IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY

No. S143 of 2018

No. S144 of 2018

BETWEEN:

BIANCA HOPE RINEHART

First Appellant

JOHN LANGLEY HANCOCK

Second Appellant

and

HANCOCK PROSPECTING PTY LTD

(ACN 008 676 417)

AND OTHERS NAMED IN THE SCHEDULE

TO THE NOTICE OF APPEAL IN S143 OF 2018

Respondents to appeal S143 of 2018

GEORGINA HOPE RINEHART (IN HER PERSONAL CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST)

AND OTHERS NAMED IN THE SCHEDULE

TO THE NOTICE OF APPEAL IN S144 OF 2018

Respondents to appeal S144 of 2018

SUBMISSIONS AS AMICUS CURIAE BY THE AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION LIMITED (ACICA)

Ashurst Australia
Level 11, 5 Martin Place Sydney NSW 2000

Telephone: (02) 9258 6000
Fax: (02) 9258 6999
Email: luke.carbon@ashurst.com

Part I: CERTIFICATION

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

Part II: BASIS FOR APPLICATION TO BE HEARD

2. The Australian Centre for International Commercial Arbitration Limited (**ACICA**) seeks leave to be heard as *amicus curiae*.

3. In doing so, ACICA does not take a position on the ultimate resolution of the particular dispute between the parties, but confines its submissions to the important matter of principle raised by these appeals, especially as it relates to the integrated statutory framework for both domestic and international commercial arbitration in Australia.

Part III: REASONS FOR GRANT OF LEAVE

4. Leave to appear as *amicus curiae* should be granted to ACICA for the following reasons.

5. *First*, the proper interpretation and scope of arbitration agreements – squarely raised by these appeals – is at the very heart of the operation and effectiveness of Australia's integrated framework for domestic and international commercial arbitration. As such, the subject matter of the proceeding has the potential substantially to affect the interests of ACICA, which, by virtue of its functions and objectives, is in a position to present a "larger view of the matter"[1] and to assist the Court "to reach a correct determination".[2]

6. *Second*, as the peak arbitral institution in Australia, ACICA is also able to assist the Court on relevant matters of importance to the operation and effectiveness of arbitration as a beneficial form of alternative dispute resolution.[3]

7. Further support for the application to be heard as *amicus curiae* is set out in the affidavit of Alexander Baykitch, President of ACICA, in particular in light of the matters set out at paragraphs [4]-[6].

Part IV: STATEMENT OF ISSUES

A. Summary

8. In summary, ACICA makes the following submissions:

---

1 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312 (French CJ).

2 *Roadshow Films Pty Ltd v iiNet* (2011) 248 CLR 37 at 39 [6] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

3 ACICA similarly intervened as *amicus* in *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 and *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533.

(a) **Entry Point for the Enquiry—Statutory Construction**: The entry point for the issue of principle raised by these appeals is a question of statutory construction as to whether there was before the Federal Court the grounds for a stay of *"an action ... brought in a matter which is the subject of an arbitration agreement"* within the meaning of s 8 of the *Commercial Arbitration Act 2010* (NSW) (**CAA**). Similar questions of statutory construction arise under the CAA concerning the interpretation and scope of an arbitration agreement where there is: (i) a ruling by the arbitral tribunal as to its jurisdiction or there is a challenge to a court from that ruling (s 16); (ii) a challenge to set aside an award (s 34); or (iii) a challenge in relation to the recognition and enforcement of the award (s 36). See paragraphs [9]-[14] below.

(b) **Integrated Statutory Framework**: The domestic arbitration regime is now fully integrated with the regime governing international arbitrations in Australia under the *International Arbitration Act 1974* (Cth) (**IAA**). This statutory interdependence means that the principles for the interpretation of the scope of arbitration agreements as they arise under the CAA are the same as those that arise under the IAA. See paragraphs [15]-[17] below.

(c) **Role of Statutory Overlay and Context—Prism of the Model Law**: This Court's consideration of the correct approach to the interpretation of arbitration agreements should be strongly informed by this integrated statutory framework, the centerpiece of which is an international instrument, being the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**). Accordingly, the process of construction of the arbitration agreement, to determine what matters have been submitted to arbitration, should be informed by the principles of construction for an instrument given an international meaning and application across a range of both common law and civil law jurisdictions. As such, the question should not be seen purely as one of common law alone. See paragraphs [18]-[24] below.

(d) ***Fiona Trust* and Australian Principles of Contractual Interpretation**: The approach adopted by the House of Lords in *Fiona Trust & Holding Corporation v Privalov* [2008] UKHL 40; [2008] 4 All ER 951 (***Fiona Trust***) is consistent with the orthodox application of principles of Australian contract law; *a fortiori*, when situated in the context of the integrated statutory framework. The governing principle that emerges under Australian law is that all parties to arbitration agreements falling within the integrated statutory framework are presumed to have intended that all possible disputes, including as to the validity of the arbitration agreement, are to be dealt with in the one forum, unless there can be found a clear indication to the contrary in the text or context of that agreement. See paragraphs [25]-[38] below.

(e) **Comparative Analysis**: In reaching the above conclusions, it should be a highly relevant consideration that any narrower statement of Australian law as it relates to the construction of arbitration agreements would place our law at odds with the common law and Model Law jurisdictions in the Asia-Pacific region. See paragraphs [40]-[45] below.

(e) **CAA Applies**: The principles underlying the propositions above should be applied to the deeds at issue in these appeals, notwithstanding that they were entered into prior to the completion of the process of statutory integration described below. See paragraphs [46]-[50] below.

B. The Entry Point for the Enquiry—Statutory Construction

9. The Notice of Appeal in Ground 1(a) states that the Full Court erred in finding that the following arbitration clauses extend to cover disputes concerning the validity of the deeds in whole or in part:

(a) cl 14 of the **2005** Deed of Obligation and Release;

(b) cl 20.2 of the **2006** Hope Downs Deed; and

(c) cl 9.2 of the **2007** of the HD Deed.

10. At the time the deeds were entered into, any application for a stay of court proceedings in reliance upon the deeds would have then been governed by either the *Commercial Arbitration Act 1984* (NSW) (**1984 Act**) or the equivalent *Commercial Arbitration Act 2012* (WA). (The parties have since proceeded on the basis that the NSW law is the relevant supervisory law for the purposes of any arbitration.[4])

11. However, the question before the court at the time when the present dispute had arisen and the stay of proceedings and referral was sought in 2014, was a question under the current integrated framework; namely, whether an action was brought in a matter which was the subject of an arbitration agreement within s 8(1) of the CAA. This position was reached because in 2010, after the entry into of the above deeds but before the commencement of the litigation, the CAA was enacted. Importantly, the CAA applies to the arbitration agreements in issue in these appeals by reason of the savings and transitional provisions in the scheme. Schedule 1 cl 2(1)(a) of the CAA provides that the "*Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and to an arbitration under such an agreement*".

12. Section 8(1) of the CAA having been invoked, the primary task of the Court was one of statutory construction and the identification of the correct principles required by the CAA to determine whether the action was brought in a matter the subject of the arbitration

---

4 See the appealed decision, *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170 (**FFC**) at [6].

agreement. Contrary to some of the submissions of the parties,[5] the question was not simply, or only, a matter to be resolved by application of common law principles of contractual interpretation. Rather, it was what approach did the CAA require to be brought in determining whether the matter was one submitted to arbitration under the arbitration agreement, so as to enliven the court's power and duty under s 8 of the CAA.

13. In addition to a stay under s 8(1), there are three other statutory pathways in which the court (or the arbitral tribunal) may be called upon to consider the proper interpretation and scope of the arbitration agreement: (i) a ruling by the arbitral tribunal itself as to its jurisdiction under Article 16 of the Model Law and any appeal from that ruling to a court under subsection 9 of Article 16; (ii) a challenge to set aside the award under Article 34(2)(a)(iii) of the Model Law on the basis that the award deals with a dispute not falling with the terms of the arbitration agreement; and (iii) on recognition and enforcement under Article 36(1)(a)(iii) of the Model Law also on the basis of a dispute not within the arbitration agreement.

14. In principle, the question as to the proper interpretation and scope of the arbitration agreement should yield the same answer in whichever way it is raised. In each case, the entry point is one of statutory construction, which necessarily engages the objects and purposes of the integrated statutory framework. That is, it is important to recognise that the correct answer to the question on each occasion involves the intersection of statutory construction and an appropriate consideration of the relevant principles of contractual interpretation, as understood in light of the history and origins of the statutory framework.[6] In this interpretive setting, therefore, the integrated statutory framework and the principles of contractual interpretation are in a "symbiotic relationship" or mutual process of influence and interaction.[7]

C. The Integrated Statutory Framework and the Model Law

15. In this section we identify in more detail the nature of the integrated statutory framework. By 2010, the statutory frameworks for domestic and international arbitration in Australia (including the CAA) were fully integrated, with both Commonwealth and State and Territory legislation now having a common origin in the Model Law and the *New York Convention on the Recognition and Enforcement of Foreign Awards 1958* (**Convention**).[8]

---

5 For example, the Appellants' Submissions (No. S144 of 2018) at [46].

6 Mason, "The Interaction of Statute and Common Law" (2016) 90 ALJ 324; Bant, "Statute and Influence in Light of the Principle of Coherence" (2015) 38 *UNSW LJ* 367.

7 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 532 [31]; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 183 [17].

8 UNCITRAL adopted the Model Law in 1985 as a model arbitration law in respect of arbitrations with an international character. In 2006, UNCITRAL adopted the first set of amendments to the Model Law since it was originally adopted in 1985.

(a) The domestic arbitration regime is relevantly governed by the CAA, which has been enacted in substantially the same form in each other State and Territory,[9] as the applicable supervisory law for domestic arbitrations seated within those jurisdictions. Those statutes are based on the model *Commercial Arbitration Bill 2010*, which was agreed at the meeting of the Standing Committee of Attorneys-General in mid-2010 to reflect the decision to adopt the Model Law. The manifest objective was to harmonise the domestic arbitration regime with the international arbitration regime by adopting the Model Law and to thereby implement international best practice.[10]

(b) The international arbitration regime is governed by the IAA,[11] which was relevantly amended in 2010.[12] The Explanatory Memorandum to the *International Arbitration Amendment Bill 2009* (Cth), which introduced amendments to the Model Law made in 2006, noted that the effect of the amendments was in part to give force to the Model Law as the primary arbitral law governing the conduct of international commercial arbitration in Australia.[13] Australia's system of arbitration under the IAA therefore forms part of an interconnected global system of dispute resolution facilitating cross-border commerce.[14]

16. It is the fundamental policy of the Model Law and the Convention, and in turn the strong policy of the Commonwealth and State and Territory governments having adopted the Model Law, that parties are to be kept to their bargain to arbitrate disputes – with minimal curial intervention – in part to achieve certainty and finality in commercial dealings.[15]

17. The integration of the domestic and international regimes arises by virtue of three matters: (i) the common foundation in the Model Law; (ii) s 2A of the CAA, which requires the promotion of uniformity in the interpretation of the domestic regime with the international regime as given force by the IAA; and (iii) recognition that each regime provides for the present type of question as to the scope of the disputes within the coverage of the arbitration agreement to arise either before the arbitral panel or the court

---

9 *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2017* (ACT).

10 See Nottage and Garnett, *International Arbitration in Australia* (Federation Press, 2010), pp. 14-18.

11 The IAA was enacted in 1974 in furtherance of Australia's public international law obligations upon ratifying the Convention.

12 The *International Arbitration Amendment Act 2010* (Cth) came in to force on 6 July 2010.

13 Explanatory Memorandum to the *International Arbitration Amendment Bill 2009* (Cth), p. 2.

14 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2012) 251 CLR 533 at [13]; Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History* (Kluwer Law International, 1995), pp. 6-9.

15 See, for example, *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142 at [7] and *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [126].

in one or more of four different ways identified in paragraph [13] above with relevantly identical language used across both regimes.

D. Role of Statutory Overlay and Context – Prism of the Model Law

18. This Court's consideration of the correct approach to the interpretation of arbitration agreements in determining whether to exercise the statutory power to stay court proceedings in favour of arbitration should be strongly informed by the integrated statutory arbitration framework described above.[16] Any pronouncement of principle by Australia's highest court concerning the proper interpretation and scope of arbitration clauses will undoubtedly impact upon the future application of the current integrated statutory regime. Additionally, having regard to the common Model Law origin of these two related statutory frameworks, the articulation of general principle concerning the proper interpretation and scope of arbitration agreements will have implications not only for domestic commercial arbitration, but also for international arbitrations seated in Australia.

19. It is, therefore, appropriate to approach the important issue of interpretive principle raised by these appeals by recognising that for all arbitration agreements executed post-2010, which includes the deeds here by reason of paragraph [11] above, the correct prism through which to approach the interpretive exercise is one that is consistent with the current integrated statutory framework and its foundation in the Model Law. At least four matters bear emphasis in this respect.

20. ***First*, the framework itself requires "uniformity"**: The answer as to the proper interpretation and scope of arbitration agreements should be the same under both s 8 of the CAA and s 7 of the IAA. Both the domestic and international arbitration regimes make provision for a court to "refer the parties to arbitration" unless the court finds that the *"agreement is null and void, inoperative or incapable of being performed"*: s 8(1) CAA, s 7(2) and (5) IAA. As noted above, s 2A(1) of the CAA provides that, subject to the paramount object in s 1C, the Act is to be interpreted by having regard to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law to international commercial arbitrations.[17] Any divergent approach would evidently run counter to the overarching intention and mandate for uniformity.

21. ***Secondly*, this requirement of uniformity is consistent with and flows from the international origins of the two interrelated statutory regimes**: The common

---

16 As to the relevance of the statutory regime to the context in contractual interpretation, see *Victoria v Tatts Group* [2016] HCA 5; (2016) 90 ALJR 392.

17 This "march[ing] in step" and ideal of a "common approach" in the "field of arbitration (both international and national)" was foreshadowed some many years earlier by Kirby P in *Ferris v Plaister* (1994) 34 NSWLR 474 at 488 and 492.

foundation in the Model Law promotes uniformity and comparative analysis. The Model Law has been recognised as an integral part of a "coherent international system" for dealing with the settlement of disputes by international commercial arbitration.[18] As such regard should be had "in construing [the arbitration clause] to the clear tenor of approach internationally in construing arbitration clauses in international agreements".[19] Moreover, consistently with what this Court has held in respect of the construction of international law provisions directly,[20] it was also held by the Court of Appeal of Victoria in *Subway Systems Australia Pty Ltd v Ireland* that "...the interpretation of the domestic enactment *should be unconstrained by technical rules* and should instead be informed by 'broad principles of general acceptation'".[21] This is also consistent with the principle that in a case of ambiguity, the courts should favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.[22] Importantly in this respect, Gary Born, in his seminal treatise on international arbitration law and practice, states that the better view is that "liberal rules of construction" as to international arbitration agreements are prescribed, as a matter of international law, by the Convention's pro-arbitration objectives and by Article II's requirement that Contracting States recognise and enforce international arbitration agreements.[23]

22. Accordingly, while the questions of statutory construction concerning the interpretation of arbitration agreements that arise under the integrated statutory framework involve the construction of contractual agreements, that process of construction is to be undertaken through the Model Law lens and thus by reference to principles governing the construction of an international instrument, which is given an international meaning and application.[24] As such, the interpretive enquiry is not to be seen as a purely common law question but one strongly informed through the prism of the integrated statutory framework and, in particular, the international dimension of the Model Law. This requires recognising that in the context of the wider international system of uniformity established by the Model Law the issue of interpretation of arbitration agreements at the heart of that system is not one unique to common law systems. Civil law systems too that have adopted the Model Law will be required to engage in the same analytical task,[25] through the same Model Law prism. Uniformity is fundamental to the international

---

18 The Honourable JJ Spigelman AC, "Transaction Costs and International Litigation", address to the 16th InterPacific Bar Association Conference, Sydney, 2 May 2006.

19 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [164]; *IMC Mining Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 at [35].

20 *Povey v Qantas Airways Limited* (2005) 223 CLR 189 at [60].

21 *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49 at [26] and [29] (emphasis added). See also *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Constructions)* (2017) 52 VR 198 at [10].

22 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38.

23 Gary B. Born, *International Arbitration Law and Practice* (Kluwer Law International, 2014, 2nd ed) at [9.02].

24 *Maloney v The Queen* (2013) 252 CLR 168 at 235 [175], 255-256 [235]-[236], 292-293 [325]-[328].

25 See, for example, the reference in *Fiona Trust* at [14] to the approach to interpretation of arbitration agreements adopted in Germany.

Model Law scheme designed in order to produce certainty and consistency in international commerce.

23. ***Thirdly*, a narrow or technical interpretation of arbitration clauses would frustrate the policies and objects of the integrated statutory framework:** The objects of the IAA under s 2D include facilitating the use of arbitration agreements and arbitration. Furthermore, s 39 of the IAA *directs* courts in interpreting an arbitration agreement to have regard to the objects in s 2D and the fact that arbitration is an efficient and timely method of dispute resolution intended to provide certainty and finality. By reason of the policy of uniformity above, those policies and objects are part of the integrated statutory framework now covering both domestic and international commercial arbitrations. Moreover, s 1C of the CAA is also directed towards the facilitation of arbitration. A technical or narrow interpretation of arbitration agreements is likely to lead to the fragmentation of the parties' disputes between different fora at different times, substantial delay, the possibility for inconsistent outcomes and the drawing of difficult practical and conceptual distinctions as to whether, for example, a dispute relates to the "validity" or not of an arbitration agreement. Such an outcome is not efficient, it does not yield certainty and it undermines, rather than promotes, the use of arbitration as method of dispute resolution.

24. ***Fourthly*, a liberal or purposive interpretation of arbitration clauses accords with other precepts of arbitral law recognised and entrenched by the integrated statutory framework:** Several other features of the integrated statutory framework promote a liberal construction of arbitration agreements including: (i) the common law principle of separability as codified by Article 16 of the Model Law, which recognises the arbitration agreement as a distinct agreement which requires a distinct, direct and separate attack on the arbitration clause for its validity to be impugned;[26] (ii) the related principle of "*kompetenz-kompetenz*" empowering the tribunal to rule on its own jurisdiction; (iii) the width of disputes that are "arbitrable" or amendable to arbitration under the IAA and CCA;[27] (iv) the Model Law's policy of minimum curial intervention;[28] and (v) the application of the Model Law to commercial disputes, whether contractual or not.[29] Each of these matters support a wide reading of arbitration clauses so as to produce a result that the parties' disagreements, including as to the existence and validity of the arbitration agreement, are determined, in the first place, by the arbitral tribunal, and not by a court.

---

26 FFC at [341]-[360]. See also Greenberg, Kee and Weermantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011, CUP), pp. 155-158.

27 See Holmes & Brown, *The International Arbitration Act 1974: A Commentary* (LexisNexis Butterworths, 2017, 2nd ed), pp. 52-55.

28 *TCL Air Conditioner* (id) at [46].

29 See definition of "arbitration agreement" in s 7 of the CAA and Article 7 of the Model Law as arising from a defined legal relationship, whether contractual or not and the Model Law note to s 1 of the CAA that the term "commercial" should be given a wide interpretation.

E. *Fiona Trust* and Australian Principles of Contractual Interpretation

25. The principles in *Fiona Trust* – and similarly, the principles in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways* (1996) 39 NSWLR 160 (***Francis Travel***) – have five key elements. While each of those cases was decided outside the Model Law framework, we submit that their approaches reflect the correct approach to the Model Law.

26. The *first element* is that *Fiona Trust* identifies the *context* in which parties to any agreement constituting an "arbitration agreement" under the CAA or the IAA will reasonably be presumed to have entered into that agreement, absent any specific indication to the contrary in the text or context. That context acknowledges the nature of arbitration as consensual and the purpose of the arbitration clause as it relates to a broader agreement, which may give rise to a range of disputes.[30] It is the very nature of arbitration agreements that they involve parties electing to have their disagreements referred to a third party for determination, and in so doing, the parties make an interdependent promise to be bound by that third party's determination.[31]

27. The *second* element is that this contextual inquiry should not be seen as confined to a subset of arbitration agreements between persons described as "businesspersons". The assumption should be understood as applying more widely to all reasonable "persons"[32] entering into arbitration agreements to which the CAA and IAA apply.[33] The statutory trigger does not turn on the status of the parties as "businesspersons" but a relationship capable of being characterised as "commercial" in nature.[34]

28. The *third element* is that the reasonable assumption is that as "*sensible parties*"[35] the contracting parties do not intend to have possible disputes between them adjudicated in separate places before separate tribunals at separate times.[36] To impute an intention to the parties to adjudicate their disputes before separate tribunals – in the *absence* of supporting text or context – would be an irrational (as well as uncommercial) construction of the clause; hence, it is an intention not to be attributed to any reasonable "person".

---

30 *Fiona Trust* at [5]-[6].

31 *TCL Air Conditioner* (id) at [77]-[80].

32 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 351; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 1181 at [11], citing Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwhich Building Society* [1998] 1 WLR 896 at 912.

33 *Fiona Trust* at [5]: "Businessmen *in particular* are assumed to have entered into agreements to achieve some rational commercial purpose ..." (emphasis added). *Francis Travel* at 165 "*parties*"; *Kraft Foods Group Brand LLC v Bega Cheese Limited* [2018] FCA 549 at [92].

34 FFC at [117]-[124].

35 FFC at [193].

36 *Fiona Trust* at [7], [13].

29. The *fourth element* is that, as a consequence, the language of an arbitration clause should be interpreted as widely as the words reasonably permit[37] so that an elastic and general phrase such as "any dispute under the deed" would ordinarily capture a dispute about the existence and validity of the arbitration agreement itself, except where something specific in the text or context indicates to the contrary.

30. The *fifth element* is that the House of Lords in *Fiona Trust* recognised that an unduly narrow approach to the construction of arbitration agreements could have the effect of frustrating the governing legislative scheme "to give effect to the reasonable commercial expectations of the parties about the questions which they intended be decided by arbitration"[38] as intended by s 7 of the *Arbitration Act 1996* (UK). As noted above, the integrated statutory scheme in Australia reflects the same legislative policy in adopting Article 16 of the Model Law, which is to substantially the same effect as s 7; indeed, the Australian statutory scheme goes markedly further in informing the proper interpretation by Australian courts (and arbitral tribunals) of arbitration agreements by reason of the matters set out above in paragraphs [22] and [23] above.

31. A key passage in the reasoning in *Fiona Trust* was endorsed by French CJ and Gageler J in *TCL Air Conditioner* (at [16]), albeit in the context of an argument different to the present.[39] ACICA submits that once *Fiona Trust* is properly understood, as explained above, it is perfectly consonant not only with the Model Law, but also – to the extent this is relevant – with the general principles governing the construction of contracts under the common law of Australia and the approach taken in *Francis Travel*. In particular:

    (a) **Reasonable Person Enquiry:** When construing a commercial contract, the objective inquiry is commonly framed in terms of what would a reasonable businessperson have understood the terms to mean.[40] This requires consideration of the text, the circumstances to which the contract is addressed, and the commercial objects or purpose of the contract.[41] As noted, the language of a reasonable "businessperson" is a particular application to commercial contracts of the objective theory of contractual interpretation based on the meaning a reasonable "person" would ascribe to the terms of a contractual document.

---

37 *Fiona Trust* at [8].

38 *Fiona Trust* at [12].

39 See also *Eriez Magnetics Pty Ltd v Duro Felguera Australia Pty Ltd* [2017] WASC 304 at [43] (Martin CJ); *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [114] (Beach J).

40 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [47], citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35]; see also *Simic v New South Wales Land and Housing Corporation & Ors* (2016) 260 CLR 85 at [78] (Gageler, Nettle and Gordon JJ), citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35].

41 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [47]), citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35]. The modern principles of the English common law concerning contractual interpretation are not relevantly different: *Arnold v Britton* [2015] UKSC 36 at [15] (Lord Neuberger).

Moreover, the application of the reasonable businessperson inquiry in *Fiona Trust* was merely an orthodox application of the general principle to the specific context of arbitration agreements.[42]

(b) **Proper regard to Context and Purpose**: The approach in *Fiona Trust* is consistent with the importance given to context in instances of constructional choice. In particular, it is consistent with context being informed by the nature of the agreement and background legal context, which in turn focus attention on and inform the purpose of the clause, and the experience of the relevant the market or environment.[43]

(c) **Repeated Application of Principle:** The emergence of a *prima facie* presumption (or the "assumed legal context") through which arbitration agreements are interpreted reflects the orthodox development of the common law over time through the repeated application of a general principle in particular contexts. It is not at all novel for contracts or clauses of a particular category or character to become the subject of special subsidiary principles of construction as courts encounter and apply them over time; put differently, the application of general principles in similar contexts time and again leads to the generation of an established category, or special rules or principles of interpretation. The treatment of arbitration clauses in this way, as a class or category of contractual provision, is a paradigm example of the generation of a principle "derived from judicial decisions upon particular instances"[44] and the common law method of articulating and developing the common law from time to time by processes of inductive and deductive reasoning based on the application of settled legal principles.[45] The development of such rules or principles in particular contexts also promotes certainty and predictability in a branch of the law where those values are important.

(d) **Consistent with Forum Jurisdiction Clauses**: The principle in *Fiona Trust* is also consistent with the analogous context of jurisdiction or choice of court clauses as interpreted by Australian courts.[46]

32. Further to [31(c)], special rules or principles of construction have been developed in relation to particular types of contract or particular contractual clauses.[47] Like the

---

42 *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *Comandate Marine Corp v Pan Aust Shipping* (2006) 157 FCR 45 at [162]

43 *IATA v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8]. See also *Fiona Trust* at [6]-[7].

44 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 158 [154], citing *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [72].

45 *PGA v The Queen* (2012) 245 CLR 355 at 372-373 [29].

46 *Global Partners Fund Ltd v Babcock & Brown (in liq)* [2010] NSWCA 196; (2010) ACSR 383.

47 Herzfeld, Prince and Tully, *Interpretation And Uses of Legal Sources* (2013, Laws of Australia) at [25.3.700].

principle in *Fiona Trust*, these so-called "rules of construction" are more in the nature of presumptive guides informing the central task of ascertaining the parties' common intention having regard to text, context and purpose and may be displaced having regard to the particular contract in question. By way of example, one can point to standard form contracts (including conveyancing contracts),[48] guarantees and indemnities,[49] releases,[50] insurance contracts,[51] restraint of trade clauses in an employment contracts,[52] exclusion and limitation clauses,[53] remedy clauses generally[54] and termination and damages clauses in the leases.[55] Such clauses of a particular character or category have become the subject of special principles of construction – derived from the broader principles – by reason of their repeated application over time, the court's familiarity with those clauses and in the interests of contractual certainty.

33. Importantly, the separability principle, codified by Article 16 of the Model Law, itself is derived from the common law and demonstrates the special treatment given by the common law to arbitration agreements.[56] The significance of the separability principle to the interpretation of arbitration agreements is noted above and was a central plank of Lord Hoffman's reasoning in *Fiona Trust*. The development of a special principle or "rule of construction" for the interpretation for arbitration agreements is unremarkable in light of the separability principle; indeed, it is a logical extension of that principle.

34. While there are now certain model arbitration clauses expressed with greater specificity – including ACICA's own model clause – in practice parties have historically used and continued to use a wide range interchangeable formulations in their arbitration agreements, including "any matter or thing whatsoever arising thereunder or in connection therewith", "arising out of or relating to", "arising out of", "arising under", or "arising from". In this context and "market", these various formulations should be seen as part of the same linguistic genus of expression designed to perform the same essential

---

48 As to consistency of meaning: *Johnson v American Home Assurance Co* (1998) 192 CLR 226 at 272-273; Lewison and Hughes, *The Interpretation of Contracts in Australia* (2012, Thomson Reuters Australia), [4.08].

49 Doubt as to the construction of provisions of a guarantee should be construed in favour of surety: *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 292 [53].

50 Presumption that general words of a release are construed as limited to those matters that were in the contemplation of the parties at the time the release was given: *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 at 123-124; *Bank of Credit & Commerce International Sa (in liq) v Ali (No 1)* [2002] 1 AC 251 at [9]-[17].

51 *McCann v Switzerzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [74].

52 *Just Group Limited v Peck* [2016] VSCA 334; 344 ALR 162 at [38].

53 Application of the contra proferentum rule: *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* (1966) 115 CLR 353 at 376; *Association of British Travel Agents Ltd v British Airways Plc* [2000] 2 Lloyd's Rep 209 at 220; *Carter on Contracts* at [15-010].

54 Clear words are needed to rebut the presumption that a contracting party does not intend to abandon any general law remedies for breach of contract: *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at [27]-[29].

55 *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 628, 637.

56 FFC at [341]-[360].

function.[57] The Full Court was thus correct to observe (at [193]): "*Context will almost always tell one more about the objectively intended reach of such phrases than textual comparison of words of a general relational character. None of the phrases is linguistically stable or fixed.*"

35. The principle in *Fiona Trust*, so properly understood, does not involve disregarding the words of the arbitration agreement or giving them a meaning they cannot tolerably bear. The application of a general principle – the presumed intention of the sensible parties – in the particular context of an arbitration agreement remains subject to any contrary indication in the text such as any express exclusion or carve out from the arbitration agreement. The decision in *BTR Engineering (Australia) Limited v Dana Corporation & Ors* [2000] VSC 246 is illustrative. The arbitration agreement there specified that it related to "a dispute involving ... respective rights and obligations under" the purchase agreement, but expressly carved out working capital adjustments, which was a class of dispute "of itself a contractual matter falling under the umbrella of the agreement itself".[58] While the expression "under" was contrasted to the wide meaning generally given to the phrase "arising out of", it was the express carve out within the clause itself that led to a narrower construction of the arbitration agreement and the exclusion of disputes in relation to misleading and deceptive conduct, fraudulent misrepresentation and negligent misstatement.[59]

36. The principle is also capable of being displaced by the specific context. For example, in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Paicenza SpA* [2016] SGCA 53 the Singapore Court of Appeal (at [30]-[34]) noted the limits of the approach in *Fiona Trust* in concluding that the assumed intention was displaced by the particular commercial context there involving an agreement to arbitrate in an underlying supply contract that did not extend to a dispute rising from a related promissory note.[60]

37. Chief Justice Bathurst in *Rinehart v Walker* (2012) 95 NSWLR 221 at [121]-[122], understood *Fiona Trust* to require a court "irrespective of the language" or "irrespective of the plain meaning go the words" to construe arbitration clauses in accordance with the presumption identified above. As explained, the decision does not require arbitration

---

57 *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [69] (Hammerschlag J), cited with apparent approval in *In the matter of Infinite Plus Pty Ltd* (2017) NSWLR 282 at [56] (Gleeson JA).

58 *BTR Engineering (Australia) Limited v Dana Corporation & Ors* [2000] VSC 246 at [24]

59 Similarly, the "tendency to adopt a liberal approach to the interpretation of an arbitration clause which is couched in general words does not apply with equal force where specific areas of dispute are identified in the clause": *Four Colour Graphics Australia Pty Ltd v Gravitas Communications Pty Ltd* [2017] FCA 224 at [25], citing *Vetreria Etrusca SRL v Kingston Estate Wines Pty Ltd* [2008] SASC 75 at [21].

60 The application of any presumption to the context of purely "consumer" claims under the ACL might give rise to interesting questions. See Garnett, "Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward" (2017) 29 *Syd LR* 569, noting the pro-arbitration position taken by the United States Supreme Court (for example, *Epic Systems Corp. v Lewis* 584 US_(2018); *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011)). For present purposes it is sufficient to note that the presumption in *Fiona Trust* can be displaced by the specific context.

clauses to be construed without regard to the actual words used. Rather, it establishes the correct general context through which the language in arbitration agreements is to be construed in ascertaining the parties' objective intention in the circumstances.

38. Insofar as reliance was placed by Bathurst CJ (at [120] and [124]) on the judgment of French J in *Paper Products Pty Ltd v Tomlinsons (Rochdal) Ltd* (1993) 43 FCR 439 at 448, it is respectfully observed that his Honour (i) correctly noted that where the "*language of the arbitration clause in question is sufficiently elastic, then the more liberal approach of the courts ... can have some purchase*" consistently with the fact that it is unlikely parties will have intended to "*artificially divide their disputes*", but (ii) went on to adopt a construction in respect of the phrase "arising under" that is open to doubt and did not appear to reflect a full appreciation of the principle underpinning *Fiona Trust* and *Francis Travel* above.[61] Were *Paper Products* to be decided today, under the integrated statutory framework and the Model Law, it is likely the result would be different.

39. In the alternative, to the extent that resolution of the present question raises a common law question, and the above conclusion does not emerge from a correct reading of previous decisions of this Court, then the common law principles of contractual interpretation should be adapted and developed by this Court to accommodate such a result and bring Australian law into line with international commercial best practice.[62] Such a development in the common law would be an appropriate incremental step consistent with the existing baseline of legal principle.[63] This includes because such development is necessary to align the common law with the integrated statutory framework as a consistent and uniform pattern of established legislative policy,[64] recognising that in *Fiona Trust* the need for a "fresh start" was in part justified by reference to statutory developments (at [12]); namely, s 7 of the *Arbitration Act 1996* (UK). And, again, the integrated statutory context, and the governing role of the Model Law, even more strongly points in favour, if not mandates, such a result.

F. Approach in Comparative Jurisdictions

40. In reaching the above conclusions, it should be a highly relevant consideration that any narrower statement of Australian law as it relates to the construction of arbitration

---

61 The decision is also difficult to reconcile with subsequent decisions addressing misleading and deceptive conduct claims and arbitration clauses. See, for example, *IBM Australia v National Distribution Services* (1991) 22 NSWLR 466.

62 Delany & Lewis, "The Presumptive Approach to the Construction of Arbitration Agreements and the Principle of Separability—English law Post Fiona Trust and Australian law Contrasted" (2008) 31 *UNSW Law Journal* 341.

63 *Breen v Williams* (1996) 186 CLR 71 at 115.

64 As to the development of the common law in light of statutory developments, see *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49 at 59-63 [18]-[28]; Beatson, The Role of Statute in the Development of Common Law Doctrine" (2001) 117 *LQR* 247 at 264-265, referred to in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [132].

agreements would place our law at odds with the common law and Model Law jurisdictions in the Asia-Pacific region.

41. It has been observed that the international provenance of Australia's arbitration regime necessitates an international judicial approach and a degree of international harmony and concordance of approach to international commercial arbitration.[65] Moreover, it has also been specifically observed that the temptation for domesticity must be resisted in the context of the CAA in light of the requirement for uniformity in s 2A.[66]

42. The leading common law and Model Law jurisdictions in the Asia-Pacific have adopted the approach described by Gary Born in relation to the interpretation of international arbitration agreements:[67]

> To a substantial extent, developed national legal systems have formulated specialized rules for interpreting international arbitration agreements, specifically designed to facilitate the arbitral process. These interpretive principles generally provide for liberal construction of arbitration agreements...the basic "pro-arbitration" objectives of the New York Convention and other leading international arbitration conventions have been relied on by national courts in developing liberal rules of construction of international arbitration agreements. In many jurisdictions, courts hold that the parties' intentions, in concluding to arbitrate in an international commercial setting, are presumptively to resolve all disputes related to their business relationship in a single, centralized proceeding, rather than in separate and potentially inconsistent proceedings.

43. *Fiona Trust* was adopted by Singapore's highest court in *Larsen Oil and Gas Pty Ltd v Petroprod Ltd* [2011] 3 SLR 414 where the Singapore Court of Appeal observed ([12]-[19]) that there are strong reasons for supporting a generous approach towards the construction of arbitration clauses including because it is consistent with a philosophy of facilitating arbitration (as noted above, which is required by s 2D of the IAA).

44. Lord Hoffman's approach in *Fiona Trust* has also been adopted and applied in New Zealand at first instance, being described as the principle of "one-stop adjudication"[68] and *Fiona Trust* has been cited with approval at first instance by the High Court of Hong Kong in several decisions.[69]

---

65 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 at 405 [75]. See Allsop, Justice James, "The Role of the Courts in Australia's Arbitration Regime" (FCA) [2015] FedJSchol 25.

66 *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 at [43], citing *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49 at 57 [24]–[27].

67 Born (id) at [9.01]-[9.02].

68 See *Openyd Limited v G J Lawrence Dental Limited* [2018] NZHC 1618 at [33]; *Tamihere v Media Works Radio Ltd* [2014] NZHC 2082, [2014] NZAR 113 at [23]-[24]; see also *Carr v Gallway* [2014] NZSC 75 at [43] where the Supreme Court referred approvingly to *Fiona Trust* at [17] on separability.

69 *Chevalier (Construction) Company Ltd v Universal Aluminium Industries Ltd* [2014] HKCFI 1168 at [16]; *Z v. A and Others* [2015] HKCFI 228; [2015] 2 HKC 272 at [38]-[41]; *L v. M* [2016] HKCFI 1368 at [52]-[53].

45. The approach in these jurisdictions would justify this Court either (i) recognising that the approach in *Fiona Trust* is consistent with existing common principles of contractual interpretation and the integrated statutory framework or (ii) developing the common law to achieve that result.

G. Arbitration Agreements pre-dating the CAA 2010 and the IAA (as amended)

46. No different approach should be taken to the present deeds, notwithstanding that they were entered into before 2010, and at a time when they were governed by the *Commercial Arbitration Act 1984* (NSW) (**1984 Act**) or the equivalent *Commercial Arbitration Act 2012* (WA).

47. *First*, as submitted above, the transitional provisions of the CAA produce the result that the arbitration agreements here are to be viewed through the prism of the current integrated statutory regime, and the Model Law, which together strongly inform the correct interpretive enquiry.

48. *Second*, and in any event, should it be relevant, no different result would have been achieved even if regard were to be given to the Act as in force as the time the various arbitration agreements were entered into. The construction of the deeds remains a process of contractual interpretation and the inquiry is still one as to the objective intention of sensible parties in respect of any disputes arising between them in light of the inclusion of the arbitration clauses. This principle is not of recent origin. It was clearly stated and applied by Gleeson CJ in *Francis Travel* in 1996 in terms similar to Lord Hoffman in *Fiona Trust*.

49. *Third*, as early as 1994 – well before the present deeds were entered into – the principle of separability established by s 7 of the *Arbitration Act 1996* (UK), which was central to Lord Hoffman's reasoning in *Fiona Trust*, was recognised as part of the common law in *Ferris v Plaister* (1994) 34 NSWLR 474.

50. *Fourth*, as also recognised in *Ferris v Plaister* (1994) 34 NSWLR 474 at 488 and 492, with the promulgation of the Model Law in 1985, the process of convergence in respect of international and domestic arbitration had begun and by 2005 there was widespread recognition of the desirability for uniformity and cross-pollination between domestic and international arbitrations.[70] Furthermore, s 53 of the 1984 IAA also provided for a stay in terms similar to s 8 of the CAA relied on by the Respondents.

Part VI: ESTIMATE TIME FOR ARGUMENT

51. ACICA respectfully seek leave to elaborate on aspects of these submissions in oral submissions of not more than 20 minutes.

---

70 *Raguz v Sullivan* (2000) 50 NSWLR 236 at [50]-[53].

Date: 17 August 2018

Justin Gleeson SC
T (02) 8239 0200
justin.gleeson@banco.net.au

Jonathon Redwood
T (02) 9376 0658
F (02) 9210 0521
jonathon.redwood@banco.net.au

Danielle Forrester
T (02) 8915 2614
F (02) 02 9232 3902
dforrester@sixthfloor.com.au