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 ON BEHALF OF THE ATTORNEY GENERAL FOR NSW

PART I: CERTIFICATION FOR PUBLICATION ON THE INTERNET

1. These submissions may be published on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for New South Wales intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT PROVISIONS

4. *Constitution* Ch III.

5. *International Arbitration Act 1974* (Cth) Pts I, III and V, Schs 1 and 2 ("Model Law"). That Act is annexed to the Plaintiff's submissions ("PS").

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PART V: SUBMISSIONS

A. Introduction and overview

6. The Plaintiff's submissions mischaracterise what is occurring when a court recognises and enforces an arbitral award under the *International Arbitration Act 1974* (Cth) ("the Act").

7. The Act does not relegate courts to the status of a "*junior partner*"[1] or enlist courts in a scheme which merely adds the "*cloak*" of a court order to international arbitral awards[2]. Rather, recognition and enforcement of awards under the Act involves the implementation of a constitutionally valid procedure to enforce the obligations and rights which arise from the making of international arbitral awards, the authority for which is sourced in the parties' agreement.

8. In substance, this is not relevantly different to what a court does when it recognises and enforces a foreign judgment under the *Foreign Judgments Act 1991* (Cth) or at common law, recognises a notice of assessment issued by the Deputy Commissioner of Taxation as being definitive of the amount of tax owing[3], treats a "*Dobbs certificate*" as providing conclusive evidence of the existence and amount of a debt[4], enforces a trustee's obligation to proceed in accordance with a decision of the Superannuation Complaints Tribunal[5] or treats the determination of an expert valuer as final and binding even though the determination may have been infected by mistake[6].

9. In none of those cases is the institutional integrity of an Australian court infringed, and in none of those cases is judicial power being conferred on a foreign court, the Deputy Commissioner of Taxation, a bank manager, the Superannuation Complaints Tribunal, an expert valuer or any other person or body which is not a court.

10. The Plaintiff's constitutional challenge to the Act should be dismissed.

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[1] Cf PS at [80].

[2] Cf PS at [67].

[3] See, eg, *Deputy Commissioner of Taxation v Richard Walter* (1995) 183 CLR 168.

[4] See *Dobbs v National Australia Bank Ltd* (1935) 53 CLR 643.

[5] *A-G (Cth) v Breckler* (1999) 197 CLR 83.

[6] See, eg, *Legal & General Life v A Hudson* (1985) 1 NSWLR 314 at 335D-336A per McHugh JA.

B. In general, the Parliament can select whatever factum it wishes as the "*trigger*" for a legislative consequence

11. As French CJ explained in *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 at [49][7] (emphasis added):

> The separation of legislative, executive and judicial powers reflected in the structure of Chs I, II and III of the Constitution does not prevent the Commonwealth Parliament from passing a law which has the effect of **requiring** a court exercising federal jurisdiction to make specified orders if certain conditions are met.

12. Consistent with this, McHugh, Gummow, Hayne and Heydon JJ observed as follows in *Baker v The Queen* (2004) 223 CLR 513 at 532 [43]:

> in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence.

13. This legislative freedom is subject to two presently relevant qualifications arising from the constitutional separation of judicial power.

14. First, it is not within the power of the Commonwealth Parliament to confer the judicial power of the Commonwealth on something which is not a court.[8]

15. Secondly, it is not within the power of the Commonwealth Parliament to authorise or require the exercise of that judicial power in a manner inconsistent with its nature.[9]

16. The substance of the Plaintiff's "*objections*" to the Act appears to be an assertion that the Act offends both of these qualifications to the otherwise broad power of the Parliament to ascribe curially enforceable consequences to acts, facts and circumstances of its choosing. These objections are maintained even though all or most of the complaints said to support those objections do not arise on the facts of the present case.

17. It is convenient to consider the Plaintiff's objections in the reverse order to which they appear in the Plaintiff's submissions. This is done below.

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[7] See also, eg, *South Australia v Totani* (2010) 242 CLR 1 at [70] per French CJ; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 378.

[8] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[9] *Lim v Minister* (1992) 176 CLR 1 at 27, 36-7, 53; *Nicholas v The Queen* (1998) 193 CLR 173 at [15], [146]; *Australian Education Union v Fair Work Australia* (2012) 286 ALR 625; [2012] HCA 19 at [48].

C. Arbitral tribunals do <u>not</u> exercise the judicial power of the Commonwealth

18. One of the "*objections*" raised by the Plaintiff to the Act is an allegation that that Act impermissibly confers Commonwealth judicial power on arbitral tribunals.[10]

19. A similar suggestion was unanimously disavowed of by this Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 ("*CFMEU*").

20. The Court made the following observations at paragraph 31 of its reasons (emphasis added):

> **Where the 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 proceedings are brought and results in a judgment or order that is binding of its own force. In the case of 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.

21. Similarly, in *A-G (Cth) v Breckler* (1999) 197 CLR 83 ("*Breckler*") at [43], one of the grounds on which this Court held that the Superannuation Complaints Tribunal was not exercising judicial power was that, on analysis, that tribunal was simply performing an "*arbitration of a dispute using procedures and criteria adopted by the constituent trust instrument ...*" (being procedures binding as a matter of private law) rather than exercising sovereign power of the kind referred to by Griffith CJ in *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330 at 357.

22. The Plaintiff's attempts to distinguish *CFMEU* and *Breckler* are unconvincing.

23. Two alleged "*points of distinction*" are raised: first, that an "*implied agreement to abide by the award is not unqualified*" and, secondly, that the Act provides a situation where an Act of Parliament "*directly imposes an obligation upon a [party] to submit to the jurisdiction of a tribunal and abide by its decisions*".[11] On

24. Neither of these points assists the Plaintiff.

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[10] See PS at [82]-[92].

[11] PS at [91].

25. As to the *first alleged "point of distinction"*, the Plaintiff relies on older authorities[12] which suggest that, as a matter of contractual construction, questions of law which are not "*necessarily included within the inner area of the submission [to arbitration]*" may be able to be regarded as matters which have "*not been confided to the arbitrator*".[13] As a result, according to those authorities, certain errors made by arbitrators may be able to be reconsidered by a court on the basis that they fall beyond the scope of the matters submitted for binding determination.

26. In order to resolve the present matter, it is unnecessary to consider whether the authorities relied on by the Plaintiff in support of its first "*point of distinction*" correctly state the present law of Australia[14] as to the proper construction of arbitration agreements. Suffice to say for present purposes, if on the proper construction of an arbitration agreement, the parties expressly or impliedly qualify the matters that are "*confided to the arbitrator*", the parties will not be bound by any decision of arbitrators on the matters so qualified either at common law or under the Act. This is inherent to the nature of international commercial arbitration as a consensual process and, in the case of the Act, is made clear by arts 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law which contemplate the setting aside, non-recognition and non-enforcement of awards which purport to deal with matters "*not falling within the terms of the submission to arbitration*"[15] and art 16 which permits an arbitral tribunal and, ultimately, a court to rule on whether an arbitral tribunal has jurisdiction.

27. In this way and despite the Plaintiff's submissions, an "*arbitration agreement*" for the purposes of the Act is not relevantly distinguishable from what the whole of the Court in *CFMEU* described at [30] as an "*agree[ment] to submit disputes as to their legal rights and liabilities for resolution by a particular person and to accept the decision of that person as binding upon them*" or what six members of the Court in *Breckler* described at [43] as an "*arbitration of a dispute using procedure and criteria*" binding as a matter of private law.

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[12] PS fn 25.

[13] *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 at 586.2 per Isaacs J; See also *Rolls & Son (Produce) Ltd v J Alastair McGregor* (1973) 6 SASR 358 at 371.8-372.2.

[14] Noting that the law of Australia will not necessarily be the law applicable to the construction of an international commercial arbitration agreement.

[15] In this regard, the Court of Appeal for Ontario has held that there is power under art 34(2)(a)(iii) to set aside awards for what it described as "*true jurisdictional errors*": *Mexico v Cargill* 2011 ONCA 622 at [42].

28. As to the *second alleged "point of distinction"*, there is no basis for the assertion that the Act "***directly imposes*** *an obligation upon a [party] to submit to the jurisdiction of a[n] [arbitral] tribunal and abide by its decisions*"[16].

29. International commercial arbitration of the kind contemplated by the Model Law is a consensual process arising from an "*arbitration* ***agreement***".[17]

30. While it may be accepted that it would be "*going too far to conclude that the performance of the arbitral function is* ***purely*** *a private matter of contract ...*"[18], it would also be going too far to suggest that the Act somehow "*directly imposes*" an obligation on a party to submit to arbitration without their consent. Such a conclusion would be directly contrary to the scheme of the Model Law which, inter alia, only applies to arbitrations constituted by **agreements** and contemplates the setting aside, non-recognition and non-enforcement of an award where it purports to deal with matters "*not falling within the submission to arbitration*"[19].

31. The Court should accept the Second Defendant's submission that the "*source of the authority of a private arbitral tribunal depends upon parties having agreed to submit their dispute to private arbitration ...*".[20]

32. In light of the above, the Court should reject the Plaintiff's assertion that the impugned provisions of the Act can be distinguished from those considered in *Breckler* (or *CFMEU*) on the grounds that the Act "*directly imposes an obligation...to submit*". If anything, the legislation considered in *Breckler* imposed more of a practical "*obligation...to submit*" given that a trustee may be obliged to submit to the arbitral procedure in order to avoid a breach of trust.[21]

33. Once it is accepted that an "*arbitration agreement*" for the purposes of the Act is not relevantly distinguishable from the arbitral procedures discussed in *CFMEU* and *Breckler*, it follows by application of the reasoning in those cases that tribunals performing arbitral functions under such agreements are not exercising judicial power.

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[16] Cf PS at [91] (emphasis added).

[17] See Model Law art 7 (emphasis added).

[18] *Westport Insurance v Gordian Runoff* (2011) 244 CLR 239 at [20] (emphasis added).

[19] Model Law arts 1(1), 7, 34(2)(a)(iii), 36(2)(a)(iii).

[20] Second Defendant's Submissions at [19].

[21] See *A-G (Cth) v Breckler (1999) 197 CLR 83* at [44].

34. This is the case notwithstanding the fact that, in rendering an award, an arbitral tribunal will usually apply legal criteria to the facts and circumstances of a particular case.[22] Proceeding in such a manner is "*characteristic, **but not distinctive**, of the judicial function*".[23]

35. The above analysis is not affected by the provisions of the Act relating to the enforcement of arbitral awards (which provisions only become relevant if a party fails to abide by the determination of an arbitral tribunal).

36. An otherwise non-judicial process is not converted into one involving the judicial power of the Commonwealth simply because the outcome of such a process may be given effect to by a court exercising federal jurisdiction.

37. If it were otherwise, it would not be possible to resolve, in an enforceable manner, any "*federal dispute*" or difference other than by curial means (including, for example, a simple contract dispute between residents of different Australian States or any dispute raising an allegation of misleading and deceptive conduct in contravention of the *Competition and Consumer Act 2010* (Cth)). In such circumstances and contrary to existing authority, it would also not be possible for Commonwealth law to empower a non-court to make a decision or determination which "*constitutes the factum by reference to which*" curially enforceable rights and obligations could attach.[24]

38. The correct view is that there is no constitutional impediment to the Commonwealth Parliament passing a law which ascribes curially enforceable consequences to an act of a non-court (including an act which involves the application of legal criteria to the facts and circumstances of a particular case) provided that the effect of the law is not to confer judicial power on a non-court and provided that the law does not authorise or require a court to exercise judicial power in a manner which is inconsistent with its nature.[25]

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[22] Cf PS at [40], [68], [77], [83].

[23] *Luton v Lessels* (2002) 210 CLR 333 at [21] (emphasis added); see also *Westport Insurance v Gordian Runoff* (2011) 244 CLR 239 at [20].

[24] See, eg, *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 378.3.

[25] See section B of these submissions.

39. The registration and enforcement provisions of the *Racial Discrimination Act 1975* (Cth) considered in *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245 ("*Brandy*") fell foul of the first of these provisos.

40. This was so because those provisions had the effect of elevating an administrative determination (which, but for the registration and enforcement provisions, would not have been binding or enforceable and would not have involved the exercise of judicial power[26]) to the status of a judgment (which is binding, authoritative and enforceable in and of itself). The Act did this by providing that a determination of the Human Rights and Equal Opportunities Commission ("HREOC"), when registered (as it had to be[27]) through an administrative procedure which did not involve a judge or a court as such[28], had "*effect as if it were an order of the Federal Court*"[29].

41. In this way, HREOC determinations obtained the status of Federal Court judgments through an administrative act even though in substance (and at least arguably in form) they remained determinations of HREOC.[30] Thus, the HREOC determinations became binding, authoritative and enforceable without any "*independent exercise of judicial power by the Federal Court*" (or, indeed, without any exercise of power by the Court as such).[31]

42. Thus, "*all the attributes of judicial power*" – namely the ability to "*give a binding and authoritative decision and [the ability] to take action to enforce that decision*" – were "*plainly present*" in the case of HREOC determinations.[32]

43. The impugned provisions in the Act are distinguishable from those considered in *Brandy*.

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[26] *Brandy* (1995) 183 CLR 245 at 269.8.

[27] *Racial Discrimination Act 1975* (Cth) s 25ZZA(2): "*As soon as practicable after the determination is made, the Commission **must** lodge the determination in a Registry of the Federal Court*" (emphasis added).

[28] See *Racial Discrimination Act 1975* (Cth) s 25ZZA(3): "*Upon lodgement of the determination, a Registrar **must** register the determination...*" (emphasis added).

[29] *Racial Discrimination Act 1975* (Cth) s 25ZAB(1).

[30] See *Brandy* (1995) 183 CLR 245 at 270.3, 270.9; *A-G (Cth) v Breckler (1999) 197 CLR 83* at [42].

[31] *Brandy* (1995) 183 CLR 245 at 261.2; see also *Luton v Lessels* (2002) 210 CLR 333 at [23].

[32] *Brandy* (1995) 183 CLR 245 at 269.2 citing *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185 at 199 per Latham CJ (emphasis added).

44. Most fundamentally, as already noted, the source of an arbitrator's authority is private agreement; in *Brandy* the source of authority for HREOC (itself a creature of Commonwealth law) was statute.

45. Further, an arbitral award is not enforceable in Australia in and of itself. In order to enforce such an award, it is necessary to invoke the original jurisdiction of a court and move the Court to make orders enforcing the award.[33]

46. Enforcement under the Act does not involve simply restating the award in the form of a judgment or, to use the Plaintiff's language[34] "*cloak[ing]*" an arbitral award with a court order. Rather, enforcement is a streamlined procedure intended to "*enabl[e] the victorious party in the arbitration to obtain the material benefit of the award in its favour in an easier manner than having to sue on the award*".[35]

47. That procedure involves an "*independent exercise of judicial power*" of the kind referred to in *Brandy*[36] by a court constituted as such. It is not deprived of that character merely because there are limited grounds on which a court can decide not to enforce an arbitral award.

48. To adapt the words used by Gummow J in his Honour's consideration of the constitutionality of the remedial regime passed in the wake of this Court's decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, the Act does not "*by legislative fiat*" convert arbitral awards to orders made by the Federal Court. Rather, certain consequences are attached to them "*as acts in the law*".[37]

49. Provided that it does not involve the enforcement of a determination which is at odds with the fundamentals of the judicial process, such a legislative approach is constitutionally permissible.

50. The Plaintiff's contentions to the contrary should be rejected.

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[33] *Brandy* (1995) 183 CLR 245 at 270.9.

[34] PS at [67].

[35] *Tridon Australia Pty Ltd v ACD Tridon Inc* (2004) 20 BCL 413; [2004] NSWCA 146 at [11]; cf PS at [69].

[36] *Brandy* (1995) 183 CLR 245 at 261.2.

[37] *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [208].

D. The Act does not "*substantially undermine the institutional integrity*" of the Federal Court

51. The other "*objection*" to the Act raised by the Plaintiff is that that Act is alleged to "*substantially undermine the institutional integrity of the enforcing courts*" including the Federal Court.[38]

52. Various complaints are made throughout the Plaintiff's submissions regarding the kinds of things that a court exercising federal jurisdiction might arguably be required to do under the Act.

53. Those complaints include that courts might be obliged to enforce an award "*notwithstanding that the award may have been made on the basis of a legal error apparent on its face*"[39], might be "*required to give its judicial imprimatur to an award notwithstanding its legal flaws*"[40] or might be obliged to enforce an award which affects the rights of third parties[41].

54. The Plaintiff does not assert that the various complaints its raises specifically arise on the awards in connection with which the Plaintiff seeks a writ of prohibition (being awards for the payment of money). For example, the Plaintiff has not identified any particular legal error or "*flaw*" which it contends necessitates prohibition of the enforcement of the particular awards in issue.

55. Instead, the Plaintiff has assumed the burden of attempting to demonstrate that the incorporation of the Model Law into Australian law is wholly invalid[42] (that is, invalid in its application to all international arbitral awards, not just invalid in its application to the particular awards presently in issue).

56. The Plaintiff cannot discharge that very high burden.

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[38] PS at [64]-[81].

[39] PS at [50], [62], [76]. In passing, it might be noted that there is no longer a jurisdiction (discretionary or otherwise) in England and Wales for reviewing arbitral awards on the grounds of error of law on the face of an award. In order to obtain leave to appeal under the *Arbitration Act 1996* (UK), it is now necessary to demonstrate that "*the decision of the tribunal is obviously wrong*" or that the question proposed to be raised "*is one of general public importance and the decision of the tribunal is at least open to serious doubt*": *Arbitration Act 1996* (UK) s 69(3)(c). Even that (limited) appeal jurisdiction is capable of exclusion by agreement: *Arbitration Act 1996* (UK) s 87.

[40] PS at [76].

[41] PS at [51].

[42] See PS at [82].

57. Consider for example an international arbitral award (rendered in Australia or overseas without want of natural justice) which solely pertained to questions of fact or solely pertained to questions of foreign law. It is difficult to see how enforcement of such an award could "*substantially undermine the institutional integrity*" of the Federal Court or otherwise offend the separation of powers contemplated by Chs I, II and III of the Constitution. This is the case even in the absence of what the Plaintiff describes[43] as the "*traditional supervisory function*" (which function would be irrelevant anyway given that that function only ever permitted review for certain errors of (domestic) law and not for errors of fact).

10 58. If this was incorrect and Australian constitutional law instead required a court to perform some kind of de novo or similar level of review on "*substantive*" issues[44] before being entitled to enforce a determination of a non-court (even though, in such circumstances, a court is giving effect to the outcome of the determination and not necessarily the reasons leading to that outcome), serious questions would arise as to the validity and efficacy of many laws and contractual provisions which have until now been held or assumed to be valid. Questions would also arise as to the continued applicability of previous authorities which have held or assumed that such laws and provisions are valid and effective.

59. For example, if the Plaintiff was correct to submit that the incorporation of the
20 Model Law in Australian law is wholly invalid because it does not provide sufficient "*scope for reviewing substantively the matter referred to arbitration*" or because it has the effect of denying "*decisional independence*"[45], quaere whether the Court would also need to revisit its decision in *Dobbs v National Australia Bank* (1935) 53 CLR 643 which upheld the effectiveness of a contractual provision which permitted a bank manager to issue a certificate which provided, in court proceedings, conclusive evidence of the amount and existence of a customer's indebtedness.

60. On the Plaintiff's argument, applying such a certificate would presumably deny the court "*decisional independence*" on the matters referred to in the certificate.

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[43] PS at [57]-[63].

[44] See PS at [75].

[45] PS at [64].

61. Quaere also whether accepting the Plaintiff's submissions would require the Court to revisit the lines of authorities on the resolution of disputes and issues by way of expert determination or other consensual non-curial means[46] and/or the authorities regarding the constitutional validity of the "*notice of assessment*" procedure in Commonwealth taxation legislation.[47]

62. Those lines of authorities do not support the existence of any general requirement that a court have a "*scope for reviewing substantively*" the matters underlying a determination, notice of assessment or other agreed or legislative authorised non-curial procedure. Nor do those authorities include any suggestion that the absence thereof supports a suggestion of constitutional invalidity.

63. Similarly, if the purported incorporation of the Model Law into Australian law was considered to be wholly invalid on the grounds that it does not contain general provisions for review on issues of Australian law, questions would also arise as to the constitutional validity of the *Foreign Judgments Act 1991* (Cth). That Act contains grounds for setting aside a registered judgment which are not dissimilar to those appearing in Art 34 of the Model Law[48] but which do not include a provision for a "*substantive*" review either generally or with respect to questions of Australian law (even though the foreign court may have applied Australian law to one or more questions before that court).

64. Despite this, the existing authorities contain no suggestion that the *Foreign Judgments Act 1991* (Cth) invalidly deprives courts of "*decisional independence*" or the "*ability to act in accordance with the judicial process*"[49]. On the contrary, in *Re Macks; Ex parte Saint* (2000) 204 CLR 518 at [208], Gummow J opined (albeit in dictum) as follows (citations omitted):

> ... There is ample legislative precedent at the State and federal level for providing, if stipulated conditions be satisfied, for the registration of foreign judgments in State Supreme Courts and in the Federal Court .... The functions performed by courts of federal jurisdiction under such laws of the Commonwealth or the States are not incompatible with the exercise of judicial power of the Commonwealth of those courts....

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[46] See, eg, *Legal & General Life v Hudson* [1985] 1 NSWLR 314 at 335D-336A.

[47] See, eg, *Batagol v Commissioner of Taxation* (1963) 109 CLR 243 at 252.7; *Deputy Commissioner of Taxation v Richard Walter* (1995) 183 CLR 168.

[48] See *Foreign Judgments Act 1991* (Cth) s 7.

[49] Cf PS at [64].

65. In light of the above, there is plainly a wide range of circumstances in which enforcing arbitral awards under the Act could not raise seriously arguable constitutional concerns (the most obvious example being money awards of the kind presently in issue).

66. Further, contrary to the Plaintiff's submissions[50], the Act does not constitute arbitral tribunals as "*islands of power immune from supervision and restraint*" of the kind with which this Court was concerned in *Kirk v Industrial Court* (2010) 239 CLR 531 at [99]. The final arbiters of whether an arbitral award should be enforced in Australia are courts exercising federal jurisdiction. While the grounds on which Australian courts are entitled to "*supervise*" or "*restrain*" arbitrators are limited, that position is no different to that which applies in many other areas of law (including the areas of law discussed above).

67. The above necessitates a conclusion (at least in the absence of a wholesale review of decades of authority) that the Act is **not wholly invalid** insofar as it purports to incorporate the Model Law.

68. The Plaintiff's contentions to the contrary should be rejected.

69. This conclusion is sufficient to dispose of the Plaintiff's application for an order to show cause.

70. This is because, as discussed above[51], the Plaintiff does not contend that there are any peculiar features of the awards presently in issue which would support the issue of prohibition in connection with those particular awards. Rather, the contention is that prohibition should issue because the Act is wholly invalid (including for reasons extraneous to the awards presently in issue). That contention must be rejected for the reasons given above.

71. In this way, it is unnecessary for the Court to now consider the Plaintiff's catalogue of complaints regarding matters such as:

    (a) the potential operation of the Act – on facts divorced from the facts of this case – such as the question of whether any constitutional issues arise from the fact that ex parte applications for enforcement of awards appear to be

[50] PS at [78]-[79].

[51] See paragraphs 52 to 55 above.

permissible (but not required[52]) under the Act[53];

(b) what approach the Court should take if asked to enforce an award which might affect the rights of third parties;[54]

(c) whether it is beyond the power of the Commonwealth Parliament and/or the Parliaments of the States to repeal or exclude the operation of[55] previous State laws which expressly empowered State Supreme Courts (but not the Federal Court) to review certain arbitral awards for manifest error of law on the face of an the award where no "*exclusion agreement*" was in place[56].

72. Complaints of those kinds are appropriately left for another case where such issues arise.

73. Suffice to say for present purposes, in circumstances where there is a "*safety valve*" under the Model Law for courts to (on their own motion) refuse to recognise or enforce arbitral awards which would be contrary to the public policy of the forum[57], it is difficult to conceive of a circumstance in which the Model Law (as applied by the Act) would purport to require an Australian court to proceed in a manner which would undermine its institutional integrity or otherwise offend fundamental constitutional principles. This is the case even though that discretion (and, for that matter, the similar discretion applying to foreign judgments[58]) should ordinarily be narrowly construed.[59]

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[52] Cf *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 at [55].

[53] PS at [67].

[54] PS at [51]. In *Resort Condominiums Inc v Bolwell* [1995] 1 Qd R 406 at 431.48ff, the Queensland Supreme Court considered that it was entitled to refuse to enforce an interim measure or arbitral award in the nature of an injunction where those orders are in a form which would not be made in Australia. It is not necessary to determine whether or not this decision is correct in order to determine the present application. See also Model Law art 17I(b)(i) (power to refuse recognition or enforcement of interim measures on the grounds that it is incompatible with the powers conferred upon the court); Richard Cole, 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards' (1986) 1 Ohio State Journal on Dispute Resolution 365 at 382.

[55] See, eg, *International Arbitration Act 1974* (Cth) s 21.

[56] PS at [77]. Although it would be a strange result if it was within the power of a State Parliament to abrogate the availability of certiorari for non-jurisdictional error on the face of an administrative record (*Kirk v Industrial Court* (2010) 239 CLR 531 at [100]) but beyond power to abrogate, repeal or exclude an analogous power with respect to private arbitral awards.

[57] Model Law arts 36(1)(b)(ii). See also Model Law arts 17I(b).

[58] *Stern v National Australia Bank* [1999] FCA 1421 at [140].

[59] See, eg, *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415; [2011] FCA 131 at [132].

74. Thus, it is difficult to conceive of a situation in which issues of the kind now raised by the Plaintiff could support a conclusion that the Act is constitutionally invalid (either generally or in its operation to a particular case) rather than (at most) a conclusion that consideration may need to be given as to whether the public policy discretion should be applied. In any event, this issue is not now necessary to resolve.

75. Ultimately, the Plaintiff has not identified sufficient grounds to justify the issue of a writ of prohibition in the proposed form or any other form.

76. The Plaintiff's application for an order to show cause should be dismissed.

PART VI: TIME ESTIMATE

77. The Attorney General for New South Wales estimates that no more than thirty minutes will be required for the presentation of his oral argument.

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