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

AND: **CASTEL ELECTRONICS PTY LTD**
Second Defendant

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

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

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the plaintiff.

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Filed on behalf of: Attorney-General for the State of Queensland

Prepared by:
Gregory Richard Cooper
Crown Solicitor
11th Floor State Law Building
50 Ann Street
Brisbane Qld 4000

Tel: (07) 3239 6328
Fax: (07) 3239 3456
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V. ARGUMENT

No impairment of the Federal Court's institutional integrity

5. The plaintiff submits that the IAA substantially impairs the institutional integrity of the Federal Court because of several factors:

   (a) the IAA confers jurisdiction on the Federal Court to enforce the award but prevents the courts from performing an 'independent adjudicative function';[1]
   (b) the IAA ousts the Federal Court's traditional supervisory power over arbitral awards;[2]
   (c) the procedure for enforcing an award in the Federal Court is short-form and will most likely be initiated ex parte;[3] and
   (d) the Federal Court is enlisted to assist the conduct of arbitral proceedings.[4]

6. In response, the Attorney-General submits that none of these factors, individually or collectively, establish that the IAA substantially impairs the Federal Court's institutional integrity.

(a) Federal Court retains an independent adjudicative function

7. The plaintiff's submissions ignore the limited role that courts have historically played in enforcing awards. For centuries, courts have enforced or given effect to awards without being 'fully seized of the dispute' before the arbitrator;[5] contrary to the implication of the plaintiff's submissions, they have never undertaken de novo reviews of arbitral awards. In *Hodgkinson v Fernie*, for example, Williams J said:[6]

> The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact.

8. While Williams J recognised exceptions for corruption or fraud, and for legal errors of law on the face of an award,[7] he never suggested that judges did anything other than take the award 'as a given'.[8] It is therefore difficult to see why the inability of the Federal Court to conduct a de novo review of the award under the IAA is problematic.[9]

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1 Plaintiff's submissions, para 67. See also para 70.
2 Plaintiff's submissions, paras 76 to 77.
3 Plaintiff's submissions, para 79.
4 Plaintiff's submissions, para 80.
5 Plaintiff's submissions, para 67.
6 (1854) 3 CB (NS) 189 at 202; 140 ER 712 at 717.
7 This exception was, however, a matter of some regret to his Honour.
8 Plaintiff's submissions, para 74.
9 It is noteworthy that in the United States, courts likewise do not conduct a de novo review of the award. See, for example, *United Paperworkers International Union v Misco Inc* 484 US 29 at 36

9. In any event, the Federal Court does exercise an independent adjudicative function in relation to the 'matter' before it. The 'matter', or justiciable controversy, that the court must resolve in the exercise of judicial power is whether award should be enforced. In resolving that controversy, the Federal Court would need to identify the relevant legal principles, find facts and apply them to the facts as found. In other words, the court would act in accordance with the traditional judicial process.[10]

10. So much is clear from considering the grounds in Article 36 of the Model Law. Article 36(1)(a)(iii), for example, allows a court to refuse recognition of an award in these circumstances:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

11. If a party sought to rely on Art 36(1)(a)(iii), the Federal Court would need to construe any submission to arbitration and determine its scope. It would also need to construe the award and then form conclusions about whether the award dealt with matters beyond the scope of the submission. These are tasks that courts have traditionally performed in connection with arbitral awards.[11] Nothing in the IAA purports to regulate how the Federal Court is to perform them. As this example makes clear, the IAA does not deprive the Federal Court of an independent adjudicative function when it exercises its jurisdiction.

12. It does not matter that the grounds in Art. 36 are narrower than those at common law. In *Abebe v Commonwealth*,[12] a majority of the High Court held that Chapter III did not require a federal court to have jurisdiction over all the issues in controversy between parties. But they also held that Chapter III did not require a federal court to have authority to deal with every legal ground that the parties wished to advance.[13] As Callinan J explained:[14]

(1987): 'The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contact.'

10 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (Kitto J); *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 655 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ); *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 12 (Mason J); *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 532 (Mason CJ), 685 (685); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 ('*Breckler*') at 109-110 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

11 See, for example, *Goode v Bechtel* (1904) 2 CLR 121.

12 (1999) 197 CLR 510.

13 (1999) 197 CLR 510 at 525 [26] (Gleeson and McHugh JJ), 588-590 [227]-[229], 591-593 [234]-[237] (Kirby J), 604-605 [278]-[280] (Callinan J).

14 *Abebe v Commonwealth* (1999) 197 CLR 510 at [279].

> If a matter arises under a law (within power) made by the Parliament, the scope of the matter is to be ascertained by reference to the statute which creates the right or duty and confers jurisdiction on the Court to enforce it. The content of the matter will depend on the terms of the relevant law under which the matter arises. Any issue which is declared not justiciable by that law will not form part of the matter as defined by s 76(ii).

13. The reasoning in *Abebe* cannot be reconciled with the claim that merely limiting the grounds on which an award may not be enforced undermines the independent adjudicative role of the Federal Court.

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14. Furthermore, the plaintiff's submissions are inconsistent with the recognition that 'matters' may involve decisions or determinations by non-judicial bodies. In *South Australia v Totani* ('*Totani*'), Gummow J said:[15]

> Under various laws of the Commonwealth there arise "matters" within the meaning of s 76(ii) of the Constitution in which *the significant element is some anterior decision or determination not made in the exercise of the federal judicial power.* Examples are the enforcement in the State and Territory courts of foreign arbitral awards, the registration in the Federal Court and State and Territory Supreme Courts of foreign judgments, and
> 20 the curial effect given to determinations of the Superannuation Complaints Tribunal established by the legislation upheld in *Attorney-General (Cth) v Breckler.*

15. In *Re Macks; Ex parte Saint*, moreover, his Honour said:[16]

> 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 with the effect they would have if given in those courts and entered on the day of registration. *The functions performed by courts of federal jurisdiction under such laws of the Commonwealth or the States are not incompatible with the*
> 30 *exercise of the judicial power of the Commonwealth by those courts.*

16. If the plaintiff's submissions were correct, however, these comments would be inexplicable. Chapter III courts do not conduct merits review of foreign judgments before they register and enforce them under the *Foreign Judgments Act 1991* (Cth).[17] They take those judgments 'as a given'.[18] By the plaintiff's logic, Australian courts are thereby denied their traditional adjudicative role in relation to fact-finding and applying the law to ascertain the rights and liabilities of the parties. Such a consequence illustrates that the plaintiffs' logic is flawed.

40 17. The plaintiff's reliance on *Totani* is misplaced. In that case, a majority of the High Court found that South Australian legislation infringed the principle in

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15 (2010) 242 CLR 1 at 64 [136] (emphasis added).
16 (2000) 204 CLR 158 at 232-233 [208] (emphasis added).
17 *Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd* [2012] NSWSC 1306 at [85] (Stevenson J).
18 Plaintiff's submissions, para 74.

Kable v Director of Public Prosecutions (NSW).[19] But that was because it required the Magistrates Court to exercise power after 'undertaking an adjudicative function that [was] so confined, and so dependent on the Executive's determination...that it depart[ed] impermissibly from the ordinary judicial processes of an independent and impartial tribunal'.[20] The declaration of the Attorney-General meant, in effect, that the court was required to make a control order restricting a person's capacity to associate if the Police Commissioner applied for it.

18. The IAA does not share these vices. It does not require the Federal Court to implement any executive or legislative determinations.[21] All it requires the Federal Court to enforce are awards that stem directly from the agreement of the parties to resolve their disputes by arbitration, unless certain grounds can be proved.[22] For the reasons outlined in paragraph 9 to 13 above, in deciding whether those grounds are proved and whether the award should be enforced, the Federal Court follows ordinary judicial processes. The IAA therefore is not contrary to the Federal Court's independence and impartiality.

(b) Removal of error on face of award does not affect validity of IAA

19. The plaintiff makes two different submissions about the ouster of the traditional jurisdictional. The fact that the Federal Court cannot refuse to enforce an award for error of law on the face of the award, it says, means that the court is being asked to give its imprimatur to an award despite its legal flaws.[23] It also says that removing review for such errors undermines a defining characteristic of the Federal Court, just as removing the supervisory jurisdiction of the Supreme Court undermines a defining characteristic of those courts.[24]

20. These submissions should be rejected.

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19 (1996) 189 CLR 51.

20 (2010) 242 CLR 1 at 160 [436] (Crennan and Bell JJ).

21 Because of this fact, it is far from clear how the IAA engages the central concern of the separation of powers; namely, the protection of the judicial branch from encroachment by the other branches of government. As to this concern, see *R v Davison* (1954) 90 CLR 353 at 381-382 (Kitto J); *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 540; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Albarron v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at [59]-[67] (Kirby J); *Mistretta v United States* 488 US 361 (1989) at 660.

22 It is well established that, in general, 'a legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence': *Baker v The Queen* (2004) 223 CLR 513 at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ). It can therefore require courts to exercise their powers in certain circumstances, including by making orders. Such laws do not, on that ground alone, amount to an impermissible direction to a court as to the outcome of its jurisdiction: *Totani* (2010) 243 CLR 1 at [133] (Gummow J).

23 Plaintiff's submissions, para 76.

24 Plaintiff's submissions, para 77.

21. First, there is no principle that a court can only enforce arbitral awards that are legally flawless. Such a principle would be inconsistent with the fact that review for error of law on the face of the award did not apply where the parties had agreed to submit a particular question of law to an arbitrator.[25] In such circumstances, absent some other ground, a court would have been obliged to enforce an award notwithstanding its legal flaws. As the Privy Council made clear in *Max Cooper & Sons Pty Ltd v University of New South Wales* ('*Max Cooper*'), moreover, the same result would have followed at common law if the arbitrator set out his or her reasons in a separate document that was clearly intended not to form part of the award, but those reasons revealed legal error.[26] It is therefore mistaken of the plaintiff to claim that because an award contains some legal flaw, a court cannot enforce it.

22. Secondly, and relatedly, that conclusion accords with the authority of *Abebe*.[27] As explained in paragraphs 12 and 13 above, that decision stands for two propositions: the Commonwealth Parliament can define the scope of the 'matter' arising under a law; and Chapter III does not require Parliament to authorise a federal court to consider all the legal grounds that a party may wish to advance. It therefore suggests that Parliament can require the Federal Court to enforce awards without dealing with error of law on the face of the award.

23. Thirdly, no proper analogy exists between review for legal error on the face of the award and the Supreme Courts' supervisory jurisdiction over inferior courts and tribunals. The jurisdiction to police jurisdictional error by mandamus, prohibition and certiorari formed a part of each Supreme Court's jurisdiction before federation.[28] By contrast, many courts at federation had no jurisdiction to enforce awards at all. The *Interdict Act 1867* (Qld), for example, conferred jurisdiction to enforce awards only on the Supreme Court of Queensland.[29] Review for error of law on the face of the award therefore cannot be regarded as a defining characteristic of all Chapter III courts. Since no provision of the Constitution mandates that courts created by the Commonwealth Parliament must be able to enforce arbitral awards, that ground of review cannot be a defining characteristic of the Federal Court. Its absence therefore does not invalidate the IAA and the Model Law.

24. Finally, in any event, the ground of legal error on the face of the award should not be treated as entrenched. Not every aspect of the common law that existed at federation constitutes a defining characteristic of a Chapter III court.

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25 *Melbourne Harbour Trust Commissioners v Hancock* (1927) 39 CLR 570 ('*Hancock*') at 585-586 (Isaacs J), 590 (Rich J), 590-591 (Starke J); *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Ltd* (1968) 118 CLR 58 at 76 (Windeyer J); *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 262 (Menzies J).

26 [1979] 2 NSWLR 257 at 262.

27 (1999) 187 CLR 510.

28 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [97]-[98]; *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 86 ALJR 862 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [73] (Heydon J).

29 See ss 1 to 5.

Although error of law on the face of the award was a well-established ground of review in the nineteenth century, it was always anomalous.[30] It could not be easily reconciled with the terms of the *Arbitration Act 1698* (UK) and later enactments, which limited the circumstances in which awards could be set aside to matters such as corruption, undue means or misconduct.[31] It did not apply if the parties had agreed to submit a particular question of law to an arbitrator.[32] It did not apply if the arbitrator provided no reasons or provided reasons in a separate document that that was clearly intended not to be part of the award.[33] As long ago as 1857, Williams J and Willes J expressed regret that it existed as an exception to the finality of awards.[34] In 1972, Barwick CJ did the same and said:[35]

> Many judges of the past have regretted, as I do now, the exception to the finality of an arbitrator's award which was made in cases decided before *Hodgkinson v Fernie*. However, it is with us, *the legislature of New South Wales not having seen fit by legislation to remove it.*

25. The Privy Council expressed similar sentiments in 1979.[36] Given its anomalous nature, the ground of error on the face of the award should not be treated as immune from legislative abolition.[37]

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30 In *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Ltd* (1968) 118 CLR 58 at 76, Windeyer J traced the origin of the ground of review to cases in which a question arising in an action at law had been remitted to an arbitrator but noted that it now had a wider scope.

31 The *Arbitration Act 1698* (UK) relevantly provided that an award was to be enforced 'unlesse it shall be made to appeare upon Oath to such Court that the Arbitrators or Umpire misbehaved themselves and that such Award Arbitration or Umpirage was procured by Corruption or other undue Means'. A similar provision was found in the *Interdict Act 1867* (Qld), s 3. The *Arbitration Act 1889* (UK) provided in s 11 that an award could be set aside if the award had been improperly procured, or the arbitrator had misconducted himself. The language of these provisions does not suggest that any legal error on the face of the award is a ground for setting aside the award.

32 *Hancock* (1927) 39 CLR 570 ('*Hancock*') at 585-586 (Isaacs J), 590 (Rich J), 590-591 (Starke J). It was, however, unclear whether this exception was itself subject to an exception where it appeared on the face of the award that the arbitrator had proceeded 'on evidence which was inadmissible or wrong principles of construction, or [was] otherwise guilty of some error in law': *Kelantan Government v Duff Development Co* [1923] AC 395 at 411 (Viscount Cave LC). Justice Starke in *Hancock* found the suggested exception difficult of application: see *Hancock* (1927) 39 CLR 570 at 591 and its rationale is difficult to understand. In any event, later authorities do not seem to have picked up the exception: see, for example, *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Ltd* (1968) 118 CLR 58 at 76 (Windeyer J); *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 262 (Menzies J).

33 *Max Cooper* [1979] 2 NSWLR 257 at 262.

34 *Hodgkinson v Fernie* (1854) 3 CB (NS) 189 at 202 (Williams J), 205 (Willes J); 140 ER 712 at 717, 718.

35 *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 258 (emphasis added).

36 *Max Cooper* [1979] 2 NSWLR 257 at 262. Their Lordships made it clear that if there were ambiguity in terms of an award the court should favour a construction that did not expose to those reading it the process of legal reasoning by which the arbitrator made the decision.

37 *Ashjal Pty Ltd v Alfred Toepfer Insternational (Australia) Pty Ltd* [2012] NSWSC 1306 at [60]-[62] (Stevenson J) (rejecting the argument that the ground formed a defining characteristic of the Supreme Court of New South Wales).

26. Furthermore, courts in the United States have not applied error of law on the face of an award; and in recent decades, after the enactment of Model Law, courts in Canada have not either.[38] No case has suggested, however, that this has undermined the essential character of courts in these jurisdictions.

27. Accordingly, there is no basis for regarding review for error of law on the face of the award as a defining characteristic of the Federal Court.

(c) Federal Court's procedures do not affect validity of the IAA

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28. The plaintiff claims that because the party seeking to enforce an award under the IAA may apply on an ex parte basis and use a short form procedure, this affects the validity of the IAA.[39]

29. That claim is baseless. Nothing in the IAA obliges a party to proceed in an ex parte manner or directs how the Federal Court is to determine whether one or more of the grounds in Art. 36 is established. The IAA simply takes the Federal Court as it finds it, with all of its incidents.[40] The Federal Court can therefore be expected to afford the parties procedural fairness, to consider the application
20 for enforcement of the award in a public hearing involving both parties and to follow the ordinary judicial process. That is what occurred before Murphy J here.[41]

30. The IAA therefore cannot be regarded as breaching Chapter III on this basis.

(d) Court's assistance in arbitral proceedings does not invalidate IAA

31. The plaintiff claims that the court's enlistment to assist in conducting the arbitral proceedings, coupled with its role in enforcement of the award, means
30 that the court is co-opted as the arbitral tribunal's 'junior partner'.[42] This, it suggests, undermines the institutional integrity of the Federal Court.

32. The constitutionality of provisions of the IAA and the Model Law, however, cannot depend on a comparison between the size and complexity of what a court does and what the arbitral tribunal does.[43]

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38 *Hall Street Associates, LLC v Mattel, Inc* 128 S.Ct. 1396 (2008) at 1403-1405; *Bayview Irrigation District No 11 v United Mexican States* 2008 CarswellOnt 2682 at [13]; *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* 1999 CarswellOnt 2988 at [21], [27].

39 Plaintiff's submissions, para 79.

40 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560; *Mansfield v Department of Public Prosecutions* (WA) (2006) 226 CLR 486 at 491-492 [7]-[9] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ); *International Finance Trust v NSW Crime Commission* (2009) 240 CLR 319 at 377-378 [134] (Hayne, Crennan and Kiefel JJ).

41 See Application for Show Cause Book at 157.

42 Plaintiff's submissions, para 80.

43 *Totani* (2010) 243 CLR 1 at [43] (French CJ), [199]-[200] (Hayne J).

33. In any event, the assistance provided by the courts under the IAA is hardly without precedent. Imperial, colonial and early State legislation authorised courts to assist in the arbitration process in various ways. For example, they provided for courts to appoint arbitrators if the parties could not agree and if the arbitrator was incapable of acting or refused to act.[44] They provided for courts to remove arbitrators who had misconducted themselves,[45] and for parties to use the courts' processes to require persons to be examined and to gather evidentiary material.[46] They required courts to enforce or give effect arbitral awards.[47] The IAA does not represent a radical departure from these precedents. For that reason, it is difficult to see how these matters can suggest that the IAA is invalid.

No conferral of judicial power on arbitral tribunal

34. The plaintiff also submits that Articles 5, 8, 34, 35 and 36 of the Model Law, as applied by s 16 of the IAA, impermissibly confer the judicial power of the Commonwealth on arbitral bodies.[48] The operation of the IAA, it says,[49] is indistinguishable from the operation of the *Racial Discrimination Act 1975* (Cth) ('the RDA') that was found to be invalid in *Brandy v Human Rights and Equal Opportunity Commission* ('*Brandy*').[50]

35. These submissions ignore the distinction between arbitral power and judicial power. The former differs from the latter because it is based upon the consent of the person against whom it is exercised and does not result in an award that is binding of its own force. As Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ explained in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission*:[51]

> 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

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44 *Arbitration Act 1889* (UK), ss 5 and 6.

45 *Arbitration Act 1889* (UK), s 11.

46 *Interdict Act 1867* (Qld), s 5; *Arbitration Act 1889* (UK), s 8.

47 See, for example, *Interdict Act 1867* (Qld), ss 2 and 3 (making a party subject to arbitration subject to the penalties for disobeying a court order). See also *Arbitration Act 1889* (UK), s 1; *Arbitration Act 1902* (NSW), s 13. Articles 35 and 36 of the Model Law are analogous to such provisions.

48 Plaintiff's submissions, para 82.

49 Plaintiff's submissions, para 86.

50 (1995) 183 CLR 245.

51 (2001) 203 CLR 645 at [31] (emphasis added). In addition, arbitral awards lack other distinctive hallmarks of judicial power; namely, 'the maintenance of public confidence in the manner of its exercise and in the cogency or rationality of its outcomes, and the operation of the appellate structure and of the case law system': *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 261 [20] (French CJ, Gummow, Crennan and Bell JJ).

> 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.*

36. The IAA does not alter this situation. The agreement of the parties to arbitration is as central to the operation of the IAA and the Model Law as it was to earlier statutes that provided for the curial enforcement of arbitral awards.[52] The grounds for refusing to enforce an award make this clear. Article 36(1)(a)(ii), for example, applies if a party was not given proper notice of the appointment of the arbitrator or was not able to present its case. Article 36(1)(a)(iii) applies if the award contains decisions on matters beyond the scope of the submission to arbitration, while Art 36(1)(a)(iv) applies if the composition of the tribunal or the procedure was not in accordance with the agreement of the parties. These grounds underpin the importance of the voluntary nature of the arbitration.[53]

37. Furthermore, the IAA does not purport to make the award binding of its own force. It remains necessary for a party that wishes to enforce an award to apply to the Federal Court.[54] That court must independently determine whether the award can be enforced under the Model Law.[55] Enforcement is thus not automatic.

38. *Brandy* involved a very different legislative scheme. The operation of the RDA was not based on the agreement of the parties.[56] The provisions that were struck down lacked historical analogues suggesting that they did not infringe the separation of powers. In addition, they rendered the decisions of the Human Rights and Equal Opportunity Commission automatically enforceable as orders of the Federal Court after registration by the Commission (which was compulsory).[57] Any comparison with such provisions is therefore not apt.

39. The plaintiff's efforts to distinguish *Breckler*[58] should be rejected. In that case, the High Court held that determinations of the Superannuation Complaints Tribunal did not involve an exercise of judicial power because the trustee had made an election under the *Superannuation Industry (Supervision) Act 1993* (Cth).[59] The Court also pointed out that enforcement of a determination required an 'independent exercise of judicial power'.[60]

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52 See the provisions mentioned in footnote 46 above.

53 The grounds in Art 36(1), however, are not simply process-based, as the plaintiff claims at paragraph 71 of its submissions. The grounds in Art 36(1)(b) cannot be limited to process.

54 Art 35(1).

55 See paragraphs 10 to 11 above.

56 The relevant provisions were ss 25ZAA, 25ZAB and 25ZAC. Their operation is discussed in *Brandy* (1995) 183 CLR 245 at 253-254.

57 (1995) 183 CLR 245 at 259-260, 264 (Mason CJ, Brennan and Toohey JJ), 270 (Deane, Dawson, Gaudron and McHugh JJ).

58 (1999) 197 CLR 83.

59 (1999) 197 CLR 83 at 111 [44] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

60 (1999) 197 CLR 83 at 111 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

40. Both factors are present here. As explained in paragraph 36 above, the foundation for the arbitral award is the voluntary agreement of the plaintiff and second defendant that any dispute should be resolved by arbitration.[61] That agreement is the only reason that the IAA and the Model Law will apply to permit enforcement of the award. The agreement to resolve disputes through arbitration is thus no different from the election of the trustees in *Breckler*.

41. Just as in *Breckler*, moreover, an award cannot be enforced except pursuant to an independent exercise of judicial power.[62]

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42. It follows that the claim that the IAA and the Model Law impermissibly confer judicial power on a non-Chapter body is groundless.

43. The plaintiff's application for an order to show cause should be dismissed.

VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

44. The Attorney-General estimates that 30 minutes should be sufficient to present his oral argument.

20 Dated: 30 October 2012

WALTER SOFRONOFF QC
Solicitor-General for Queensland
Tel: (07) 3237 4884
Fax: (07) 3175 4666
Email: cossack@qldbar.asn.au

GIM DEL VILLAR
Murray Gleeson Chambers

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61 Application for Show Cause Book at 23 (clause 12 of the General Distribution Agreement between the plaintiff and second defendant).

62 See paragraphs 10 to 11 above.