁹ [ABFM3/15/1202–1413].

¹⁰ See CA [12]–[19], [54], [60], [96]–[97], [112]; PJ [7]–[12], [38]–[43], [67]–[68].

endorsed the primary judgment's acknowledgement of "*the potential need to construe the arbitration agreement*", and the propriety of doing so by "*forming a general view as to whether a dispute falls within the scope of an arbitration agreement*".

17. This case is not about whether a court should or should not construe an arbitration agreement, but about how far a court must go in doing so for the purposes of s.7 of the IAA. Section 7(2)(b) of the IAA requires the court to construe an arbitration agreement to the point of being satisfied that the differences forming the matter that the proceedings involve are, or are not, its subject. It is not required to reach a final view on the balance of probabilities about the scope of an arbitration clause.¹¹

10 The task required by s.7(2)(b)

18. (Principles of construction) The principles of construction ought not be controversial, but in the present context it bears emphasising that:

18.1. under s.39(2) of the IAA, when interpreting the IAA and the Model Law, the court must have regard to the objects stated in s.2D of the IAA, and "*the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes*";¹²

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18.2. article 2A of the Model Law requires, in the interpretation of the Model Law, that "*regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith*" and "[q]uestions concerning matters governed by [the Model Law] which are not expressly settled in it are to be settled in conformity with the general principles on which [the Model Law] is based"; and

18.3. it is "*essential*" in construing provisions of the IAA and the Model Law to give "*due regard*" to the decisions of other jurisdictions on equivalent provisions.¹³

¹¹ *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at [141]–[151].

¹² See also *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 282 CLR 512 at [73]–[75] (Gageler CJ), [147] (Edelman J), [296] (Jagot and Beech-Jones JJ); *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* (2024) 281 CLR 171 at [18] (Gageler CJ, Gordon, Steward, Gleeson and Jagot JJ); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [8]–[16] (French CJ and Gageler J), [81]–[99] (Hayne, Crennan, Kiefel and Bell JJ) and cf *Raguz v Sullivan* (2000) 50 NSWLR 236 at [45]–[54] (Spigelman CJ and Mason P).

¹³ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [75] (Allsop CJ, Middleton and Foster JJ). See also *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* (2024) 283 CLR 172 at [45] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ).

19. (Language of s.7(2)(b)) Section 7(2)(b) concerns the statutory command that a court “shall” stay a proceeding that “involve[s] the determination of a matter that, in pursuance of [an arbitration agreement], is capable of settlement by arbitration”.
20. The “scope” task required of a court by s.7(2) of the IAA is not one of assessing the merits of a dispute (even at a “summary judgment” level),¹⁴ but rather one of broad characterisation of a dispute as a matter to be resolved pursuant to an arbitration agreement (in accordance with the terms of IAA, including the Model Law).¹⁵
21. (“Light touch”) The Court of Appeal and the primary judge adopted the expression “light touch”. Contrary to the implication in OBL’s submissions, that expression does not connote an absence of construction, but rather concerns the degree of finality in exercising the constructional task, reflecting the mandate provided to the arbitral tribunal by the IAA and the Model Law. As the Full Court explained in *Hancock*, “it will often not be possible fully to delineate the metes and bounds of a dispute without fully hearing the dispute”. Doing so “would undermine the practical and effective operation of s 8”.¹⁶ Nor should the power in s.7(2) of the IAA be exercised in a way that usurps the role of the arbitrators provided for by the Model Law¹⁷ or to “undermine the practical and effective operation of [s.7 of the IAA].”¹⁸
22. (“Matter”) As to AS [19]–[20], the authorities are clear on what is meant by a “matter ... capable of settlement by arbitration”.¹⁹ As the Court of Appeal explained at CA [75]–[76], it is “the substantive dispute and not a disagreement as to whether that dispute is capable of arbitration pursuant to an arbitration agreement”.
23. OBL contends at AS [19] that it “sought no relief on the substance of the D&D Claims”.²⁰ A party cannot manufacture a different “matter” simply by confining the relief that it seeks. Doing so would create the precise problems that the IAA is directed to resolving (see [52] below). But in any event, and contrary to AS [20], resolution of the issues the subject of OBL’s amended statement of claim dated 31 May 2024 (ASOC) filed in the proceeding will necessarily involve the resolution of whether the

¹⁴ *Hancock* at [149].

¹⁵ See *Hancock* at [109], [146], [149]–[152], [157], [158], [222], [229], [249], [264], [343]–[376].

¹⁶ The Full Court referred to s.8 of the *Commercial Arbitration Act 2011* (WA).

¹⁷ *Hancock* at [149].

¹⁸ *Hancock* at [146].

¹⁹ *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332 at 351 (Deane and Gaudron JJ). See also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [235] (Allsop J; Finn and Finkelstein JJ agreeing).

²⁰ The “D&D Claims” are the same as the “D&D Issues” defined in CA [9].

merits of the D&D Issues require a modification that is inconsistent with the terms of clause 6B(f) of the Settlement Agreement (one of the defences raised by OBL to the D&D Issues at ASOC [43], together with other merits defences to those claims raised in ASOC [44]–[47]). As noted by OBL (AS [27]) that would also require the Court’s determination as to whether the D&D Issues “*are fundamentally inconsistent with the nature of the netback method.*”

24. (Problems with conclusive construction) The difficulty with OBL’s contention is exemplified by the facts of this case. As clause 19(b)(ii) of the Settlement Agreement expressly recognises, disputes as to whether the Special Referee’s modified methodology should be further modified comprise a class of dispute within the scope of the arbitration agreement. Clause 5(b) does not limit the scope of the arbitration agreement by removing a category of dispute from determination by arbitration. Under New York law the question of whether the parties are entitled to the relief that they seek goes to the merits and not arbitrability.²¹ The clause conditions the extent to which the parties’ agreement may be modified by arbitration as a consequence of the resolution of a dispute as to the need for a modification. In that regard, it is fundamental to understand that the Settlement Agreement empowers the arbitral tribunal to do something – re-make the terms of a contract – that a court cannot do. Parties’ ability to empower arbitrators in that way is a fundamental characteristic of arbitration.

25. The effect of OBL’s argument is that the court would be invited to posit a modification to the terms of the Settlement Agreement, determine what the outcome of that modification might be in the context of the Settlement Agreement, and consider whether that outcome is consistent or inconsistent relevantly with the rate fixed by clause 6B(f) of the Settlement Agreement. That is, inevitably, a court would be compelled to consider the merits of the claim in order to resolve the asserted inconsistency the subject of clause 5(b). In this case, that is implicitly accepted by OBL, which contends that the modifications sought by the Producers are prohibited (AS [27]). For a court to embark on this task – considering the merits of what is sought by a party – is fundamentally inconsistent with the mandate given to arbitrators to resolve disputes. The problem is even more acute where, as here, it is inevitably necessary for a court to stray beyond its institutional role in evaluating the desirability of making changes to parties’ contractual arrangements.

²¹ Cf *Chafin v Chafin*, 568 US 165, 174 (2013); *MOAC Mall Holdings LLC v Transform Holdco LLC*, 598 US 288, 296 (2023); *PacifiCare Health Systems Inc v Book*, 538 US 401, 407 n 2 (2003).

26. (Party autonomy) As to the significance of party autonomy and consent, that principle “does not mean that provisions found in legislation governing arbitral proceedings and the enforcement and recognition of arbitral awards are similarly dependent on such consent” (CA [71]).
27. (Section 7(5)) As to AS [23], s.7(5) is directed to a different question (which is not in issue: it is accepted the arbitration agreement is valid and operates according to its terms), and “find” does not mean what OBL would have it mean.²² As to AS [26], the purpose of s.7(2) is not to deny a party access to the court, but rather to condition that access in a way that accords with the court’s role under the Model Law.
- 10 28. (New York Convention) As to AS [24]–[25], art II(3) of the New York Convention obliges a court to refer parties to arbitration, and has been given effect by s.7(2) of the IAA. Article II(3) says nothing about a court having to construe the terms of a contract conclusively in order to address scope. The “leading commentary” relied on by OBL also states that “[i]n addressing questions of scope, courts *may* have to grapple with the language of some arbitration agreements that *may* seem to cover only a certain type of claims or to be limited to a specific purpose. However, the disadvantages of having disputes under the same contract allocated to different jurisdictions are substantial.”²³ That accords with the approach endorsed by the Court of Appeal.
- 20 29. Unlike the United States of America, Australia has implemented both the New York Convention (by s.7) and the Model Law. The Parliament’s adoption of the New York Convention in s.7 cannot be read to strip art 16 of its content; the two provisions must be read harmoniously. Further, art V(1)(c) of the Convention provides the relevant review mechanism under the Convention, which is consistent with arts 34 and 36.
30. (“Capable of settlement”) As to AS [29], the IAA’s statutory language of “*is capable of settlement by arbitration*” is not informed by the content New York law would give to the concept of “arbitrability”. Rather, under Australian law that collocation, properly understood, is directed to public policy concerns, not the scope of the arbitration agreement.²⁴
- 30 31. (The court’s role is not ousted) Contrary to AS [30], a construction that affords interlocutory conditioning of the court’s role to staying its own proceeding pending a

²² *Hancock* at [147]–[148], [367], [369].

²³ International Council for Commercial Arbitration, *ICCA’s Guide to the Interpretation of the 1958 New York Convention* (2nd ed, 2024) at 41 (emphasis added).

²⁴ *Tesseract* at [75] (Gageler CJ), [155] (Edelman J), [271] (Steward J), [340]–[341] (Jagot and Beech-Jones JJ).

ruling on jurisdiction by arbitrators is not an “*ousting*” of the court’s jurisdiction. Rather, it is a construction that both recognises the mandatory nature of the right afforded to a party to seek a stay under s.7(2) of the IAA and, in the context of the Model Law’s arts 16(3), 34(2)(a)(iii) and 36(1)(a)(iii), reserves (given the terms of art 5)²⁵ the court’s role thereafter as one of *de novo* review.²⁶ The point is that s.7(2) does not “*preserve the Court’s ability to determine jurisdictional issues itself*” at the expense of an arbitral tribunal’s ability to do so promptly at the first instance.

32. (When the Model Law does not apply to the seat) OBL’s recitation of former legislative provisions in AS [31] says nothing about the present operation of ss.16 and 21 and arts 1(2) and 16, which are applicable in this case.²⁷ OBL’s submission resolves to the proposition that the right afforded to a party to obtain a stay by an Australian court of its own proceeding under s.7(2) in favour of an arbitration whose seat is not a Model Law jurisdiction may raise different issues. Even if that possibility were to be assumed, that provides no answer to such an application when the seat of the arbitration is stipulated by the Model Law.
33. (Article 8(2)) As OBL notes in AS footnote 13, art 5 of the Model Law strictly limits curial intervention. Article 8(2) is not a *concession* that the court is to decide a scope dispute – it merely confirms that the existence of a court proceeding is not a basis to impede an arbitral determination of the same dispute. It says nothing that would limit the court’s mandate under s.7(2) of the IAA, save that, by art 8(3), it provides the same rights of review afforded to the court as are provided to a scope ruling under art 16.
34. (Other Model Law jurisdictions) As to AS [32], as OBL correctly notes, numerous Model Law jurisdictions have construed art 16 as embodying the *Kompetenz-Kompetenz* principle such that it is for the arbitral tribunal, and not the court, to determine scope issues first.²⁸ That considered body of law cannot be dismissed as reflecting “*a priori* assumptions” (cf AS [32]). It ought be influential in the proper construction of art 16 (and s.7(2)), given the IAA’s policy of aligning Australia’s international arbitration law with the law of foreign countries, particularly those that

²⁵ Cf *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* [2020] WASCA 77 at [322], [465] (Quinlan CJ); *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476 at [136]–[137] (Lyons J).

²⁶ Cf *Tesseract* at [47] (Gageler CJ).

²⁷ Cf IAA s.21; 2011 CAA s.43; PJ [52].

²⁸ In addition to the cases and commentary referred to by OBL, see **Born**, *International Commercial Arbitration* (3rd ed, 2021) at 1171–1172; Polkinghorne et al, ‘Article 16: Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction’ in Banketas et al (eds), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020) at 297–300.

have adopted the Model Law.²⁹ For example, in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [67], the Singaporean Court of Appeal set out a principled analysis of why the *Kompetenz-Kompetenz* principle embodied in art 16 of the Model Law requires an arbitral tribunal to determine jurisdictional questions first.

35. *Dell Computer Corporation v Union des consommateurs* [2007] 2 SCR 801 similarly lays down a “general rule that in any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator”.³⁰
36. *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 concerned the court of the seat determining jurisdiction, and enforcement, not a mandatory stay (cf AS footnote 15). The Court’s *obiter* remarks about *Kompetenz-Kompetenz* do not assist OBL, although it is notable that, at [85], Lord Collins JSC located the court’s role in determining scope questions under the Model Law as arising from art 34, rather than as parallel authority with that of the arbitral tribunal under art 16(1). In any event, the Producers’ case is not that the arbitral tribunal has *exclusive* power to resolve a dispute about scope.
37. It is well established that the word “may” when used in a statute conferring decision-making power implies an obligation to exercise the power so conferred.³¹ An award could not be rendered without an anterior determination as to disputed jurisdiction. Such a construction is consistent with the interpretive mandate in s.39(2)(b)(i) of the IAA, the structure of art 16(1) read with arts 16(3), 34(2)(a)(iii) and 36(1)(a)(iii), and is in harmony with the analysis in cases such as *Ward v Williams* concerning the conferral of jurisdiction and powers on judicial bodies.
38. The suggestion in the final sentence of AS [32] that the existence of s.7(2) “confirms the parallel authority of the courts to rule on jurisdiction” again inverts the issue. The mandatory terms of s.7(2) provide the very mechanism by which a court is to ensure that the arbitral tribunal rules on jurisdictional issues first before those issues are determined by a court.

²⁹ See [18] and footnote 13 above.

³⁰ *Dell* identified an “exception” where the relevant issue involves a question of law alone. The Producers’ position remains that, properly construed, the IAA and Model Law permit no such exception, because the statutory language in s.7(2) requires that the court “shall” stay the proceedings. However, the issue is not necessary for this Court to determine, as on any view the determination of the scope of the arbitration agreement in this case turns on mixed questions of fact and law: CA [56]; PJ [62].

³¹ Cf *Ward v Williams* (1955) 92 CLR 496 at 505–507 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ); *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214.

Ground 2

39. OBL's ground 2 relies on common law choice-of-law principles. Those principles have no relevant application to this case, which is governed by the terms of the IAA. Ground 2 is therefore misconceived and must be dismissed.
40. As OBL accepts,³² and for the reasons explained in [9] above, the curial law of the arbitration agreement is Victoria. As has occurred in the United Kingdom,³³ in Australia the Parliament has introduced a statute that displaces what would otherwise be the common law position. That statute is the IAA, which covers the field to the exclusion of the law of a State or Territory concerning arbitration, and which in turn gives the Model Law the force of law in Australia. That is – the curial law of the arbitration is the law embodied in the IAA in relation to matters with which it deals.
41. The effect of s.21 of the IAA and art 1(2) of the Model Law is that Victorian law “*supplies a singular definitive answer*” to the question of the application of arts 16, 19, 28 and 34 (among others) of the Model Law.³⁴ “*New York law only has effect by application of the Australian common law choice of law principles, which are necessarily subject to Australian statutory provisions to the contrary*” (CA [96]).
42. Article 28(1) of the Model Law makes plain that the allocation of authority as between courts and arbitrators to resolve disputes is not imported by a choice of law clause.³⁵ Rather, it is determined by the curial law, which is the IAA. At its highest, OBL's case is that clause 18 of the Settlement Agreement supplies the law of the arbitration agreement for the purposes of art 28(1) of the Model Law. But art 28 is self-evidently not concerned with the curial law, and cannot affect the principle of *Kompetenz-Kompetenz* embodied in art 16 of the Model Law.³⁶
43. As to the suggestion in AS [42] that the application of the IAA “*does not negate or displace the parties' choice of New York law to govern the interpretation and application of the arbitration agreement*”, there is no New York law about how to construe an Australian statute. A New York court, if asked what the parties' choice of curial law meant, would inevitably understand that question as referring to the curial law being Victorian, which in turn means the IAA, which in turn allocates authority

³² AS [39], [42], [67], [72].

³³ See AS footnote 22, where OBL acknowledges that the common law position described in *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'* [2020] 1 WLR 4117 has been reversed by statute.

³⁴ *Tesseract* at [24] (Gageler CJ).

³⁵ Cf *Tesseract* at [55] (Gageler CJ), [87] (Gordon and Gleeson JJ).

³⁶ *Tesseract* [24]–[30] (Gageler CJ).

between the court and the arbitrators as to their respective authorities to rule on scope issues.³⁷

44. It is otherwise unnecessary for the Court to address OBL’s contentions concerning *Enka* – the issue simply does not arise.

Ground 3

OBL’s “issue 1”

- 10 45. Article 16 of the Model Law is given the force of law by statute. However important the principle of “party autonomy” may be, parties cannot remove that force of law (cf CA [71]).³⁸ This does not mean that a defendant to a court proceeding could not waive its right to seek a stay under s.7 of the IAA. But that is not what has happened in this case. There is no suggestion that the Producers have waived any statutory right, or acquiesced in a particular course of conduct that would prevent them from relying on s.7(2) (or art 16). The allegation is that, by implication, the parties agreed that a court, and not an arbitral tribunal, is to decide whether a dispute is within the scope of the parties’ arbitration agreement. That allegation is misconceived for the reasons given in relation to OBL’s “issue 2” below, but even if such an agreement was made, it cannot overcome the effect of s.16 of the IAA giving legal force to the Model Law.
- 20 46. As the Court of Appeal explained (CA [80]–[85]), art 16 has the force of law in Australia, and stands in contrast to the limited number of specific provisions of the Model Law that expressly permit parties to opt out from their operation such as arts 9(1) and 28(1).
47. As to OBL’s reliance on Born at AS [50], that is a passing observation in a section of his text addressing the power of parties to agree that *arbitrators*, and not the court, might finally determine jurisdiction. That distinction is critical in appreciating the significance of New York cases, addressed below. In any event, Born’s statement is asserted without any reference to authority and, as a normative assertion, cannot displace the effect of statutory language, properly construed.
48. More pertinent is the preceding section of Born’s text, where he explains by reference to the Model Law and relevant authority that, properly construed, “*an interlocutory*

³⁷ *Scherk v Alberto-Culver Co*, 417 US 506, 519 (1974); *Viking River Cruises Inc v Moriana*, 596 US 639, 653 (2022); *JSC Surgutneftegas v President & Fellows of Harvard College*, 2005 WL 1863676, at *7 (SD NY, 3 August 2005); *Molecular Dynamics Ltd v Spectrum Dynamic Medical Ltd*, 2024 WL 3523414 at *7 (SD NY, 23 July 2024); *PK Time Group, LLC v Robert*, 2013 WL 3833084 at *3 (SD NY, 23 July 2013).

³⁸ See *American Diagnostica Inc v Gradipore* (1998) 44 NSWLR 312 at 325 (Giles CJ Comm D).

*judicial decision on jurisdictional issues under Article 8(1) is contemplated **only** in circumstances where the **existence or validity** of the arbitration agreement is challenged, as distinguished from a jurisdictional challenge concerning the scope of an admittedly valid agreement”.*³⁹

49. In any event, as the Court of Appeal explained, some provisions of the Model Law are expressly described as being subject to contrary agreement, and some are not (CA [80]–[85]). The choice to structure the Model Law in that way must be given work to do, particularly in the context of art 5 (which restricts court intervention “except where so provided in this Law”), and given the *travaux* reveal a deliberate choice *not* to include such language in art 16.⁴⁰
50. As to OBL’s reliance on disparate features of arbitration practice at AS [52]:
- 50.1. Parties’ ability to make arbitration conditional on prior mediation is simply a condition precedent, not a limit on an arbitral tribunal’s authority or mandate.
- 50.2. The exclusion of particular issues from the scope of an arbitration agreement is commonplace, and says nothing about determination of scope itself.⁴¹
- 50.3. The fact a party may waive a right to arbitrate by failing to assert that right during years of protracted correspondence⁴² says nothing about whether parties may agree that a statutory provision does not apply to them.
- 50.4. The UNCITRAL Digest passage concerns the exclusion of “*immediate court intervention in relation to interim jurisdictional rulings*”. The only case it cites concerned “waiver” of the requirements of the Quebecois codification of the Model Law by the parties’ adoption of the UNCITRAL Arbitration Rules.⁴³ The Quebec Court of Appeal found that the local rules giving effect to art 5 of the Model Law have as their “*fundamental objective ... to exhaust the arbitration procedure before resorting to the courts*”, and endorsed the trial judge’s description of the effect of the codification of art 16 of the Model Law being that “[o]nly the arbitrator is qualified to rule on his or her own jurisdiction”⁴⁴ (subject to the court’s review pursuant to arts 8(3), 16(3), 34 or 36).

³⁹ Born at 1186 (emphasis in original).

⁴⁰ See [54]–[55] below.

⁴¹ Cf Born at 1186.

⁴² See *Dialogue Consulting Pty Ltd v Instagram Inc* (2020) 291 FCR 155 at [470] (Beach J).

⁴³ *Compagnie Nationale Air France v Libyan Arab Airlines* (Quebec Court of Appeal, Rothman, Mailhot and Chamberland JJA, 31 March 2003).

⁴⁴ See *Air France v Libyan Arab Airlines* at [24], [51]–[52], [59]–[61], [70]–[71].

51. Ultimately (cf AS [52]), in a case like the present, where the parties are in dispute about whether an agreement allocating scope exclusively to a court was made, that dispute is itself a dispute about scope, and is precisely contemplated by the terms of art 16.
52. The alternative would be to permit the subdivision of the dispute between the parties into different constituent elements, with each element to be decided by a different decision-maker. Such an approach is anathema to the objects of the IAA and has repeatedly been deprecated by authority.⁴⁵
- 10 53. OBL's concerns at AS [53] about futility are wrong, and the reference to s.39 is misplaced. The Model Law (and IAA) reflects a legislative choice that (a) it is for an arbitral tribunal to rule on a plea under arts 16(2) and (3) that the tribunal does or does not have jurisdiction prior to that issue being determined by a court, and (b) a court may review an arbitral tribunal's decision on jurisdiction *de novo* under arts 8(3), 16(3), 34(2)(a)(iii) or 36(1)(a)(iii). Whatever policy OBL might prefer, that is what the statute says. So much was explained by Gageler CJ in *Tesseract* at [47]–[49]. Further, given the interplay between arts 1(2), 19, 20, 28 and 34 (in the context of art 36) of the Model Law, and given an Australian seat is chosen, the scope of the parties' choice of law clause necessarily excludes any New York rules limiting or excluding the scope of the authority of courts or arbitrators expressed or implied in the IAA.⁴⁶
- 20 54. The *travaux préparatoires* are not “ambiguous” (cf AS [54]); they support the Producers' position. Holtzmann and Neuhaus's commentary on the Model Law bluntly states that “[t]he principle of *Kompetenz-Kompetenz* is a mandatory one in the Law, that is, the parties cannot agree to limit the power of the arbitral tribunal to rule on its jurisdiction.”⁴⁷ The support for that proposition is the considered choice by the UN Commission on International Trade Law not to state that art 16 applied “*unless otherwise agreed by the parties*”.⁴⁸
55. Further, the Report of the Commission's 18th session records a concern that the proposed form of art 16(1) “*would not be acceptable ... to those parties who did not want arbitrators to rule on their own jurisdiction*”.⁴⁹ The Commission resolved to

⁴⁵ See, eg, *TCL Air Conditioner* at [16]; *Comandate* at [162]–[187]; *Hancock* at [163]–[205]; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165 (Gleeson CJ).

⁴⁶ *Tesseract* at [55] (Gageler CJ), see also [293], [311], [335]–[339], [345] (Jagot and Beech-Jones JJ).

⁴⁷ **Holtzmann and Neuhaus**, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) at 480.

⁴⁸ Holtzmann and Neuhaus at 480; UN Doc A/CN.9/SR.315 at 438.

⁴⁹ UN Doc A/40/17 at [150].

adopt the proposed wording in art 16(1)⁵⁰ on the basis that the “*principle embedded in the paragraph was an important one for the functioning of international commercial arbitration*”, and noted that “*it was ultimately for each State, when adopting the model law, to decide whether it wished to accept the principle ...*”.⁵¹ By adopting the text of the Model Law including art 16(1) (that is, accepting the principle “*embedded in*” art 16), the Parliament gave statutory force to the principle that it is for arbitrators to rule, first, on their jurisdiction.

OBL’s “issue 2”

56. OBL contends that the parties agreed that a court would decide scope disputes.

10 57. This question is one of sequence – who decides scope questions *first*? OBL’s position is that, despite the absence of any written agreement addressing art 16, and despite the parties’ express agreement that the IAA applies to the arbitration, and despite OBL’s express statement to the arbitral tribunal on 22 April 2024 that art 16 applied to it, there is no “clear and unmistakable evidence” that the arbitral tribunal, and not the court, should determine scope disputes first. That is fundamentally wrong and misunderstands the position under New York law.

58. The New York position must be understood in context. Under the FAA, the court is *required* to resolve scope disputes before a stay of the court’s proceeding is to be granted.⁵² That is the inverse of the Model Law position under art 16(1). In that context
20 and given the primacy attributed by § 2 of the FAA, the US Supreme Court has determined that parties may by “clear and unmistakable evidence” provide, by their delegation, that an arbitrator, and not the court, may decide scope disputes. That is, the parties may thereby displace the statutory operation of what would have otherwise been the obligation of the New York court to resolve the issue of, what that jurisprudence coins, “arbitrability” on a contested stay application. The principle is an extension of the standard of review a New York court will apply in an award recognition or enforcement application.⁵³

59. In *First Options*, the Supreme Court delineated three issues: the merits; whether the parties agreed to arbitrate the merits (“arbitrability”); and who has the “primary power”

⁵⁰ Subject to a minor irrelevant change – see UN Doc A/40/17 at [152].

⁵¹ UN Doc A/40/17 at [151].

⁵² See FAA §§ 3 and 4; Born at 1217–1237, especially 1219–1226.

⁵³ *First Options* at 944–945.

– the final authority – to decide arbitrability.⁵⁴ *First Options* was about the third issue. In the context of an enforcement application under FAA §§ 10 and 11, the Court held that, if the parties did *not* agree to submit arbitrability itself to arbitration, “*the court should decide that question ... independently*”. But if the parties did agree to submit arbitrability to the arbitrator by “*clear and unmistakable evidence*”, courts review the arbitrator’s decisions with the same deference they accord to decisions by the arbitrators on the merits of the dispute. The principle in *First Options* was acknowledged as applying to applications for a stay under FAA §§ 3 and 4 in ***Henry Schein, Inc. v Archer & White Sales, Inc.***, 586 US 63 (2019) (so much so that the Supreme Court affirmed that a delegation of such authority is effective and will be enforced even where the contention that the merits claim is within the scope of the arbitration agreement can be said to be “wholly groundless”).⁵⁵

60. That is – the rule set down by *First Options* is one about displacing what New York jurisprudence accepts is no more than a default statutory right that the parties can agree to contract away. It is not properly characterised as a free-standing contractual “presumption”. It is tied to New York’s curial law of arbitration, read in the context of the FAA. It has no relevance to the curial law embodied in the IAA. Unlike § 2 of the FAA, the IAA provides no statutory default for the presumption to displace.
61. The third question posed in *First Options* – sometimes characterised as the “who” question – is answered in this case by art 16 of the Model Law.
62. As to the suggestion that this Court is bound by a statement of New York law made before the primary judge, the Court is capable of reaching its own view of the law of New York by reference to relevant texts, even if expert evidence on that subject was not contradicted,⁵⁶ particularly where otherwise the Court’s understanding of the law would be incomplete.⁵⁷ Here, the assertion that Judge McGuire accepted that cases in AS footnote 44 were “*correct and up-to-date statements of the law*” ignores that those statements of the law are reflective of the context of the statutory presumption

⁵⁴ *First Options* at 942–943.

⁵⁵ *Henry Schein* at 65, 68.

⁵⁶ Cf *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at [60] (Kiefel CJ, Gageler and Jagot JJ).

⁵⁷ See *James Hardie v Hall* (1998) 43 NSWLR 554, at 573C–D (Sheller JA). See also Davies et al, *Nygh’s Conflict of Laws in Australia* (11th ed, 2026) at [17.30]–[17.31]; *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995 at [148]–[149] (Lord Leggatt JSC; Lord Reed PSC, Lord Lloyd-Jones, Lord Briggs and Lord Burrows JJSC agreeing); *Blasket Renewable Investments LLC v Kingdon of Spain* [2025] FCA 1028 [113]–[115] (Stewart J).

established by the FAA. In any event, reliance on those cases cannot assist OBL in light of the statements of law in cases cited in footnotes 37 above and 59 and 65 below.

Part VI: Notice of contention and notice of cross-appeal

63. If, contrary to the Producers' position, OBL succeeds in establishing that the proper law of the parties' arbitration agreement is the law of New York, the appeal should nonetheless be dismissed because the law of New York would not support the existence of an agreement between the parties ousting art 16 of the Model Law.

10 64. (Ground 1(a)) First, under New York law, the effect of a proper law clause such as that contained in clause 18 of the Settlement Agreement is not to import New York law's allocation of authority as between courts and arbitrators to resolve disputes, which is a matter of that State's curial law.⁵⁸

65. That does not exclude the possibility of parties specifically electing to adopt New York law as it would apply to an arbitration,⁵⁹ but that is not what occurred in *Mastrobuono*, and is not what occurred in this case. It follows that, even if the proper law of the arbitration agreement is the law of New York, that law would not affect the application of the IAA and art 16 of the Model Law.

20 66. The Producers accept that this point was not expressly put below (though they have always maintained that the parties' adoption of New York law does not extend to its allocation of authority between a court and an arbitrator).⁶⁰ It is expedient in the interests of justice to raise it now: it is a question of US law, it relies on a case that formed part of the record below, and a refusal by this Court to consider the point would risk overlooking the effect of a US Supreme Court decision that has already been the subject of consideration by this Court.⁶¹ OBL – which has addressed the merits of the point in AS [62], and whose submissions are replete with references to foreign law and secondary literature – cannot seriously maintain that it is prejudiced by the point.

⁵⁸ *Mastrobuono v Shearson Lehman Hutton Inc*, 514 US 52 (1995); *Shaw Group Inc v Triplefine International Corporation*, 322 F 3d 115 (2nd Cir, 2003); *Smith Barney Shearson Inc. v Sacharow*, 91 NY 2d 39, 49 (1997).

⁵⁹ See, eg, *Smith Barney, Harris Upham Co v Luckie*, 85 NY 2d 193, 202, 205 (1995), where the choice of law clause concerned not only the agreement but also its enforcement in accordance with the chosen law. See also *Sacharow* at 48–49; *Shaw* at 123; *Gab Robins NA Inc v Safety Insurance Company*, 2009 WL 5386819 at *1 (NY Sup Ct, 30 December 2009); *Diamond Waterproofing Systems Inc v 55 Liberty Owners Corp*, 4 NY 3d 247 (2005); *ROM Reinsurance Management Company Inc v Continental Insurance Company Inc*, 115 AD 3d 480, 481 (1st Dep, 2014), where the arbitration clause stated “the arbitration laws of New York State” governed the parties' arbitration.

⁶⁰ See, eg, Producers' written case dated 11 April 2025 at [21] citing Model Law art 28 [RBFM/4/33].

⁶¹ See *Tesseract* at [55] (Gageler CJ), [98] (Gordon and Gleeson JJ), [178] (Edelman J), [375] (Jagot and Beech-Jones JJ).

67. Having regard to the principles described in *Mastrobuono*, the prospect of New York law governing the arbitration agreement goes nowhere, as it cannot establish the “presumption” relied on by OBL in its ground 3.
68. (Ground 1(b)) *Second*, even if the proper law of the arbitration agreement is New York, and that choice is found to import New York’s allocation of authority to decide as between courts and arbitrators, the presumption does not establish an actual agreement by the parties to exclude the application of art 16 of the Model Law. As already addressed above, *First Options* stands only for the proposition that, in the context of the FAA, courts will finally rule on questions of scope absent a delegation to the arbitration by “clear and unmistakable evidence”. Such a presumption does not, and cannot, constitute a negative covenant by the parties preventing the arbitral tribunal from ruling on scope questions.
69. This position is not new; it was relied on by the Producers before the Court of Appeal.⁶²
70. As to the submissions made at AS [64]–[72], the Producers submit as follows.
71. The absence of any express reference to arbitrators deciding their own jurisdiction in clause 19 does not assist OBL given the express reference to Melbourne as the arbitral seat, with the result that its curial law is to be applied.
72. The express reference to the *Commercial Arbitration Act 1984* (Vic) cannot have the effect contended for in AS [66], because:
- 20 72.1. it is superseded by the parties’ agreement in clause 8 of the Ad Hoc Arbitration Agreement that the arbitration is to be governed by the IAA;
- 72.2. section 43 of the 2011 CAA relevantly provides, in the case of an arbitration commenced after 17 November 2011,⁶³ that “a reference in an arbitration agreement to the *Commercial Arbitration Act 1984* ... is to be construed as a reference to this Act”; and
- 72.3. by reason of 2011 CAA s.1 and IAA ss.12, 14, 16 and 21, the effect of identifying the 2011 CAA as the legislation governing an international arbitration is to adopt the IAA as governing that arbitration.
73. Accordingly, even if the parties’ intention is properly to be determined by reference to the date on which they entered the agreement, that contractual presumption has been
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⁶² See Producers’ supplementary written case dated 1 August 2025 at [16] [RBFM/5/45].

⁶³ The date on which the 2011 CAA commenced: Victoria, *Victoria Government Gazette*, No S 369, 15 November 2011.

(a) superseded in fact and (b) altered by statute. That position is reinforced by the fact that art 7(1) of the Model Law, which defines “arbitration agreement”, speaks of “disputes which have arisen or may arise”. It expressly contemplates its operation as a dispute resolution regime into the future. Parties contracting for the future resolution of future disputes cannot be taken to have assumed that the law would never change. Further, any arbitration is, by its nature, governed by a body of law that changes.

74. OBL otherwise relies on what it characterises as an “*(at least) arguably applicable exception to the arbitration agreement*” (AS [67]ff). The argument is circular. Whether there is an “*(at least) arguably applicable exception*” is itself a question about the scope of the arbitration agreement, and therefore falls within art 16 of the Model Law. OBL’s position is otherwise that it must succeed even if its construction of clause 5(b) is wrong, and that it is appropriate for the court to undertake a complex examination of the merits of the dispute between it and the Producers (AS [68]–[71]). The former point should not be permitted; the impropriety of the latter point only serves to support the Producers’ case (cf [25] above).⁶⁴
75. (Ground 1(c)) Finally, even if OBL’s characterisation of New York law is correct, and even if “clear and unmistakable” evidence is required in order for arbitrators to be permitted to rule on scope disputes, there is evidence to the requisite standard in this case. That is supplied by the Ad Hoc Arbitration Agreement, which expressly adopts the IAA (and the Model Law) as applying to the dispute.⁶⁵ It is also supplied by the 22 April 2024 letter referred to at [11] above.
76. OBL seeks to avoid this conclusion by arguing that the Ad Hoc Arbitration Agreement is described as applying to disputes “*under cl 19 of the Settlement Agreement*”. Even if that is right, clause 19 at a minimum impliedly provides for the application of IAA, and any ambiguity in that regard is dispelled by clause 8 of the Ad Hoc Arbitration Agreement.
77. As to recital E of the Ad Hoc Arbitration Agreement, a recital cannot qualify the unambiguous words of an operative provision of the agreement.⁶⁶ The recital says

⁶⁴ For the avoidance of doubt, the Producers’ position remains as stated in CA [34(e)].

⁶⁵ *Beijing Shougang Mining Investment Company v Mongolia*, 11 F 4th 144, 154–157 (2nd Cir, 2021); *DDK Hotels LLC v Williams-Sonoma Inc*, 6 F 4th 308, 318–19 (2nd Cir, 2021); *Alessi Equipment Inc v American Piledriving Equipment Inc*, 578 F Supp 3d 467, 502 (SD NY, 2022); *Credit Suisse First Boston Corp v Pitofsky*, 4 NY 3d 149, 154–155 (2005).

⁶⁶ *Ex parte Dawes*; *In re Moon* (1886) 17 QBD 275 at 286, 289 (Lord Esher), 289 (Lopes LJ); *Harpur v Levy* (2007) 16 VR 587 at [63] (Neave JA) and [102] (Redlich JA).

nothing more than that OBL maintains its objection.⁶⁷ It says nothing to exclude a decision on that objection being determined by the arbitrators as within *Kompetenz-Kompetenz* (at first instance).

78. As to AS [74], no error can or will “escape scrutiny”. If the appeal is dismissed, the question of scope will be the subject of detailed argument before the arbitral tribunal. Any decision adverse to OBL is capable of review under art 16(3) or art 34(2)(a)(iii), or by resistance to the enforcement of an award under art 36(1)(a)(iii). OBL has recourse to further appeals in respect of any decision concerning art 34(2)(a)(iii) or art 36(1)(a)(iii). OBL will not be deprived of making its point about scope; it must simply do so in the order required by statute.

Notice of cross-appeal

79. Finally, the Producers cross-appeal from the Court of Appeal’s judgment concerning costs. The Court of Appeal overturned the primary judge’s decision to require OBL to pay the Producers’ costs of the stay application on an indemnity basis. The Court of Appeal did so because it considered that the primary judge had not identified a basis justifying the exercise of his discretion to award indemnity costs.
80. Consistent with, particularly, other Model Law countries and the UK,⁶⁸ this Court should declare the law of Australia as being that, in the absence of special circumstances, where a breach of an arbitration agreement causes another party to incur legal costs, the Court should typically exercise its discretion to require that costs be paid by the breaching party on an indemnity basis. That is, for example, in the context of a party unsuccessfully resisting a stay application under s.7(2) of the IAA, there ought to be a rebuttable presumption that indemnity costs should be awarded.
81. That position is the well-established position in the UK, Hong Kong, and Singapore, following *A v B* [2007] 1 Lloyd’s Rep 358.⁶⁹ There is presently a conflict of first instance authorities as to whether the principle should apply in Australia.⁷⁰ The leading case in favour of its adoption is *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 (S).

⁶⁷ Recital E does not state it is OBL’s position that a court must determine the objection.

⁶⁸ In addition to England and Wales, Hong Kong: *A v R* [2009] HKCFI 342, [68]–[72]; *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKC 149 at [7]–[15]; Singapore: *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [19] and [71].

⁶⁹ See discussion in *Oil Basins Ltd v Esso Australia Resources Pty Ltd (No 2)* [2025] VSC 257 (**Costs Judgment**) [30]–[34].

⁷⁰ The Producers accept, as noted in the Costs Judgment, that the present weight of authority is *against* the application of the *A v B* principle.

82. This Court should confirm the principle in *A v B* is part of the law of Australia, because the IAA establishes a policy in favour of (a) the resolution of disputes by arbitration, and against the interference in that process by Courts, save as expressly contemplated by the Model Law,⁷¹ and (b) alignment of Australia's international arbitration law with the law of foreign countries, particularly those that have adopted the Model Law.⁷²
83. If the Court declines to confirm the application of *A v B*, the Court may be comfortably satisfied that the grounds on which OBL relied to resist the Producers' stay application had no reasonable prospects of success, and an award of indemnity costs is appropriate.
- 10 84. The categories that justify an exercise of the court's discretion to grant indemnity costs are not closed. One recognised category is where a party persists in what should on proper consideration have been seen to be a hopeless case. Circumstances such as the present are, or ought to be, a further such category.
85. In *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)* [2016] FCA 1169 at [25]–[27], Beach J considered the law should recognise such a category in the context of an application made under art 34 of the Model Law. That was, in essence, due to the high threshold required to succeed on such an application, and the public policy of discouraging such litigation in the context of an arbitration agreement. The same analysis ought to apply here, and supports the primary judge's conclusion that OBL should pay the respondents' costs on an indemnity basis.
- 20 86. This Court should grant the relief sought in the Producers' notice of cross-appeal.

Part VII: Time required for presentation of oral argument

87. The Producers estimate they will require 3 hours for oral argument.

Dated 27 August 2026

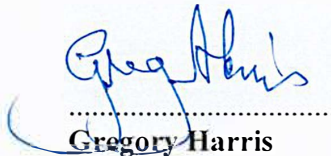


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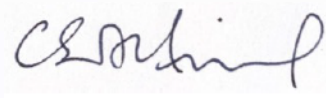


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⁷¹ Model Law art 5.

⁷² See Model Law art 2A; footnote 13 above.

**ANNEXURE TO THE FIRST, SECOND AND THIRD RESPONDENTS'
SUBMISSIONS**

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>International Arbitration Act 1974</i> (Cth)	Current version (Compilation No. 14)	Sections 2D, 7, 12, 14, 16, 21, 39; Schedule 2 (Model Law), Articles 1, 2A, 5, 7, 8, 9, 16, 19, 20, 28, 34, 36	Act in force on the date of the primary judge's decision	18 February 2022 to present
2.	<i>Commercial Arbitration Act 2011</i> (Vic)	Version No. 003	Sections 1, 43	Act in force on the date of the primary judge's decision	1 July 2015 to present
3.	<i>Federal Arbitration Act</i> (United States), 9 USC §§ 1–16	United States Code, 1994 edition (as amended to Pub. L. 102–354 (1992))	§§ 2, 3, 4, 10, 11	Version considered in <i>Mastrobuono v Shearson Lehman Hutton Inc</i> , 514 US 52 (1995) and <i>First Options of Chicago Inc v Kaplan</i> , 514 US 938 (1995)	6 March 1995: date of the decision in <i>Mastrobuono</i> ; 22 May 1995: date of the decision in <i>First Options</i>

SCHEDULE OF PARTIES

WOODSIDE ENERGY (BASS STRAIT) PTY LTD (ACN 004 228 004)
Second Respondent

WOODSIDE ENERGY (NORTH WEST SHELF) PTY LTD (ACN 004 514 489)
Third Respondent

BHP GROUP LTD (ACN 004 028 077)
Fourth Respondent