HIGH COURT OF AUSTRALIA

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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

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

PART I — CERTIFICATION

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

PARTS II AND III — INTERVENTION

2 The Attorney-General of the Commonwealth intervenes in this proceeding in support of the appellant, pursuant to s 78A of the *Judiciary Act 1903* (Cth).

3 The Australian Competition and Consumer Commission (the **ACCC**) applies for leave to intervene in support of the appellant.[1] The ACCC seeks that leave as the regulator responsible for the administration and enforcement of the CCA, including Sch 2 to that Act, which contains the ACL.[2] As recognised by Allsop CJ below, in those

[1] The ACCC applies for that leave both pursuant to this Court's inherent jurisdiction and s 139(1) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**), which provides that the ACCC may intervene in any proceeding instituted under Pt XI of the CCA or the Australian Consumer Law (the **ACL**). These submissions constitute that application: *High Court Rules 2004* (Cth), r 42.08A.

[2] The ACCC is the "regulator" for the purposes of the ACL (Cth): see ACL, s 2(1) (definition of "regulator", para (a)). The ACCC may therefore obtain declaratory and injunctive relief in relation to s 23: ACL, ss 232(2), 250(1)(b), (2)(b). It has done so in a number of cases: see, by way of recent example, *ACCC v Fujifilm Business Innovation Australia Pty Ltd* [2022] FCA 928, *ACCC v Smart Corp Pty Ltd (No 3)* (2021) 153 ACSR 347 and *ACCC v Mitolo Group Pty Ltd* (2019) 138 ACSR 143. The ACCC notes that s 23 will be amended with effect from 9 November 2023: *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) Sch 2 s 1. Because that Act has not yet commenced, it is not relevant to the questions of construction raised by the

circumstances, the ACCC has a substantial interest in the proper construction of s 23 of the ACL,[3] that being a question of evident public importance.[4] The ACCC submits that its intervention would "assist [the Court] to reach [the] correct determination",[5] because its submissions address several aspects of the construction of s 23 not addressed by the appellant. In circumstances where the submissions to be advanced by the ACCC would sit alongside and complement those of the Attorney-General, who intervenes as of right, no concerns arise as to undue cost and delay.[6]

4 The Attorney-General and the ACCC (together, the **Commonwealth parties**) jointly advance the submissions in Pts IV and V(A)-(B). The Attorney-General advances the submissions in Pt V(C)-(D).

PART IV — ISSUES PRESENTED BY THE APPEAL

5 ***Background.*** The appellant, Ms Karpik, is the applicant in a representative proceeding brought under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (the **Federal Court Act**) against the respondents, Carnival plc and Princess Cruise Lines Limited (**Princess**), in relation to loss and damage allegedly suffered during a voyage of the *Ruby Princess*.[7] The group relevantly includes passengers from that voyage.[8] The claims are common law claims in negligence and statutory claims under the ACL.[9] One aspect of the respondents' response to the proceeding, insofar as it concerns a subgroup of passengers subject to the so-called "US terms and conditions" (**US subgroup**), is that those terms and conditions contain: (i) an exclusive jurisdiction clause in favour of the United States District Court for the Central District of California in Los Angeles (**exclusive jurisdiction clause**); and (ii) a clause pursuant to which passengers waived

present case: compare *Croxford v Universal Insurance Co Ltd* [1936] 2 KB 253 at 270 (Slesser LJ; Scott LJ and Eve J agreeing).

3 *Carnival plc v Karpik* (2022) 404 ALR 386 (**FC**) at [34] (Core Appeal Book (**CAB**) 141). See also *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2001) 116 FCR 490 at [9], [15]-[16] (Sackville J).

4 *Northern Land Council v Quall* (2020) 271 CLR 394 at [18] (Kiefel CJ, Gageler and Keane JJ).

5 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 (***Roadshow Films***) at [6] (the Court).

6 *Roadshow Films* (2011) 248 CLR 37 at [4] (the Court).

7 *Karpik v Carnival plc* (2022) 157 ACSR 1 (**PJ**) at [4]-[7] (Stewart J) (CAB 15-16); FC at [97] (Derrington J) (CAB 158).

8 PJ at [3] (Stewart J) (CAB 15).

9 PJ at [4] (Stewart J) (CAB 15).

any entitlement to participate in a class action (**class action waiver clause**).[10] The respondents contend that the claims of the US subgroup should, in those circumstances, be stayed.[11] The appellant identified a representative of the US subgroup, Mr Ho, and the primary judge (Stewart J) determined whether Mr Ho's claims should be stayed.[12] His Honour held that they should not, principally because the US terms and conditions were not incorporated into Mr Ho's contract.[13]

6 The Full Court allowed an appeal (Allsop CJ and Derrington J; Rares J dissenting). The Court unanimously held that the US terms and conditions were incorporated into Mr Ho's contract.[14] It also held, by majority, that the exclusive jurisdiction clause and the class
10 action waiver clause were not rendered void by operation of s 23 of the ACL, and that the class action waiver clause was not contrary to Pt IVA of the Federal Court Act.[15]

7 ***Issues presented by the appeal.*** The issues on the appeal to this Court are, in summary:

7.1 Does s 23 of the ACL apply to Mr Ho's contract with Princess?

7.2 If so, is the class action waiver clause void by operation of s 23 of the ACL?

7.3 Is the class action waiver clause contrary to Pt IVA of the Federal Court Act?

7.4 Did the Full Court err in staying Mr Ho's claim pursuant to the exclusive jurisdiction clause?

8 These submissions address the first and third issues.

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[10] FC at [97] (Derrington J) (CAB 158).

[11] PJ at [12] (Stewart J) (CAB 18).

[12] PJ at [13], [17]-[18] (CAB 18-21).

[13] Eg, PJ at [71], [74], [76], [89] (CAB 35-36, 39). His Honour also considered various consequential issues, including those the subject of the present appeal, against the possibility that the US terms and conditions were incorporated into Mr Ho's contract.

[14] FC at [1] (Allsop CJ) (CAB 130), [40]-[47] (Rares J) (CAB 143-145), [100]-[239] (Derrington J) (CAB 159-207).

[15] FC at [1] (Allsop CJ), (CAB 130) [350]-[363] (Derrington J) (CAB 245-250). Rares J held that the class action waiver clause was contrary to Pt IVA, and that enforcement of the exclusive jurisdiction clause would therefore be contrary to public policy: FC at [85]-[86], [94] (CAB 154, 156-157). He therefore considered it unnecessary to decide whether the exclusive jurisdiction clause and the class action waiver clause were void by operation of s 23 of the ACL: FC at [49] (CAB 145).

PART V — ARGUMENT

9 On the first issue, the Commonwealth parties advance the following propositions:

9.1 The ACCC and the Attorney-General submit that as a matter of statutory construction, ss 5(1)(c) and (g) of the CCA extend the operation of s 23 of the ACL extraterritorially to contracts made outside Australia by bodies corporate incorporated or carrying on business within Australia: Pt V(A)-(B).

9.2 The Attorney-General submits that in that operation, s 23 of the ACL is supported by both the geographic externality aspect of the external affairs power (s 51(xxix) of the Constitution) and by the corporations power (s 51(xx) of the Constitution):
10 Pt V(C).

A THE ACL

10 The ACL is intended to provide a "single national consumer law for Australia" (**AS [29]**).[16] It does so by creating general protections (Ch 2), specific protections (Ch 3), and offence provisions (Ch 4). One such general protection is contained in the unfair contract terms regime, within Pt 2-3 of the ACL. Both the ACCC and private litigants may seek a range of remedies in respect of various provisions contained in the ACL, including the unfair contract terms regime.[17]

11 The ACL is an applied law scheme.[18] However, by s 131(1) of the CCA, the ACL "applies as a law of the Commonwealth to the conduct of corporations, and in relation to
20 contraventions of Chapter 2, 3 or 4 of [the ACL] by corporations". The "Note" to s 131(1) provides that ss 5 and 6 of the CCA "extend the application of this Part (and therefore extend the application of [the ACL] as a law of the Commonwealth)".

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[16] Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) at 3; see also at [17.1]. See also Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) at 4, [1.1], [1.7], [3.1]. The ACL thereby replaced some 13 pre-existing State and Territory consumer protection laws: Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) at 4; see also at 5-6, [1.4].

[17] ACL Pt 5-2.

[18] Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth), [1.12], [3.20]-[3.21]; Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), [17.6]. Part XIAA of the CCA facilitates the application of the ACL as a law of a State or Territory, and each of the States and Territories has applied the ACL as a law of that jurisdiction: see, eg, *Fair Trading Act 1987* (NSW); *Fair Trading Act 1989* (Qld); *Australian Consumer Law and Fair Trading Act 2012* (Vic).

12 ***Engaging in conduct.*** Section 5 of the CCA extends the operation of the ACL extraterritorially. Most relevantly for present purposes, ss 5(1)(c) and (g) together provide that the ACL (other than one presently immaterial exception) extends to the "engaging in conduct" outside Australia by "bodies corporate incorporated or carrying on business within Australia". Section 4(2)(a) provides that a reference in the CCA to "engaging in conduct" shall be read as "a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the engaging in of a concerted practice".[19]

10 13 It is against this background that the constructional issue and head of power questions concerning s 23 of the ACL arise.

B SECTION 23 OF ACL IS EXTENDED BY SECTIONS 5(1)(C) AND (G) OF CCA

14 Section 23(1) of the ACL provides that "[a] term of a consumer contract or small business contract is void if: (a) the term is unfair; and (b) the contract is a standard form contract". The terms "consumer contract" and "small business contract" are defined in ss 23(3) and (4) respectively. The meaning of "unfair" is addressed in s 24, and non-exhaustive examples of the kinds of terms that may be unfair are provided in s 25. Plainly the making of a standard form contract, as a result of the parties to a contract agreeing to or accepting its proposed terms, involves the parties "engaging in conduct". However, s 23(1) does
20 not expressly refer to that conduct. It is the absence of any express reference to conduct in s 23(1) that presents the constructional question as to the interaction of s 23(1) of the ACL and s 5(1)(g) of the CCA.

15 When seeking to ascertain the meaning of a statutory provision, the starting point is the text of the provision, considered in light of its context and purpose.[20] Where that text, read in context, "permits of more than one potential meaning",[21] a "constructional choice"

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19 A similar definition for the purposes of the ACL is contained in s 2(2)(a) of the ACL.

20 See, eg, *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 (***SAS Trustee***) at [20] (Kiefel CJ, Bell and Nettle JJ); *R v A2* (2019) 269 CLR 507 at [32] (Kiefel CJ and Keane J), [124] (Bell and Gageler JJ).

21 *SAS Trustee* (2018) 265 CLR 137 at [20] (Kiefel CJ, Bell and Nettle JJ), citing *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 (***Taylor***) at [66] (Gageler and Keane JJ).

must be made. The making of that choice often turns on "the relative coherence of the alternatives with identified statutory objects or policies".[22]

16 In the present case, the constructional choice that "best achieve[s] the purpose or object"[23] of the CCA is to construe s 23 of the ACL as attaching a legal consequence (voidness of the unfair term) to the conduct to which it implicitly refers, being the conduct of the parties in making a contract that contains an unfair term. So understood, ss 5(1)(c) and (g) of the CCA extend the operation of s 23 of the ACL to contracts made outside Australia by bodies corporate incorporated or carrying on business within Australia.[24]

"Engaging in conduct"

10 17 ***Text.*** It is textually open to the Court to find that the operation of s 23 implicitly depends upon the parties having "engaged in conduct" of a particular kind (within the definition supplied by s 4(2)(a) of the CCA) by "the making of … a contract" that contains an unfair term. Section 23 operates upon the product of that conduct by providing that the unfair term[25] has, and is taken always to have had, no legal effect.[26] Understood in that light, consistently with the observations of Allsop CJ in the Full Court, s 23 can be taken to involve "engaging in conduct".[27]

18 The contrary position – that a distinction is to be drawn between conduct (the making of a contract) and its effect (the terms of the contract as made) – is artificial. Such a narrow construction should not be adopted in respect of beneficial legislation.[28] As observed by

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22 *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56 at [88] (the Court), quoting *Taylor* (2014) 253 CLR 531 at [66] (Gageler and Keane JJ). See also *SAS Trustee* (2018) 265 CLR 137 at [20] (Kiefel CJ, Bell and Nettle JJ); *R v A2* (2019) 269 CLR 507 at [125] (Bell and Gageler JJ).

23 *Acts Interpretation Act 1901* (Cth) s 15AA.

24 The primary judge found that the second respondent carries on business in Australia: PJ at [129] (Stewart J) (CAB 49). That finding was not challenged on appeal to the Full Court (see FC at [298] (Derrington J) (CAB 227)), nor is it challenged in this Court.

25 But not the contract as a whole, if capable of continuing operation absent the term: s 23(2).

26 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) at [5.17] (stating that unfair terms are to be "treated as if [they] never existed").

27 FC at [22] (Allsop CJ) (CAB 135-136); cf at [287] (Derrington J) (CAB 224).

28 See also **AS [19]**. As to consumer protection provisions constituting beneficial legislation, see *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41 (McHugh J); *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 503-504 (Lockhart and Gummow JJ). See more generally *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [50] (French CJ, Hayne, Crennan and Kiefel JJ); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands*

Allsop CJ below, "[i]t might be thought to be difficult or at least unnecessary to divorce the making of the contract from the contract as made" in circumstances where "[t]he contractual provisions to which s 23 is directed cannot exist without the act of making those provisions in standard form contracts to which s 23 applies and their offer to and acceptance by consumers".[29]

19 In those circumstances, it is textually open to the Court to find that s 23 intersects with, and has its territorial reach extended by, s 5(1)(g) of the CCA. As explained further below, the legislative history and statutory context strongly support that conclusion.

20 ***Legislative history.*** The ACL was first inserted as Sch 2 to the *Trade Practices Act 1974* (Cth) (the **TPA**) by the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth) (the **ACL No 1 Act**). The version of the ACL enacted by the ACL No 1 Act contained just one substantive Part: Pt 2 (ss 2-8), which was entitled "Unfair contract terms".[30] The provisions in Pt 2 were relevantly identical to the unfair contract terms regime now contained in Pt 2-3 of the ACL.[31] The main operative provision, s 2, was the predecessor to the current s 23. The ACL No 1 Act also enacted a new s 130 of the TPA, which provided that the ACL "applies as a law of the Commonwealth to the conduct of corporations" (emphasis added). At the time that the ACL No 1 Act was enacted, "conduct" was defined in s 4(2)(b) of the TPA in terms that were substantially identical to the definition of "engaging in conduct" in s 4(2)(a) of that Act.

21 The point of significance to be drawn from this legislative history is that, unless s 2 of the ACL as originally enacted involved "conduct", s 130 of the TPA would have had no operation because there would have been no "conduct" in respect of which the ACL would have applied. That conclusion would evidently have been contrary to Parliament's

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Act (2016) 260 CLR 232 at [32]-[33] (French CJ, Kiefel, Bell and Keane JJ), [92] (Gageler J); *Tjungarrayi v Western Australia* (2019) 269 CLR 150 at [44] (Gageler J).

29 FC at [22] (CAB 135-136).

30 The Explanatory Memorandum noted that a second Bill would be introduced into Parliament to amend the ACL to include the balance of the reforms that had been agreed to by the Council of Australian Governments: Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) at [1.13]; see also at [1.16].

31 The only substantive difference between then-Pt 2 of the ACL and the current Pt 2-3 is that Pt 2-3 applies to consumer contracts and small business contracts, whereas Pt 2 applied only to consumer contracts. Part 2-3 was extended to cover small business contracts by the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).

intention: the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) indicates that Parliament intended and expected the ACL to operate, as enacted, as a law of the Commonwealth.[32]

22 A similar point can be made in respect of s 5(1)(ea) of the TPA, which was also enacted by the ACL No 1 Act. At the time that the ACL No 1 Act was introduced, s 5(1)(g) of the TPA extended the operation of the provisions listed in s 5(1)(a)-(f) to conduct engaged in outside Australia by bodies corporate incorporated or carrying on business within Australia (see also **AS [19]-[20]**). "Engaging in conduct" was defined in s 4(2)(a) of the TPA in terms that were substantially similar to the definition of "engaging in conduct" presently contained in s 4(2)(a) of the CCA. The ACL No 1 Act introduced paragraph (ea) into s 5(1) of the TPA, which had the effect of rendering the ACL one of the provisions the operation of which was extended by s 5(1)(g) of the TPA. In circumstances where the unfair contract terms regime was, at that time, the sole substantive Part of the ACL, to interpret s 2 of the ACL as not involving "engaging in conduct" would be to deprive s 5(1)(ea) of the TPA, as enacted, of all operation.[33]

23 The ACL and s 130 of the TPA, as enacted by the ACL No 1 Act, were repealed and replaced by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) (the **ACL No 2 Act**).[34] The ACL No 2 Act re-enacted the unfair contract terms provisions in identical terms to the provisions that appeared in Pt 2 of the ACL No 1 Act.[35] It also re-enacted a provision, in very similar terms to s 130 of the TPA, that applied the ACL as a law of the Commonwealth "to the conduct of corporations and in relation to contraventions of Chapter 2, 3 or 4 of Schedule 2 by corporations".[36] In

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[32] Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) at [2.19] ("The scope of the unfair contract terms provisions in the ACL (as applied by the TP Act as a law of the Commonwealth) …"); see also at 3, [1.1], [1.10], [1.17], [3.1]-[3.2], [3.8]-[3.9], [3.12]. In addition, see Supplementary Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) at 4, [1.3].

[33] Cf *Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [97] (Gummow, Hayne, Crennan and Bell JJ).

[34] ACL No 2 Act Sch 1, Sch 2 s 1. The Explanatory Memorandum stated that the ACL No 2 Act "complete[d] the initial text" of the ACL: Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) at 3.

[35] ACL Pt 2-3.

[36] CCA s 131, and more generally Pt XI of the TPA, which was repealed and replaced by the ACL No 2 Act.

addition, it repealed and substituted paragraphs within s 5(1) of the TPA, including so as to provide that the provisions to which s 5(1) applied included "the Australian Consumer Law" (with one presently immaterial exception).[37] In that context, in enacting the ACL No 2 Act, Parliament must be taken to have intended that s 23 of the ACL involves "conduct", such that it applies as a law of the Commonwealth by reason of s 131 of the CCA, and to involve "engaging in conduct", such that it operates extraterritorially pursuant to s 5(1) of the CCA, just as it had under the ACL No 1 Act.

24 Understood against that background, the legislative history confirms Parliament's intention that s 23 of the ACL be construed as involving "engaging in conduct", and that its territorial operation would be extended by s 5(1)(g) of the CCA.

25 ***Statutory context.*** Statutory context also supports the conclusion that s 23 involves "engaging in conduct". In particular, if s 23 does not involve "engaging in conduct", that raises the prospect that s 23 of the ACL does not apply, and has never applied, as a law of the Commonwealth through s 131 of the CCA. That conclusion is distinctly unattractive and would be contrary to Parliament's clear intent.

26 As explained in paragraph 11 above, s 131 of the CCA provides that the ACL applies "as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of Chapter 2, 3 and 4 of [the ACL] by corporations" (the unfair contract terms regime being located within Ch 2). Accordingly, in order for s 23 of the ACL to apply as a law of the Commonwealth by reason of s 131 of the CCA, it must involve either "the conduct of corporations" or "contraventions … by corporations".

26.1 For the reasons explained at paragraphs 21 and 23 above, if s 23 of the ACL does not involve "engaging in conduct", then it would also be taken not to involve "conduct" for the purposes of s 131 of the CCA.[38]

26.2 Further, it is unlikely that s 23 could be applied as a law of the Commonwealth by s 131 of the CCA on the basis that it is capable of being "contravened", as several provisions of the ACL indicate that s 23 does not, of itself, found a contravention

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[37] The exception is Pt 5-3: see CCA s 5(1)(c). Note that the ACL No 2 Act also provided for the repeal and substitution of s 5(1)(b), such that s 5(1) would also apply to Pt XI of the CCA, which contains s 131.

[38] "Conduct" is defined in relevantly identical terms to "engaging in conduct": CCA ss 4(2)(a)-(b).

(although that will change on the commencement of the amendments noted in footnote 2 above). Most significantly, s 15(a) of the ACL provides that conduct is not taken, for the purposes of the ACL, to contravene a provision of the ACL merely because of the application of s 23(1). In addition, the remedial provisions of the ACL distinguish between conduct in contravention of certain ACL provisions, on the one hand, and conduct in relation to unfair contract terms, on the other, apparently on the basis that s 23 cannot be "contravened".[39] That position is consistent with the general law position as to what constitutes a "contravention".[40]

27 ***Conclusion.*** In those circumstances, s 23 should be understood to involve "engaging in
10 conduct", such that it operates in conjunction with ss 5(1)(c) and (g) of the CCA to extend the operation of the ACL, applied as a law of the Commonwealth, to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia. In so doing, ss 5(1)(c) and (g) displace the presumption that statutes are not intended to apply to matters that, under the rules of private international law, are governed by foreign law.[41]

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[39] See, eg, ss 232(3) and 237(1)(a)(ii) of the ACL. The effect of those provisions is that, if a court has declared that a term of a consumer contract or small business contract is an unfair term under s 250, the court may proceed to issue an injunction or make a compensation order. However, each of those provisions expressly distinguishes between "contraventions" and certain "conduct" in relation to unfair terms. Section 232(1) provides that a court may grant an injunction if it is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of a provision of Chapter 2, 3 or 4 of the ACL (as well as for certain accessorial liability in relation to such contraventions). Section 232(3) extends the application of s 232(1) by providing that s 232(1) "applies in relation to conduct constituted by applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term *as if the conduct were a contravention of a provision of Chapter 2*" (emphasis added). Section 237(1)(a) provides that a court may make a compensation order "on application of a person … who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that: (i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or (ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term". See also, to somewhat similar effect, ss 238(1)(b) (compensation orders arising out of other proceedings) and 239(1)(a)(ii) (orders to redress non-party consumers).

[40] Eg, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [29]-[30] (French CJ); cf FC at [275], [281], [284] (Derrington J) (CAB 220-223).

[41] Eg, *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601 (Dixon J); *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 142-143 (Kitto J); *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 (***Old UGC***) at [23] (Gummow, Hayne, Callinan and Crennan JJ; Gleeson CJ agreeing). See also FC at [24], where the Chief Justice referred to this presumption "as a narrower subset of the presumption against extra-territorial application of statutes" (CAB 136-137). See also **AS [20]**.

No additional limitation

28 Having determined that ordinary principles of statutory construction support the position that s 23 of the ACL involves "engaging in conduct", such that its application is extended by ss 5(1)(c) and (g) of the CCA, there is no warrant to attempt to confine the scope of s 23 (consistently with the primary position identified in **AS [20]**). Indeed, each of the confining possibilities considered by Allsop CJ and Derrington J is attended by significant difficulties.

29 **First**, there is no secure basis to conclude that s 23 applies only to contracts for services performed wholly or partially in Australia.[42] In circumstances where s 23 of the ACL is deliberately extended by ss 5(1)(c) and (g) of the CCA to conduct that takes place *outside* Australia, it is difficult to see why that extension should be wound back by implication so as to require an additional territorial nexus in the form of the performance of services *in* Australia. Moreover, this construction would have the unlikely (and unattractive) consequence that s 23 would not apply to a contract between an Australian consumer and a corporation incorporated under the *Corporations Act 2001* (Cth) that has its principal place of business in Australia, if the contract were for services wholly performed overseas. That construction would not advance the purpose of the CCA of "enhanc[ing] the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".[43]

30 **Secondly**, s 23 cannot be construed as applying only to contracts governed by Australian law. Parliament having expressly provided that s 23 can apply extraterritorially through ss 5(1)(c) and (g), the scope of s 23 is "not at large".[44] Those provisions leave no room for the presumption that statutes do not affect contracts governed by foreign law.[45] Further, construing s 23 as applying only to contracts governed by Australian law would allow its operation to be "set at nought by the simple expedient" of including a governing

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42 FC at [314] (Derrington J) (CAB 233-234). Presumably, by parity of reasoning, s 23 would also be limited to goods sold in Australia, or land that is sold in Australia: see ACL ss 23(3)(b), (4)(a).

43 CCA s 2.

44 *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 (***CSL Pacific Shipping***) at [43] (the Court), discussed in FC at [25]-[26] (Allsop CJ) (CAB 137).

45 FC at [24]-[27] (Allsop CJ) (CAB 136-138); *CSL Pacific Shipping* (2003) 214 CLR 397 at [43] (the Court). See also **AS [24]**.

law clause in favour of a foreign jurisdiction.[46] A construction that allows s 23 to be "rendered ineffective by … verbal devices" should be rejected.[47] It is distinctly unlikely that Parliament intended that beneficial legislation such as s 23 could be evaded in that way. That is particularly so because, as Allsop CJ recognised, a governing law clause is precisely the kind of clause to which s 23 may, in a particular case, be directed.[48]

31 **Thirdly**, two other potential limitations considered by Derrington J – that the contract must be entered into "while" the relevant company was engaged in business in Australia,[49] and that s 23 is confined to contracts to which an "Australian consumer" is a party[50] – lack any foundation in the text of the ACL. Further, in circumstances where the
10 expression "Australian consumer" is not defined in the CCA (see **AS [31]**), the latter option would raise significant questions as to the basis and form of any such limitation.

32 **Finally**, if any limitation were to be necessary, the preferable form of that limitation, having regard to the object of the CCA, would be that the contract in question was entered into "in trade or commerce" (which, by s 2(1) of the ACL, means trade or commerce within Australia or between Australia and places outside Australia). However, it is not clear what the basis for reading those words into s 23 would be.[51] While many provisions in the ACL expressly include the expression "in trade or commerce", others do not.[52] Further, some provisions within that latter class undoubtedly involve "engaging in conduct",[53] such that the operation of those provisions is extended extraterritorially by
20 ss 5(1)(c) and (g) of the CCA unconfined by any requirement that they involve trade or commerce within or involving Australia. In those circumstances, it cannot be said to be

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46 *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 143 (Kitto J), quoted in FC at [29] (Allsop CJ) (CAB 138-139). See also **AS [24]**.

47 *Old UGC* (2006) 225 CLR 274 at [56] (Kirby J), quoted in FC at [31] (Allsop CJ) (CAB 139-140).

48 FC at [32] (CAB 140).

49 FC at [313] (Derrington J) (CAB 233).

50 FC at [315] (Derrington J) (CAB 234).

51 FC at [309]-[312] (Derrington J) (CAB 232-233). See generally *Taylor* (2014) 253 CLR 531 at [35]-[40] (French CJ, Crennan and Bell JJ).

52 Eg, ACL ss 31, 39, 43, 44, 50.

53 Section 31 of the ACL expressly refers to "engaging in conduct". Sections 39, 43, 44 and 50 do not expressly refer to "engaging in conduct", but all of those provisions turn on conduct having been engaged in.

"anomalous" to treat the operation of s 23 of the ACL as being similarly extended by ss 5(1)(c) and (g) of the CCA, without implying such an additional territorial nexus.[54]

33 As each of these confining possibilities produces real difficulties, ss 5(1)(c) and (g) of the CCA should be construed as extending the operation of s 23 of the ACL in accordance with the terms of each of those provisions, without further limitation.

34 ***Absurd breadth?*** Justice Derrington suggested that the conclusion that ss 5(1)(c) and (g) of the CCA extended the operation of s 23 of the ACL to contracts made outside Australia by bodies corporate incorporated, or carrying on business, within Australia would give s 23 an operation of "absurd" breadth.[55] As an illustration, his Honour observed that the "logical consequence" would be that "a company which manufactures cars in Europe and sells them in Australia is subject to the operation of s 23 in relation to its sales of cars in other European countries".[56]

35 His Honour's precise concern about that "logical consequence" is unclear. To the extent that his Honour was concerned about the possibility that a consumer who purchased a car in Europe could take action against a European car manufacturer under s 23 of the ACL *in the Federal Court of Australia*, the Commonwealth parties accept that that may be correct as a formal consequence of the construction they advance (albeit that such a case is very unlikely to be commenced in practice, and is even more unlikely to progress to judgment).[57] Such a case would be unlikely to progress to judgment because, in the absence of a connection with Australia beyond the extraterritorial operation of s 23 of the ACL, the Federal Court would likely stay such a proceeding on the basis that that Court is an "inappropriate forum" for the proceeding.[58]

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54 Cf FC at [300] (Derrington J) (CAB 228).

55 FC at [301] (CAB 228-229); see also at [275], [298], [300] (CAB 220, 227-228).

56 FC at [300] (Derrington J) (CAB 228).

57 Statutory provisions, like constitutional provisions, are not to be construed by reference to "extreme examples and distorting possibilities". In statutory interpretation, see, eg, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [94] (Keane, Nettle and Gordon JJ); *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495 at [86] (Gageler J). In constitutional interpretation, see, eg, *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [32] (Gleeson CJ, Gummow and Hayne JJ); *XYZ v Commonwealth* (2006) 227 CLR 532 (***XYZ***) at [39] (Gummow, Hayne and Crennan JJ).

58 See *Federal Court Rules 2011* (Cth), r 10.43A(2)(b). Rule 10.43A(2)(b) forms part of Div 10.4 of the Rules, which was repealed and substituted earlier this year in order to harmonise the rules of court across jurisdictions: see Explanatory Statement to the *Federal Court Legislation Amendment Rules 2022* (Cth) at 4, 6. The

36 If his Honour was concerned about the possibility that the ACL might apply in the resolution of any claim brought by such a consumer against such a car manufacturer *in a court in Europe*, then his Honour's concern was, with respect, overstated. There is no reason to think that European courts subject to the *Rome I* regulation[59] would apply s 23 of the ACL to resolve such a dispute unless the governing law of the contract required it to be applied.

37 *Rome I* governs choice of law rules in commercial matters involving contractual obligations. In consumer contracts, *Rome I* provides that the parties may choose the governing law of the contract, and in the absence of such a choice, the law of the
10 consumer's habitual residence will apply.[60] If a contractual claim is brought by a consumer who purchased a car in Europe, against a car manufacturer who manufactured that car in Europe, a European court subject to *Rome I* would not apply the ACL in the resolution of that dispute unless the substantive law of the contract – whether the law of Australia or that of another jurisdiction – requires s 23 of the ACL to be applied.[61] Accordingly, even if s 23 applies to conduct in Europe as a matter of Australian law, the courts of Europe will pay no regard to Australian law in deciding a contractual dispute between Europeans other than in the limited circumstance described above.

"inappropriate forum" criterion has been treated as substantially equivalent to the "clearly inappropriate forum" criterion: see *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Chandrasekaran v Navaratnem* [2022] NSWSC 346 at [5]-[8] (Garling J). As explained by the plurality in *Henry v Henry* (1996) 185 CLR 571 at 592-593, "the question whether Australia is a clearly inappropriate forum is one that depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved", including "the connection of the parties" to the relevant jurisdiction. A court will be more likely to grant a stay on inappropriate forum grounds where a case concerns "the rights of two sets of foreigners whose relationships and their legal consequences had nothing to do with this jurisdiction other than for the adventitious commencement of this litigation here": see *Suzlon Energy Ltd v Bangad (No 3)* [2012] FCA 123 at [63] (Rares J), which was affirmed in *Suzlon Energy Ltd v Frankfurter Bankgesellschaft (Schweiz) AG* [2012] FCA 465.

59 *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6.

60 See Art 6(1); cf Art 6(2).

61 As explained in *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, 2012), vol 1 at 24 [1-053], the English position is relevantly that "according to standard doctrine in the conflict of laws, a statute does not normally apply to a contract unless it forms part of the governing law of the contract". One exception to that principle is "mandatory rules", being "[o]verriding statutes" which are generally employed to ensure that "the intention of the legislature to regulate certain contractual matters [is not] frustrated" by parties choosing "some foreign law to govern their contract": at 25 [1-053]. However, even "[m]andatory rules which are not part of the law of the forum or of the applicable law are not normally applied by the English court": at 25 [1-055]. This reflects the same approach taken by states subject to *Rome I*: see *Greece v Nikiforidis* (Court of Justice of the European Union, C-135/15, 18 October 2016), especially at [49]-[55].

C THE CONSTITUTIONAL BASIS FOR SECTION 23 OF THE ACL, AS EXTENDED BY SECTIONS 5(1)(C) AND (G) OF THE CCA

38 In the Full Court, Allsop CJ and Derrington J each raised the question whether it was necessary to read down s 5(1)(g) of the CCA, in its application to s 23 of the ACL, in order to avoid exceeding the legislative power of the Commonwealth Parliament.[62]

39 It being well established that the Commonwealth Parliament is competent to enact legislation that operates extraterritorially,[63] the only constitutional question that need be answered to resolve that query is whether s 23, as extended by ss 5(1)(c) and (g), is a law "with respect to" one of the matters in s 51 of the Constitution.[64]

10 40 The Attorney-General submits that s 23, as extended by ss 5(1)(c) and (g), is (at least) a law with respect to both the geographic externality aspect of s 51(xxix) of the Constitution and (in its application to Princess by reason of s 131 of the CCA) the "foreign corporations" aspect of s 51(xx). For either or both of those reasons, there is no basis to read down s 5(1)(g) of the CCA in order to avoid exceeding the limits of Commonwealth legislative power.[65] That being so, it is unnecessary to consider the scope of power under s 51(i) of the Constitution, although at least in the circumstances of the present case that may also support the relevant operation of the above provisions (see **AS [25]**).

41 ***Section 51(xxix).*** It is well settled that the geographic externality aspect of the external affairs power supports the enactment of legislation in respect of "places, persons, matters
20 or things physically external to Australia".[66] As explained by a majority of the Court in the *Industrial Relations Act Case*, "[i]f a place, person, matter or thing lies outside the

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62 FC at [23], [34] (Allsop CJ) (CAB 136, 141), [308], [316] (Derrington J) (CAB 231-232, 234).

63 Eg, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (***Polyukhovich***) at 634 (Dawson J), 714 (McHugh J). See also *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 (***Impiombato***) at [71] (Gordon, Edelman and Steward JJ).

64 *R v Foster; Ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256 at 306 (Windeyer J). As to the principles governing characterisation, see, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Spence v Queensland* (2019) 268 CLR 355 at [57]-[58] (Kiefel CJ, Bell, Gageler and Keane JJ).

65 Cf *Acts Interpretation Act 1901* (Cth) s 15A.

66 *Victoria v Commonwealth* (1996) 187 CLR 416 (***Industrial Relations Act Case***) at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *New South Wales v Commonwealth* (1975) 135 CLR 337 at 360 (Barwick CJ), 470 (Mason J), 497 (Jacobs J), 503-504 (Murphy J); *Polyukhovich* (1991) 172 CLR 501 at 530 (Mason CJ), 602 (Deane J), 632 (Dawson J), 695-696 (Gaudron J), 714 (McHugh J); *Horta v Commonwealth* (1994) 181 CLR 183 at 194 (the Court); *XYZ* (2006) 227 CLR 532 at [33], [38] (Gummow, Hayne and Crennan JJ).

geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'."[67] For the reasons explained in Pt V(B) above, s 23 of the ACL, as extended by ss 5(1)(c) and (g) of the CCA, operates in respect of the making of contracts outside Australia (provided one party to the contract is a body corporate carrying on business in Australia). The making of a contract outside Australia, being conduct that is engaged in outside Australia, is conduct that can be regulated pursuant to s 51(xxix).[68]

42 ***Section 51(xx).*** Section 51(xx) of the Constitution confers power to regulate "the activities … and the business" of constitutional corporations,[69] including foreign corporations. Princess, being a corporation incorporated in Bermuda,[70] was formed outside the limits of the Commonwealth, and is therefore a "foreign corporation" within the meaning of s 51(xx) of the Constitution.[71]

43 Section 131 of the CCA applies the ACL as a law of the Commonwealth to the conduct of corporations. In the CCA, "corporation" is defined in s 4 to include a body corporate that is a "foreign corporation",[72] and "foreign corporation" is defined (also in s 4) to mean "a foreign corporation within the meaning of paragraph 51(xx) of the Constitution". As such, in its operation as a law of the Commonwealth by reason of s 131 of the CCA, s 23 of the ACL is supported in its application to Princess by s 51(xx) of the Constitution.[73] That is so with respect to conduct both inside and outside Australia, because as a matter of constitutional power s 51(xx) supports the operation of those provisions to Princess irrespective of the place where the relevant conduct occurs.

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67 *Industrial Relations Act Case* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), quoting *Polyukhovich* (1991) 172 CLR 501 at 632 (Dawson J).

68 *Polyukhovich* (1991) 172 CLR 501 at 603 (Deane J), 695-696 (Gaudron J); *XYZ* (2006) 227 CLR 532 at [30]-[31] (Gummow, Hayne and Crennan JJ); see also [13] (Gleeson CJ).

69 *New South Wales v Commonwealth* (2006) 229 CLR 1 (***Work Choices Case***) at [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at [83] (Gaudron J).

70 PJ at [128] (Stewart J) (CAB 49).

71 *New South Wales v Commonwealth* (1990) 169 CLR 482 at 497-498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ). See also *Work Choices Case* (2006) 229 CLR 1 at [55] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171 at [20] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ), [66] (Gageler J).

72 That definition is picked up by s 130, which contains definitions for Pt XI of the CCA.

73 The Commonwealth parties make no submissions as to whether the class action waiver clause is "unfair", and therefore rendered void by s 23 of the ACL.

D CLASS ACTION WAIVER CLAUSES ARE CONTRARY TO PART IVA OF THE *FEDERAL COURT ACT*

44 The Attorney-General advances the following submissions concerning the third issue that arises on the appeal.

45 Both the Full Court and the appellant approached the question of whether class action waiver clauses are contrary to Pt IVA of the Federal Court Act through the lens of whether a person may "waive" or "contract out" of rights conferred on them by statute.[74] That question is one of statutory construction. Even if a statute contains no express prohibition on "contracting out", a person will nonetheless be unable to waive a statutory right if "the provisions of the statute, read as a whole, are inconsistent with a power to forgo its benefits", or if "the policy and purpose of the statute … [show] that the rights which [the statute] confers on individuals are given not for their benefit alone, but also in the public interest, and are therefore not capable of being renounced".[75]

46 It is clear that a person can elect not to pursue their claims by way of a representative proceeding under Pt IVA of the Federal Court Act through the mechanism of opting out under s 33J(2) of that Act. The question in the present case is, therefore, not whether a person can elect to "contract out" of Pt VIA *at all*, but rather what limits Pt IVA places on the *timing or circumstances* in which such an election may be made.

47 For the reasons that follow, as a matter of statutory construction the better view is that a person may only opt out of a representative proceeding under Pt IVA *after* an opt-out notice has been issued under s 33X(1)(a) of the Federal Court Act. For that reason, a contractual clause agreed *prior* to the issuance of an opt-out notice, pursuant to which a person purports prospectively to waive their right to pursue claims in a representative proceeding, will be void as being contrary to Pt IVA.

48 The Australian Law Reform Commission (**ALRC**) report that preceded the enactment of Pt IVA identified two objectives of that Part: "first, to enhance access to justice for

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[74] FC at [11] (Allsop CJ) (CAB 132-133), [51]-[53] (Rares J) (CAB 145-146), [354]-[355] (Derrington J) (CAB 246-247); **AS [38]**.

[75] *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 456 (Windeyer J). See also *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at [46] (French CJ, Crennan, Kiefel and Bell JJ); *Price v Spoor* (2021) 270 CLR 450 at [12] (Kiefel CJ and Edelman J), [39] (Gageler and Gordon JJ), [76] (Steward J).

claimants by allowing for the collectivisation of claims that might not be economically viable as individual claims; and secondly, to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits".[76] As is apparent, the second of those objectives operates for the benefit of the public generally, rather than just that of the individual claimant. For that reason, there is an important public interest in ensuring that the class action regime is not prematurely excluded, including by the use of standard form contracts.

49 One aspect of the regime introduced by Pt IVA is the opt-out procedure contained in ss 33E and 33J of the Federal Court Act. Section 33E(1) provides, subject to the presently immaterial exceptions in s 33E(2), that consent is not required to be a group member. That section reflects the ALRC's recommendation that consent should not generally be required to be a group member.[77] The rationale for that recommendation was that the ALRC considered that adopting an opt-out procedure would balance the objectives of a representative proceeding regime with freedom of choice for group members,[78] as well as striking a balance between the interests of group members and respondents.[79]

50 An opt-out procedure having been enacted, s 33J(1) requires the Court to fix a date before which a group member may opt out of a representative proceeding. In order to make that meaningful, s 33X(1)(a) provides that notice must be given to group members of the commencement of a representative proceeding and of the right of group members to opt out of the proceeding before the date fixed under s 33J(1).[80] In fixing a date pursuant to

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[76] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [82] (Kiefel CJ, Bell and Keane JJ), citing Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) (**ALRC Grouped Proceedings**) at [13], [18] and Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3174-3175. The objectives of Pt IVA were identified in similar terms in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 (***Mobil Oil***) at [12] (Gleeson CJ); *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212 at [43] (French CJ, Kiefel, Keane and Nettle JJ).

[77] ALRC Grouped Proceedings at [127].

[78] ALRC Grouped Proceedings at [108], [126]. See also *Impiombato* (2022) 96 ALJR 956 at [58] (Gordon, Edelman and Steward JJ), stating that Parliament "chose the opt-out provisions as the statutory mechanism to ensure that persons are not made subject to the Court's jurisdiction (or bound by a judgment given in a representative proceeding) if they are unwilling to participate").

[79] ALRC Grouped Proceedings at [126]. See also FC at [54] (Rares J) (CAB 147), quoting the second reading speech in which the then Attorney-General said that an opt-out procedure was preferable to an opt-in procedure "on grounds both of equity and efficiency", as it would achieve the goals of Pt IVA "while leaving a person who wishes to do so free to leave the group and to pursue his or her claim separately": Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3175.

[80] Although s 33X(2) gives the Federal Court a discretion to dispense with compliance with any of the requirements in s 33X(1) where the relief sought does not include a claim for damages, that discretion must be

s 33J(1), "[a]dequate time must … be allowed" between the issuance of the notice under s 33X(1) and the date by which a decision whether to opt out must be made.[81]

51 As explained in the ALRC report, notice is important in circumstances where group members' consent is not required to commence a proceeding, because it ensures that group members will be told that "proceedings have been commenced and of any action they may take".[82] The importance of notices under s 33X is reflected in s 33Y(2), which provides that the form and content of a notice must be as approved by the Court. The function of approving the content of notices to group members forms part of the Federal Court's protective and supervisory jurisdiction in respect of the interests of group members.[83] It allows the Court "to ensure that group members are given such information as is appropriate and necessary to enable them to make an informed decision whether to opt out of the proceeding".[84] The fact that an opt-out notice "may not … come to the attention of, or [be] fully appreciated by, all group members"[85] does not detract from its importance, not least because any prejudice arising from a person not receiving an opt-out notice can be cured by the Court extending the time to opt out under s 33J(3).[86]

52 Understood together, the purpose of ss 33J, 33X and 33Y is to ensure that group members – whose consent is not required before they become group members – are able to make an *informed* decision as to whether to opt out of a representative proceeding (see also **AS [41]**).[87] For that reason, the better construction of Pt IVA is that a group member can only opt out of a representative proceeding under s 33J(2) *after* an opt-out notice is

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exercised having regard to the purpose for which it is conferred and the terms and subject matter of Pt IVA: *Femcare Ltd v Bright* (2000) 100 FCR 331 at [67]-[68] (the Court).

81 *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia [No 4]* [2010] FCA 749 at [22] (Flick J).

82 ALRC Grouped Proceedings at [188]; see also at [190], [195].

83 *Lenthall v Westpac Banking Corporation (No 2)* (2020) 144 ACSR 573 at [31] (Lee J). See generally *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 408 (Brennan J); *Mobil Oil* (2002) 211 CLR 1 at [21] (Gleeson CJ).

84 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (1999) 94 FCR 167 at [30] (Merkel J).

85 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq)* (2015) 325 ALR 539 at [180] (Wigney J), quoted in *Impiombato* (2022) 96 ALJR 956 at [58] (Gordon, Edelman and Steward JJ). See also *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [142] (Gordon J). That opt-out notices may not be received by all group members is clear from ss 33Y(5) and (8).

86 See generally ALRC Grouped Proceedings at [196]. See also **AS [46]**.

87 FC at [61], [64] (Rares J) (CAB 149). See also *King v GIO Australia Holdings Ltd* [2001] FCA 270 at [15] (the Court); *Pearce v 4 Pillars Consulting Group Inc* (2021) 461 DLR (4th) 205 (***Pearce***) at [265] (Griffin JA; Goepel and Abrioux JJA agreeing).

issued under s 33X(1)(a) (see also **AS [45]**).[88] The contrary conclusion would negate the purpose of ss 33J, 33X and 33Y (see also **AS [43]**): instead of a person making "an informed choice between two viable options", they would be permitted to make "an uninformed choice that leaves [them] with no options".[89] Specifically, they would be bound by a standard form contract pursuant to which they waived their right to participate in a class action potentially long before any question of such an action had arisen, and without the benefit of the information that Parliament intended that the Court would ensure would be communicated to them before a decision whether to opt-out was made.[90] Such a conclusion would tend to defeat the objectives of Pt IVA identified in paragraph 47 above.[91] It follows that a contractual provision agreed prior to the issuance of an opt-out notice that purports to require a person to opt out of a representative proceeding will be void on the basis that it is contrary to Pt IVA of the Federal Court Act.

PART VI — ESTIMATE OF TIME

53 The Commonwealth parties estimate that they will require up to 1 hour for oral submissions.

Dated: 19 May 2023

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88 FC at [66] (Rares J) (CAB 150); cf at [359] (Derrington J) (CAB 248-249). That conclusion derives some reinforcement from the absence of any mechanism within the Federal Court Act by which a respondent could enforce a class action waiver clause: FC at [75]-[77], [80] (Rares J) (CAB 152-153); see also **AS [42]**.

89 *Pearce* (2021) 461 DLR (4th) 205 at [265] (Griffin JA; Goepel and Abrioux JJA agreeing); see also at [279]. See also FC at [61], [81]-[85] (Rares J) (CAB 149, 153-154).

90 See FC at [61]-[62], [64], [72] (Rares J) (CAB 149, 151).

91 See FC at [74] (Rares J) (CAB 152).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

SUSAN KARPIK
Plaintiff

and

CARNIVAL PLC (ARBN 107 998 443)
First Respondent

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

ANNEXURE TO THE JOINT SUBMISSIONS OF THE COMMONWEALTH PARTIES

10 Pursuant to *Practice Direction No 1 of 2019*, the Commonwealth parties set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current (Compilation No 6, 29 July 1977 – present)	sub-ss 51(i), (xx), (xxix)
	Commonwealth statutory provisions		
2.	*Acts Interpretation Act 1901*	As at 30 October 2018 (Compilation No 35, 26 October 2018 – 19 December 2018)	ss 15A, 15AA
3.	*Competition and Consumer Act 2010*	As at 30 October 2018 (Compilation No 115, 26 October 2018 – 12 March 2019)	ss 2, 4, 5, 6, 131, 139(1) Sch 2: ss 2, 15(a), 23, 24, 25, 31, 39, 43, 44, 50, 232, 237(1), 238(1), 239(1), 250
4.	*Corporations Act 2001*	Current (Compilation No	

		121, 1 March 2023 – present)	
5.	*Federal Court of Australia Act 1976*	As at 30 October 2018 (Compilation No 54, 25 August 2018 –31 August 2021)	Pt IVA: ss 33E, 33J, 33X, 33Y
6.	*Federal Court Rules 2011*	Current (Compilation No 8, 13 January 2023 – present)	r 10.43A(2)
7.	*High Court Rules 2004*	Current (Compilation No 26, 1 January 2023 – present)	r 42.08
8.	*Judiciary Act 1903*	Current (Compilation No 49, 18 February 2022 – present)	s 78A
9.	*Trade Practices Act 1974*	No 51 of 1974 (Version 15 April 2010 – 30 June 2010)	ss 4(2), 5(1), 130 Sch 2: Pt 2
10.	*Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010*	As made (No 44 of 2010)	
11.	*Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010*	As made (No 103 of 2010)	Sch 1 Sch 2: s 1
12.	*Treasury Laws Amendment (More Competition, Better Prices) Act 2022*	As made (No 54 of 2022)	Sch 2: s 1
13.	*Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*	As made (No 147 of 2015)	
State statutory provisions			
14.	*Fair Trading Act 1987* (NSW)	As at 30 October 2018 (Version 11, October 2018 – 30 October 2018)	Part 3
15.	*Fair Trading Act 1989* (Qld)	As at 30 October 2018 (Version 4 March 2016 – 31 August 2019)	Part 3
16.	*Australian Consumer Law and Fair Trading Act 2012* (Vic)	As at 30 October 2018 (Version No	Chapter 2

		023, 31 December 2017 – 6 December 2018)	
International instruments			
17.	*Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6	Current (Consolidated version 24 July 2008 – present)	Art 6