THE UNIVERSITY OF WESTERN AUSTRALIA

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By Email: legcon.sen@aph.gov.au

To Whom It May Concern

Submission on Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021: *Foreign States Immunities Act 1985* issues

I write to make a brief submission with respect to the Legal and Constitutional Affairs Legislation Committee's inquiry into the Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021 (Cth).

This submission concerns the proposed amendments to the *Foreign States Immunities Act 1985* (Cth) in Part 14 of the Bill. This is a topic on which I have published:

- Michael Douglas and Claudia Carr, 'The Commercial Exceptions to Foreign State Immunity' (2017) 45(3) *Federal Law Review* 445
- Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019) ch 10 and Part 10

The Bill proposes to alter the law following the High Court's judgment in *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, a case that was the subject of our article in the *Federal Law Review*.

In my opinion, the proposed amendment to provide foreign States with immunity in *ex parte* proceedings to register a foreign judgment is unnecessary. The only circumstances in which these proposed amendments will have teeth is where a judgment creditor seeks to register a foreign judgment against a foreign State in an Australian court.

In those circumstances, the foreign court that produced the foreign judgment should have already considered the requirements of customary international law. To second guess the foreign court's disposition to the judgment debtor-State's immunity (or rather, lack thereof) may be contrary to the comity that informs the limited exceptions to the enforceability of a registrable foreign judgment in Australian private international law—comity which justifies the immunity principle informing this very Bill.

The proposed s 26A(2) within cl 77 of the Bill provides that '[a] judgment (other than an interlocutory judgment) must not be entered against a separate entity of a foreign State in ex parte proceedings **unless the court is satisfied that, in the proceedings, the separate entity is not immune'** [emphasis added]. This will assumedly require the court to consider the application of the commercial exception

to foreign State immunity in an ex parte setting; an applicant would carry the burden of satisfying the court that the exception applies. That issue should be ventilated inter partes, in which case, the current law is superior. Foreign States should be required to apply to set aside registration of a foreign judgment (or a common law enforcement of a foreign judgment) making appropriate submissions, as occurred in *Firebird*. The current law is superior because it is more efficient and will reduce costs for judgment creditors, consistent with fundamental case management principles (like the overriding objective expressed in *Federal Court of Australia Act 1976* (Cth) s 37M).

The current Act is fine. If Parliament were inclined to enhance Australia's commitment to harmonisation of international commercial law, it should instead look at the HCCH Judgments Convention and related instruments.

Thank you for your consideration.

Yours faithfully

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