HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

SUSAN KARPIK
Appellant

and

CARNIVAL PLC (ARBN 107 998 443)
First Respondent

PRINCESS CRUISE LINES LIMITED
(A COMPANY REGISTERED IN BERMUDA)
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING) AND THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (SEEKING LEAVE TO INTERVENE)

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. Sections 5(1)(c) and (g) of the CCA extend the operation of s 23 of the ACL

2. Legislative history supports the conclusion that ss 5(1)(c) and (g) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) apply to extend the operation of s 23 of the Australian Consumer Law (**ACL**) to the "engaging in conduct outside Australia" by bodies corporate carrying on business within Australia. If s 2 of Pt 2 of the ACL as originally enacted (being the predecessor to the current s 23) did not involve "conduct", then both ss 5(1)(ea) and 130 of the *Trade Practices Act 1974* (Cth) (**TPA**) (**Vol 3, Tab 7**) would have had no operation at all. Such an interpretation should not be adopted: eg, *Plaintiff M70/2011 v Minister to Immigration of Citizenship* (2011) 244 CLR 144 at [97] (Gummow, Hayne, Crennan and Bell JJ); *Hore v The Queen* (2022) 273 CLR 153 at [59] (the Court): **IS [20]-[24]**.

3. Nor does Pt 2-3 of the current ACL apply as a law of the Commonwealth under s 131 of the CCA through the indirect route of the remedial provisions of the ACL (ss 250 and 237): cf **RS [29]**.

4. The Respondents' novel submission — that, where the *lex causae* is not the law of the forum, statutory provisions of the forum will only apply if "it is manifest" that Parliament considered overriding the applicable *lex causae* and determined to do so — must be rejected (cf **RS [10], [33], [35]**). This Court has consistently treated the question of the applicability of statutory provisions of the forum as one of statutory construction, without any suggestion that the task must be undertaken with a thumb on the scales.

5. Section 5(1)(g) identifies the requisite connection between s 23 of the ACL and Australia. In the face of that express provision, there is no warrant to seek to identify a further territorial connection by implication, or by reference to statutory presumptions: *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at [38] (Kiefel CJ and Gageler J), [59]-[62] (Gordon, Edelman and Steward JJ) (**Vol 9, Tab 48**); *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 142-143 (Kitto J) (**Vol 5, Tab 25**). The necessary connection to Australia being supplied by s 5(1)(g), there is therefore no basis to construe s 23 as applying only if the proper law of the contract is Australian law (or as subject to any other territorial limitation).

6. Further, construing s 23 as applying only to contracts governed by Australian law would render it susceptible to "easy evasion" through insertion of a choice of law clause, thereby defeating its consumer protection purpose (**FC [32], CAB 140**). That would be so even in cases where resort to s 5(1) is unnecessary. Section 67 of the ACL does not assist the Respondents in answering the "easy evasion" argument (cf **RS [42]**): *Valve Corporation v ACCC* (2017) 258 FCR 190 at [112]-[115] (the Court) (**Vol 10, Tab 64**); *ACCC v Valve Corporation (No 3)* (2016) 337 ALR 647 at [90], [93], [98], [102], [104], [116]-[122] (Edelman J) (**Vol 9, Tab 44**). Nor does the proposition that "easy evasion" is solved by private international law applying s 23 of the ACL to choice of law clauses (cf **RS [43]**), that proposition being inconsistent with the Respondents' primary argument and a transparent attempt to avoid the logical consequences of that argument (cf **RS [43], [46]**).

7. Derrington J's concern that s 23 would be of "absurd" breadth if it were not limited to contracts governed by Australian law is misplaced (cf **FC [298], [300], CAB 227-228; RS [36]-[37]**). The question whether s 23 is properly construed as applying in a particular

situation is distinct from the question whether a foreign court would apply s 23 when adjudicating a dispute relating to that situation: *Impiombato* (2022) 96 ALJR 956 at [70] (Gordon, Edelman and Steward JJ) (**Vol 9, Tab 48**); **IS [35]-[37]**.

B. Class action waiver clauses are contrary to Part IVA of the FCA Act

8. Part IVA of the *Federal Court of Australia Act 1976* (Cth) is relevantly directed at avoiding a multiplicity of proceedings and promoting the efficient administration of justice: *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [82] (Kiefel CJ, Bell and Keane JJ) (**Vol 5, Tab 18**).

9. Part IVA establishes an opt-out regime. Having regard to ss 33J(1)-(2), 33X(1)(a) and 33Y(2), it is apparent that Parliament was concerned to ensure that any decision by a group member to opt out would be an informed one: *King v GIO Australia Holdings Pty Ltd* [2001] FCA 270 at [15] (the Court) (**Vol 10, Tab 57**); **IS [49]-[52]**; *Gagarimabu v The Broken Hill Pty Co Ltd* [2001] VSC 304 at [15] (Hedigan J): **IS [48]**. By contrast, the purpose that the Respondents seek to attribute to s 33J — "protect[ing] individual autonomy and freedom of choice" (**RS [66]**) — reads that provision in isolation, without regard to ss 33X and 33Y.

10. Once the joint purpose of ss 33J, 33X and 33Y is understood, the better construction of Pt IVA is that a group member may only opt out of a representative proceeding after an opt-out notice has been issued under s 33X(1)(a), but before the date fixed therein, under s 33J(1) (**FC [66], CAB 150**; cf **FC [359], CAB 248-249**). It follows that a class action waiver clause agreed to prior to an opt-out notice being issued will be void or unenforceable as contrary to Pt IVA: **IS [47], [52]**. Section 33X(2) does not stand against that construction: cf **RS [67]**; *Arthur v Northern Territory* [2019] FCA 859 (White J).

11. In contrast, the Respondents' construction would allow a group member to waive her right to participate in a class action, perhaps long before any cause of action arises, unassisted by the information in an opt-out notice, and in a manner apt to promote a multiplicity of proceedings: **IS [52]**. That would frustrate the purposes of Pt IVA identified in paragraph 8 above.

Dated: 3 August 2023

Stephen Donaghue **Ruth Higgins** **Sarah Zeleznikow** **Shawn Rajanayagam**