HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S25/2023
File Title:	Karpik v. Carnival PLC ARBN 107 998 443 & Anor
Registry:	Sydney
Document filed:	Respondents' supplementary submissions
Filing party:	Respondents
Date filed:	18 Aug 2023

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **SUSAN KARPIK**
Appellant

and

CARNIVAL PLC (ARBN 107 998 443)
10 First Respondent

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

20 **RESPONDENTS' SUPPLEMENTARY SUBMISSIONS**

Part I: Certification

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

Part II: Summary of supplementary argument

2. These supplementary submissions are made in accordance with the leave of the Court,[1] to respond to two "*contextual arguments*" advanced by the appellant after Mr Ho's oral argument in chief: namely, the arguments which relied upon s 6 of the *Competition and Consumer Act* (**CCA**) and the State and Territory statutes that apply the Australian Consumer Law (**ACL**) as a law of the respective States or Territories.[2]

Section 6 of the CCA

10 3. The appellant relies upon ss 6(2)(ca) and 6(3A) as supplying additional "*hinges*" on which s 23 of the ACL can operate, which (so it is said) is contrary to Parliament intending that s 23 be subject to any proper law limitation.[3] As part of that submission, the appellant construes ss 6(2)(ca) and 6(3A) as providing additional operations of Part 2-3 to corporations as well as to persons who are not corporations.[4] There are four reasons as to why these submissions should be rejected.

4. The <u>first</u> reason is that the purpose of ss 6(2)(ca) and 6(3A) is to simply extend the application of Part 2-3 as a law of the Commonwealth to persons other than corporations within the bounds of what is constitutionally permissible. Those sections do not otherwise seek to expand the reach of s 23.

20 5. This point was made by this Court in *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530. There, the Court was concerned with a Commonwealth statute that prohibited the "*use*" of certain intellectual property relating to the Olympics. At [96], the Court (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ) applied the usual rule that one would not construe a statute as regulating conduct occurring abroad. That statute (the "Indicia Act") contained the equivalent of s 6 of the CCA. In response to an argument that the additional operation of the statute extended its territorial reach

[1] [2023] HCATrans 100 at 4015.
[2] Ibid at 3842-4010.
[3] Ibid at 3903-3907.
[4] Ibid at 3913-3920.

to a use outside Australia when in connection with trade or commerce with Australia, the Court said (at [96], emphases added):

> *But that provision* ***did not relate to the geographical reach*** *of the Indicia Act. It, and the other provisions of s 6 of the Indicia Act, were designed,* ***like those in s 6 of the Trade Practices Act****, only to give the Indicia Act wider constitutional support.*

6. In other words, in applying s 6 of the CCA to extend the operation of the ACL, one takes the provision with its geographical limit and then reads in the constitutional limit provided by s 6, so that it may then constitutionally extend (within the confines of its
10 existing geographical limit) to persons other than corporations.

7. The second reason that s 6 does not assist is because it is of no relevance to corporations. The heading to the section even refers to its extended application as being "*to persons* ***who are not*** *corporations*" (emphasis added). This is consistent with how Mason J (with whom Barwick CJ, Gibbs, Stephen, Jacobs and Murphy JJ agreed) construed the operation of s 6 of the *Trade Practices Act* in *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235. The appellant placed reliance on what Mason J said at 244,[5] but that needs to be read with the example his Honour gave at 245 and which made clear that s 6 only adds the additional words prescribed insofar as it extends to persons other than corporations. At 245, Mason J set
20 out how s 53 of what was then the *Trade Practices Act* would read when extended by s 6, and added the additional words prescribed by s 6(2) only insofar as the provision applied to the person "*not being a corporation*". The application of s 53 to the corporation, on his Honour's example, remained as it was without s 6. That is, the provisions are unaffected by s 6 insofar as they already apply to corporations.

8. This also follows from the text of ss 6(2) and (3A). Section 6(2)(ca) is to be read cumulatively with s 6(2)(h). Section 6(2)(h) has the effect, among other things, of adding words into s 131 of the CCA such that it reads: "*Schedule 2 applies as a law of the Commonwealth to the conduct of corporations and persons not being corporations* ...". But s 131 only has these words added when read conjunctively with, among other
30 provisions, s 6(2)(ca). It has the effect that, through s 131 as amended, the ACL also

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[5] Ibid at 3913-16.

applies as a law of the Commonwealth to the conduct of persons not being corporations, but only insofar as the provisions of the ACL are then read subject to the limits imposed in s 6(2). This relationship between ss 6(2)(ca) and 6(2)(h) is clear when one has regard to the equivalent in ss 6(3A)(a) and (b).

9. The <u>third</u> reason that s 6 does not assist the appellant is that s 23 of the ACL still has its application when read with s 131 of the CCA unaffected by s 6. The question before this Court is what, in that context, is the reach of s 23.

10. The <u>fourth</u> reason that s 6 does not assist is that it provides further demonstration of the absurdities which would result from the appellant's construction. If s 23 of the ACL contains no territorial limit of its own and would, under s 6(3A) of the CCA (for example) apply as a law of the Commonwealth to any contract relating to "*the use of postal, telegraphic or telephonic services*", the effect would be that every mobile phone contract, or any other telephone or internet services contract, made anywhere in the world with a consumer or small business would be captured by s 23 of the ACL, even if that contract was between a foreign consumer and a foreign corporation that never carried on business in Australia. The appellant's construction assumes an intention of Parliament to regulate the validity of terms contained in billions of contracts around the world that have no connection whatsoever to Australia. That absurd reach and intrusion into contractual relationships in which other foreign legal systems have a far clearer interest could not have been the intention, and it indicates that the territorial "*hinge*" on which s 23 operates is not found in ss 5 or 6 of the CCA.

The State or Territory laws

11. The appellant also seeks to rely on the State and Territory legislation giving effect to the ACL as indicating that there is no need for an "*additional hinge*" in s 23 itself.[6] The appellant does not rely on the application of the ACL through any State or Territory legislation itself; the legislation is only to assist the Court "*contextually*".[7]

12. Each of the States and Territories has adopted near uniform provisions that apply the ACL as a law of the relevant State and Territory, pursuant to the *Intergovernmental Agreement for the Australian Consumer Law* (2 July 2009). In each of the relevant

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[6] Ibid at 3985-4010.
[7] Ibid at 3971-74.

consumer legislation, there is a provision equivalent to what is seen in s 32 of the *Fair Trading Act 1987* (NSW) (**FTA**),[8] which provides that the ACL applies "*to and in relation to*" various persons with connections to the State (s 32(1)) and "*extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia*" (s 32(2)).

13. The application of the ACL as a law of a State or Territory, including through s 32 of the FTA, does not support the conclusion that s 23 of the ACL is unlimited in its reach, save for any territorial limits imposed by ss 5 and 6 of the CCA or provisions like s 32 of the FTA. To the contrary, that the ACL (including s 23) is also applied as a law of the States and Territories, with an extended application provision that differs from s 5 of the CCA, further indicates that s 5 of the CCA cannot itself provide any territorial "*hinge*" on which any of the provisions within the ACL operate, including s 23.

14. That is reinforced by s 131C(1) of the CCA, which in effect allows for the concurrent operation of the ACL as a law of both the Commonwealth and of the States and Territories. With the ACL applying uniformly in this way, its territorial limitations cannot depend upon provisions that are unique to the Commonwealth legislation, such as s 5 of the CCA. The territorial limits must instead be found within the ACL itself.

15. Section 32 of the FTA (and its analogues) also offers limited, if any, contextual support for identifying the relevant territorial "*hinge*" on which s 23 of the ACL operates. The provision simply applies the ACL as a whole to any person with a connection to the State. It is, in substance, little different to saying that the ACL applies as a law of the State to the fullest extent possible within the legislative limits of the State,[9] which in any event is what is provided for in s 5A(1) of the FTA.

16. The width and generality of the provision indicates that it cannot have been intended to supply the territorial limit for the provisions of the ACL itself. Rather, as with s 5 of the CCA, its purpose is to extend the provisions of the ACL, *within their existing limits*, to matters occurring outside the jurisdiction when there is a constitutionally

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[8] See *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 12; *Fair Trading Act 1989* (Qld), s 20; *Fair Trading Act 2010* (WA), s 24; *Fair Trading Act 1987* (SA), s 18; *Australian Consumer Law (Tasmania) Act 2010* (Tas), s 10; *Fair Trading (Australian Consumer Law) Act 1992* (ACT), s 11; *Consumer Affairs and Fair Trading Act 1990* (NT), s 31.

[9] Cf, e.g., *Pearce v Florenca* (1976) 135 CLR 507 at 518 (Gibbs CJ); *Broken Hill South Ltd (Public Officer) v Cmr of Taxation (NSW)* (1937) 56 CLR 337 at 375 (Dixon J).

sufficient connection with the jurisdiction. For most of the provisions of the ACL, s 32 extends provisions that are already expressly limited to conduct occurring "*in trade or commerce*", meaning trade or commerce with or within Australia (ACL, s 2(1)). The work of s 32 is to overcome any presumptive rule that such conduct would not be captured when it occurs outside the jurisdiction, but for the provisions to apply the conduct must still occur "*in trade or commerce*" as defined. Section 32 does not, in other words, overcome the territorial limit that is within any ACL provision itself. For the small minority of provisions in the ACL in which there is no express territorial limit of conduct being "*in trade or commerce*",[10] the question still arises as to whether some other limit is contained within those provisions and whether Parliament intended to abrogate principles of private international law by extending the provisions to circumstances in which those principles would not otherwise apply the statute.

17. Section 32 of the FTA does not offer any assistance in answering this question for s 23 of the ACL, in the same way that, as Dixon J observed in *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 428, the usual constitutional restriction that applies to all enactments "*gives no further assistance*" in ascertaining the intended scope of operation of a statutory provision dealing with contractual obligations. As his Honour found (at 428), construing a statutory provision that operates on contractual obligations by reference only to requiring some connection with the State, is so general and wide that it leaves "*any ascertainable territorial consideration [] indeterminate except for the presumption that the Legislature is dealing with rights and duties over which it has an effective authority and not with those acquired under foreign law*".

18. Section 32 of the FTA also cannot offer any contextual support as to the territorial "*hinge*" on which s 23 of the ACL operates because it did not even exist when the unfair contract terms of the ACL were first introduced. The unfair contract terms were inserted into the ACL (as the only provisions contained in the ACL) with effect from 1 July 2010 (*Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth), s 2(1)), whereas the provisions of the FTA giving effect to the ACL as a law of

[10] See ACL, ss 23 (unfair contract terms), 31 and 153 (misleading conduct in relation to employment), 39 and 161 (unsolicited cards), 43 and 163 (unauthorised advertisements), 44 and 164 (pyramid schemes), 50 and 168 (harassment and coercion), 51-53 (certain guarantees with supplies, but see ss 15(b) and 259(1)(a)), 64 (exclusion of guarantees in contract), 99F (void terms and conditions of gift cards), 128 and 201 (voluntary recall of goods), 150 (void contractual terms concerning defective goods) and 193 (repairs).

New South Wales (including s 32) only came into effect from 1 January 2011: *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW), s 2.

19. In the period between 1 July 2010 to 1 January 2011, the unfair contract terms provisions instead applied as a law of New South Wales through Part 5G of the FTA, which was inserted (with consequential amendments to other provisions) by the *Fair Trading Amendment (Unfair Contract Terms) Act 2010* (NSW). Part 5G did not contain any application provision of the kind now seen in s 32, only the general extraterritorial provision contained in s 5A of the FTA.

20. Notably, the FTA (with Part 5G) also followed a similar structure to that put in place by the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth). A specific remedy was inserted (s 64B) to obtain a declaration of a term as being unfair under s 60ZD (the equivalent to what are now ss 23 and 250 of the ACL), and the existing remedial provisions under the FTA (ss 65-68) were then amended to cover circumstances in which a person applied or relied upon a term that *had been* declared unfair, which under s 61(2) was deemed to be a contravention. This followed the same structure as, for example, s 80(1C) of the *Trade Practices Act 1974* (Cth) that deemed similar conduct to be a contravention of the ACL and which then enlivened remedial provisions that were predicated on the existence of contravening conduct.[11]

21. It is provisions of these kinds on which s 5A of the FTA (and s 5 of the CCA) then operated, by extending the remedies to where persons (or corporations) had relied on unfair contract terms outside the jurisdiction. This only applied, however, if such term had first been declared to be unfair by a court. The extraterritorial extension, in other words, was only engaged (and still is only engaged) *after* the unfair contract terms provisions had operated. Then, as now, the general extraterritorial provisions did not, and do not, speak to the reach of the unfair contract terms provisions themselves.

Dated: 16 August 2023

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[11] See [2023] HCATrans 100 at 4858-4925.