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

RESPONDENTS' SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. Paragraph 2 of the appellant's submissions (**AS**) sufficiently identifies the issues raised by the appellant's three grounds of appeal. The respondents' notice of contention (**NOC**) further raises: (a) whether applying the *lex causae* to the substantive rights and obligations of the parties is a fundamental principle to which the principle of legality applies; and (b) whether the class action waiver clause also warranted the stay.

Part III: Section 78B notices and intervention

3. The appellant has already given notice under s 78B of the *Judiciary Act 1903* (Cth). The respondents do not object to the Attorney-General and ACCC being given leave to intervene as sought in their joint submissions (**JS**).

Part IV: Facts

4. The appellant does not challenge the finding that the US Terms and Conditions (**Terms**) were incorporated into a contract with Mr Ho: FC [99], [101], [232] (CAB 159, 205); AS [10]. The contract was formed and the Terms incorporated through one of three ways: by knowledge of Mr Ho's agent imputed to him, by Mr Ho being given reasonable notice of the Terms, including the class action waiver clause being reasonably brought to his notice, and not cancelling within a reasonable time, or by Mr Ho logging into "*Cruise Personalizer*" in July 2019 and expressly accepting the Terms: FC [1], [157]-[164], [209]-[238] (CAB 130, 175-178, 198-209).

5. However, the appellant apparently now seeks to challenge the Full Court's factual finding: FC [6], [271]; (CAB 131, 219) that the class action waiver clause was "*transparent*". In that respect, the summary of the facts at AS [10]–[14] is incomplete and inaccurate.

6. Mr Ho gave no evidence at the hearing: FC [111] (CAB 162-163). He is a resident of Calgary, Canada: PJ [42] (CAB 27). On 25 September 2018, he contacted CruiseShipCenters, based in Canada, and booked tickets on the voyage, some 98.5% of which was to take place beyond Australia's territorial waters: FC [111(a)] and [368]

(CAB 163, 253). It is not known whether Mr Ho met Rosanna face-to-face or what she told him: PJ [44] (CAB 27).

7. On 30 October 2018, Mr Ho received two emails from Rosanna with an invoice and Booking Confirmation: FC [112]–[115] (CAB 163-164). Other than to check the bookings were correct, Mr Ho chose not to read the details on either email: FC [115] (CAB 164). The Booking Confirmation contained an "**IMPORTANT NOTICE**" with a link to a webpage containing the terms of the Passage Contract: FC [210]–[213] (CAB 198-199). Although the webpage listed three different possible contracts, it clearly told already booked passengers to "*Sign in to Cruise Personalizer to access the Passage Contract that applies to your booking*": FC [212] (CAB 198-199).

8. If Mr Ho had done so, he would have been presented with the Passage Contract which, after the heading "*Princess Cruise Lines, Ltd Passage Contract*", contained bolded words directing the user to carefully read the Terms and specifically referring to certain limits on the passenger's right to sue in cl 15: FC [120], [214] (CAB 165-166, 199-200). The exclusive jurisdiction and class action waiver provisions were found in cl 15: see FC [125]–[126] (CAB 166-167); ABFM 21–22. Although Mr Ho did not click on the link in the Booking Confirmation, he was presented with these same Terms with the same bolded text, and clicked that he agreed to them, when he logged into Cruise Personalizer on 22 July 2019: PJ [54]–[57] (CAB 30); FC [119] (CAB 165). Again, Mr Ho chose not to read the contractual terms before doing so: PJ [57] (CAB 30). He could have cancelled at that time without fee or penalty: FC [234] (CAB 206).

Parts V and VI: Summary of argument

NOC Ground 1: Application of forum statutes

9. An unstated assumption underlying Ground 1 of the appeal is that s 23 of the ACL necessarily applies to regulate the substantive rights and obligations of the parties if, on the terms of the statute, it is capable of extending to the matter in issue. A similar assumption has previously been adopted by some intermediate appellate courts,[1] but

[1] See, e.g., *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692 at [141] and [157] (Leeming JA); ***Huntingdale Village*** *Pty Ltd v Corrs Chambers Westgarth* (2018) 128 ACSR 168 at [162]-[173] (Mitchell and Beech JJA), but cf at [123]-[134] (Martin CJ); *Valve Corp v ACCC* (2017) 258 FCR 190 at [110]-[116]; *Chubb Insurance Co of Australia Ltd v Moore* (2013) 302 ALR 101 at [197]-[205] (Emmett JA and Ball J).

without recognition of this Court's repeated emphasis on the importance of applying choice of law rules *before* determining the application of a forum statute.

10. Consistent with authority from this Court, in considering whether statutory provisions of the forum (such as s 23 of the ACL) are applicable to the substantive rights and obligations in dispute (such as the validity of a contractual term), a court must firstly apply its choice of law rules to ascertain what law governs the issue (the *lex causae*). If the statute modifies the applicable choice of law rules or governs matters of procedure, it applies because those matters are subject to the law of the forum. But if the forum's choice of law rules select a foreign law, a statute of the forum will only apply to substantive matters if the statute "*demands application … irrespective of the identity of the lex causae*".[2] For the reasons explained below, a court should only find that a statute "*demands application*" if it is manifest that the legislature considered overriding the otherwise applicable *lex causae* and determined to do so.

11. **The importance of choice of law:** In *Air Link Pty Ltd v Paterson* (2005) 223 CLR 283, the plurality (at [9]-[10] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ) observed that every case ultimately involves a choice of law and warned against adopting an "*unconscious assumption*" that the laws of the forum are necessarily to be applied, even as a "*starting point for legal analysis*". Instead, as the majority in *John* ***Pfeiffer*** *Pty Ltd v Rogerson* (2000) 203 CLR 503 had earlier stated, in cases involving a foreign element, it has "*long been accepted that the courts should identify and apply the law which governs the issue or issues that fall for decision*".[3] For courts exercising federal jurisdiction, ss 79 and 80 of the *Judiciary Act 1903* (Cth) require the application of the choice of law rules of the State or Territory in which the court sits,[4] including as modified by any applicable statute of the forum.[5]

12. The importance of first applying choice of law rules before determining the application of a statute is exemplified by the approach taken in ***Sweedman*** *v Transport Accident Commission* (2006) 226 CLR 362. There, statutes from both New South Wales and

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2 ***Akai*** *Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 436 (Toohey, Gaudron and Gummow JJ).

3 At [20] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. See also *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1 at [57] (Gaudron, Gummow and Hayne JJ); *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575 at [9] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Regie Nationale des Usines Renault SA v* ***Zhang*** (2002) 210 CLR 491 at [67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Breavington v Godleman* (1988) 169 CLR 41 at 118 (Brennan J).

4 *Pfeiffer* (2000) 203 CLR 503 at [55]-[58] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

5 See e.g., *Carriage of Goods by Sea Act 1991* (Cth), s 11; *Insurance Contracts Act 1984* (Cth), s 8(2).

Victoria were capable of applying on their terms. In deciding which statute applied, Gleeson CJ, Gummow, Kirby and Hayne JJ referred (at [19]) to the "*important function*" that the choice of law rules play, in that "*in the absence of an effective statutory overriding requirement*", those rules select "*the law to be applied to determine the consequences of acts or omissions which occurred in a State (or Territory) other than that where action is brought*". The majority resolved that the Victorian statute applied, not because it was a statute of the court of the forum that, on it is terms, extended to the matter in issue, but because the choice of law rules selected the law of Victoria to govern the substantive rights in issue: at [25]-[33].

10 13. This approach is consistent with the distinction that exists between the question of a statute's extraterritorial operation and whether, under the choice of law rules, it applies. This distinction was recognised by Scalia J (O'Connor, Kennedy and Thomas JJ agreeing) in *Hartford Fire Insurance Co v California*, 509 US 764 at 814-17 (1993), where his Honour observed (at 814-15) that even if a statute was construed as applying extraterritorially, choice of law principles were still assumed to be incorporated into those laws "*in the absence of a contrary congressional direction*": see at 817. While Scalia J was in dissent in that case, these observations were later endorsed by the Supreme Court in *F Hoffman-La Roche Ltd v Empagran SA*, 542 US 155 at 164 (2004).[6] A similar distinction between the questions of whether a statute operates
20 extraterritoriality and whether or not it is to be applied in accordance with the choice of law rules is evident from a number of authorities in this Court, where the answer to the former did not control the answer to the latter.[7]

14. In the context of the modern proliferation of statutes, the "*unconscious assumption*" that one starts with a forum's statute, and determines whether it applies to an issue on its terms without regard to choice of law rules, is an approach that is apt to lead to the more frequent application of the law of the forum, contrary to the principles underpinning choice of law rules. That a forum statute is not ordinarily construed as applying inconsistently with principles of private international law is not just an

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[6] See also F A Mann, "Statutes and the Conflict of Laws" (1972-73) 46 *British Yearbook of International Law* 117 at 122-23; Mary Keyes, "Statutes, Choice of Law and the Role of the Forum Choice" (2008) 4(1) *Journal of Private International Law* 1 at 10-15.

[7] See *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [93]-[95] (Gummow J), see also at [29] (Gleeson CJ, McHugh and JJ agreeing with Gummow J on this point); *Pfeiffer* (2000) 203 CLR 503 at [26]-[27]; *Breavington v Godleman* (1988) 169 CLR 41 at 98-99 (Wilson and Gaudron JJ); *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245 at 260-61 (Walsh J); *Koop v Bebb* (1951) 84 CLR 629 at 641 and 644 (Dixon, Williams, Fullagar and Kitto JJ).

interpretative aid,[8] it embodies a fundamental principle that substantive rights and obligations should be governed by the law selected through choice of law rules.

15. That fundamental principle was recognised by Gummow and Hayne JJ in ***Neilson*** *v Overseas Projects Corporation (Vic) Ltd* (2005) 223 CLR 331, where their Honours (at [90], emphasis added) identified that "***basic considerations of justice*** *require that, as far as possible, the rights and obligations of the parties should be the same whether the dispute is litigated in the courts of that foreign jurisdiction or is determined in the Australian forum*". Their Honours warned (at [91]) against the application of choice of law rules that would permit one party to gain an advantage through the substantive law that governs simply through the selection of the court in which to bring their suit.

16. The application of the *lex causae* to issues concerning substantive rights and obligations upholds important public policies concerning the administration of justice. These have been variously described as avoiding uncertainty in litigation (which engenders doubt as to liability and impedes settlement),[9] providing predictability as to the laws which will govern relationships,[10] the "*undesirable*" and "*manifestly absurd*"[11] result of having the same facts leading to different legal consequences depending upon the forum,[12] and upholding the reasonable expectations of parties.[13]

17. Failing to apply the *lex causae* also serves to undermine the administration of justice. Statutes that override or modify choice of law or jurisdiction, and which must be applied by an Australian court, have already resulted in foreign courts issuing anti-suit injunctions to prevent the continuation of those proceedings in Australia.[14] The application of the *lex causae*, unless the statute clearly mandates otherwise, helps to avoid this "*unseemly and mutually destructive jockeying by the parties to secure*

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[8] Cf ***Wanganui****-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601 (Dixon J), see also at 604-06 (Evatt J) and 611-13 (McTiernan J); *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 422-23 (Dixon J), 444 and 447-48 (McTiernan J).

[9] *Zhang* (2002) 210 CLR 491 at [66]-[67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[10] *Pfeiffer* (2000) 203 CLR 503 at [79] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[11] *Breavington v Godleman* (1988) 169 CLR 41 at 88 (Wilson and Gaudron JJ).

[12] *Pfeiffer* (2000) 203 CLR 503 at [59]; *Neilson* (2005) 223 CLR 331 at [91], [98] (Gummow and Hayne JJ).

[13] See Davies et al, *Nygh's Conflict of Laws in Australia* (10th ed, 2020) at [12.20].

[14] See, e.g., *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 at 108 (granting an anti-suit injunction to prevent continuance of the proceedings the subject of *Akai* (1996) 188 CLR 418); *OT Africa Line Ltd v Magic Sportswear Corporation* [2005] 2 Lloyd's Rep 170 (upholding an anti-suit injunction to restrain parties from continuing proceedings in Canada when a Canadian statute overrode a choice of law and jurisdiction clause in favour of England); *BBC Chartering Carriers GmbH & Co KG v CSBP Ltd* (England and Wales High Court, Butcher 7, 9 June 2021, issuing an anti-suit injunction to restrain parties continuing Australian proceedings where s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) applied).

tactical litigation advantages".[15] Similarly, too readily applying forum law to override the *lex causae* or a chosen jurisdiction undermines the enforceability of an Australian court's judgment overseas,[16] implicating the same concerns for the administration of justice that justify measures to protect the court's processes from being frustrated.[17]

18. Because the long-standing principle in favour of applying the *lex causae* advances the administration of justice and a number of other important public policies, it is of such importance as to amount to a fundamental principle of the common law to which the principle of legality then applies.[18] In *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [18], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ endorsed
10 Deane J's earlier statement that "*any fundamental alteration to the common law principles governing the administration of justice*" fell within the ambit of the principle of legality. The principle that the rights and obligations of the parties should be resolved in accordance with the *lex causae* also shares important similarities with the principle of equality – a well-recognised fundamental principle –[19] as it ensures that the same dispute will give rise to the same legal consequences wherever brought. The fundamental nature of this concern was recognised in *Pfeiffer* (2000) 203 CLR 503 at [59]-[60] and [103], where the majority adopted a choice of law rule specifically to ensure that the same result was reached regardless of the forum of the court.

19. **Section 23 of the ACL does not manifest the requisite clear intention:** The question
20 of whether the unfair contract terms provisions of the ACL apply to the contract between Mr Ho and the respondents does not, accordingly, turn on whether s 23 is to be read with s 5 of the CCA and whether that provides the only territorial nexus: cf AS [19]-[23]; JS [14]-[27]. Even if, contrary to what is set out below, s 5 of the CCA applies to s 23 of the ACL, under New South Wales choice of law rules the law which applies to determining the validity of the terms of the contract is the general maritime

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15 *Scherk v Alberto-Culver Co*, 417 US 506 at 516-17 (1974), cited with approval in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 343 (Brennan and Dawson JJ).

16 E.g., were Mr Ho to seek to enforce any judgment from the Federal Court in this case in California, the Californian courts would be required to refuse recognition under § 1716(c)(1)(D) of the *Californian Code of Civil Procedure*, as the Australian proceeding was contrary to the parties' agreement as to forum.

17 Cf *Deputy Commissioner of Taxation v Huang* (2021) 273 CLR 429 at [17]-[18] (Gageler, Keane, Gordon and Gleeson JJ) and [43]-[44] (Edelman J).

18 See *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Connor J); *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [128] (Hayne, Crennan and Kiefel JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

19 *Green v The Queen* (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ).

law of the United States: PJ [26] and [156] (CAB 22, 57); FC [245] and [368] (CAB 209-210, 253).[20] The question is whether it is manifest from s 23 of the ACL that Parliament has clearly directed that it should apply to void a contractual term regardless of the *lex causae*.[21]

20. That is not to say that the extraterritorial reach of a statute is irrelevant to the question of its application. Where a statute creates a new cause of action, an express provision regarding the territorial application of the statute may inform the choice of law rule to be applied by the court.[22] In cases where a statute seeks to regulate the acts or practices of persons and then expressly provides that it extends to such acts or practices outside the jurisdiction, that would more readily be construed as the expression of a clear intention to apply regardless of the *lex causae*.[23] That is contrasted with statutory provisions such as s 23 of the ACL, which seek to modify existing rights or obligations as an end in itself,[24] or provisions that regulate civil claims to which rules of private international law would ordinarily apply.[25] In these cases, the mere fact that a statute is construed as extending beyond the borders is insufficient to manifest a clear intention that it should also apply if a foreign *lex causae* otherwise governs.

21. The requirement of finding such a clear intention before a forum statute applies, consistent with the principle of legality, is not contrary to the majority judgment in *Akai* (1996) 188 CLR 418 at 443. Their Honours were dealing with a statute that sought to modify the choice of law rules and therefore demanded application if, on its terms as construed, it applied to the contract in issue: see at 436. Their Honours also recognised that different considerations may arise for statutes not modifying choice of law rules, as is clear from their uncritical citation (at 436 n 42 and 442, n 61) to jurists

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20 *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1 at [128] (Beach J, Dowsett J agreeing); *Pfeiffer* (2000) 203 CLR 503 at [20]; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 224 (Brennan J) and 259 (Gaudron J).

21 See *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459 at [40] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [158] (Kiefel J).

22 See Mortensen et al, *Private International Law in Australia* (4th ed, 2019) at [12.20].

23 See, e.g., ***Kay's Leasing*** *Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 134 (Barwick CJ, McTiernan and Taylor JJ); ***Old UGC*** *Inc v Industrial Relations Commission of New South Wales in Court Session* (2006) 225 CLR 274 at [22]-[23] (Gummow, Hayne, Callinan and Crennan JJ).

24 See *Wanganui* (1934) 50 CLR 581 at 601; *Akai* (1996) 188 CLR 418 at 443 (Toohey, Gaudron and Gummow JJ).

25 *Koop v Bebb* (1951) 84 CLR 629 at 641-42 (Dixon, Williams, Fullagar and Kitto JJ).

explaining that forum statutes do not apply to substantive issues governed by a foreign *lex causae*,[26] and endorsement (at 443) of the statutory presumption to the same effect.

22. Similarly, the approach of the plurality in *BHP Group Ltd v* ***Impiombato*** (2022) 96 ALJR 956 at [59]-[62] (Gordon, Edelman and Steward JJ) to construing the extraterritorial effect of a statute did not concern the separate question of statute's application in the face of a foreign *lex causae*, and the same applies to ***Insight Vacations*** *Pty Ltd v Young* (2011) 243 CLR 149. In the latter case, there was no question of a foreign *lex causae*, but rather the question was whether a New South Wales Act was picked up by s 74(2A) of the *Trade Practices Act* and applied to a contract for services the proper law of which was New South Wales: at [27]-[36].

23. Notably, applying the principle of legality in this field aligns with the approach of a number of jurisdictions around the world. Under *Regulation (EC) No 593/2008 (Rome I)*, for example, questions of the validity of a contract are determined by the law that governs the contract (art 10(1)), subject to a forum court being at liberty to apply "*overriding mandatory provisions of the law of the forum*", being laws that are "*regarded as crucial by a country for safeguarding its public interests*": art 9. A similar approach is adopted to the application of statutes on other issues in various civil law jurisdictions,[27] and the *Draft Restatement (Third) of Conflict of Laws* §5.01, comment *b*, draws a distinction between whether a law applies on its terms and which law *should* then apply on a conflict of laws analysis.[28] These are all similar to the approach that considers if a statute applies because it is a "*mandatory law of the forum*": cf FC [324]-[346] (CAB 237-244).[29]

Appeal Ground 1 and NOC Grounds 1 and 2: the application of s 23 of the ACL

24. Whether the question is approached through the application of the principle of legality or ascertaining the territorial nexus on a proper construction of the statute, the result is the same. Section 23 of the ACL does not apply to Mr Ho's contract.

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[26] See F A Mann, "Statutes and the Conflict of Laws" (1972-73) 46 *British Yearbook of International Law* 117 at 123-24 and 135; Nygh, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort" (1995) 251 *Recueil des Cours* 268 at 386; Brilmayer, "The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules", (1995) 252 *Recueil des Cours* 1 at 101-03.

[27] See Christopher Bisping, "Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974" (2012) 8(1) *Journal of Private International Law* 35 at 40-41.

[28] See also *Restatement (Fourth) of Foreign Relations Law*, §§ 404-05.

[29] See also *Huntingdale Village* (2018) 128 ACSR 168 at [123]-[134] (Martin CJ).

25. Contrary to AS [20] and JS [16], s 5(1)(g) of the CCA does not supply the answer to the territorial scope of s 23 nor does it evince a clear intention for s 23 to override the application of the *lex causae*. The question of s 23's territorial scope requires engaging in a process of statutory construction having regard to the text, context and purpose of the legislation to identify the "*hinge*" or "*central focus*" of s 23 and to determine the necessary territorial nexus with Australia.[30] And even if s 23 is construed as operating extraterritorially, that does not of itself indicate an intention to override the application of the *lex causae* to deem void contractual terms that are valid under their proper law.

26. Sometimes the scope of a provision of Commonwealth law might also be informed by the limits of Commonwealth legislative power under the Constitution.[31] In the context of the ACL, where its provisions are primarily to be applied as a law of the Commonwealth to conduct of, or contraventions by, corporations (CCA, s 131(1)), questions may also arise as to whether its scope is limited by the parameters of the corporations power, including whether that power includes regulating all activities of foreign corporations or only those bearing a connection to the Commonwealth.[32] These questions do not need to be resolved here, because the scope of s 23's application does not extend beyond any such limits.

Section 5(1)(g) of the CCA does not apply to s 23 of the ACL

27. Contrary to AS [19], Derrington J correctly observed at FC [281] (CAB 221-222) that s 23 of the ACL is neither enlivened by nor conditioned upon the "*engaging in*" any conduct to which s 5(1) of the CCA is directed. Section 23(1) instead operates directly to void unfair terms in standard form consumer and small business contracts. Unlike dozens of other provisions in the Act – see at FC [282] (CAB 222) and also ss 45AF, 45, 45E and 45EA of the CCA – s 23 neither uses the word "*conduct*" nor proscribes any conduct.

28. It is not to the point that a contractual term on which s 23(1) may operate is the product of making a contract, the latter being a type of "*engaging in conduct*" under s 4(2)(a)

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30 See, eg, *Old UGC* (2006) 225 CLR 274, [23] (Gummow, Hayne, Callinan and Crennan JJ; Gleeson CJ agreeing); *Insight Vacations* (2011) 243 CLR 149, [29]–[36] (the Court); *Impiombato* (2022) 96 ALJR 956, [38]–[39] (Kiefel CJ and Gageler J), [59]–[60] (Gordon, Edelman and Steward JJ).

31 See *Acts Interpretation Act 1901* (Cth), s 15A.

32 Cf *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 182-3 (Gibbs CJ); *New South Wales v Commonwealth* (2006) 229 CLR 1 at [170]-[172] and [177] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

of the CCA: cf FC [22] (CAB 135-136); AS [19]; JS [16]-[17]. Section 23 of the ACL does not seek to prohibit the making of a contract with terms that might be deemed void under the provision. That is clear from the fact that different remedies apply – unconditioned on any contravening "conduct" – to give effect to s 23: see ACL, ss 237(1)(a)(ii) and 250.

29. Those remedial provisions also explain how it is that s 23 of the ACL can be applied as a law of the Commonwealth to corporations under s 131(1) of the CCA without s 23 itself concerning the "*engaging in*" of conduct to which s 5(1) of the CCA is directed. Sections 237(1)(a)(ii) and 250 of the ACL are capable of operating on the "*conduct*" of corporations and applied as a law of the Commonwealth under s 131(1) of the CCA, including by preventing a corporation from giving of effect to provisions of a contract (see s 4(2)(b) of the CCA), but that does not transform s 23 of the ACL into a conduct provision of the kind to which s 5(1) of the CCA applies.

30. One should also not strive to force s 5(1) to govern the scope of s 23 on the basis of some principle of beneficial construction. An oddity with the appellant and Commonwealth's approach is that an Australian-law governed contract between an Australian small business and a foreign corporation that does *not* carry on business in Australia would fall outside the scope of s 23. That is not a beneficial result: cf JS [18].

31. Nor is there significance in the amendments made by the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth): cf AS [19]; JS [20]. As the relevant Explanatory Memorandum states,[33] the insertion of the unfair contract terms provisions into the ACL was always intended as only a first step, with the remainder of the consumer protection provisions to be transferred into the ACL shortly thereafter (as in fact occurred). The amendment to s 5 of the CCA to refer to the ACL was in anticipation of that transfer. In any event, the purpose or effect of s 5 was not altered.

32. In short, s 5(1) is ill-adapted to apply to s 23. That points strongly against a construction treating s 5(1) as supplying the statement of the territorial nexus required for s 23 to apply: see FC [288] (CAB 224), let alone supporting any clear intention for s 23 to override the applicable *lex causae*.

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[33] Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth), [1.13]–[1.16].

The "hinge" or "central focus" of s 23

33. Even if s 5(1) of the CCA applied to s 23, it does not provide the sole territorial nexus nor the requisite intention to override the *lex causae*. Section 5(1) is an *extension* provision. As with the *Australian Industries Preservation Act 1906* (Cth), considered by this Court in *Meyer Heine Pty Ltd v The China Navigation Co Ltd*,[34] s 5 proceeds on the assumption that, but for the section, where conduct is made a contravention of the CCA or the ACL it is only conduct in Australia that is covered.[35] Section 5(1) has the effect of extending the operation of the provisions listed to apply also to conduct engaged in outside Australia by the three classes of person specified in subsections (g)–(i). But, apart from that extension, s 5(1) does not alter the operation of the substantive provision. Whether the substantive provision expressly or impliedly requires a further territorial nexus with Australia, and demands its application regardless of the *lex causae*, must be considered by construing the substantive provision: see FC [23] (CAB 136).

34. Thus, and contrary to AS [20], s 5(1) does not supply the "*hinge*" on which s 23 of the ACL operates. It simply avoids any argument about whether conduct occurring outside Australia may fall beyond the reach of the ACL for that reason only. The "*hinge*" or "*central focus*" must instead be found within s 23 itself.[36] The central focus of s 23 is standard form consumer or small business contracts.

35. There is nothing in the subject matter of this "*hinge*" that identifies a limitation; the words of s 23 are general and the existence of such a contract is a matter of universal application. In these circumstances, one instead resorts to statutory presumptions to confine the unrestrained territorial scope of the Act,[37] including that the provision does not intend to operate in a manner contrary to the rules of private international law: FC [347] (CAB 224).[38] That necessarily follows if the question is properly addressed in accordance with the principle of legality as submitted above. On either approach, s 23 is limited to any contract the proper law of which is Australia, irrespective of whether the counterparty conducts business in Australia, or is an Australian resident

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[34] (1966) 115 CLR 10, 24 (Kitto J; McTiernan and Windeyer JJ agreeing).
[35] *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 at [50] (Merkel J). See FC [283] (CAB 222).
[36] See *Old UGC* (2006) 225 CLR 274 at [26], read with *Fish v Solution 6 Holdings Ltd (*2006) 225 CLR 180 at [40]-[41]; *Impiombato* (2022) 96 ALJR 956 at [62].
[37] *Impiombato* (2022) 96 ALJR 956, [62] (Gordon, Edelman and Steward JJ).
[38] *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 (Dixon J); *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274, [23] (Gummow, Hayne, Callinan and Crennan JJ; Gleeson CJ agreeing).

or citizen: cf AS [24]. That approach is consistent with principles of comity and also has systemic advantages such as predictability and decisional uniformity across jurisdictions.[39]

36. This conclusion is further supported by the absurd breadth of s 23 of the ACL under the appellant's and Commonwealth's construction: see FC [300] (CAB 228). On their construction, if a company happens to carry on business in Australia, all of its contracts with consumers (as defined) all over the world are then subject to Part 2-3 of the ACL. It would mean, for example, that contractual terms between a foreign corporation and consumers in Romania under standard form contracts can be deemed void under s 23.

37. There is no rational reason why Parliament would seek to interfere with the affairs of foreign corporations and foreign consumers merely because the corporation also carried on business in Australia. That would be inconsistent with that part of comity that seeks to afford respect to other sovereigns and their ability to regulate affairs within their own territory or of concern to them.[40] While, as a matter of Australian policy, one might conclude that there is a greater interest in protecting consumers by invalidating perceived unfair contract terms, it does not follow that all other countries would consider that to be an appropriate balance of interests, especially if a country was seeking to promote an environment conducive to growing business or upholding contractual bargains. It is very unlikely that Parliament sought to impose its own views on the appropriate balance to relationships that are concerned with other jurisdictions.

38. It is no answer to this concern to say that the courts themselves might protect against such absurdity by staying proceedings on grounds of *forum non conveniens*: cf JS [35]. The question is whether Parliament intended to regulate in a manner that so offends principles of comity; it is unlikely that they did so subject to leaving to the courts the discretion to stay proceedings, not least of all because the concerns of comity are generally for Parliament and the Executive, not for the courts.[41] And the comfort that the Interveners seek to draw from the fact that foreign courts would not apply s 23 of the ACL (JS [36]-[37]) proves the problem. That would suggest there would be a

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[39] See generally, *Zhang* (2002) 210 CLR 491, [66] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Neilson* (2005) 223 CLR 331, [89]–[91] (Gummow and Hayne JJ), [172] (Kirby J), [271] (Heydon J).

[40] See Edelman and Salinger, "Comity in Private International Law and Fundamental Principles of Justice", *in* Dickinson et al (eds), *A Conflict of Laws Companion* (2021) 325 at 327-28.

[41] *Neilson* (2005) 223 CLR 331 at [90] (Gummow and Hayne JJ).

strong juridical advantage to the claimant that would justify a refusal of a stay.[42] It also creates the very "*odd or unusual*"[43] and "*manifestly absurd*"[44] situation of the same facts leading to different outcomes based on the forum in which proceedings are brought; an outcome Parliament was unlikely to have intended.

39. Construing s 5(1) of the CCA as applying the territorial nexus for s 23 of the ACL, and with the intention to override any otherwise applicable *lex causae*, also creates incongruity with other provisions of the ACL. *None* of ss 18, 20, 21, 29, 30, 32, 33, 34, 35, 36 and 37 of the ACL apply merely because a corporation happens to conduct some business in Australia. All of those provisions require an additional territorial nexus, namely that the conduct proscribed be "*in trade or commerce*". That is defined in s 2 of the ACL to mean trade or commerce "*within Australia*" or "*between Australia and places outside Australia*": FC [306] (CAB 231).

40. On the appellant's and Commonwealth's construction, s 23 would still apply in circumstances where the foreign corporation was otherwise free to engage in, among other things, misleading or deceptive conduct (s 18), unconscionable conduct (ss 20-21) and bait advertising (s 35). There is no rational basis to suppose Parliament could have intended such an outcome. This is not overcome by the Commonwealth's suggestion of reading s 23 as somehow subject to a territorial limitation of contracts made "*in trade or commerce*": JS [32]. As Derrington J correctly observed: FC: [310]-[311] (CAB 233), there is no textual support for that construction.

41. That leaves the appellant and the Commonwealth to argue that s 23 of the ACL could too readily be evaded if it did not apply to contracts with a foreign proper law: AS [24]; JS [30]. A similar concern was expressed in a different context by Kitto J in ***Kay's Leasing*** *Corp Pty Ltd v Fletcher*,[45] and repeated by Allsop CJ in this case: FC [29]-[32] (CAB 138-139). *Kay's Leasing*, however, needs to be understood in its context. It concerned the application of a statute that sought to regulate the practices of parties in entering into contracts, the failure to follow those practices being an offence, and voided contractual provisions as a consequence of the offence. Justice Kitto accepted (at 143) that a law which seeks to regulate contractual rights and obligations as an end

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42 See *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 248 (Deane J), 266 (Gaudron J); *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564, 566 (Mason CJ, Deane, Dawson and Gaudron JJ).

43 *Pfeiffer* (2000) 203 CLR 503 at [59];

44 *Breavington v Godleman* (1988) 169 CLR 41 at 88.

45 (1964) 116 CLR 124, 142–144 (Kitto J).

in itself (such as s 23 of the ACL) would ordinarily not apply where the rules of private international law led to the application of another law, but when legislation sought to regulate conduct (in the ordinary sense of that term), Kitto J considered that this presumption could produce a result that the legislature would not likely have intended, because parties could avoid the legislative prescription by simply agreeing for their contract to be governed by foreign law.

42. These concerns do not arise here, not least of all because, as Derrington J observed: FC [321] (CAB 236), Parliament was aware of this issue and was capable of expressly addressing it if it were a concern. That is clear from the only other part of the ACL (Part 3-2) that includes provisions, like s 23, that are not subject to any other express territorial nexus such as the concept of "*trade or commerce*". In Division 1 of Part 3-2 of the ACL, s 64 deems certain terms of contracts to be void if they seek to exclude, restrict or modify the provisions in the Division, and s 67(a) then expressly provides that the Division applies to contracts that contain a term providing for a foreign proper law if, but for that term, the proper law would have been the law of any part of Australia (i.e., contracts which have their closest and most real connection with Australia). Parliament was aware of the issue of parties evading protections in the ACL by selecting a foreign law, and expressly addressed the problem for some provisions of the ACL.[46] The omission of an equivalent provision in Part 2-3 does not support an intention for that Part to extend to foreign-law governed contracts; it demonstrates that Parliament did not see the need to extend that Part contrary to ordinary choice of law rules.

43. One reason why an equivalent of s 67 is not contained in Part 2-3 is that the principles of private international law already accommodate the concern of parties using choice of law clauses to evade the operation of otherwise applicable laws. If a contract that otherwise had its closest and most real connection with a place in Australia contained an express choice of law clause providing for a foreign law, that clause itself could be void under s 23 of the ACL. When the validity of the express choice of law clause is in issue, the application of s 23 to that clause could not logically turn on the existence of the term. Rather, resort would need to be had to other choice of law rules, be it an exercise in finding the putative proper law of the contract while ignoring the express

[46] The construction of s 67 of the ACL given by the Full Court in *Valve Corp v ACCC* (2017) 258 FCR 190 at [108]-[114] is, with respect, inconsistent with its text and the construction indicated by Derrington J at FC [340]-[341] (CAB 232) is to be preferred.

choice,[47] or first applying the law of the forum to the question of its validity.[48] If, on either of those approaches, s 23 of the ACL was found to apply and invalidated the express choice of law, the Court would then consider whether the contract, without that term, was governed by the law of a place in Australia. If it was, s 23 of the ACL would apply. This result is achieved through the application of existing choice of law rules, which refutes any intention for Part 2-3 to apply regardless of those rules.

44. Contrary to AS [20], the wholesale exclusion of certain maritime contracts by ss 28(1) and (2) of the ACL also does not assist in determining the territorial scope of s 23. The regime established by the *Carriage of Goods of Sea Act 1991* (Cth) (**COGSA**) has its own complex rules of application in relation to both carriage within and outside Australia.[49] Whatever view is taken concerning the territorial scope of s 23, unless specific provision was made in relation to such contracts there would be potential for overlap between the ACL and the regime under COGSA. Parliament's decision to exclude the ACL from that regime does not inform the territorial operation of s 23.

45. If anything, s 28(4) tends to suggest that Parliament assumed that a "*small business contract*" in s 23 was one that was capable of being governed by the laws of the Commonwealth, State or Territory. That is reinforced by s 26(1)(c), which excludes from the operation of s 23 a term "*required, or expressly permitted, by a law of the Commonwealth, a State or a Territory*"

46. Accordingly, whether one approaches the question as to whether it is manifest that, through s 23 of the ACL, Parliament intended for that provision to apply contrary to the fundamental principle that the validity of contractual terms should be resolved in accordance with the contract's proper law, or as a matter of construing the territorial scope of s 23 itself, the answer is the same. Section 23 only applies to contracts whose proper law is that of a place in Australia, be that determined in accordance with an express or inferred choice in the contract itself or, where the choice is said to be unfair (including as amounting to an evasion of s 23), the place with which the contract has

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[47] Cf *Huntingdale Village Pty Ltd v Corrs Chambers Westgarth* (2018) 128 ACSR 168 at [182] (Mitchell and Beech JJA); *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378 at 385; *Compania Naviera Micro SA v Shipley International Inc (The Parouth)* [1982] 2 Lloyd's Rep 351 at 353 (Ackner LJ).

[48] Cf *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 255 (Brennan J) and 261 (Gaudron J); *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (2015) 331 ALR 108 at [106] (Edelman J); *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1 at [133]-[153] (Beach J, Dowsett J agreeing).

[49] For a convenient summary, see M Davies and A Dickey, *Shipping Law* (4th ed, 2016) pp 215–216.

its closest and most real connection. In either case, it is not in dispute that Mr Ho's contract was governed by a law other than that applicable in Australia, and therefore falls beyond the reach of s 23: PJ [156]–[158] (CAB 57-58); FC [368]–[369] (CAB 253).

Ground 2(a): Class action waiver clause not unfair (cf AS [27]–[37])

47. For a term of a consumer contract to be "unfair" within the meaning of s 24(1) of the ACL, it must satisfy *each* of paragraphs (a)-(c). For the reasons below, Allsop CJ and Derrington J were correct to conclude that *none* of those paragraphs were satisfied. Their Honours were also correct to conclude that the term was transparent.

10 48. The appellant's overall submission on this topic at AS [29] fails to deal with two basic matters. *First*, whether a term of a particular contract is unfair must be judged with reference to the circumstances of the particular parties, not in the abstract.[50] *Secondly*, in assessing the fairness of a particular term, the Court must take into account the contract as a whole: s 24(2)(b).[51] Thus, the appellant is obviously wrong to argue that matters such as the place of residence of one of the parties, the parties' choice of law and the parties' choice of jurisdiction are irrelevant to whether a class action waiver clause in a particular contract is unfair: cf AS [29], [31]–[32].

49. Take a simple example where an exclusive jurisdiction clause is alleged to be unfair. It is merely to state the obvious that the matters in s 24(1) may be determined very
20 differently depending on the residence of the parties. An exclusive jurisdiction clause selecting the courts of France between a French corporation and French resident is one thing; the same clause in a contract between an Australian corporation and Australian resident is altogether different. This is not to apply variable or different "*standards of fairness*" (cf AS [31]–[32]), it merely recognises that s 24 depends on the facts of the particular case, and the parties' other contractual rights and obligations.

50. It is important to also recognise that, if one is engaged in the process of applying ss 23 and 24 of the ACL to the contract in issue here, it necessarily follows that it has been found those provisions apply to contracts between foreign persons and foreign corporations that have limited, if any, connection with Australia. In those

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[50] See *Director General of Fair Trading v First National Bank Plc* [2002] 1 AC 481; *Jetstar Airways Pty Ltd v Free* (2008) 30 VAR 295 at [125]-[126] (Cavanough J).

[51] *ACCC v Chrisco Hampers Australia Ltd* (2015) 239 FCR 33 at [70] (Edelman J).

circumstances, it could hardly have been intended that the legislature also sought to inject purely Australian notions of fairness into assessing those contractual provisions. A contract being between foreigners and primarily concerned with matters outside Australia is a highly relevant context in which to assess whether a term is "unfair".

51. In the present case, it was not challenged before the Full Court that the US choice of law and exclusive jurisdiction clauses in Mr Ho's contract were valid and not unfair: FC [4] (CAB 130). In those circumstances, the appellant's criticism of Allsop CJ at AS [29]-[32] is misconceived. Far from being an error, s 24(2)(b) required the Full Court to consider the fairness of the class action waiver clause from the perspective of a contract that contained a not unfair, valid and enforceable foreign exclusive jurisdiction and choice of law clauses selecting the US: FC [5], [253] (CAB 131, 212).

No significant imbalance (s 24(1)(a))

52. Once the correct approach to s 24 is adopted, there is no reason to think that the class action waiver clause caused any significant imbalance in the parties' rights. Importantly, s 24(1)(a) directs attention to whether the term causes a significant imbalance "*in the parties' rights and obligations arising under the contract*", not at large. When the contract provides, in terms that are not challenged, for the resolution of disputes in a forum other than an Australian court and pursuant to a law that upholds the validity of a class action waiver: see FC [6], [221], [371]–[373]) (CAB 131, 201-202, 253-254), there is no imbalance caused to those rights under the contract by the class action wavier clause. Further, the clause did not impede any right Mr Ho had to sue: FC [254] (CAB 213).

53. The appellant asserts at AS [30] that the effect of the clause was to "*prevent, or at least discourage*" Mr Ho from vindicating his legal rights because the cost to him to do so individually was "*not economically viable or at least questionable*". That bald assertion is unsupported by any evidence and is speculative: see FC [255] (CAB 213). Mr Ho's claim was for personal injury. Such claims are commonly brought in individual proceedings, where the applicant's damages will not be eroded by large funder's fees and the fees of large class action firms. Further, unless there is a settlement, a class action will almost never allow for speedy quantification and payment of the applicant's damages, especially where group member's damages are idiosyncratic. Even if there is a settlement, administration of the settlement scheme may take many years and further deplete the ultimate amounts paid to group members.

The fact that at the time of trial 11 individual proceedings had already been commenced in United States Court undermines the appellant's unsupported assertion that individual proceedings were not economically viable: FC [255] (CAB 213); cf AS [33].

Princess's legitimate interest (s 24(1)(b))

54. In relation to s 24(1)(b), Allsop CJ agreed with Derrington J's reasons: FC [1] (CAB 130); cf AS [35]. The appellant's submissions repeatedly mischaracterise those reasons. His Honour did not reverse the onus at FC [265]–[267] (CAB 217-218) (cf AS [34]), nor did his Honour assess unfairness at the time when the clause was sought to be applied: see FC [259], [264]–[265] (CAB 215, 216-217); cf AS [35].

55. Contrary to the appellant's submissions, the question posed by s 24(1)(b) is not whether the term will affect the interests of the consumer or small business. Rather, it is whether the term was reasonably necessary to protect a legitimate interest of the respondents. Derrington J correctly identified that the respondents had a number of legitimate interests in facing individual claims, rather than a class action: FC [261], [264], [267], [278] (CAB 215-216, 217, 218, 220). As the US Supreme Court has recognised, when claims are aggregated in a class action, faced with even a small chance of a devastating loss, defendants are often pressured into settling questionable claims.[52]

56. The existence of the respondents' legitimate interest is not undermined by the fact that the UK and Australian Terms and Conditions did not contain a class action waiver clause: cf AS [34]. Rather, it merely demonstrates that the respondents took a nuanced view in assessing how to protect its interests under the multiple potential legal systems involved in an international cruise: see FC [266] (CAB 217).

No detriment (s 24(1)(c))

57. In relation to s 24(1)(c), it was necessary for Mr Ho to prove that the term "*would cause detriment*" if it were to be applied or relied on. Read fairly (cf AS [36]), Derrington J accepted that there was a possibility that Mr Ho might suffer detriment, but found that Mr Ho had failed to adduce evidence to show that the term would cause detriment: see FC [259], [269]–[270] (CAB 215, 218-219). Likewise, Allsop CJ

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[52] *AT&T Mobility LLC v Concepcion* 563 US 333, 350 (Scalia J, for the Court) (2011).

concluded at FC [10] (CAB 132) that Mr Ho had failed to discharge his onus of proof in relation to s 24(1)(c).

58. In circumstances where (a) there was no evidence about the foreseeable comparative costs and benefits to Mr Ho (assessed at the time of contract) of pursuing his individual claim against participating in a class action and (b) Mr Ho was obliged by the exclusive jurisdiction clause to litigate in the United States in any event, their Honours were correct to so hold.

Transparency (s 24(3))

59. There is no basis to impugn the Full Court's conclusion that the class action waiver term was transparent: cf AS [37]. The primary judge's conclusion to the contrary was based on his reasoning that the term was not incorporated: PJ [142] (CAB 53). That reasoning is now accepted to be erroneous. The class action waiver clause was expressed in plain language: s 24(3)(a). It was in bold print and was plainly legible: s 24(3)(b). Special attention was drawn to cl 15 in the opening words of the contract. It was presented clearly and was reasonably available to Mr Ho: ss 24(3)(c)–(d). The fact that Mr Ho chose not to read it does not mean that the term was not transparent.

Ground 2(b) and NOC ground 3: enforcement of the class action waiver clause

60. Both the primary judge: PJ [102]–[121] (CAB 42) and the majority of the Full Court: FC [11]–[14], [350]–[363] (CAB 132-133, 350-250) were correct to conclude that the class action waiver clause was not rendered void or unenforceable by anything in Part IVA of the FCAA. The appellant's arguments to the contrary are untenable.

61. The class action waiver clause obliged Mr Ho to opt-out of the proceedings within a reasonable time once they were commenced: PJ [119]-[120] (CAB 46-47); FC [11], [74], [353] (CAB 132, 152, 245-246). A person on whom a statute confers a right may waive or renounce that right unless it would be contrary to the statute to do so.[53] The immediate problem for the appellant is that opting out of representative proceedings is expressly permitted by s 33J the FCAA.

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

62. Thus, consistently with the authority of this Court,[54] the appellant is forced to contend, in effect, (AS [38]) that Part IVA, read as a whole, is inconsistent with a power of an individual to "*forgo its benefits*" and that the policy and purpose of Part IV is that the rights conferred by that Part are "*not capable of being renounced*".

63. The appellant's policy argument at AS [39] fails at the first hurdle. Part IVA is a procedural mechanism allowing for the grouping of existing claims.[55] While the objectives of the Part include *permitting* the combination of claims that might not be economically viable as individual claims and increasing efficiency by *allowing* for a common binding decision,[56] those objectives were not pursued at the expense of individual group members' autonomy not to participate in the class action procedure.[57] Rather, "[*t]he integrity of Pt IVA 'depends upon group members having the right to opt out'*".[58]

64. The right to opt out is conferred by s 33J. As even Rares J accepted: FC [66]) (CAB 150), the plain and literal reading of s 33J(2) is that a group member can opt out at any time before last date to opt-out fixed under s 33J(1). A judgment given in a representative proceeding does not bind a person who has opted out under s 33J: s 33ZB(b). In light of s 33J, it is impossible to argue that Part IVA, read a whole, is inconsistent with any power of group members to forgo the benefits of Part IVA.

65. The appellant contends that the right to opt out in s 33J(2) should be read as being subject to an unexpressed temporal limitation which restricts the right of group members to opt out prior to a particular point in time and that any agreement to opt out prior to that point in time is void. The appellant's submissions are inconsistent as to what that time is, being variably: (a) the Court fixing a time by which group members must opt out under s 33J (AS [45]); (b) the Court ordering that notice be given under s 33X(1)(a) including as to the existence of the right to opt out (AS [45]; JS [52]); or (c) group members receiving the s 33X notice (AS [43]).

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54 Ibid.
55 *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, [56] (Gordon, Edelman and Steward JJ).
56 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [82] (Kiefel CJ, Bell and Keane JJ).
57 See Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), [108], [126]; Senate, Parliamentary Debates (Hansard), 12 September 1991, 1448 (Senator Tate, Minster for Justice and Consumer Affairs); 13 November 1991, 3026 (Senator Tate); House of Representatives, Parliamentary Debates (Hansard), 14 November 1991, 3175 (Mr Duffy, Attorney-General).
58 *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, [58] (Gordon, Edelman and Steward JJ).

66. In light of the obvious purpose of s 33J(2) – to protect individual autonomy and freedom of choice[59] – to read in a limitation designed to restrict autonomy would require clear language or necessary intendment: FC [14], [359] (CAB 133, 248). If Parliament wanted "to *strip[] the individual of an opportunity, his freedom of right, to bring his own case*"[60] before receiving notice under s 33X(1)(a), or before a notice was issued but not received, it surely would have said so. The clear purpose of s 33J is to set the last date by which group members must exercise their right to opt out, not to prohibit opting out prior to the last date to do so being fixed. Indeed, the notice to be given under s 33X relevantly informs group members of *"the right of the group members to opt out of the proceedings before a specified date, being the date fixed under subsection 33J(1)"* (s 33X(1)(a)). That serves the purpose of informing group members of their existing right to opt out, it does not prohibit group members already aware of that right from opting out prior to receiving a notice describing their right to do so.

67. Apart from lacking any textual foundation, the contention that a person cannot opt out of proceedings before the last date to opt out has been fixed under s 33J or the person has received notice under s 33X(1)(a) is not supported by anything in the context of Part IVA. As contemplated by s 33X(2), the Court is not required to give notice under s 33X(1)(a) in any case where there is not a claim for damages. It is untenable to suggest that in such cases there is no effective ability to opt out of such a case. Even if a notice is issued, group members – particularly those who live overseas or in remote parts of Australia – may not receive it: see s 33Y(5), (8).

68. The suggestion by Rares J, endorsed at AS [43], that the purpose of notice under s 33X(1)(a) is to allow a "*fully informed*" decision concerning opt out, which cannot be made before receiving a notice, is wrong. The language of s 33X(1)(a) reflects the ALRC's intention that the notice be issued "*so that group members are informed of the commencement of the proceeding and their rights*".[61] Consistently with long-established notions of judicial power, the Court's function is not to give advice to group members on exercising their rights. And a notice under s 33X(1)(a) will rarely be sufficient of itself to allow an informed decision. To make an informed decision,

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[59] See the extrinsic materials at n 57 above.
[60] Senate, Parliamentary Debates (Hansard), 13 November 1991, 3026 (Senator Tate, Minister for Minster for Justice and Consumer Affairs).
[61] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), [190].

most persons will need to consult a lawyer, which is precisely what the Federal Court sample opt out notice advises.[62] As a practical matter, particularly in light of the need for clarity and simplicity, a generic notice under s 33X(1)(a) cannot deal with the individual matters critical to making such an informed decision. In any event, even accepting the purpose of a notice under s 33X is to inform, it does not follow that the FCAA implicitly prohibits a group member from deciding to opt-out before receiving such a notice, any more than it prevents group members from opting out even if they have not read or understood the s 33X notice.

69. As Derrington J recognised at FC [358]-[359] (CAB 248-249), the logical consequence of Rares J's construction is that the institution of proceedings under Part IVA will render void *all* exclusive jurisdiction clauses and agreements to arbitrate entered into between an individual group member and the respondent prior to that group member receiving notice under s 33X(1)(a). Similarly, any settlement or covenant not to sue entered into after commencement of proceeding but before notice would be void. If such radical consequences were intended, they would have been stated expressly: FC [359] (CAB 248-249).

70. Even if the right to opt-out cannot be exercised until the unstated times identified by the Appellant, it does not follow that an agreement to opt-out prior to that time is contrary to the FCAA.

71. Further, contrary to AS [42] and JS [52] there are numerous ways a class action waiver clause can be enforced. The Federal Court could stay the proceedings,[63] a court could require the promisor to opt-out pursuant to the implied obligation to do all things necessary to enable the other party to have the benefit of the contract,[64] or under the applicable Californian law obligation of good faith and fair dealing,[65] by an order for specific performance, a mandatory injunction or an anti-suit injunction.[66]

72. Indeed, there is no reason of principle as to why a stay could be ordered to give effect to an exclusive jurisdiction clause but not to a class action waiver clause. The principle underpinning the stay in the former case is to "*require the parties to abide by their*

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62 The sample opt out notice is referred to in Class Action Practice Note (GPN-CA), [12.2].
63 Section 33ZG(B) FCAA; see, eg, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
64 See *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.
65 See, e.g., *Comunale v Traders & General Insurance Co* (1958) 50 Cal 2d 654 at 658; *Racine & Laramie Ltd v Dept of Parks and Recreation* (1992) 11 Cal App 4th 1026 at 1031-32.
66 See *Atlasnavios Navegacao, LDA v Ship "Xin Tai Hai"* (2012) 291 ALR 795 (Rares J).

agreement",[67] which is equally applicable to a class action waiver clause. This provides an additional basis, consistent with the NOC ground 3, for upholding the stay ordered by the Full Court if the class action waiver clause is otherwise valid. Finally, to the extent that any of these powers were thought insufficient s 33ZF would fill the gap.[68] The absence of a specific power in Part IV to deal with the various issues thrown up international cruises is hardly a surprise: cf AS [42].

73. For these reasons, it should not be accepted that Part IVA prevents a person agreeing to opt out before a date is fixed under s 33J, before a notice is ordered to be issued or before it is received under s 33X(1)(a).

10 74. Finally, the submission at AS [38] and [44] that a class action waiver clause is void because it ousts the jurisdiction of the courts should be rejected. It is not within the grounds of appeal. Nor was it pleaded, raised or argued below. In any event, as was made clear in *Impiombato*,[69] Part IVA is procedural not substantive; it does not confer jurisdiction on the Federal Court. Non-participation in a representative proceeding does not preclude a group member from seeking to invoke the Federal Court's jurisdiction.[70] More generally, the enforceability of the class action waiver clause must depend on the terms, context and purpose of Part IVA. The decision of the British Columbia Court of Appeal referred to at AS [44] does not assist in that task for reasons given by Derrington J at FC [364]–[366] (CAB 250-252).

20 **Ground 3: Exclusive jurisdiction clause (cf AS [47]–[51])**

75. If the class action waiver clause is valid, then there are plainly no "*strong grounds*" for refusing enforcement of the exclusive jurisdiction clause, because Mr Ho should not be participating in, let alone seek to take the benefit of, the representative proceedings. Even if the class action waiver clause were found to be invalid, however, the majority of the Full Court was still correct to find that the exclusive jurisdiction clause should be enforced by way of staying Mr Ho's claims.

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67 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 259 (Gaudron J); *Huddart Parker Ltd v The Ship "Mill Hill"* (1950) 81 CLR 502 at 508-09 (Dixon J).

68 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [3], [46], [69] (Kiefel CJ, Bell and Keane JJ), [145] (Gordon J).

69 (2022) 96 ALJR 956, [54] (Gordon, Edelman and Steward JJ).

70 Cf *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, 652 (Rich, Dixon, Evatt and McTiernan JJ).

76. *Prima facie*, the respondents were entitled to a stay of Mr Ho's claim brought in contravention of the exclusive jurisdiction clause. It is common ground that Mr Ho bore the onus of establishing "*strong grounds*" or "*strong reasons*" not to grant a stay: FC [375] (CAB 255); AS [47]. [71] The majority of the Full Court correctly held that the primary judge's refusal to grant a stay was vitiated by three matters: cf AS [48]–[51].

77. The *first* was the primary judge's reliance: PJ [338]–[339] (CAB 99) on his Honour's earlier conclusion that the appellants could not rely in these proceedings on the class action waiver clause against Mr Ho because it was unfair: FC [376] (CAB 256). For the reasons above, that was in error. In any event, as a matter of principle, a mere procedural advantage in the local forum cannot constitute a strong reason not to enforce an exclusive jurisdiction clause.[72]

78. The *second* matter related to the primary judge's conclusion PJ [332]-[335] (CAB 97-98) that a stay of US sub-group members would result in the alleged "fracturing" of the litigation. This conclusion involved two errors.

79. *First*, as Derrington J explained at FC [378]-[381] (CAB 256-258) there was no fracturing in any relevant sense. A class action is a combination of a number of individual claims. All that would occur by a stay is that not all claims arising out of the cruise would be tried in a single jurisdiction. But, even absent the existence of an exclusive jurisdiction clause, there is no reason why all claims arising from an international cruise involving passengers resident in multiple jurisdictions, who travelled on different contractual terms governed by different foreign legal systems, should be determined in a single jurisdiction. That is especially so when, as recognised by the primary judge: PJ [288] (CAB 87), various of Mr Ho's claims may be governed by a different law to the claims of other group members, such that resolution of certain common questions in the representative proceeding may not apply to, let alone resolve, his claims.

80. *Secondly*, and in any event, a third party commencing representative proceedings and choosing to use a definition of group members that captures those who have agreed to exclusive jurisdiction clauses cannot amount to "*strong grounds*" for refusing to

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[71] See *Huddart Parker Ltd v Ship "Mill Hill"* (1950) 81 CLR 502 at 509 (Dixon J); *Akai* (1996) 188 CLR 418 at 427-9 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ).

[72] See e.g.,*The Media* (1931) 41 Lloyd's Law Rep 80 at 82 (Lord Merivale); *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496 at 506 (Allsop J); *Australian Health and Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419 at [101]-[102] (Bell P).

recognise the exclusive jurisdiction clause. The parties' agreement would be set at nought because of the conduct of third parties. That would turn the principle of *pacta sunt servanda* on its head.

81. The *third* error was the primary judge's conclusion that there was a public policy consideration that ACL claims should be heard in Australian courts: PJ [337] (CAB 98). This was an erroneous and irrelevant consideration, and the appellant does not challenge the findings of all members of the Full Court finding this was so: see FC [36]-[37], [87] and [387] (CAB 141-142, 155, 260). Contrary to what the appellant contends at AS [49], this was not a mere error of weight. The primary judge wrongly understood the implications and relevance of *Epic Games, Inc v Apple Inc* (2021) 286 FCR 105 and gave inappropriate weight to that factor as a result.

82. Because the Full Court was correct to re-exercise the primary judge's discretion, the appellant must, in turn, establish an error of the kind discussed in *House v King* (1936) 55 CLR 499 at 504-05 in the re-exercise of their discretion. For the reasons submitted above, the appellant has failed to do so. The appeal should be dismissed with costs.

Part VII: Estimate of time required

83. The respondents estimate they will require 4 hours for oral argument.

Dated: 2 June 2023

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **SUSAN KARPIK**
Appellant

and

CARNIVAL PLC (ARBN 107 998 443)
Respondent

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

ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENT

Pursuant to Practice Direction No 1 of 2019, the respondent sets out below a list of constitutional statutory provisions referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current (Compilation No 6, 29 July 1977 – present)	
	Commonwealth statutory provisions		
2.	*Acts Interpretation Act 1901*	As at 30 October 2018 (Compilation No 35, 26 October 2018 – 19 December 2018)	s 15A
3.	*Australian Industries Preservation Act 1906*	As made (No 9 of 1906)	

No.	Description	Version	Provisions
4.	*Carriage of Goods by Sea Act 1991*	Current (Compilation No 11, 23 August 2017 – present)	s 11
5.	*Competition and Consumer Act 2010*	As at 30 October 2018 (Compilation No 115, 26 October 2018 – 12 March 2019)	ss 4, 5, 45, 45AF, 45E, 45EA, 131 Sch 2: ss 18, 20, 21, 23, 24, 26, 28, 29, 30, 32, 33, 34, 35, 36, 37, 64, 67, 237, 250
6.	*Federal Court of Australia Act 1976*	As at 30 October 2018 (Compilation No 54, 25 August 2018 –31 August 2021)	Pt IVA
7.	*Insurance Contracts Act 1984*	As at 30 October 2018 (Compilation No 24, 1 July 2016 – 12 March 2019)	s 8(2)
8.	*Judiciary Act 1903*	Current (Compilation No 49, 18 February 2022 – present)	ss 79, 80, 78B
9.	*Trade Practices Act 1974*	No 51 of 1974 (Version 15 April 2010 – 30 June 2010)	s 74(2A)
10.	*Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010*	As made (No 44 of 2010)	
US statutory provisions			
11.	*California Code of Civil Procedure*	Current (1 January 2018 – present)	§ 1716(c)(1)(D)

No.	Description	Version	Provisions
	International instruments		
12.	*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)	arts. 9, 10(1)