ARBITRATE THIS! ENFORCING FOREIGN ARBITRAL AWARDS AND CHAPTER III OF THE *CONSTITUTION*

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[With significant amendments recently made to the International Arbitration Act 1974 *(Cth), international commercial arbitration is increasingly becoming an efficient, effective and enforceable dispute resolution mechanism in Australia. This article considers whether s 8 of the Act, which makes foreign arbitral awards readily enforceable, has gone so far as to confer the judicial power of the Commonwealth on international arbitral tribunals contrary to the requirements of ch III of the* Australian Constitution*. The question is approached in two ways: a substance-focused approach in line with* Brandy v Human Rights and Equal Opportunity Commission *and a more formalistic approach found in other ch III cases. Each comes to a different conclusion as to the constitutionality of s 8, so this article, drawing from United States jurisprudence, advocates answering the question in light of the objects and purposes underlying ch III. Finding that the enforcement mechanisms do not undermine the objects and purposes underlying ch III — the maintenance of the federal compact, the rule of law and the ability of an independent and impartial judiciary to enforce and interpret laws — it is concluded that enforcing foreign arbitral awards under s 8 does not invest arbitral tribunals with judicial power.]*

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I INTRODUCTION

The ease of enforcing foreign arbitral awards has been a cornerstone of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*').[1] Australia has implemented the *New York Convention* through the *International Arbitration Act 1974* (Cth) ('*IAA*') which, amongst other things, provides for the enforcement of foreign arbitral awards in an Australian court as if the award were a judgment of the court.[2] This article explores whether such an enforcement mechanism invests international arbitral tribunals with the judicial power of the Commonwealth, contrary to the requirements of ch III of the *Australian Constitution*.

Part II briefly outlines s 8 of the *IAA* and explores the extent of judicial review permitted under the Act. This is an important first step, as the nature and extent of judicial review of a tribunal's determination is a key indicium in determining whether the tribunal exercises judicial power. Parts III and IV then approach the question of the constitutionality of s 8 in two ways: a substance-focused approach in line with *Brandy v Human Rights and Equal Opportunity Commission* ('*Brandy*'),[3] and a more formalistic approach consistent with a larger number of High Court authorities on ch III. The substance-focused approach in Part III yields a strong argument for holding the *IAA* unconstitutional. In substance, the international arbitral tribunal decides a controversy as to existing rights with s 8 making the tribunal's determination immediately enforceable. Part IV, however, after considering whether arbitral tribunals can possibly exercise the judicial power 'of the Commonwealth' as well as the applicability of the principle in *Attorney-General (Cth) v Breckler* ('*Breckler*')[4] and *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* ('*CFMEU*'),[5] considers the nature of arbitration as an agreement to abide by the award. Viewing arbitration in this way, it is submitted that arbitral tribunals do not exercise judicial power, as they create rights, as opposed to enforcing existing ones. Furthermore, s 8 merely allows a court to enforce the agreement between the parties through a simplified procedure for enforcing a contractual promise. On this view of arbitration, s 8 does not make the tribunal's determination immediately enforceable.

Noting that the High Court has, in recent times, preferred substance over form in constitutional analysis, the conclusion in Part IV is somewhat unsatisfying considering that a substance-focused approach suggests a different conclusion. Part V, therefore, approaches the constitutional question in a different way. It considers whether s 8 of the *IAA* undermines the objects and purposes underlying the separation of judicial power as embodied in ch III. It begins by showing how United States courts have taken this approach, and finds that its use in Australia

[1] *New York Convention*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).
[2] *IAA* s 8.
[3] (1995) 183 CLR 245.
[4] (1999) 197 CLR 83.
[5] (2001) 203 CLR 645.

is both logical and consistent with precedent. Applying this approach, it is first submitted that the objects and purposes underlying ch III concern the maintenance of the rule of law through an independent and impartial judiciary that is capable of enforcing and interpreting laws, all with a view to maintaining the federal compact created by the *Constitution*. Since s 8 of the *IAA* does not undermine these objects and purposes, it should be held constitutional.

In many respects, this article is exploring uncharted territory. The constitutionality of enforcing foreign arbitral awards has never been fully considered by courts in Australia, nor in the United States.[6] In *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 5]*, Emmett J, in obiter, considered that international arbitral tribunals do not exercise the judicial power of the Commonwealth because their determinations do not have an enforceable nature equivalent to that of a court order.[7] That case, however, was dealing with s 7 of the *IAA*, and his Honour did not consider the effect of s 8.

As at the end of 2010, only 15 cases have arisen under s 8 of the *IAA* and its predecessor, s 8 of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth).[8] However, international commercial arbitration is becoming increasingly popular as more Australian businesses engage in international trade.[9] The *IAA* has recently been amended[10] to further promote the use of international arbitration,[11] and the Standing Committee of Attorneys-General has agreed to adopt a uniform commercial arbitration bill that, in substance, is more closely in line with the regime in the *IAA*.[12] New South Wales has already passed new arbitra-

6 Peter B Rutledge, 'Arbitration and Article III' (2008) 61 *Vanderbilt Law Review* 1189, 1191. But see *Marine Transit Corporation v Dreyfus*, 284 US 263 (1932). In Australia, Kirby P raised the question as to whether an arbitrator determining a dispute under the *Trade Practices Act 1974* (Cth) would involve the conferring of federal judicial power on the arbitrator, but left the question for another day: *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, 468.

7 (1998) 90 FCR 1, 14. See also *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC 169 (8 October 2008) [50] (Gray, Branson and Lander JJ).

8 *SPP (Middle East) Ltd v Egypt* [1984] 2 Qd R 410; *Brali v Hyundai Corporation* (1988) 15 NSWLR 734 ('*Brali*'); *Re Resort Condominiums International Inc* [1995] 1 Qd R 406; *ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* [1997] 2 VR 31; *Antclizo Shipping Corporation v The Food Corporation of India* (Unreported, Supreme Court of Western Australia, Master Bredmeyer, 6 November 1998); *Hallen v Angledal* [1999] NSWSC 552 (10 June 1999); *Toyo Engineering Corporation v John Holland Pty Ltd* [2000] VSC 553 (20 December 2000); *Commonwealth Development Corporation v Montague* [2000] QCA 252 (27 June 2000); *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317; *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820 (13 September 2004); *ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2005] NSWSC 224 (17 March 2005); *Transpac Capital Pte Ltd v Buntoro* [2008] NSWSC 671 (7 July 2008) ('*Transpac Capital*'); *Yang v S & L Consulting Pty Ltd* [2008] NSWSC 1051 (12 September 2008); *China Sichuan Changhong Electric Co Ltd v CTA International Pty Ltd* [2009] FCA 397 (27 March 2009); *Yang v S & L Consulting Pty Ltd* [2009] NSWSC 223 (31 March 2009).

9 See Peter E King, 'Contemporary Developments in the Law of International Arbitration in Australia and New Zealand' (1999) 18 *Australian Bar Review* 254, 254.

10 *International Arbitration Amendment Act 2010* (Cth).

11 See ibid sch 1 item 1; Explanatory Memorandum, International Arbitration Amendment Bill 2009 (Cth) 3.

12 Standing Committee of Attorneys-General, *Communiqué* (7 May 2010) 2 <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes>.

tion legislation in line with this agreement.[13] All this makes it likely that a defendant will, in the future, raise a constitutional challenge to the *IAA* to avoid what can sometimes be significant liabilities.[14] A finding of unconstitutionality would be devastating to Australia's reputation as a secure forum in which to do international business, as foreign companies could not have the confidence that their agreed form of dispute resolution would be recognised and enforced in Australia. It is therefore the intention of this article to assess how a court would answer the question of whether s 8 is constitutional, so that entities engaging in international business may have the assurance that Australian courts will be open to, and capable of, enforcing international arbitral awards.

It should be noted, however, that this article does not consider other potential constitutional problems surrounding s 8 of the *IAA*. It is possible, for example, that s 8 improperly interferes with judicial power.[15] Resolution of this and other constitutional questions must be left for another time. This article will only consider the question of whether s 8 invests international arbitral tribunals with the judicial power of the Commonwealth.

It is also important to note that this article does not consider the constitutional position of enforcing awards from international commercial arbitrations held within Australia. Such awards are enforced under arts 35–6 of the *UNCITRAL Model Law on International Commercial Arbitration* ('*Model Law*'),[16] which is given the force of law in Australia by s 16 of the *IAA*. However, the requirements for enforcing awards under arts 35–6 of the *Model Law* are largely identical to the requirements under s 8 of the *IAA* and, accordingly, much of what is discussed in this article would be equally relevant for international commercial arbitrations held within Australia.

II Overview of the *IAA*

The *IAA* implements Australia's obligations under the *New York Convention* and s 8 was designed to provide a uniform scheme throughout Australia for the recognition and enforcement of foreign arbitral awards.[17] A foreign award is defined as an 'arbitral award made, in pursuance of an arbitration agreement, in a

13 See *Commercial Arbitration Act 2010* (NSW).

14 In *Toyo Engineering Corporation v John Holland Pty Ltd* [2000] VSC 553 (20 December 2000), for example, the award was for the applicant to the sum of $40 million.

15 See generally *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*'); *Nicholas v The Queen* (1998) 193 CLR 173. Many of the features of the *IAA* discussed in this article would also be relevant to the issue of whether s 8 interferes with judicial power. In light of the severe restrictions placed on any judicial discretion under s 8, this issue would be a significant one even if a court finds that arbitral tribunals do not purportedly exercise the judicial power of the Commonwealth.

16 *Model Law*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 June 1985) annex I, as amended by UN GAOR, 61st sess, Supp No 17, UN Doc A/61/17 (7 July 2006) annex I. The *Model Law* is reproduced in *IAA* sch 2.

17 Explanatory Memorandum, Arbitration (Foreign Awards and Agreements) Bill 1974 (Cth) 1; Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1974, 4390 (Keppel Enderby).

country other than Australia, being an arbitral award in relation to which the [*New York*] *Convention* applies.'[18]

It was once the case that the *IAA* enforced foreign arbitral awards via s 33 of the various states' and territories' uniform commercial arbitration acts.[19] By its terms, s 33 seems to provide courts with a residual discretion to enforce the award.[20] However, s 33 no longer applies to the enforcement of foreign arbitral awards since the enactment of the *International Arbitration Amendment Act 2010* (Cth).[21] Section 8(2) of the *IAA* now reads: 'Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.' A new s 8(3) has also been inserted conferring jurisdiction on the Federal Court to enforce an award to the same effect as s 8(2). Then, to remove any doubt that may have otherwise existed, a new s 8(3A) explicitly provides that '[t]he court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).'[22]

As the following Parts of this article reveal, an important indicium of the exercise of judicial power is the extent to which a court can review the decision of the tribunal. In relation to the *IAA*, the extent to which a court has a discretion to enforce the award and an ability to review the award may affect a finding as to whether the international arbitral tribunal exercises judicial power. Although the position was once unclear due to *Re Resort Condominiums International Inc* ('*Resort Condominiums*'),[23] the amendments to the *IAA* make it clear that courts

18 *IAA* s 3(1) (definition of 'foreign award').

19 *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA). See, eg, *Brali* (1988) 15 NSWLR 734, 743 (Rogers CJ Comm D). Prior to the 2010 amendments, s 8(2) of the *IAA* provided that 'a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory.'

20 A single judge of the Supreme Court of Queensland found that such a residual discretion existed when enforcing foreign arbitral awards, albeit his Honour did so on the basis of s 8 of the *IAA*: *Re Resort Condominiums International Inc* [1995] 1 Qd R 406, 427 (Lee J).

21 In New South Wales, the *Commercial Arbitration Act 1984* (NSW) has been replaced with the *Commercial Arbitration Act 2010* (NSW), ss 35–6 of which provide for an enforcement mechanism similar to that found in the *IAA*.

22 A detailed overview of the enforcement process under s 8 prior to the 2010 amendments is provided in Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 8th ed, 2010) 867–73.

23 [1995] 1 Qd R 406, 427 (Lee J). It is likely that *Resort Condominiums* would not have been followed in any event due to its inconsistency with art V of the *New York Convention* and art 36 of the *Model Law*, the decisions of the courts on equivalent provisions in the United Kingdom and United States and the pro-enforcement trend of more recent decisions in Australia: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (Rakta)*, 508 F 2d 969 (2nd Cir, 1974); *Scherk v Alberto-Culver Co*, 417 US 506, 516–17 (Stewart J) (1974); *Europcar Italia SpA v Maiellano Tours Inc*, 156 F 3d 310, 313 (Walker J) (2nd Cir, 1998); *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] 2 Lloyd's Rep 326, 328 (Gross J); *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 94–6 (Allsop J) ('*Comandate Marine*').

must enforce foreign arbitral awards as if they were judgments of the court *unless* ss 8(5) or (7) apply.[24]

The process for seeking enforcement itself is a relatively simple one.[25] Under s 9(1), a party seeking enforcement need only produce to the court the original award and the arbitration agreement under which it was made, or a duly certified copy of both. Section 10(1) then allows for the production of a certificate stating that a country specified in the certificate was, at the relevant time, a *Convention* country.[26] Both these sections provide that these documents are to be admitted by a court as prima facie evidence of the matters to which they relate.[27] A party who opposes the enforcement may then raise a ground in s 8(5) as to why enforcement should be refused, or the court may do so under s 8(7).[28] This is a summary procedure,[29] which, although amounting to an exercise of judicial power, 'merely makes what is already a final arbitration award a judgment of the court.'[30]

Another important aspect of the *IAA* is that, in relation to 'foreign awards', a court cannot review the award, it can only refuse to enforce the award if ss 8(5) or (7) apply.[31] There is no Australian authority on point,[32] but American and British courts have found that the *New York Convention* does not permit a court to review the foreign award, regardless of any legal errors it contains.[33] In light of the *IAA*'s purpose to give effect to Australia's obligations under the *New York*

24 See Explanatory Memorandum, International Arbitration Amendment Bill 2009 (Cth) 7. The grounds for refusal in s 8(5) are, generally speaking, that a party was under some incapacity, the arbitration agreement was invalid, there was no proper notice of the appointment of an arbitrator or the commencement of arbitration proceedings, a party was otherwise unable to present their case, the arbitrator went beyond the scope of the arbitration agreement, the composition of the arbitral tribunal was not in accordance with the agreement or that the award was not yet binding. The grounds in s 8(7) are that the subject matter of the dispute between the parties is not capable of settlement by arbitration or that to enforce the award would be otherwise contrary to public policy, including, under s 8(7A), that the arbitrator breached the rules of natural justice in connection with the making of the award or the making of the award was affected by fraud or corruption.

25 See, eg, *Transpac Capital* [2008] NSWSC 671 (7 July 2008).

26 Section 8 applies only to awards made in countries that are signatories to the *New York Convention*, or where the party seeking enforcement is domiciled or ordinarily resident in such a country: *IAA* s 8(4).

27 Ibid ss 9(5), 10(1).

28 *Transpac Capital* [2008] NSWSC 671 (7 July 2008) [43]–[44] (Hall J).

29 See *Brali* (1988) 15 NSWLR 734, 743 (Rogers CJ Comm D); *Hallen v Angledal* [1999] NSWSC 552 (10 June 1999) [35] (Rolfe J).

30 *Florasynth Inc v Pickholz*, 750 F 2d 171, 176 (Cardamone J) (2nd Cir, 1984).

31 See also John Goldring, 'The 1958 United Nations *Convention on Recognition and Enforcement of Foreign Arbitral Awards* and the *Australian Constitution*' (1973) 5 *Federal Law Review* 303, 304. For international arbitral awards made within Australia, the *Model Law* has equally restrictive grounds for review under art 36. Cf the position prior to the 2010 amendments inserting new *IAA* s 21 in *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312, which is discussed in Explanatory Memorandum, International Arbitration Amendment Bill 2009 (Cth) 16.

32 Although there seems to be an assumption that courts cannot review an arbitrator's decision: see *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175 (4 December 2006) [72]–[73] (Hollingworth J).

33 *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F 3d 357, 368 (Wiener J) (5th Cir, 2003); *Yusuf Ahmed Alghanim & Sons WLL v Toys "R" Us Inc*, 126 F 3d 15, 20–1 (Miner J) (2nd Cir, 1997); *Norsk Hydro ASA v State Property Fund of Ukraine* [2009] Bus LR 558, 567 (Gross J); David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd ed, 2007) 461–2.

Convention, it is submitted that Australian courts would follow the reasoning of their American and British counterparts.[34] Therefore, the nature and extent of judicial review of foreign arbitral awards is very limited.[35]

III *BRANDY* AND ENFORCING FOREIGN ARBITRAL AWARDS

The scheme outlined in Part II raises a question as to whether international arbitral tribunals are exercising the judicial power of the Commonwealth. This Part considers this question in the context of the decision in *Brandy* alone, as *Brandy* provides a good example of a substance-focused approach to ch III. Part IV then considers the question in relation to the wider pool of ch III cases. Each analysis suggests a different conclusion, which in turn highlights the need for another approach to the question.

A *The Decision in* Brandy

Chapter III of the *Constitution* gives effect to the doctrine of the separation of judicial power from executive and legislative powers by vesting, under s 71, the judicial power of the Commonwealth exclusively in the High Court, federal courts created by Parliament and such other courts Parliament invests with federal jurisdiction.[36] Since *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*'),[37] it has been well-accepted that ch III forbids the judicial power of the Commonwealth from being conferred on any body that does not meet the requirements of ch III.

Brandy concerned the validity of certain provisions of the *Racial Discrimination Act 1975* (Cth) which were said to confer judicial power on a body that did not meet the requirements of ch III. Under the Act, the Human Rights and Equal Opportunity Commission ('HREOC') was empowered to hear complaints of racial discrimination and make determinations which, although not binding, were to be registered in the Federal Court.[38] Upon registration, the determination was to have the effect of an order of the Court, although the respondent could make an application to the Court to have the determination reviewed.[39]

The High Court found that as the findings of HREOC, which were based on existing rights, became binding 'as an order of the Federal Court',[40] the registration and enforcement provisions invalidly invested HREOC with judicial power.[41] The majority judgment explicitly stated that if it were not for the registration provisions, HREOC would not have been exercising judicial

34 See also Explanatory Memorandum, International Arbitration Amendment Bill 2009 (Cth) 16.
35 See also Sutton, Gill and Gearing, above n 33, 459.
36 See, eg, *Lim* (1992) 176 CLR 1, 26–7 (Brennan, Deane and Dawson JJ).
37 (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
38 *Brandy* (1995) 183 CLR 245, 264–5 (Deane, Dawson, Gaudron and McHugh JJ).
39 Ibid 265.
40 Ibid 270.
41 Ibid 260 (Mason CJ, Brennan and Toohey JJ), 269–71 (Deane, Dawson, Gaudron and McHugh JJ).

power.[42] The fact that HREOC could only enforce its determinations through another mechanism — registration in the Court — rather than enforcing them itself was not decisive.[43]

B *Comparison between* Brandy *and the* IAA

At the outset, there is a significant and obvious difference between the position of HREOC in *Brandy* and that of international arbitral tribunals. Under the *Racial Discrimination Act 1975* (Cth), Parliament had conferred inquiry and determination functions on HREOC with the registration provisions then transforming those functions into an exercise of judicial power.[44] Under the *IAA*, however, there are no provisions that expressly confer inquiry and determination functions on international arbitral tribunals outside of Australia. How then can there be a purported conferral of judicial power on the tribunals?

In considering this issue and in comparing *Brandy* with the *IAA*, it is important to note that the decision in *Brandy* turned on substance rather than form.[45] Furthermore, the High Court has often advocated an approach based on substance rather than form when answering constitutional questions.[46] Accordingly, the question must be whether, in substance, the *effect* of the *IAA* is to confer judicial power on an international arbitral tribunal.

Whereas the functions and powers of HREOC emanated from a Commonwealth Act, the functions and powers of an arbitral tribunal emanate from a combination of the arbitration agreement and the applicable arbitration law.[47] Some arbitration agreements detail specific functions and powers of the tribunal, but many will merely provide for arbitration to resolve any disputes arising out of a specific relationship and contain few other details.[48] Further content is then given to the powers and functions of the arbitral tribunal by the arbitration law of the *lex loci arbitri*, the *lex loci arbitri* ordinarily being the law of the seat of the arbitration.[49]

In Australia, the arbitration law that governs international commercial arbitrations is primarily the *Model Law*, given the force of law by s 16 of the *IAA*. The *Model Law* has been widely adopted as the governing law for international

42 Ibid 269 (Deane, Dawson, Gaudron and McHugh JJ).

43 Ibid 269–71.

44 Ibid 264–7.

45 See Russell Blackford, 'Judicial Power, Political Liberty and the Post-Industrial State' (1997) 71 *Australian Law Journal* 267, 280. See also below nn 83–7 and accompanying text.

46 See, eg, *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185, 210 (Starke J); *Street v Queensland Bar Association* (1989) 168 CLR 461, 522–5 (Deane J); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 466–7 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Ha v New South Wales* (1997) 189 CLR 465, 497–8 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 233 (Gummow J), 278 (Hayne J). Cf *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 408–9 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

47 Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (Kluwer Law International, 2nd ed, 2006) 33.

48 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) 18–19, 110–11.

49 Ibid 173–84.

arbitrations in many states throughout the world.[50] Accordingly, the functions and powers given to international arbitral tribunals in other countries will often, subject to contrary agreement between the parties, be largely the same as in Australia. The *Model Law* shares some similarities with certain provisions of Commonwealth legislation that directly conferred functions and powers on tribunals and that have been considered by ch III cases. For example, the *Model Law*: confers powers on an arbitral tribunal to determine its jurisdiction[51] and order interim measures;[52] deals with the appointment and challenge of arbitrators;[53] provides for the procedure the tribunal is to follow absent any contrary agreement between the parties;[54] requires the tribunal to 'decide the dispute in accordance with such rules of law … as applicable';[55] allows for early settlement or termination of the proceedings;[56] and deals with the tribunal's power to correct or interpret the award.[57]

The *IAA* does, therefore, confer some functions and powers on international arbitral tribunals,[58] yet a significant difference remains between it and the *Racial Discrimination Act 1975* (Cth) in that the original conferral of power to hear and determine the dispute comes from the arbitration agreement, not the Commonwealth Act. The arbitration agreement identifies what disputes an arbitral tribunal may hear and it is from the agreement that certain arbitration laws then become relevant; the agreement allows for the referral of the dispute to an arbitral tribunal which determines the arbitration law that is to govern the dispute.[59]

With that, it is tempting to conclude that there cannot be a purported conferral of judicial power as the *IAA* does not confer the necessary power on the tribunal to hear the dispute in question. However, the very legitimacy of parties entering into an arbitration agreement and the ability to have it enforced depends upon national arbitration laws such as the *IAA*.[60] This means that, as Blackaby et al state, international arbitration 'is a hybrid';[61] a 'private process' that 'has a public effect, implemented with the support of the public authorities of each

50 For a list of countries, states and territories that have enacted legislation based on the *Model Law*, see United Nations Commission on International Trade Law, *Status: 1985 — UNCITRAL Model Law on International Commercial Arbitration* (2010) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

51 *Model Law* art 16.

52 Ibid art 17.

53 Ibid arts 10–15.

54 Ibid arts 18–27.

55 Ibid art 28(1).

56 Ibid arts 30, 32.

57 Ibid art 33.

58 Although most foreign arbitrations would apply an arbitration law other than the *IAA* by the very nature of the arbitration being held outside of Australia. The discussion below shows that this fact, however, does not affect the conclusion that the *IAA* may nonetheless purport to confer judicial power.

59 See *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 167 (Gleeson CJ); Blackaby et al, above n 48, 21; Sutton, Gill and Gearing, above n 33, 5.

60 Bühring-Uhle, Kirchhoff and Scherer, above n 47, 42.

61 Blackaby et al, above n 48, 30.

State and expressed through that State's national law.'[62] As Carbonneau describes it:

> The local law of arbitration establishes rules pertaining to the validity of arbitration agreements and the enforceability of awards. It thereby establishes the legitimacy of arbitration and the mode by which the process is to operate as an adjudicatory mechanism.[63]

Therefore, although the arbitration agreement is the first link in a causative chain that confers functions and powers on the arbitral tribunal, it is the national arbitration law that legitimises and enforces this link and enables arbitral tribunals to be given such functions and powers in the first place. As a result, even where the details of a tribunal's functions and powers are to be found in both the arbitration agreement and an applicable foreign arbitration law, the *IAA* still has the effect of ultimately conferring on such tribunals those functions and powers.

It does this, first, by ensuring that matters falling within the arbitration agreement will be determined by the arbitral tribunal, wherever constituted. Section 7 provides that, on the application of a party to the arbitration agreement, a court must stay any proceedings that would involve the determination of matters that are covered by an arbitration agreement, subject to a few narrow exceptions.[64] Section 3 defines an arbitration agreement (by reference to art II(1) of the *New York Convention*) as an agreement in writing by the parties to submit to arbitration 'differences' between them in relation to a 'defined legal relationship … concerning a subject matter capable of settlement by arbitration.' Therefore, Parliament has determined through the *IAA* that specific 'matters', namely disputes arising out of a defined legal relationship covered by an arbitration agreement, are to be dealt with by arbitral tribunals, not the courts. In substance, this is not so different from Parliament determining in *Brandy* that certain matters, namely complaints of racial discrimination, are to be heard and dealt with by HREOC. Unlike in *Brandy*, Parliament has not expressly detailed the functions and powers of the tribunal, but such detail would be counterproductive given that a key benefit of arbitration is the flexibility it provides parties as to the powers and procedures of the arbitral tribunal.[65] Such prescription is also

62 Ibid.

63 Thomas E Carbonneau, 'National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error' in Richard B Lillich and Charles N Brower (eds), *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity? — Twelfth Sokol Colloquium* (Transnational Publishers, 1993) 115, 118.

64 All parties could, of course, agree to litigate in the courts and not rely on s 7: see *Comandate Marine* (2006) 157 FCR 45, 65 (Allsop J). The fact that parties have a choice to go to arbitration or the courts does not, however, solve the constitutional question. In fact, the choice may even indicate an exercise of judicial power: see *The British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422, 432 (Knox CJ), 436 (Isaacs J).

65 See Jack J Coe Jr, 'Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness' in Dennis Campbell and Susan Meek (eds), *The Comparative Law Yearbook of International Business — Special Issue, 2001: The Arbitration Process* (Kluwer Law International, 2002) 153, 155; Michael Polkinghorne and Jean-Claude Najar, 'An Introduction to ICC Arbitration in Australia: Some Current Issues in International Arbitration' (1991) 3 *Bond Law Review* 43, 44.

unnecessary, as those details are contained within the arbitration agreement and the arbitration law that follows from the implementation of that agreement.

Once a matter has been referred to arbitration and cannot be litigated in an Australian court, the *IAA* then continues to offer support to the tribunal to ensure it effectively exercises its powers and functions. Article 17H(1) of the *Model Law*, for example, allows a court to enforce any interim measures that have been issued by the tribunal, irrespective of the country in which they were issued. Interim measures are used by the tribunal to protect the rights of the parties, which in turn protects the arbitral proceedings and ensures that their continuation would not be futile.[66] The *IAA* also contains a number of provisions that parties can opt out of and others that parties may choose to have applied to the dispute.[67] Among the provisions that parties may opt out of are those allowing a party to apply for a subpoena from a court compelling a person to attend for examination before a tribunal or produce documents,[68] or a court order compelling a person to comply with certain orders of the tribunal.[69] Finally, when the tribunal has exercised its functions and powers through hearing and determining the matters referred to it, it issues an award that a court is required to enforce, 'as if the award were a judgment or order of that court',[70] subject to a few narrow exceptions.[71]

Although the *IAA* does not necessarily spell out the functions and powers of the tribunal, the above discussion details how the *IAA* ensures that, from the commencement of the arbitral proceedings to the enforcement of the award, the tribunal is to determine all disputes covered by an arbitration agreement and is able to do so through exercising functions and powers that, in substance, closely resemble those contained in the *Model Law*.[72] With s 7 of the *IAA* legitimising and enforcing arbitration agreements that ultimately lead to the conferral of powers and functions on tribunals and s 8 then enforcing awards that can only be made by a tribunal exercising functions and powers similar to those contained in the *Model Law*, in substance, the *effect* of the *IAA* is a purported conferral on arbitral tribunals, wherever located, of something that may resemble judicial power. It is thus a question of whether, in comparing the position of arbitral tribunals to that of HREOC in *Brandy*, arbitral tribunals have, as a matter of substance, been conferred with the judicial power of the Commonwealth.

The first apparent feature shared by HREOC and international arbitral tribunals is that both decide controversies between parties and do so by the determi-

66 *Perenco Ecuador Ltd v Ecuador (Decision on Provisional Measures)* (ICSID Arbitral Tribunal, Case No ARB/08/6, 8 May 2009) [43]; *United Technologies International Inc v Iran (Decision)* (1986) 13 Iran–US CTR 254, 257–8 [17]–[18].

67 See *IAA* s 22.

68 Ibid s 23.

69 Ibid s 23A.

70 Ibid s 8(2).

71 Ibid ss 8(3A), (5), (7), (7A).

72 An award made by means of exercising functions and powers radically different to those found within the *Model Law* may amount to a breach of natural justice and make the award unenforceable under s 8(7)(b) of the *IAA*: ibid s 8(7A)(b).

nation of rights and duties based upon existing facts and the law.[73] In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* ('*Comandate Marine*'), for example, the dispute that was referred to arbitration concerned the breach of a time charter.[74] This category of case, an action for breach of contract, falls within the functions that have traditionally been viewed as the exclusive domain of judicial action.[75] Without the *IAA*, however, determinations of arbitral tribunals would not give rise to an 'immediately enforceable liability'[76] as the tribunals would have no way to enforce their determinations.

Although the nature of international arbitral tribunals suggests that they exercise judicial power, it was the enforcement mechanisms in *Brandy* that bestowed judicial power on HREOC; the High Court found no difficulty with HREOC making determinations per se.[77] It is with enforcement that a key difference arises. Unlike in *Brandy*, an award sought to be enforced under the *IAA* does not take the form of an order of the court automatically through a registration provision. The court instead enforces the award upon an application by a party. The question, therefore, is whether this distinction gives rise to a different conclusion.

All judges in *Brandy* placed emphasis on the fact that a determination could be enforced without there ever being court intervention.[78] Subsequent decisions have also suggested that the scheme in *Brandy* was unconstitutional because of the system of automatic registration.[79] However, it was not only the automatic registration of a determination that made the legislation in *Brandy* unconstitutional. All judges held that even if a respondent sought review of HREOC's determination, HREOC was still exercising judicial power. The judgment of Mason CJ, Brennan and Toohey JJ found that review by the Federal Court was not by way of a de novo hearing; it was more akin to an appeal because 'new evidence' could only be admitted with the court's leave.[80] This was despite the Court's seemingly wide powers under the *Racial Discrimination Act 1975* (Cth) to 'review all issues of fact and law and make such orders as it thinks fit.'[81] The judgment of Deane, Dawson, Gaudron and McHugh JJ similarly found that the

73 See *Brandy* (1995) 183 CLR 245, 269 (Deane, Dawson, Gaudron and McHugh JJ); *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, 259, 262–3 (Tucker LJ); *Government Insurance Office (NSW) v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206, 246–7 (Mason J); *Model Law* art 28(1); Bühring-Uhle, Kirchhoff and Scherer, above n 47, 33. See generally Sutton, Gill and Gearing, above n 33, 5–7.

74 (2006) 157 FCR 45, 54–7 (Allsop J).

75 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

76 *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185, 199 (Latham CJ).

77 See *Brandy* (1995) 183 CLR 245, 269 (Deane, Dawson, Gaudron and McHugh JJ).

78 See ibid 259, 261–2 (Mason CJ, Brennan and Toohey JJ), 270–1 (Deane, Dawson, Gaudron and McHugh JJ).

79 See, eg, *Breckler* (1999) 197 CLR 83, 110 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 133 (Kirby J); *Luton v Lessels* (2002) 210 CLR 333, 357 (Gaudron and Hayne JJ); *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 579 (Hayne J) ('*Takeovers Panel*'). Cf *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 133 (Kenny J).

80 *Brandy* (1995) 183 CLR 245, 262–4.

81 Ibid 263.

review procedure did not indicate a proceeding in the original jurisdiction of the Federal Court.[82] As such, even where the Federal Court engaged in its own exercise of judicial power by reviewing HREOC's determination, the limited review permitted by the Act still had the effect of investing HREOC with judicial power. This has implications for the *IAA*, which significantly limits the review of foreign arbitral awards, as discussed in Part II.

It is also important to remember the substance-focused approach that was taken in *Brandy*.[83] As a matter of form, the legislation provided that a determination of HREOC was not binding.[84] However, as the determination was then registered in the Federal Court and took on the form of an order of the court, in substance it was a binding and conclusive determination.[85] It was legislation that made the determination of HREOC enforceable, not the Federal Court.[86] The Federal Court was merely 'rubber stamping' the determination of HREOC, with any available review being by way of appeal as opposed to re-hearing.[87]

Comparing this to the *IAA*, the mechanism for enforcement is a court which can enforce the award as if it were a judgment of the court.[88] As a matter of form, it could be argued that it is the court order that is binding and enforceable, not the award itself. As a matter of substance, however, the limited discretion that is left to a court suggests that the practical outcome is no different to an automatic system of registration. In *Brandy*, the Federal Court could review all issues of fact and law.[89] Under the *IAA*, however, courts cannot in any way review the decision of the arbitrator, nor change the award, regardless of any errors it may contain.[90] Furthermore, courts can only refuse to exercise their discretion to enforce the award if one of the grounds in ss 8(5) or (7) apply.[91] In circumstances other than those provided for by the *IAA*, the court has little choice but to enforce the award.[92] The fact that the court itself has to enforce the award may be a step up from the mere registration of a determination by a registrar, but, in circumstances where the *IAA* provides the court with little choice, in substance it is the *IAA* that makes the tribunal's determination enforceable, not the order of the court.

There is, therefore, a reasonable argument that, under the *IAA*, a court is simply being used as a 'rubber stamp' mechanism to make a foreign arbitral award

82 Ibid 270–1.
83 See Blackford, above n 45, 280.
84 *Racial Discrimination Act 1975* (Cth) s 25Z(2) as it then stood: see *Brandy* (1995) 183 CLR 245, 253 (Mason CJ, Brennan and Toohey JJ).
85 See *Brandy* (1995) 183 CLR 245, 260 (Mason CJ, Brennan and Toohey JJ), 270 (Deane, Dawson, Gaudron and McHugh JJ).
86 Ibid 270 (Deane, Dawson, Gaudron and McHugh JJ).
87 Fiona Wheeler, *The Separation of Federal Judicial Power: A Purposive Analysis* (DPhil Thesis, The Australian National University, 1999) 183.
88 See *IAA* ss 8(2)–(3).
89 (1995) 183 CLR 245, 263 (Mason CJ, Brennan and Toohey JJ).
90 See above nn 31–5 and accompanying text.
91 *IAA* s 8(3A). See above nn 20–2 and accompanying text.
92 See *Gulf Petro Trading Co Inc v Nigerian National Petroleum Corporation*, 288 F Supp 2d 783, 792 (Fish CJ) (ND Tex, 2003).

immediately enforceable. The award remains the determination of the arbitral tribunal, but it is given the force of an order of the court.[93] The award determines rights and duties based on existing facts and law, and Parliament ensures that the tribunal has the legitimacy and ability to make such determinations.[94] With the addition of enforcement, the substance-focused approach of *Brandy* would suggest that arbitral tribunals have been invested with judicial power contrary to the requirements of ch III.

IV THE FORMALISTIC APPROACH TO THE CONSTITUTIONAL QUESTION

Although the reasoning in *Brandy* suggests that the *IAA* is unconstitutional, *Brandy* is only one of numerous cases concerning the investment of judicial power in non-judicial bodies. Many of the cases concerning ch III turn on highly technical, case-specific reasoning of somewhat 'excessive subtlety',[95] typically drawing fine distinctions as to the nature of the power being exercised.[96] The British Imperial Oil cases[97] illustrate the more formalistic approach courts have often taken in considering whether a body is exercising judicial power.[98]

This Part considers the constitutionality of the *IAA* through this more formalistic approach. It considers two highly technical arguments that could be invoked to dismiss the constitutional question without any analysis of whether 'judicial power' is being exercised by arbitral tribunals. The first is that arbitral tribunals cannot possibly be exercising the judicial power 'of the Commonwealth' where the application of foreign law is involved. The second is that, applying statements in *Breckler* and *CFMEU*, the parties' agreement to arbitrate necessarily means that the arbitral tribunal cannot be exercising 'judicial power'. This Part considers these two arguments and finds that they cannot, by themselves, dismiss the constitutional question. It then considers whether arbitral tribunals are exercising the 'judicial power of the Commonwealth' by reference to the wider pool of ch III cases.

A *The Judicial Power 'of the Commonwealth'*

Section 71 of the *Constitution* invests only the 'judicial power *of the Commonwealth*' exclusively in ch III courts.[99] This raises the question of whether an international arbitral tribunal can possibly exercise the judicial power 'of the

93 Cf *Brandy* (1995) 183 CLR 245, 270 (Deane, Dawson, Gaudron and McHugh JJ).

94 See above nn 60–3 and accompanying text.

95 *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90 (Barwick CJ).

96 See Wheeler, *The Separation of Federal Judicial Power*, above n 87, 140.

97 *The British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; *The Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530.

98 See Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 225–9.

99 *Constitution* s 71 (emphasis added). See *Boilermakers* (1956) 94 CLR 254, 268–70 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

Commonwealth' when foreign law governs the dispute before them.[100] A conclusive answer to this question is an article in itself, and many of the more complex aspects of providing such an answer have been discussed elsewhere.[101] Accordingly, this article intends to offer only a modest and brief answer.

The judicial power 'of the Commonwealth' is that exercised over 'matters' contained in ss 73, 75 and 76 of the *Constitution*.[102] A 'matter' involves a justiciable controversy concerning an 'immediate right, duty or liability' that is at issue.[103] International arbitrations involving either the Commonwealth as a party or 'matters' of admiralty or maritime jurisdiction may involve the exercise of the judicial power 'of the Commonwealth', as they concern 'matters' under ss 75(iii) and 76(iii) of the *Constitution* respectively, regardless of the law applied to the dispute.[104] For all other international arbitrations, it is submitted that the judicial power 'of the Commonwealth' may still be exercised if the rights determined by the tribunal constitute a 'matter … arising under any laws made by the Parliament' pursuant to s 76(ii) of the *Constitution*.

A matter arises under any law of the Parliament where the 'right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement'.[105] The federal law does not need to both create the right and enforce it; one or the other suffices.[106] Accordingly, the rights and duties determined by an international arbitral tribunal may constitute a matter that arises under a law of Parliament through either one of two propositions.

The first proposition is that the rights and duties determined by the arbitral tribunal form part of the same 'matter' as the right to have an award enforced, which is itself a 'matter' created by ss 8(2) and (3) of the *IAA* and, accordingly, is a matter arising under a law of Parliament.[107] They form part of the same

100 All of the cases that have arisen under *IAA* s 8 to date have involved arbitrations applying foreign law, so far as it is possible to determine the applicable law from the reports: see above n 8 and accompanying text.

101 See generally Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002); P H Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed, 1997) 497–500, 601–8; Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227; Justice Allsop, 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2002) 23 *Australian Bar Review* 29.

102 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 546 (Gleeson CJ), 555 (McHugh J); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 611 (Gaudron J); *Ruhani v Director of Police* (2005) 222 CLR 489, 497–8 (Gleeson CJ); Sir John Quick and Littleton E Groom, *The Judicial Power of the Commonwealth with the Practice and Procedure of the High Court* (Charles F Maxwell, 1904) 4.

103 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 583–4 (Gummow and Hayne JJ).

104 For s 75(iii), see *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 581–2 (Gleeson CJ, Gaudron and Gummow JJ). For s 76(iii), see *The Shin Kobe Maru* (1994) 181 CLR 404, 424 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *The Global Peace* (2006) 154 FCR 439, 449–51 (Allsop J).

105 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ) ('*Barrett*'). See also Zines, *Federal Jurisdiction in Australia*, above n 101, 66–9.

106 *Ruhani v Director of Police* (2005) 222 CLR 489, 514, 521–2 (McHugh J).

107 Cf ibid 527 (Gummow and Hayne JJ).

'matter', as the enforceable award *is* the determination of the tribunal, which is, in turn, the tribunal's findings as to the rights of the parties to the dispute.[108] Because the award is so connected with the determination of the tribunal, which is in turn so connected with the rights of the parties, they all comprise the one 'matter'.[109] On this view, as the right to have the award enforced is a matter arising under a law of Parliament, so too are the rights and duties that are determined by the tribunal.[110]

The second proposition is that the rights and liabilities determined by the tribunal are dependent on a federal law for their enforcement.[111] As s 7 of the *IAA* requires disputes governed by a valid international arbitration agreement to be referred to arbitration,[112] a party must proceed to arbitration before seeking enforcement of their rights under s 8 of the *IAA*. Accordingly, the rights that are determined by an arbitral tribunal depend on the *IAA* for their enforcement and, as such, arise under a law of Parliament.

Therefore, on the basis of either proposition, the constitutional question cannot be answered by simply asserting that a determination of an international arbitral tribunal cannot involve the judicial power 'of the Commonwealth'.

B Breckler *and* CFMEU

Statements made by the Court in *Breckler* and *CFMEU* may provide another possible avenue for disposing of the constitutional question without considering 'judicial power' in detail. *Breckler* involved a Commonwealth scheme whereby superannuation fund trustees could elect for their funds to become a 'regulated superannuation fund' which, amongst other things, enabled disputes to be determined by the Superannuation Tribunal.[113] That scheme is analogous to an agreement between parties that all disputes arising out of a certain relationship are to be determined by an arbitral tribunal. Noting that the Superannuation Tribunal only had power to hear the disputes as a result of a voluntary election by the trustees (just as an arbitral tribunal only has power to hear a dispute as a result of the parties' arbitration agreement), the High Court found that the trustees were bound by the Tribunal's determination as a matter of private law.[114]

108 Sutton, Gill and Gearing, above n 33, 271.

109 For further discussion as to when something arises under the one 'matter', see *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 545 (Wilson J); *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ); *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1, 13–16 (Wilcox, Sackville and Katz JJ).

110 See *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 for an example of how broadly the High Court has interpreted whether something is a 'matter … arising under any laws made by the Parliament'.

111 The second limb of Latham CJ's definition in *Barrett* (1945) 70 CLR 141, 154 has not been the subject of judicial consideration and so this proposition is based on the prima facie meaning of the phrase 'depends upon Federal law for its enforcement'.

112 Unless the parties otherwise agree or waive their right to arbitrate: see *Comandate Marine* (2006) 157 FCR 45, 65 (Allsop J).

113 (1999) 197 CLR 83, 100, 103–4, 108–9 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

114 Ibid 110–11.

As such, the Tribunal's determination 'involved not the exercise of … sovereign power … but the arbitration of a dispute'.[115] The Court, therefore, characterised the Tribunal's power by looking at the source of the power to adjudicate, distinguishing between a power originating from a Commonwealth law and a power derived from private agreement.[116]

In *CFMEU*, the High Court was concerned with the validity of certain clauses in an industrial agreement certified by the Australian Industrial Relations Commission. One such clause was that certain disputes that arose were to be determined by the Commission and the parties agreed to be bound by any decision made.[117] The case concerned whether it was within the Commission's power to certify such a clause, rather than whether such a function would be an exercise of judicial power on the part of the Commission. However, the Court did make some remarks as to why such a power was not judicial, stating that:

> Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.[118]

As with *Breckler*, the Court in *CFMEU* characterised the power by looking to its source.

As international arbitration is the result of parties agreeing to submit their dispute to arbitration, *Breckler* and *CFMEU* suggest that international arbitral tribunals cannot be exercising judicial power. However, viewing the source of authority to adjudicate as being determinative of the constitutional question seems inconsistent with the jurisprudence surrounding ch III.[119] In *Albarran v Companies Auditors and Liquidators Disciplinary Board*, the majority stated that, in determining whether the judicial power of the Commonwealth is being exercised, 'the focus in the authorities is upon the manner in which and subject matter upon which the body purportedly exercising judicial power operates and the purposes and consequences of any decisions it makes.'[120] To find that an agreement between parties necessarily prevents the judicial power of the Commonwealth from being exercised ignores this focus.

115 Ibid 111.

116 M A Perry, 'Chapter III and the Powers of Non-Judicial Tribunals: *Breckler* and Beyond' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 148, 152.

117 *CFMEU* (2001) 203 CLR 645, 650 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, and Callinan JJ).

118 Ibid 658.

119 See George Williams, 'Commentary' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 178, 181–5. Cf Perry, above n 116, 152–5.

120 (2007) 231 CLR 350, 363 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

The importance of focusing on the manner in which and subject matter upon which a body exercises power can be seen through a simple example. Suppose that the Commonwealth provides an option in criminal cases for the prosecutor and defendant to agree to take a case before an arbitrator instead of a court, with sufficient incentives provided so that most parties elect to do so.[121] The determination of the arbitrator is then given the force of a court order and the court's ability to review the decision is limited. If the source of authority to adjudicate was determinative of the issue, this arrangement would not involve an exercise of judicial power as the arbitrator's authority emanates from an agreement between the parties. However, this would potentially compromise the separation of judicial power, by transferring an area that was exclusively within the domain of the judiciary to another body, preventing judicial enforcement of Parliament's laws and undermining the independence of the judiciary.[122] It would also allow Parliament to create a plethora of non-judicial tribunals to authoritatively adjudicate matters that were previously judicial and exercise powers that would, but for the private agreement, be clearly judicial, all without infringing ch III. A focus on the manner in which and subject matter upon which the arbitrator exercises power would instead likely find such schemes unconstitutional.

This consequence suggests that it is unlikely that *Breckler* and *CFMEU* stand for the proposition that the source of authority is determinative of the issue; rather, the source of authority may simply be one of many factors to consider.[123] This conclusion is supported by the fact that the Court in *Breckler* went on to consider a number of other factors as to why the Tribunal's power was non-judicial.[124] In *CFMEU*, the Court also emphasised that an award made in private arbitration 'is not binding of its own force',[125] whereas the very question in this article is whether the *IAA* has the effect of making this so. It may also be the case that these statements are more related to the question, discussed above in Part III, as to whether there can possibly be a conferral of judicial power on a body where a private agreement, as opposed to legislation, confers power on that body. In this regard, the discussion in Part III as to how the *IAA* confers, in effect, powers and functions on the tribunal is relevant. Similarly, the consequences that would follow from an application of *Breckler* and *CFMEU* discussed in this Part would equally follow if *Brandy* could be distinguished for the reasons considered, and ultimately rejected, in Part III. In either case, the constitutionality of s 8 of the *IAA* does not hang on the fact that the source of authority to adjudicate is an agreement between the parties. Instead, a more thorough analysis is required to determine whether international arbitral tribunals are exercising 'judicial power'.

121 The Court in *Breckler* did not consider it significant that, in practice, there may be no real choice: see (1999) 197 CLR 83, 111 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

122 See below Part V.

123 See also Zines, *The High Court and the Constitution*, above n 98, 245–6. Cf Perry, above n 116, 152.

124 See (1999) 197 CLR 83, 111–12 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

125 (2001) 203 CLR 645, 658 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

C *'Judicial Power'*

In analysing whether international arbitral tribunals exercise 'judicial power', it is important to note that there is 'no single combination of necessary or sufficient factors' that identifies whether judicial power is being exercised.[126] Reference is often made to Griffith CJ's definition,[127] but this offers limited assistance. Consequently, the analysis proceeds through a consideration of the factors that cases on ch III have examined in ascertaining whether a particular body is exercising judicial power.[128] These include:

- the manner in which the power is to be exercised;[129]
- the availability of judicial review;[130]
- the historical treatment of the power;[131]
- the nature of the tribunal exercising the power (the 'chameleon doctrine');[132]
- the ascertainment of existing rights versus the creation of new rights;[133] and
- the finality and conclusiveness of the determination, including its enforceability.[134]

Before applying these factors to international arbitration, it should be noted that a number of cases have characterised industrial arbitration as involving non-judicial power.[135] The word 'arbitration' is not, however, a term of art.[136] Accordingly, it must still be considered whether international arbitration involves the exercise of judicial power.

126 *Takeovers Panel* (2008) 233 CLR 542, 577 (Hayne J).

127 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

128 See generally, eg, Zines, *The High Court and the Constitution*, above n 98, 247–61; Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 3, 13–16.

129 See *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

130 See *Luton v Lessels* (2002) 210 CLR 333, 387–8 (Callinan J); *Takeovers Panel* (2008) 233 CLR 542, 579 (Hayne J).

131 See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J); *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11–12 (Jacobs J).

132 See *R v Davison* (1954) 90 CLR 353, 370 (Dixon CJ and McTiernan J).

133 See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374–5 (Kitto J) ('*Tasmanian Breweries*').

134 See *The Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 543 (Lord Sankey LC for Lord Sankey LC, Viscount Dunedin, Lords Blanesburgh and Russell of Killowen and Anglin CJ); *Brandy* (1995) 183 CLR 245, 268 (Deane, Dawson, Gaudron and McHugh JJ).

135 See, eg, *Boilermakers* (1956) 94 CLR 254; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('*Alexander's Case*').

136 *Alexander's Case* (1918) 25 CLR 434, 446 (Griffith CJ). See also Katherine V W Stone, *Private Justice: The Law of Alternative Dispute Resolution* (Foundation Press, 2000) 602.

1 *Factors Suggesting the Exercise of Judicial Power*

There are a number of factors that suggest that arbitral tribunals are exercising 'judicial power'. First, the manner in which arbitral tribunals exercise their power is indicative of judicial power. Decisions of the tribunal are reached by the application of legal principles to proven facts,[137] as opposed to being based on considerations of public interest,[138] commercial factors,[139] or what the decision-maker believes 'ought' to occur as between the parties.[140] Decisions based on legal principles which are analogous to the decisions of a court are more likely to involve the exercise of judicial power.[141]

Secondly, the availability of judicial review, even if only under s 75(v) of the *Constitution*, has been an important factor in finding a power non-judicial.[142] The limited review permitted by s 8 of the *IAA* on the other hand, as discussed in Parts II and III of this article, suggests that international arbitral tribunals exercise judicial power.

Finally, arbitration involves the determination of 'basic rights' that have, historically, been considered within the exclusive domain of judicial power.[143] Zines suggests that where such 'basic rights' are involved, courts are less willing to find the exercise of non-judicial power in a tribunal that possesses a number of features of a court.[144] As international arbitration frequently involves a party suing on a contract, which is a 'basic right',[145] this may suggest that an arbitral tribunal is exercising judicial power.

2 *Formalistic Reasons to Find the Enforcement of Foreign Arbitral Awards Constitutional*

Despite the above factors suggesting the exercise of judicial power, the nature of arbitration may suggest a different conclusion.

(a) The Nature of Arbitration

As discussed above, although the principle in *Breckler* and *CFMEU* is not determinative of the constitutional question, the source of authority to adjudicate may still be a relevant factor in characterising the functions of a tribunal. The argument here is not an application of the chameleon doctrine,[146] but instead

137 *Model Law* art 28(1).

138 Cf *Tasmanian Breweries* (1970) 123 CLR 361, 399–400 (Windeyer J).

139 Cf *Takeovers Panel* (2008) 233 CLR 542, 562–3 (Kirby J), 596–7 (Crennan and Kiefel JJ).

140 See *Model Law* art 28(3). Cf *Alexander's Case* (1918) 25 CLR 434, 463 (Isaacs and Rich JJ). Judicial power may also involve some considerations of policy: ibid 550–1 (Gleeson CJ).

141 Cf *R v Davison* (1954) 90 CLR 353, 383–4 (Kitto J); *Brandy* (1995) 183 CLR 245, 258–9 (Mason CJ, Brennan and Toohey JJ).

142 See *Tasmanian Breweries* (1970) 123 CLR 361, 386 (Menzies J); *Breckler* (1999) 197 CLR 83, 108, 112 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Luton v Lessels* (2002) 210 CLR 333, 359–60 (Gaudron and Hayne JJ); *Takeovers Panel* (2008) 233 CLR 542, 579 (Hayne J). See also Zines, *The High Court and the Constitution*, above n 98, 245.

143 See *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J).

144 Zines, *The High Court and the Constitution*, above n 98, 233, 244–5.

145 See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J).

146 According to the chameleon doctrine, there are some functions which may be treated as administrative when conferred on an administrative body and judicial when conferred on a court.

focuses on the fact that an agreement between the parties changes the nature of the tribunal's exercise of power. Arbitration has long been seen as a contractual agreement between parties to refer disputes to an independent arbitrator and to abide by their determination.[147] Accordingly, arbitration may be analogous to a contractual 'agreement to agree', whereby the parties agree to abide by terms created in the future by a third party. It is well-accepted that a contract can leave terms to be decided by a third party in the future, even essential ones.[148] Even problems of uncertainty that may have plagued the enforceability of arbitration agreements in the past are no longer an issue in Australia, with the *Model Law* filling in for any uncertainty wherever it exists.[149] Traditionally, a party has also been able to bring an action in contract to enforce their rights under an arbitral award.[150] Arbitration may, therefore, be viewed as a mechanism by which the contractual rights of the parties may be altered should disputes arise under the contract.

Viewing arbitration in this way has implications for considering whether the arbitral tribunal is exercising judicial power. In particular, it may change the nature of the tribunal's function from enforcing existing rights to creating new ones. Section 8 of the *IAA* and the limited scope for judicial review may also be seen as a mechanism for enforcing a contractual agreement as opposed to one that merely makes the tribunal's determination enforceable. Both these aspects are now discussed.

(b) Creation of Rights

Prima facie, an arbitral tribunal applies existing law to a set of proven facts and awards remedies as a matter of legal entitlement. However, as the parties have agreed to submit disputes to arbitration and abide by the arbitrator's determination, the determination may instead create new rights. Arbitration can simply be seen as a mechanism for the creation of new contractual rights as between the parties. It may be that the arbitrator applies law to existing facts, but this can validly be done by a non-judicial body as a process incidental to the

It is generally applicable where the tribunal's functions could be exercised judicially or administratively: see *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–9 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). In cases that involve 'basic rights', this doctrine is inapplicable: see *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11–12 (Jacobs J).

147 See *Sutcliffe v Thackrah* [1974] AC 727, 745 (Lord Morris); *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 311–12 (Brennan CJ, Gaudron and McHugh JJ); *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 5]* (1998) 90 FCR 1, 14 (Emmett J); James Morrison, 'Drawing a Line in the Sand: Defining the Scope of Arbitrable Disputes in Australia' (2005) 22 *Journal of International Arbitration* 395, 395.

148 *Godecke v Kirwan* (1973) 129 CLR 629, 645 (Gibbs J).

149 See *IAA* s 16. Cf *Re Smith & Service and Nelson & Sons* (1890) 25 QBD 545; *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, 463 (Templeman LJ for Cumming-Bruce, Templeman and Oliver LJJ). Jurisdictions may differ as to the level of certainty required in an arbitration clause.

150 See Francis Russell, Edward Pollock and Herbert Russell, *A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards; with an Appendix of Forms, and of the Statutes Relating to Arbitration* (Stevens and Sons Ltd, 8th ed, 1900) 320–2.

creation of new rights.[151] The arbitrator's decision is merely a '*factum* upon which the law operates to create the right or duty.'[152] As the nature of the final act of the international arbitral tribunal is the creation of new rights, the previous inquiry, which may otherwise have appeared judicial through the determination of existing contractual rights, changes its nature to be merely a process by which new rights are created.[153]

The problem with this approach is that in most cases in which a tribunal was held to be creating rights, there was an extra element such as the tribunal exercising a discretion based on policy or some other non-legal ground.[154] It is more likely that a determination will be a factum by which new rights are created where the tribunal applies policy considerations in a manner similar to the legislature.[155] With international arbitration, however, the tribunal is not exercising any policy-orientated discretion that makes it analogous to legislative power.[156] Indeed, Carlston even suggests that it is not for the arbitrator to create rights by making a new agreement; they must, ordinarily, determine the parties' rights arising out of a dispute.[157] International arbitration also involves 'basic rights', meaning courts may be less willing to adopt this more strained reasoning of viewing arbitration as a mechanism by which rights are created.[158] Finally, the fact that future rights as between the parties may change as a result of arbitration does not necessarily differentiate it from court decisions. A court's ruling on a breach of contract can create future obligations, for example, by requiring a party to pay damages or specifically perform their end of the bargain.

(c) Enforcement Mechanism

The stronger argument for the constitutionality of s 8 of the *IAA* comes from considering the enforcement mechanism provided by it. Although enforceability is not necessarily a condition of a power being judicial,[159] the ability of a tribunal to have its determination enforced has been a strong factor in finding a power judicial.[160] As discussed in Part III, s 8 of the *IAA* may restrict any discretion the court has to such an extent that, as a matter of substance, the *IAA* provides for the

151 See *Re Cram; Ex parte The Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 149 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

152 *Alexander's Case* (1918) 25 CLR 434, 464 (Isaacs and Rich JJ).

153 See *Prentis v Atlantic Coast Line Co*, 211 US 210, 227 (Holmes J) (1908), quoted with approval in *R v Davison* (1954) 90 CLR 353, 370 (Dixon CJ and McTiernan J); Wheeler, *The Separation of Federal Judicial Power*, above n 87, 199.

154 See, eg, *Tasmanian Breweries* (1970) 123 CLR 361, 375 (Kitto J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Takeovers Panel* (2008) 233 CLR 542, 596–7 (Crennan and Kiefel JJ).

155 See *Tasmanian Breweries* (1970) 123 CLR 361, 377–8 (Kitto J).

156 See Bühring-Uhle, Kirchhoff and Scherer, above n 47, 33.

157 Kenneth S Carlston, 'Psychological and Sociological Aspects of the Judicial and Arbitration Processes' in Pieter Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff, 1967) 44, 48. Cf *Model Law* art 28(3).

158 See Zines, *The High Court and the Constitution*, above n 98, 244. See also *R v Gough; Ex parte Meat and Allied Trades Federation of Australia* (1969) 122 CLR 237, 241 (Barwick CJ), 245–7 (Windeyer J), 248 (Owen J), 248 (Walsh J).

159 *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J).

160 See *Brandy* (1995) 183 CLR 245, 269 (Deane, Dawson, Gaudron and McHugh JJ).

immediate enforceability of foreign awards. However, when we consider arbitration as an agreement by the parties to follow the decision of the arbitrator, s 8 may instead be seen as permitting a court to enforce such an agreement. In other words, s 8 of the *IAA* provides that an 'agreement to agree' to the arbitrator's decision is binding on the parties and enforceable by a court.[161] The restricted grounds on which a court can refuse enforcement support this view, as many of the grounds go to whether there was a valid agreement or whether the award was made in conformity with the agreement.[162] The grounds contained in s 8(7) further go to whether parties can lawfully agree to submit certain matters to arbitration. If the subject matter is not arbitrable or the award is against public policy, the agreement itself is illegal and unenforceable in the same manner as an illegal contract.[163]

On this view, since a court is enforcing the parties' agreement, the actions of the court result in an independent exercise of judicial power in the same way as though the parties had brought an action in contract before the court. Sections 9–10 of the *IAA* then provide for a simple procedure by which such an action can be brought and proven. The fact that the procedure for obtaining enforcement may be simple and involve the court in an almost procedural manner does not change the fact that it is still an independent exercise of judicial power that enforces the award.[164] This is in contrast with *Brandy*, where nothing that the Federal Court did itself changed the nature of the determination as an order of HREOC.[165]

The enforcement of an international arbitral tribunal's determination can therefore be seen as coming not from the operation of the *IAA*, but from the independent exercise of judicial power by a court. A court's ability to review the award is limited, but only because there is no need to review the arbitrator's decision when what is being enforced is the parties' agreement. As such, on this more technical analysis of the operation of s 8, and combined with the possibility that a tribunal is creating new rights, an international arbitral tribunal exercises non-judicial power.

This argument for constitutionality is consistent with previous High Court authority and, accordingly, it is the most likely reasoning a court would adopt. It is, however, unsatisfactory reasoning. This Part's logic turns on form rather than substance in focusing on a definition of arbitration as an 'agreement to agree'. It places too much emphasis on the events that led ultimately to a party having a binding and enforceable award and ignores the power the *IAA* in effect confers on arbitral tribunals. If we were to look instead to the substance of what is taking place — a tribunal deciding a dispute between parties based on existing rights

161 See also *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 3]* (1998) 86 FCR 374, 381, where Beaumont J held that s 7 of the *IAA* simply creates an entitlement for the parties to have their agreement to arbitrate enforced.

162 See above n 24.

163 See generally *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413–14 (Gibbs ACJ).

164 See *Takeovers Panel* (2008) 233 CLR 542, 578–9 (Hayne J).

165 See ibid 579.

and liabilities, with such parties required to resolve their dispute in this manner unless all parties agree otherwise, and the tribunal's determination being binding and enforceable with minimal court involvement — we are left on less stable constitutional ground.

In view of the unsatisfactory state in which we are left through this analysis, Part V considers the constitutional question from first principles, to find an alternative and more intellectually satisfying basis upon which the *IAA*'s constitutionality may be founded.

V ARBITRATION AND THE PURPOSES UNDERLYING CHAPTER III

Numerous commentators have suggested that the underlying purposes for confining the judicial power of the Commonwealth to ch III courts should be a primary consideration in finding whether an investment of power contravenes ch III.[166] The differing conclusions in Parts III and IV of this article necessitate such an approach, as simply considering whether 'judicial power' has been invested in international arbitral tribunals does not offer a sound conclusion. This Part, therefore, changes the frame of the question, to assess whether enforcing arbitral awards under the *IAA* undermines the purposes underlying the separation of judicial power. It first considers the United States cases that have applied a purposive approach to art III of the *United States Constitution* and whether it is appropriate to undertake such an approach in Australia. Finding that it is, this Part defines the Australian concept of the separation of judicial power, before analysing whether international arbitration undermines the purposes underlying that concept.

A *United States Jurisprudence*

As in Australia, the question of commercial arbitration's compatibility with art III of the *United States Constitution* has never been fully considered by the American courts.[167] The principles considered in *Commodity Futures Trading Commission v Schor* ('*Schor*'),[168] however, are highly relevant for our consideration of arbitration and the purposes underlying ch III of the *Australian Constitution*.[169] *Schor* involved a statutory scheme whereby persons injured by a commodity broker's violation of the *Commodity Exchange Act*, 7 USC §1 could choose to take their dispute to the Commodity Futures Trading Commission ('CFTC') for an enforceable order directing the offender to pay reparations.[170]

166 See Zines, *The High Court and the Constitution*, above n 98, 234; Wheeler, *The Separation of Federal Judicial Power*, above n 87, 200; Sir Anthony Mason, 'A New Perspective on Separation of Powers' [1996] (82) *Canberra Bulletin of Public Administration* 1, 2. See also Saunders, above n 128, 36.

167 Rutledge, above n 6, 1191. The case of *Marine Transit Corporation v Dreyfus*, 284 US 263 (1932) held enforcing arbitral awards constitutional, but did not consider questions of the investment of judicial power or whether it would undermine the purposes of art III.

168 478 US 833 (1986).

169 See Rutledge, above n 6, 1196–7.

170 478 US 833, 837 (O'Connor J for Burger CJ, White, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1986).

Instead of analysing whether 'judicial power' was invested in a non-art III body, the United States Supreme Court held that finding whether a scheme contravenes art III 'must be assessed by reference to the purposes underlying the requirements of Article III.'[171] They considered that art III contained a right to adjudication before independent and impartial courts, which could be waived by the parties.[172] However, art III also 'safeguards the role of the Judicial Branch' in the 'constitutional system of checks and balances' by 'barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] …" and thereby preventing "the encroachment or aggrandizement of one branch at the expense of the other."'[173] For this reason, this aspect of art III could not be waived by the parties and it was necessary to assess whether the legislative scheme undermined this purpose.[174]

Although the nature of the rights being adjudicated by the CFTC were at the 'core' of matters reserved to art III courts,[175] the Court in *Schor* found that the CFTC dealt only with a particularised area of law, the orders were enforceable only by an order of a court that had power to review the decision, and there were good policy reasons for the scheme.[176] Accordingly, it was found that the CFTC did not pose a substantial threat to the separation of judicial power, nor did it offend the non-waivable principles underlying art III.[177] However, the Court did issue a warning that, if Congress were to create a 'phalanx of non-Article III tribunals' such that the entire business of art III courts was taken away, such a move may offend the purposes of art III.[178]

Schor is one of several cases that have relied upon the purposes underlying art III to resolve constitutional questions.[179] Its finding is, however, most applicable to arbitration, given that the scheme in dispute involved a voluntary submission to a non-art III body. Having been decided in 1986, *Schor* also shows that it is not a new concept for courts to consider the purposes underlying the separation of powers in analysing whether legislation is unconstitutional. Given the inconclusiveness of existing Australian authorities when applied to the question of whether judicial power has been invested in international arbitral tribunals, the United States approach may be instrumental in providing a

171 Ibid 847.

172 Ibid 848–9.

173 Ibid 850 (citations omitted), quoting *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50, 58 (Brennan J for Brennan, Marshall, Blackmun and Stevens JJ) (1982) and *Buckley v Valeo*, 424 US 1, 122 (Burger CJ, Brennan, Stewart, Powell, Marshall, Blackmun, White and Rehnquist JJ) (1976).

174 *Schor*, 478 US 833, 850–1 (O'Connor J for Burger CJ, White, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1986).

175 Ibid 853.

176 Ibid 851–7.

177 Ibid 855.

178 Ibid.

179 See, eg, *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50, 74 (Brennan J for Brennan, Marshall, Blackmun and Stevens JJ) (1982); *Administrator, United States Environmental Protection Agency v Union Carbide Agricultural Products Co*, 473 US 568, 590 (O'Connor J for Burger CJ, White, Powell, Rehnquist and O'Connor JJ) (1985) ('*Union Carbide*').

satisfactory solution to the constitutional question of this article. Accordingly, consideration is now given as to whether such an approach can be applied in Australia and, if so, how.

B *Adopting the United States Approach in Australia?*

Chapter III of the *Australian Constitution* was largely modelled on *United States Constitution* art III.[180] As such, American jurisprudence relating to art III, including *Schor*, is relevant in interpreting ch III.[181] Considering the purposes underlying ch III to decide a ch III case is also not without precedent in Australia.[182] The High Court has tended, however, to focus more on the text of the *Constitution*, analysing whether something falls within the elusive definition of 'judicial power' as opposed to whether it undermines the purposes of the separation of powers doctrine.[183] Applying abstract concepts of 'judicial power' to the system of enforcing foreign arbitral awards leads to an unsatisfactory conclusion. As s 71 of the *Constitution* embodies the doctrine of the separation of judicial power[184] — a doctrine itself possessed of a number of objects and purposes[185] — a more satisfactory, substance-focused approach to resolving the constitutional uncertainty of the *IAA* would be to assess the scheme in light of those underlying objects and purposes.[186]

What then are the objects and purposes of the separation of judicial power in the Australian context? There have been a number of statements as to what the purposes of the separation of powers are, but many are stated in vague and aspirational language that offers limited guidance.[187] What little was said on ch III in the Convention Debates seems to suggest that the maintenance of the federal compact was an underlying purpose of the separation of judicial power.[188] The Court in *Boilermakers* similarly saw the purpose behind the separation of judicial power in Australia as protecting the ability of courts to

[180] See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1976 ed) 720; Leslie Zines, 'Federal, Associated and Accrued Jurisdiction' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 265, 265; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 366 (Dixon J); *Boilermakers* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See generally William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*' (2009) 33 *Melbourne University Law Review* 718.

[181] *Harris v Caladine* (1991) 172 CLR 84, 134–5, 139–40 (Toohey J). See also at 159 (McHugh J).

[182] See *New South Wales v Commonwealth* (1915) 20 CLR 54, 93 (Isaacs J); *Grollo v Palmer* (1995) 184 CLR 348, 376–7 (McHugh J), 392–4 (Gummow J); *Kruger v Commonwealth* (1997) 190 CLR 1, 167 (Gummow J); Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205, 208–9.

[183] Wheeler, *The Separation of Federal Judicial Power*, above n 87, 332; Mason, above n 166, 2, 6.

[184] *Grollo v Palmer* (1995) 184 CLR 348, 376 (McHugh J).

[185] See W B Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution* (Tulane University, 1965) 5.

[186] Cf Wheeler, *The Separation of Federal Judicial Power*, above n 87, 79.

[187] Ibid 78.

[188] See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 274 (Sir John Downer).

ensure that the Commonwealth and states act within their constitutional powers.[189]

Wheeler, on the other hand, suggests that the Australian concept of the separation of powers can only be understood in the context of the doctrine's origin and application from Locke through to the American Federalists,[190] a view with which Windeyer J and Gummow J evidently agree.[191] Wheeler examines the formulation of the separation doctrine by Locke, Montesquieu, Blackstone and the American Federalists and comes to the conclusion that they all see the separation of powers as a means to uphold the rule of law.[192] The rule of law has itself been recognised as a principle underpinning our legal system as a whole.[193]

It is acknowledged that use of the term 'rule of law' can be somewhat precarious, particularly given the significant disagreement over its meaning and content.[194] It is not the intention of this article to delve into the complexities of defining the 'rule of law'; rather, this article uses the term at its highest level of abstraction, as put by Chief Justice Gleeson writing extrajudicially: it is 'an idea about government, the essence of [which] is that all authority is subject to, and constrained by, law.'[195] As will be evident from the discussion below, this article largely confines this broad definition of the 'rule of law', in the context of ch III, to a primary concern with the enforcement of the federal compact created by the *Constitution*.

The rule of law contains a number of principles which Raz has identified,[196] although these are neither exhaustive nor determinative.[197] Relevant for the objects and purposes of ch III are the principles that judicial independence is required to uphold the rule of law, that natural justice is essential for the correct application of the law, and that courts have the ability to review the implementation of the law, maintaining a check on other arms of government.[198] These principles have themselves been separately identified as objects and purposes underlying ch III by a number of commentators and judges.[199] Such principles

189 (1956) 94 CLR 254, 267–8, 275–6 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *The Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 117 (Evatt J); Saunders, above n 128, 6–7.

190 Wheeler, *The Separation of Federal Judicial Power*, above n 87, 82.

191 See *Tasmanian Breweries* (1970) 123 CLR 361, 392–3 (Windeyer J); *Grollo v Palmer* (1995) 184 CLR 348, 392–3 (Gummow J).

192 Wheeler, *The Separation of Federal Judicial Power*, above n 87, 83–105.

193 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

194 See generally Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 1–48.

195 Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 178, 179 (citations omitted).

196 Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195, 198–202.

197 Ibid 202; Wheeler, *The Separation of Federal Judicial Power*, above n 87, 114–15.

198 Raz, above n 196, 200–1.

199 For judicial independence, see *Kruger v Commonwealth* (1997) 190 CLR 1, 167 (Gummow J); Saunders, above n 128, 6–7. For natural justice, see *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 (French CJ). For courts' ability to review the implementation of the law, see Saunders, above n 128, 28–30; *Boilermakers* (1956) 94 CLR 254, 275–6 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

may therefore form part of what is required for the maintenance of the rule of law, which is itself a purpose of the separation of powers doctrine.

To summarise, the purposes underlying the Australian concept of the separation of judicial power are by no means settled, but are largely predicated on upholding the rule of law to ensure the maintenance of the federal compact and, to that end, an independent and impartial judiciary that is able to rule on controversies free from interference from other arms of government and through a process that accords natural justice.

This concept is not dissimilar to the purposes underlying art III of the *United States Constitution* as outlined in *Schor*,[200] except insofar as art III embodies a personal rights aspect. Whether ch III contains a personal rights aspect may be of importance when we consider the *IAA*, as it bears upon whether the reasoning in *Schor* that parties can 'waive' such rights would apply in the Australian context. There has been some suggestion that ch III encompasses personal rights. Blackford, for example, argues that ch III creates an individual right to have 'matters' pertaining to one of the 'basic rights' adjudicated by an independent and impartial judiciary free from executive and legislative interference.[201] Cases on ch III have also suggested that ch III may embody an implied right of curial due process,[202] a right against bills of attainder[203] and, more tentatively, a right to a fair trial.[204]

Although these protections may be the practical result of pursuing the objects and purposes underlying ch III, it does not necessarily follow that individual rights themselves form an object or purpose underlying ch III that can subsequently be waived by litigants. Instead, the weight of authority suggests that ch III is directed more towards structural protection rather than individual rights protection,[205] even if the latter is a practical consequence of the former.[206] Such a finding is also consistent with the broader scheme of the *Constitution*, which is more concerned with the structural protection of federalism than rights protection.[207] Regardless of this question, however, the maintenance of the rule of law

200 478 US 833, 848 (O'Connor J for Burger CJ, White, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1986).

201 Blackford, above n 45, 283. See also Geoffrey Kennett, 'Individual Rights, the High Court and the *Constitution*' (1994) 19 *Melbourne University Law Review* 581, 589.

202 See *Lim* (1992) 176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ). See also Saunders, above n 128, 31–3.

203 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 612 (Deane J), 685–6, 689 (Toohey J), 704–5 (Gaudron J).

204 See *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J); Wheeler, 'Due Process', above n 182, 205–6, 220.

205 See *Boilermakers* (1956) 94 CLR 254, 275–6 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Harris v Caladine* (1991) 172 CLR 84, 164 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1, 167 (Gummow J). See also Mason, above n 166, 1–2.

206 *Harris v Caladine* (1991) 172 CLR 84, 135 (Toohey J).

207 For example, a trial by jury under s 80 of the *Constitution* cannot be waived by the accused person: *Brown v The Queen* (1986) 160 CLR 171, 197 (Brennan J), 214 (Dawson J); James Stellios, 'The Constitutional Jury — "A Bulwark of Liberty"?' (2005) 27 *Sydney Law Review* 113, 127. In relation to s 116: *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 599 (Gibbs J), 609 (Stephen J); *Kruger v Commonwealth* (1997) 190 CLR 1, 60 (Dawson J). In relation to s 92: *Cole v Whitfield* (1988) 165 CLR 360, 394, 403–7 (Mason CJ, Wilson, Bren-

to protect the federal compact is of fundamental importance to the Australian concept of the separation of judicial power. This could not be waived by parties, as the effects of a waiver could have repercussions beyond the immediate dispute that could undermine the federation or the rule of law.[208] The ability of parties to waive any rights under ch III is therefore of limited relevance to the question of whether the *IAA* accords with the purposes underlying ch III. It may be that parties can choose to forfeit the opportunity to have their controversy determined by an independent and impartial judiciary. They cannot do so, however, if it would undermine the structural purposes of ch III. It is this question that is now considered.

C *Does the* IAA *Undermine the Purposes Underlying Chapter III?*

As discussed, international arbitral tribunals exercise broad jurisdiction over any dispute parties agree to arbitrate as well as determining 'basic rights', all whilst enjoying limited judicial review of their decisions. This is in contrast to the scheme in *Schor* where, although the CFTC was making determinations on matters within the 'core' of the responsibilities of art III bodies, it had such limited jurisdiction and was subject to such extensive judicial review that it did not undermine the position of the judiciary in the constitutional system.[209]

On the one hand, all this may lead to the conclusion that the federal compact and the rule of law would be undermined if the determination of arbitral tribunals can be enforced so readily under the *IAA*. The effect of the stay provisions under s 7 is to remove the ability of the judiciary to interpret and enforce the law that applies to an arbitrable dispute, including making findings as to whether a law is valid.[210] For example, an arbitral tribunal may apply and enforce a Commonwealth statute that is not supported by a head of power under the *Constitution*. The award may then be enforced under s 8 of the *IAA* without a court having the ability to review the award or correct the legal error made. This process would facilitate the enforcement of an invalid Commonwealth law, undermining the federation and the rule of law. Even if questions of statutory validity were not involved, the process of arbitration still takes away from an independent and impartial judiciary the ability to apply law and resolve controversies. Under the *IAA*, the courts then have minimal involvement in the controversy and limited ability to review the award. In effect, by enforcing an award without the ability to review it, courts are enforcing the application of substantive legal principles to

nan, Deane, Dawson, Toohey and Gaudron JJ). In relation to s 117: Amelia Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (2008) 32 *Melbourne University Law Review* 639, 651–62.

208 Cf *Schor*, 478 US 833, 850–1 (O'Connor J for Burger CJ, White, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1986).

209 See ibid 853–6. Cf *Union Carbide*, 473 US 568, 592 (O'Connor J for Burger CJ, White, Powell, Rehnquist and O'Connor JJ) (1985), where judicial review was only available for fraud, misconduct or misrepresentation. This scheme was nonetheless found to be constitutional.

210 Cf *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 5]* (1998) 90 FCR 1, 14 (Emmett J).

individual cases, yet are doing so under the control of the legislature, which so demands the enforcement.[211]

On the other hand, although the jurisdiction given to arbitral tribunals is far broader than that under the scheme held valid in *Schor*, the disputes which are referred to international arbitration are themselves so limited that, in substance, the impact on the rule of law and the federal compact may be negligible. By its very nature, the enforcement of awards under s 8 of the *IAA* only involves awards made in a country other than Australia,[212] such that the disputes involved are mostly those involving an agreement between parties from different countries.[213] These disputes are rare in Australia, as is evident from the small number of cases arising under s 8 of the *IAA*.[214]

Furthermore, the *IAA* is not taking away jurisdiction from the courts, but instead providing for the enforcement of a choice made by the parties as to how to resolve their dispute.[215] The *IAA* is not aggrandising any arm of government; international arbitral tribunals are not ch III courts, nor do they form part of the legislature or executive.[216] The *IAA* is not, therefore, undermining the ability of the judiciary to keep in check the legislature and executive. Most international arbitrations are also decided according to the application of foreign law[217] and, in this sense, are not taking away from the courts the ability to maintain the federal compact and the rule of law in Australia through the interpretation and enforcement of laws.[218] How the law of another state is applied to a dispute is, logically speaking, of no significance to the federation or rule of law in Australia.

Even where the application of Australian law is at issue, if to enforce the award would have the practical result of undermining the federation or rule of law, then s 8(7)(b) of the *IAA* allows courts to refuse to enforce the award on the grounds of public policy. In *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd*, for example, the Victorian Supreme Court refused to award a stay on the grounds that public policy required that the dissolution and winding up of a joint venture vehicle be done by a court and not by an arbitral tribunal.[219] If enforce-

211 This may be contrary to the idea of judicial independence. See Peter A Gerangelos, 'The Decisional Independence of Chapter III Courts and Constitutional Limitations on Legislative Power: Notes from the United States' (2005) 33 *Federal Law Review* 391, 395.

212 *IAA* s 3(1) (definition of 'foreign award').

213 See above n 8 and accompanying text.

214 See the cases in above n 8.

215 Cf *Schor*, 478 US 833, 855 (O'Connor J for Burger CJ, White, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1986).

216 However, legislation does not have to aggrandise another arm of government in order to undermine the judiciary: ibid 856–7.

217 See above n 100.

218 Of course, where an Australian party is involved, questions of s 52 of the *Trade Practices Act 1974* (Cth) may apply regardless of the law governing the dispute and those questions necessarily involve issues of federal law. It is an open question, however, whether a court may refuse enforcement of an award not adequately dealing with s 52 on grounds of public policy: see *Stern v National Australia Bank Ltd* (2000) 171 ALR 192, 208 (Hill, O'Connor and Moore JJ); *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 5]* (1998) 90 FCR 1, 23–4 (Emmett J); *Comandate Marine* (2006) 157 FCR 45, 107–8 (Allsop J). See also Davies, Bell and Brereton, above n 22, 873.

219 [1999] VSC 170 (19 May 1999) [18] (Warren J).

ment of such an award was sought in Australia, it would likely be refused on similar grounds.[220] Also, the procedure of many international arbitrations are such that natural justice is accorded to the parties[221] and, again, where natural justice is not so given, ss 8(5)(c) and (7)(b)[222] provide an avenue for courts to refuse to enforce the award.[223]

On top of these considerations, there are also very strong policy grounds for enforcing international arbitral awards under the *IAA*. A caveat must be placed here stressing that considerations of economy and efficiency cannot render valid a law that otherwise contravenes ch III.[224] However, past cases have considered ch III's application to certain statutory schemes in light of the scheme's importance to the effective working of government.[225] Furthermore, the separation of powers is not absolute and itself embodies a principle of efficiency through having each arm of government focusing on what it is best at doing.[226] It is a means to an end, not an end in itself.[227] As the rule of law, and with that the independent and impartial exercise of judicial functions and the maintenance of the federal compact, are normative ideals,[228] they are less likely to be undermined where there are strong, normative grounds for a certain procedure existing.

This is especially so with international arbitration, as the strong grounds for enforcing awards in fact enhance the rule of law globally.[229] The *New York Convention* was implemented to unify the standard by which arbitral awards are enforced throughout the world.[230] Where contracts are entered into between parties of two or more countries, there is uncertainty as to the law to be applied should disputes arise and as to the forum in which disputes are to be heard.[231] International arbitration is designed to overcome that uncertainty by providing for an orderly, timely, predictable, flexible and less expensive mechanism of

220 See Morrison, above n 147, 405.

221 See Carbonneau, above n 63, 127; Samantha Hepburn, 'Natural Justice and Commercial Arbitration' (1993) 21 *Australian Business Law Review* 43, 48.

222 *IAA* s 8(7A)(b) provides that enforcing an award will be 'contrary to public policy' where there was a breach of the rules of natural justice in connection with the making of the award. Although stating it does not limit s 8(7)(b), s 8(7A) may be indicative of a construction of s 8(7)(b) that offers procedural rather than substantive objections on the grounds of public policy. But see *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317, 322 (McDougall J); *Comandate Marine* (2006) 157 FCR 45, 97–8 (Allsop J); *Nicola v Ideal Image Development Corporation Inc* (2009) 261 ALR 1, 15–16 (Perram J).

223 Edward I Sykes and Michael C Pryles, *Australian Private International Law* (Law Book, 3rd ed, 1991) 185, 192.

224 *Alexander's Case* (1918) 25 CLR 434, 441 (Griffith CJ).

225 See, eg, *Le Mesurier v Connor* (1929) 42 CLR 481, 519–20 (Isaacs J); *Harris v Caladine* (1991) 172 CLR 84, 145 (Gaudron J).

226 Wheeler, *The Separation of Federal Judicial Power*, above n 87, 115.

227 *Le Mesurier v Connor* (1929) 42 CLR 481, 519–20 (Isaacs J). See also Gwyn, above n 185, 5.

228 See Gwyn, above n 185, 5.

229 See *Scherk v Alberto-Culver Co*, 417 US 506, 516–17 (Stewart J) (1974).

230 *Sedco Inc v Petroleos Mexicanos Mexican National Oil Co (PEMEX)*, 767 F 2d 1140, 1147 (Brown J) (5th Cir, 1985).

231 See *Scherk v Alberto-Culver Co*, 417 US 506, 516 (Stewart J) (1974).

dispute resolution for international transactions.[232] The inability to enforce awards easily 'would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. … [T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade'.[233] Extensive curial intervention further undermines arbitration as a cost-effective and speedy alternative dispute resolution mechanism[234] as well as subjecting a party to a forum that may be hostile or unfamiliar to them.[235] These concerns exemplify why the ability of courts to review an award is so limited under the *IAA*.[236]

In conclusion, utilising an American approach of examining the effect legislation has on the objects and purposes of ch III, s 8 of the *IAA* appears constitutional as was concluded in Part IV. Unlike Part IV, however, this Part has applied a more substantive approach to the question, but of a different kind to the approach in Part III. Whereas Part III considered, in substance, whether 'judicial power' was being exercised by an international arbitral tribunal, this Part has looked at, in substance, whether the very objects and purposes for which judicial power has been exclusively vested in ch III courts have been undermined. It has been submitted that s 8 does not undermine these purposes. Combining this reasoning with the more formalistic reasoning in Part IV yields a satisfying and strong legal basis for upholding the constitutionality of the *IAA*.

Of course, there are normative reasons as to why the judiciary should only approach ch III questions by applying legal rules to determine whether 'judicial power' has been invested in a non-ch III body.[237] The approach in this Part may, for example, give greater room for judges to apply their own personal value system to a legal dispute, whereas the application of the notion of 'judicial power' is ostensibly more restricted to impartial legal rules, albeit vague and flexible ones.[238] However, there are various ways in which the judiciary considers issues of policy.[239] The application of a vague concept of 'judicial power' is also open to normative judgments, given the flexibility such an undefinable concept affords the courts to reach a conclusion that seems desirable for the working of government.[240] Where there is uncertainty as to whether 'judicial

232 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1974, 4390 (Keppel Enderby).

233 *Scherk v Alberto-Culver Co*, 417 US 506, 516–17 (Stewart J) (1974).

234 Marcus S Jacobs, 'The Spectre of Section 47 of the *Model Uniform Legislation*' (1995) 69 *Australian Law Journal* 822, 822.

235 See Polkinghorne and Najar, above n 65, 44.

236 See Jacobs, above n 234, 822–3.

237 See, eg, Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962); George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 185, 206.

238 In *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 143, Brennan J stated: 'In the interpretation of the *Constitution*, judicial policy has no role to play. The Court, owing its existence and its jurisdiction ultimately to the *Constitution*, can do no more than interpret and apply its text, uncovering implications where they exist.'

239 *Takeovers Panel* (2008) 233 CLR 542, 553–4 (Gummow J).

240 See, eg, ibid; *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185.

power' is being invested, assessing legislation with reference to the objects and purposes underlying ch III provides a more substantive basis for arriving at one conclusion or another. It is therefore submitted that assessing whether 'judicial power' is invested in arbitral tribunals, combined with an assessment of the *IAA*'s impact on the objects and purposes underlying ch III, is the most appropriate way in which to answer the question as to the *IAA*'s constitutionality.

Whilst many of the reasons given above as to why s 8 of the *IAA* does not undermine the objects and purposes of ch III may be equally applicable to international arbitrations held within Australia, the same cannot be said for purely domestic arbitrations. Many proponents of international arbitration are likely to welcome the recent announcements from state Attorneys-General that the *Uniform Arbitration Acts* will be amended so as to broadly be in line with the *Model Law* and remove significant court supervision.[241] However, such a move may see so many federal matters being removed from ch III courts that it would fall foul of the warning in *Schor*[242] and undermine the objects and purposes of ch III.[243] A court faced with this situation may be more inclined to find the scheme unconstitutional. If a court were to do so by focusing only on whether the 'judicial power of the Commonwealth' had been conferred on the tribunals, they would have to, for consistency, find the equivalent scheme in the *IAA* unconstitutional.[244] This further reinforces the desirability of this Part's approach to the constitutional question. It is only through examining the objects and purposes underlying ch III that one can come to a satisfactory conclusion that binding and enforceable international arbitrations are constitutional, whilst leaving open the possibility that a similar domestic scheme may not be.

VI CONCLUSION

The enforcement of foreign arbitral awards under the *IAA* is one scheme in a list of many that have been established to cater for the needs of a changing world, but at the same time, have posed a potential challenge to the requirements of ch III. The High Court has traditionally considered these challenges by

241 Standing Committee of Attorneys-General, above n 12, 2. See, eg, Chief Justice Spigelman, 'Opening of Law Term Dinner' [2009] (Winter) *Bar News* 49, 52–3; Luke Nottage, 'Australia's Less Lethargic Law Reform? International Arbitration in the Asia-Pacific' (21 April 2009) East Asia Forum <http://www.eastasiaforum.org/2009/04/21/australias-less-lethargic-law-reform-international-arbitration-in-the-asia-pacific>.

242 See 478 US 833, 855 (O'Connor J for Burger CJ, White, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1986).

243 See Carbonneau, above n 63, 124–6. It should be noted, however, that the *Commercial Arbitration Act 2010* (NSW) provides a greater role for the courts than that under the *Model Law*. Under the Act, the only recourse a party will have against an award is the same as that provided in ss 8(5) and (7) of the *IAA*, unless the parties to the arbitration agree that an appeal on a question of law may be made and certain other conditions are met: *Commercial Arbitration Act 2010* (NSW) ss 34–34A.

244 An alternative approach would be to apply a different construction to the domestic arbitration acts than that given to the *IAA*. Such an approach would be justified on the principle in the common law that there is a stronger bias in favour of supporting the finality of international arbitrations: see *Joy Manufacturing Co v A E Goodwin Ltd (rec apptd)* [1970] 1 NSWR 57, 59 (Street J); *W C Thomas & Sons Pty Ltd v Bunge (Australia) Pty Ltd* [1975] VR 801, 805 (Gillard, Newton and Norris JJ).

analysing whether 'judicial power' has been invested in a non-ch III body. This article has shown, however, that such an approach leads to an unsatisfactory conclusion when applied to s 8 of the *IAA*. Considering 'judicial power' from a substance-focused approach in line with *Brandy* suggests that the *IAA* is unconstitutional, whereas a more formalistic analysis, viewing international arbitration as an agreement by the parties to abide by the determination of an arbitrator, suggests a different conclusion. Accordingly, this article has shown that the *IAA* necessitates another approach; an approach similar to that of the United States Supreme Court in *Schor*. Adopting this approach, this article has concluded that as s 8 does not undermine the purposes underlying ch III — the rule of law, an independent and impartial judiciary and the maintenance of the federal compact — it should be held constitutional. Although this supports the conclusion in Part IV of this article, it is intellectually more satisfying as the conclusion is based on substance, not form.

The High Court could benefit from adopting this American approach in cases where the application of the concept of 'judicial power' is ambiguous. The *Takeovers Panel* case is such an example, with the ambiguity seen in the High Court's and Federal Court's differing conclusions.[245] Underlying the High Court's reasoning may have been an assessment that the Takeovers Panel did not undermine the purposes underlying ch III.[246] However, an explicit analysis of the scheme's effect on ch III's purposes would have made for a more compelling process of reasoning. As the Court has, evidently, decided against this course of reasoning, it is likely that it would instead adopt reasoning similar to that found in Part IV of this article when considering s 8 of the *IAA*. Even so, Part V still serves a purpose in showing that, despite the unsatisfactory means with which Part IV arrives at its conclusion, such a conclusion is still correct, as international arbitration does not undermine the purposes underlying ch III. Accordingly, businesses can engage in international transactions with the confidence that foreign arbitral awards can be enforced in Australia under s 8 without impermissibly investing international arbitral tribunals with the judicial power of the Commonwealth.

[245] See *Takeovers Panel* (2008) 233 CLR 542; *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301.

[246] This interpretation of *Takeovers Panel* is consistent with a broader trend discerned in Saunders, above n 128, 36. According to Saunders, '[s]uccessive courts have been guided, implicitly or explicitly, by a view of the purpose served by [ch III] of the *Constitution*.'