HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **SUSAN KARPIK**
Appellant

and

CARNIVAL PLC (ARBN 107 998 443)
First Respondent

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

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues on appeal

2. There are four issues on appeal. *First*, whether s 23 of the *Australian Consumer Law* (**ACL**) applies to Mr Patrick Ho's standard form consumer contract with the second respondent. *Second*, if so, whether the class action waiver clause in Mr Ho's contract is unfair within the meaning of s 24 of the ACL such that the clause is void under s 23. *Third*, whether the class action waiver clause is also unenforceable by reason of Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**). *Fourth*, whether there are strong reasons for not enforcing the exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California.

Part III: Section 78B notice

3. The appellant has given notice under s 78B of the *Judiciary Act 1903* (Cth) not because of substantive arguments she wishes to make but because of a question raised in the appeal judgment as discussed at [25]-[26] below.

Part IV: Citations of the decisions below

4. The decision of the Federal Court of Australia is *Karpik v Carnival plc (Ruby Princess) (Stay Application)* [2021] FCA 1082; 157 ACSR 1 (Stewart J) (**PJ**) (CAB 5-109).

5. The decision of the Full Court of the Federal Court of Australia is *Carnival plc v Karpik (Ruby Princess)* [2022] FCAFC 149; 404 ALR 386 (Allsop CJ, Rares and Derrington JJ) (**FC**) (CAB 123-264).

Part V: Relevant facts

6. **Background:** The appellant commenced representative proceedings pursuant to Part IVA of the FCAA on behalf of passengers who travelled on the Ruby Princess' voyage departing from Sydney on 8 March 2020, during which there was an outbreak of COVID-19. The first respondent, a company incorporated in the United Kingdom that carried on business in Australia, was the time charterer and operator of the Ruby Princess. The second respondent (**Princess**), a company registered in Bermuda, headquartered in Florida, and that had California as its principal place of business, was the owner of the Ruby Princess. Princess also carried on business in Australia selling and marketing cruises, including the Ruby Princess' voyage departing from Sydney on 8 March 2020 (PJ [128]).

7. The respondents answered the case against them by contending that of the 2,651 passengers onboard, 696 were parties to the US terms and conditions which contained a class action waiver clause, an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California, and a choice of law clause applying the general maritime law of the United States (PJ [9]-[10]). A copy of the US terms and conditions can be found at ABFM 5-23.

8. Of the 1,955 remaining passengers, 1,796 were a party to the Australian terms and conditions and 159 were a party to the UK terms and conditions (PJ [9]). A copy of the Australian and UK terms and conditions can be found at ABFM 24-45 and 46-65

respectively. Unlike the US terms and conditions, the Australian and UK terms and conditions did not purport to prohibit passengers from participating in a class action. The Australian terms and conditions also contained a New South Wales exclusive jurisdiction clause and a New South Wales choice of law clause.

9. Whether a passenger was a party to the US, UK or Australian terms and conditions depended upon the location of the passenger's IP address when making the booking or the location of the Princess call centre or travel agent who made the booking (PJ [33]-[40]). There were, for example, Australian resident passengers who were alleged to be parties to the US or UK terms and conditions (ABFM 69).

10. **Mr Patrick Ho:** The respondents sought to have determined as a separate question whether Mr Patrick Ho, a Canadian resident who travelled onboard the Ruby Princess, was a party to the US terms and conditions and whether the claim concerning him should be stayed. While the appellant has not challenged the finding that Mr Ho became a party to the US terms and conditions after receiving a booking confirmation on 30 October 2018, in determining whether the class action waiver clause is "unfair" the Court is required to take into account the extent to which the class action waiver clause is "transparent" within the meaning of s 24(3): ACL, s 24(2)(a).

11. On 25 September 2018, Mr Ho used a travel agent to book his tickets and pay a deposit. At that time, Mr Ho was given no notice of the US terms and conditions, including the class action waiver clause (PJ [44]).

12. On 30 October 2018, Mr Ho was sent two booking confirmation emails which made no mention of the class action waiver clause (PJ [48]; ABFM 71-74). At the foot of the second email was a notice which stated:

> **IMPORTANT NOTICE**: Upon booking the Cruise, each Passenger explicitly agrees to the terms of the Passage Contract (https//www.princess.com/legal/passage_contract/). Please read all sections carefully as they affect the passenger's legal rights.

That incorrectly stated that Mr Ho had already become bound by the cruise line's conditions when he made his booking over a month earlier and at a time when he had no access to the US terms and conditions.

13. Mr Ho, like most consumers, did not click on the link in the notice (PJ [51]). However, if Mr Ho had clicked on the link, he would have been taken to a website displaying three different possible passage contracts (PJ [77]; ABFM 77). Mr Ho would have needed to take the further step of logging into the respondents' "Cruise Personalizer" to determine whether the US terms and conditions applied to his booking (PJ [77]-[80]).

14. The US terms and conditions also contained in bold an "important notice to guests" which referred to other clauses in the contract but made no mention of the class action waiver clause. The class action waiver clause itself is found within clause 15, the penultimate clause in a long and complex agreement.

15. **Stewart J:** The primary judge held that, if Mr Ho was a party to the US terms and conditions, s 23 of the ACL applied by reason of s 5(1)(g) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and that the class action waiver clause was an unfair term (PJ [126]-[129], [138]-[145]). His Honour held that there were strong reasons for not enforcing the exclusive jurisdiction clause (PJ [331]-[340]). The primary judge held that the class action waiver clause was not unenforceable for being contrary to Part IVA of the FCAA (PJ [102]-[121]).

16. **Allsop CJ and Derrington J:** The majority ultimately did not decide but delivered divergent reasons on the extraterritorial application of s 23 of the ACL (FC [20]-[35], [274]-[349]). For different reasons, both judges held that the class action waiver clause was not an unfair term (FC [2]-[10], [13], [244]-[273]). They also found that the class action waiver clause was not unenforceable by reason of Part IVA (FC [11]-[14], [350]-[366]) and they would enforce the exclusive jurisdiction clause (FC [36]-[37], [374]-[394]).

17. **Rares J:** Rares J held that the class action waiver clause was unenforceable for being contrary Pt IVA of the FCAA and that there were strong reasons for not enforcing the exclusive jurisdiction clause (FC [50]-[95]). His Honour did not consider whether the class action waiver clause was also unenforceable as an unfair term (FC [49]).

Part VI: Argument

Ground 1: Section 23 of the ACL applies to Mr Ho's contract

18. Section 5(1) of the CCA relevantly provides that "the Australian Consumer Law (other than Part 5-3) … extends to engaging in conduct outside of Australia by … bodies corporate incorporated or carrying on business within Australia". Section 4(2)(a) of the CCA provides that a reference to "engaging in conduct" shall be read as a reference to "doing or refusing to do any act, including the making of, or giving effect to a provision of, a contract". The primary judge correctly held that since Princess carried on business within Australia, s 23 of the ACL applied to its passage contract with Mr Ho (PJ [125]-[129]). While the Full Court did not finally determine the extraterritorial application of s 23 of the ACL, two questions emerge from the judgment. *First*, does s 5(1)(g) of the CCA apply to s 23 of the ACL at all? *Second*, is any other connection with Australia is required?

19. **Section 5(1) applies to s 23:** Derrington J stated that the "preferable construction" is that s 5(1)(g) has no operative effect on s 23 because s 5(1) is concerned with "engaging in conduct" whereas s 23 is only concerned with the terms of the contract itself and not with the making of or giving effect to the contract (FC [284]). That view, which was "only obliquely suggested by Princess" (FC [281]), is incorrect for the following reasons. *First*, other than Part 5-3, s 5(1)(g) expressly applies to the whole of the ACL, including s 23. *Second*, when the unfair contract terms legislation was first introduced as part of the *Trade Practices Act 1974* (Cth), s 5(1) was specifically amended to apply to those provisions[1]. This reflects a clear legislative intention that s 5(1) applies to the unfair contract terms legislation which should not be given a different construction when the unfair contract terms legislation was subsequently consolidated as part of the ACL to the CCA[2]. *Third*, as Allsop CJ indicated at [22], the making of the contract cannot be divorced from the contract as made. The contract itself is the product of "engaging in conduct" (i.e. the making of the contract) without which the contractual terms to which s 23 is directed would not exist. *Fourth*, there is no reason for giving beneficial consumer protection legislation a narrow and strained construction which would limit the operation of s 5(1)(g) to

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[1] *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth), Schedule 1, items 1, 6.
[2] *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth), Schedule 1, item 1.

the making of a contract but exclude the contract itself. *Fifth*, the closest authority which has been identified on the topic is *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470. In that case, the majority (Lockhart and Gummow JJ) held that the making of contractual warranties could, by reason of s 4(2)(a), amount to 'conduct' which was misleading and deceptive for the purpose of the then s 52 of the *Trade Practices Act,* the progenitor of s 18 of the ACL. By parity of reasoning, the making of a contract containing the term said to be unfair within s 23 is conduct for the purpose of s 4(2)(a). Derrington J referred to this decision at FC [285]-[286] but wrongly regarded it as an authority suggesting that s 4(2)(a) of the CCA may be inapplicable to s 23.

20. **No further nexus required:** Unlike some of the other provisions to which s 5(1) applies, s 23 does not contain any express further territorial limitation whether by reference to a "market" (which means "a market in Australia…": s 4E)[3] or "trade or commerce" (which means "trade or commerce within Australia or between Australia and places outside Australia": s 4) or otherwise. The appellant's primary position is that no connection with Australia in addition to s 5(1)(g) is required in order for s 23 to apply. Derrington J accepted that the "natural", "ordinary" or "literal" meaning of the words in ss 5(1)(g) and 23 would support the appellant's primary position, although he ultimately considered that a "contextual construction" which "displaced" the appellant's primary position was necessary (FC [301], [311], [317], [348]). The appellant submits that the "natural", "ordinary" or "literal" meaning of the provisions calls for no "displacement" and this conclusion is reinforced by legislative history and broader context. As set out at [19] above, s 5(1) was specifically amended when the unfair contracts terms legislation was first enacted to extend its operation to those provisions without the need for any further connection to Australia. The legislature has also identified in s 28(1) certain types of contracts to which s 23 does not apply including contracts for marine salvage or towage, a charterparty of a ship, and a contract for the carriage of goods by ship. The choice to specifically exclude these contracts from the operation of s 23 confirms the intention that s 23 would apply generally to consumer contracts and small business contracts (as defined) without need for further enquiry into their connection with Australia beyond the requirements

[3] See, for example, *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305, 319-320.

in s 5(1)(g). The extrinsic material reveals that the exceptions created by Parliament in s 28(1) were not created in ignorance but in light of Australia's international relations[4]. In summary, the presumption of territoriality has been expressly displaced by the clear words in ss 5(1)(g) and 23 and there is no scope to introduce a further "hinge" with Australia[5]. It was therefore an error for Derrington J, to search for some further limitation, let alone to find one in the "established rules of construction", which he thought limited the operation of ss 5(1)(g) and 23 to contracts which have Australian law as their proper law (FC [292]).

21. Section 5(1)(g), as applied to s 23, falls within one of three broad categories of legislation given express extraterritorial reach. This first category identifies the necessary and sufficient criterion for the legislation to apply to conduct occurring outside Australia that the conduct is done by a person who is properly regarded, under principles both of Australian domestic law and international law, as subject to Australia's jurisdiction. In compressed form, this first category may be described as 'Australian nationals or companies'[6]. In more complete form, as expressed in s 5(1), this category comprises bodies corporate, incorporated or carrying on business within Australia, Australian citizens and persons ordinarily resident within Australia. Two further categories of express extraterritorial legislation may be identified as, secondly, legislation directed to conduct of foreign nationals or corporations outside Australia which has an impact within Australia or on Australians; and, thirdly, legislation which is expressly stated to have an extraterritorial effect, irrespective of any connection to Australia[7]. Division 15 of Part 2.7 of the *Criminal Code* (Cth) in its various statements of extended geographical jurisdiction illustrates use of these various techniques.

22. In addition to the above textual, contextual and historical analysis, the result for which the appellant contends under her primary position in no way jars with the

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[4] Explanatory Statement, *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (Cth), [2.93]-[2.97]; Explanatory Statement, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth), [5.77]-[5.81].
[5] cf *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692, [157]; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, [36], [59].
[6] AS Bell, "Extraterritoriality in Australian Law", 2023 Spigelman Oration (27.04.23) at [46]-[58] <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2023%20Speeches/Chief%20Justice/Bell_20230427.pdf>.
[7] Ibid.

purposes of the ACL in general or its unfair contract terms jurisdiction in particular. The subject matter of the jurisdiction is limited to consumer contracts and small business contracts as defined in s 23(3) and (4) (subject to the carve outs in s 28). Parliament has chosen the category of consumers to be protected by the jurisdiction through the definitions of these two types of contracts. It has left all other contracts wholly unaffected. In defining the subject contracts, it has not sought to introduce any further restriction upon the identity of the person who is protected by the jurisdiction. Parliament has not said, for example, that the beneficiary of the jurisdiction must be an Australian national or corporation. However, what has clearly been said, through the application of s 5(1)(g) to s 23, is that the jurisdiction will extend to conduct, that is the making of the contract containing the unfair terms, where the counterparty is an Australian citizen, resident, corporation, or a body corporate carrying on business within Australia, as fleshed out in s 5(1)(g), (h) or (i).

23. The above completes the primary submissions which the appellant makes in chief on the first issue. While an intervention by the ACCC has been notified, the submissions which the ACCC will seek to make are as yet unknown. Likewise, since the respondents have not filed a notice of contention, the respondents' hand remains currently concealed. At present, the most that can be said further, in chief, is limited to two points.

24. **Not the proper law of the contract:** In relation to the first point, if (which is denied) there is to be a search for a further connection with Australia beyond s 5(1)(g), that connection is not supplied by Derrington J's postulated reliance upon the proper law of the contract for the following reasons. *First*, Derrington J said that if s 5(1)(g) does not apply to s 23, "the preferable and more orthodox construction" was that s 23 was limited to contracts the proper law of which was the law of the Australia (FC [289]-[296]). Accordingly, on his Honour's construction, the territorial scope of s 23 is narrower if s 5(1)(g) applies because the contract must have as its proper law the laws of Australia and the counterparty must be a body corporate incorporated or carrying on business in Australia. This would be inconsistent with s 5(1)(g), reflecting Parliament's "clear intention" to extend the operation of s 23 "beyond the usually accepted territorial limitations" (FC [299]). *Second*, as Allsop CJ correctly explains at FC [24]-[27], the presumption against the extraterritorial application of statutory provisions to contracts governed by foreign law should rarely be applied

where the statute, as in s 5(1)(g), expressly provides for the circumstances in which the legislation is to have extraterritorial effect. *Third*, Derrington J's construction has the consequence that s 23 can be readily evaded through the inclusion of a foreign choice of law clause, which itself is capable of being an unfair term. As Allsop CJ correctly observed at [21] and [32], such a construction of ss 5(1)(g) and 23 has the potential to create a significant carve out from the application of beneficial consumer legislation, a result which would be squarely inimical to the purposes of s 23 and the ACL as a whole.

25. **Constitutional considerations:** As to the second point, the appellant has served s 78B notices only against the possibility raised in the majority judgments that there may be a need to "read down" ss 5(1)(g) and 23 by reference to the limits of the Commonwealth Parliament to legislate under s 51(i) or (xx) of the Constitution (FC [23], [34], [308], [316]). Yet it is difficult to see how there could be any excess of constitutional power under s 51(i) or (xx), at least insofar as s 5(1)(g) extends s 23 to a case like the present. The conduct, while done overseas, involves the making of a contract containing the alleged unfair term where that contract is for performance in and from Australia and the term is relied upon to prevent Mr Ho from accessing beneficial procedures under the jurisdiction of Australian courts. No sensible view of the limits of the power over overseas trade and commerce or over trading corporations would see the Commonwealth unable to regulate such conduct.

26. Further, if one is to consider constitutional questions, it is to be recalled that the ACL has a dual operation: as a direct law of the Commonwealth and as a law applied by the States and Territories so as to create a consistent national scheme. For example, the *Fair Trading Act 1987* (NSW) applies the ACL as a law of New South Wales (s 28). It does so with respect to persons carrying on business within NSW and in any event with respect to persons "otherwise connected with this jurisdiction" (which clearly captures Princess): s 32(1). Subject to s 32(1), the ACL (NSW) is expressly extended to conduct, and other acts, matters and things, occurring or existing outside or partly outside NSW (whether within or outside Australia): s 32(2)[8]. Section 32, supported by the plenary power of a state, is broader in operation than s 5(1) of the

[8] Under s 5A, the Act is intended to have extraterritorial application in so far as the legislative powers of the State permit and extends to conduct either in or outside the State that is in connection with goods or services supplied in the State, or effects a person in the State, or results in loss or damage in the State.

CCA but importantly like s 5(1) extends the operation of the ACL to conduct engaged in outside of Australia. Under neither ss 5(1) nor 32 is there any warrant as a matter of Commonwealth or State constitutional power to read in any further limitation.

Ground 2(a): The class action waiver clause is an unfair term under s 23 of the ACL

27. **Introduction:** If s 23 applies to Mr Ho's contract, the class action waiver clause was void as an unfair term. A term in a standard form consumer or small business contract will be unfair if it satisfies the requirements in s 24(1)(a) to (c). In determining whether a term is unfair, the Court is required to take into account the extent to which the term is transparent and the contract as a whole: ACL, s 24(2). Section 25 lists examples of the kinds of terms that may be unfair, which includes a term that limits, or has the effect of limiting, one party's right to sue another party: ACL, s 25(k). It was accepted at first instance and on appeal that unfairness must be assessed at the time of contracting (PJ [143]; FC [259], [265]).

28. The primary judge at [142]-[144] correctly found that the class action waiver clause was an unfair term because it practically limited the ability of a passenger to vindicate their legal rights, Princess did not have a legitimate interest in limiting the ability of passengers to vindicate their legal rights, the term would cause detriment to Mr Ho if relied on and it was not transparent.

29. **Overall submission:** By s 5(1)(g) of the CCA the Australian Parliament has determined that foreign corporations which choose to carry on business in Australia cannot enforce unfair terms in standard form contracts with consumers and small businesses. If the extraterritorial application of s 23 is attracted, the standard of fairness to be applied within s 24 of the ACL does not vary depending upon the consumer's place of residence, the parties' choice of law, or the parties' choice of jurisdiction. The standard by which fairness must be judged under s 24 remains the same and is an Australian standard. The ACL implemented a single, national consumer law of the Commonwealth and of each State and Territory which is expressed to apply extraterritorially[9]. If the class action waiver clause would be unfair in the Australian terms and conditions with an Australian consumer the result should not be different because the consumer resides abroad, or the standard form

[9] Explanatory Statement, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, [17.1]-[17.12].

contract contains a foreign choice of law or jurisdiction clause. Allsop CJ was wrong to reason otherwise: see [31]-[32] below.

30. **A significant imbalance (s 24(1)(a)):** It was recognised in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, at least in respect of Part IVA of the FCAA and Part 10 of the *Civil Procedure Act 2005* (NSW), that one of the objectives of representative proceedings is to enhance access to justice for claimants by allowing for the collectivisation of claims that might not be economically viable as individual claims. The effect of the class action waiver clause in the US terms and conditions was to prevent, or at least discourage, passengers from vindicating their legal rights where the cost to do so individually was not economically viable or at least questionable. The clause has significant implications when the cost of commencing and prosecuting a typical claim arising out of a 13 day cruise holiday with a ticket price of CAD$1,786.17 will not be economically viable when brought as an individual proceeding relative to the damages recoverable, no matter how meritorious the claim may be. In this way the class action waiver clause creates a significant imbalance in the parties' rights and obligations arising under the contract as it has the practical effect of limiting or even removing the ability of a passenger to pursue an otherwise available claim against the cruise line.

31. The Chief Justice acknowledged at [13] that "there might be little doubt that in many cases of Australian consumer contracts it would be unfair and unjust for standard form contracts, as contracts of adhesion, to seek to impose a waiver of the operation of Pt IVA or any other statute of a State or Territory of a similar character." However, his Honour held that the class action waiver clause in Mr Ho's contract was not unfair because Mr Ho was not an "Australian consumer" but a "North American" and the contract contained a United States choice of law and exclusive jurisdiction clause where the class action waiver clause would be enforced (FC [5]-[9], [13]). It was an error to introduce the concept of an "Australian consumer contract" into s 23 for which there is no warrant in the text, context, purpose or legislative history. It was a further error, building on this premise, to introduce a variable standard of fairness into s 23, whereby 'non-Australian contracts' – however they may be defined – invite a *renvoi* to the standards of fairness of some foreign forum with which the contract may also be connected.

32. If s 23 applies despite Mr Ho's Canadian residence, it would be a surprising outcome to say the least that the Parliament intended that a different standard of fairness would be applied because of a consumer's place of residence. This then begs the question why the clause would not have been unfair when it would have been unenforceable in Canada where Mr Ho resides[10]. Similarly, if it is accepted that s 23 applies to a contract containing foreign choice of law and exclusive jurisdiction clauses, it could not have been intended that the fairness of a term within that contract would be assessed by reference to its enforceability in the foreign jurisdiction. Such a construction would also have the consequence that the protections afforded by s 23 could be readily circumvented through the inclusion of foreign choice of law and exclusive jurisdiction clauses, something which his Honour elsewhere said could "hardly be presumed… except with express words of necessary intendment" (FC [32]). These errors have come about because the Chief Justice did not first finally determine the anterior question of whether s 23 applies. Indeed, while leaning to the correct view on s 5(1)(g), that the presumption against extraterritoriality has no work to do, the Chief Justice has wrongly reintroduced the presumption into s 23 itself.

33. Derrington J at [254] and [259] held that the class action waiver clause simply limits "the method by which a claim can be brought as opposed to whether it can be brought at all", which overlooks the practical effect of the clause set out at [30] above. His Honour at [255] also accepted the submission that because there was no evidence about Mr Ho's financial circumstances the clause could not be an unfair term. This was an error because, even if Mr Ho had the financial means to bring an individual proceeding, he would not, or at least would be reluctant to, if the likely costs far exceed the likely amount to be recovered. To focus on Mr Ho's circumstances outside of the contract also loses sight of the statutory test which is whether the term "would cause a significant imbalance in the parties' rights and obligations arising under the contract", not whether Mr Ho personally could cope with such an imbalance. For the same reasons, it is irrelevant that Mr Ho did not lead evidence about the difficulties he might encounter if he commenced an individual proceeding in California (FC [255]). A lawyer would be unwilling or unlikely to act on a speculative basis where the likely costs exceed the likely amount to be recovered (cf

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[10] *Pearce v 4 Pillars Consulting Group Inc* (2021) 461 DLR (4th) 205.

FC [255]). Further the "well known" 'no costs' regime in the United States (of which there was no evidence), does not "potentially reduce any perceived imbalance" but rather exacerbates it if Mr Ho's costs are likely to exceed the amount to be recovered (FC [256]). Putting to one side that unfairness must be assessed at the time of contracting, the fact that only 11 passengers of the 696 allegedly party to the US terms and conditions have commenced individual proceeding in California does not "negate the conclusion that the class action waiver clause caused an imbalance" (FC [255]). If anything, it proves the contrary, particularly when only 12 group members in total had opted out of the representative proceeding (ABFM 67). His Honour also suggested at [257] that "a plaintiff could secure a better outcome by pursuing a personal action than by being a member of a class action where recovery is often significantly eroded by the entitlements of both the litigation funder and the class action lawyers." Not only is the suggestion entirely speculative but more importantly the class action waiver clause denies group members the opportunity to participate in a representative proceeding when that will result in a greater recovery than an individual proceeding.

34. **No legitimate interest (s 24(1)(b)):** The class action waiver clause is presumed not to be reasonably necessary to protect Princess' legitimate interests unless Princess proves otherwise: ACL, s 24(4). Princess led no evidence to establish why the class action waiver clause was reasonably necessary to protect its legitimate interests. The absence of that evidence is particularly striking when Princess offered tickets on the very same cruise on the Australian and UK terms and conditions which did not prohibit those passengers from participating in a class action. Derrington J suggested at [265]-[267] that Mr Ho ought to have led this evidence which is an error because Princess accepted at [249] that it bore the onus on this issue. The only interest that Princess was shown to have in the class action waiver clause was that found by the primary judge of preventing and discouraging passengers from vindicating their legal rights when it was economically unviable or at least questionable for them to do so in an individual proceeding. Under the Australian standards of fairness embodied in s 24, the primary judge correctly viewed that as not being a legitimate interest.

35. The Chief Justice did not identify why the class action waiver clause was reasonably necessary to protect Princess' legitimate interests (FC [3]-[10]). Derrington J found, unsupported by any evidence, that Princess had, beyond an apparent and general

aversion of defendants to representative proceedings, a "substantially more idiosyncratic" interest of being "able to secure economies of scale by responding to similar claims in the same forum, utilising the same lawyers, experts and processes … to rationalise all litigation against it in the location from which it carries on business, in highly experienced Courts with which it is likely to be familiar" (FC [262], [268]). That was an error as the interests identified by Derrington J are not protected by a class action waiver clause but an exclusive jurisdiction clause. If anything, a class action would facilitate the "economies of scale" identified by Derrington J as Princess could litigate in one proceeding with the same lawyers, experts and processes rather than in multiple proceedings. A class action, at least under Part IVA of the FCAA, has the added 'economy of scale' for both a plaintiff and a defendant of having common questions of fact and law determined in a single proceeding. It was a further error for his Honour to identify this feature of representative proceedings as something to be legitimately guarded against (FC [261], [268]). His Honour thought that it was relevant that these "usual adverse effects of class actions on defendants are present in this case" (FC [264]) which was another error because, as his Honour accepted at [259] and [265], unfairness must be determined at the time that the contract was entered into rather than when the clause is sought to be applied.

36. **Detriment (s 24(1)(c)):** In terms of whether the class action waiver clause would cause detriment (financial or otherwise) if it were to be relied upon, Derrington J accepted at [269] that "it is not doubted that [Mr Ho] will be denied the benefits of the protection of the class action process through which he can avoid risk and the outlay of expenses and the like." It follows that the requirement in s 24(1)(c) was satisfied. However, his Honour held at [272] that the term was not unfair because he applied the wrong and more onerous test of "significant detriment". Allsop CJ said at [10] without explanation that "Mr Ho did not prove he is disadvantaged by suffering detriment for the purposes of s 24(1)(c)." That is plainly wrong. There can be, to use Derrington J's expression, 'no doubt' that the class action waiver clause would occasion detriment if it were to be relied on including but not limited to the loss of the benefits identified by Derrington J at [269].

37. **A lack of transparency (s 24(2)(a)):** A term is "transparent" if it is legible, presented clearly, expressed in reasonably plain language and is readily available to

any part affected by the term: ACL, s 24(3). The finding at [271] that the class action waiver clause was transparent is simply not borne out by the facts set out at [11]-[14] above. The class action waiver clause was not readily available to Mr Ho (to such an extent that the primary judge even concluded that it was not incorporated into the contract), it was not presented clearly and was not expressed in reasonably plain language.

Ground 2(b): The class action waiver clause is contrary to Part IVA of the FCAA

38. The class action waiver clause is unenforceable for being contrary to Part IVA of the FCAA. In addition to a statute expressly prohibiting 'contracting out', a term of a contract will not be enforceable if as a matter of construction "the provisions of the statute, read as a whole, are inconsistent with a power to forgo its benefits" or "the policy and purpose of the statute may shew that the rights which it confers on individuals are given not for their benefit alone, but also in the public interest, and are therefore not capable of being renounced"[11]. Further, clauses which interfere with the administration of justice or seek to oust the jurisdiction of the Court have long been recognised as being contrary to public policy[12].

39. Gleeson CJ identified the "primary object" of the Victorian equivalent of Part IVA of the FCAA as being "to avoid multiplicity of actions" which "the State has an interest in preventing"[13]. Kiefel CJ, Bell and Keane JJ by reference to the report prepared by the Australian Law Reform Commission (**ALRC**) identified the objectives of Part IVA as being enhanced access to justice for claimants and increased efficiency in the administration of justice[14]. The ALRC's report recognised that access to justice would be enhanced if claimants were informed of their legal rights[15]. One of the perceived disadvantages of requiring the consent of group members prior to the commencement of a representative proceeding was that it depended upon group members already being aware of their legal rights[16]. The

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[11] *Brooks v Burns Philip Trustee Co Ltd* (1969) 121 CLR 432, 456; *Price v Spoor* (2021) 270 CLR 450, [39].
[12] *Egerton v Earl of Brownlow* (1853) 4 HLC 1, 123; 10 ER 359, 424; *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, 652.
[13] *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, [12].
[14] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [82].
[15] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), [2], [14], [15], [69].
[16] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), [103], [106]-[108], [126]. See also House of Representatives, Parliamentary Debates (Hansard), 13 November 1991, 3174-3175.

solution and the ALRC's recommendation was to allow representative proceedings to be commenced without first obtaining the consent of group members and to provide them with a notice containing sufficient information to enable them to exercise their rights in relation to the proceeding, including their right to opt out[17].

40. These objectives are reflected in Part IVA. Where seven or more persons have a claim against the same person, a proceeding may be commenced by one or more of them on behalf of the others where the claims arise out of the same, similar or related circumstances and a common question of law or fact arises: FCAA, ss 33C(1), 33D(1). A person's consent is not required for them to be a group member in a representative proceeding: FCAA, s 33E(1). Instead, group members can opt out of the proceeding pursuant to s 33J.

41. Section 33X(1)(a) provides that group member must be given notice of the commencement of the representative proceeding and their right to opt out before a specified date. Section 33Y(2) and (3) provides that the Court must approve the form and content of the notice as well as its method for distribution. The purpose of these provisions is to ensure that group members can make an informed decision and they form part of the Court's protective and supervisory jurisdiction in respect of group members[18].

42. Tellingly, there is no express power within Part IVA by which a respondent could enforce a class action waiver clause. Section 33K(1) provides that an application to amend the group member definition can only be brought by the applicant. The Chief Justice acknowledged at [38] that the "combination of the terms of the class action waiver clause and the operation of Part IVA does not lend itself to easy remedial solution." The absence of a power to enforce a class action waiver clause in Part IVA was one matters relied upon by Rares J at [70]-[80] in concluding that a stay was contrary to the public policy considerations in Part IVA.

43. Rares J correctly held at [50]-[86] that the class action waiver clause is unenforceable by reason of Part IVA. As His Honour observed at [61], if a person could make a

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[17] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), [127], [188]-[190], [195]. See also House of Representatives, Parliamentary Debates (Hansard), 13 November 1991, 3174-3175.
[18] *King v GIO Australia Holdings Ltd* [2001] FCA 270, [15]; *Lenthall v Westpac Banking Corp (No 2)* (2020) 144 ACSR 573, [31].

legally binding decision to opt out before receiving a notice under ss 33X and 33Y informing them of their right to remain in or opt out of the proceeding as well as any other matters the Court determined should be included in the notice, the person would not be fully informed of the matters that Parliament intended that the Court would ensure are communicated to them before opting out. Further, as his Honour found at [74], a construction of Part IVA that permitted the enforcement of a class action waiver clause would negate the legislative intention to enhance access to justice and the efficiency of the exercise of judicial power as it would necessarily require the bringing of individual proceedings.

44. The Court of Appeal for British Columbia similarly held in *Pearce v 4 Pillars Consulting Group Inc* (2021) 461 DLR (4th) 205 at [248]-[279] that a class action waiver clause was void as being contrary to public policy because "it so functionally interferes with access to the courts". While the details of the two statutory regimes differ, importantly for present purposes both adopt an 'opt out' model. The attempt to equate the freedom to opt out of a class action with the freedom to opt out at the time that the contract was entered into was rejected in *Pearce* at [264]-[266].

45. Critical to the respondents' argument and the majority's reasons for finding that the class action waiver clause is not contrary to Part IVA is an erroneous construction of s 33J which would permit group members to opt out of the proceeding at *any time* before the date fixed by the Court. Derrington J at [359] said that "importantly, by s 33J(2) a group member is given an entitlement to opt out prior to the date fixed by the Court and *before* receiving the notice." Section 33J(1) and (2) provides that the Court must fix a date "before" which a group member may opt out of a representative proceeding and a group member may opt out of the representative proceeding "before" the date so fixed. It does not follow that a group member can opt out of a proceeding at *any time* before the fixed date. Rather, when properly construed the time during which group members may opt out under s 33J is the period between the making of an order fixing the opt out date, which is expressly linked in s 33X(1) to giving group members notice, and the opt out date itself (subject to any extensions granted under s 33J(3)) (FC [66]). Accordingly, while Part IVA is permissive in the sense that group members can opt out of a representative proceeding the process is mandatory in that it can only occur after the giving of a Court approved notice and

group members cannot have bound themselves contractually to do so in advance (cf FC [12], [357]-[358]).

46. The fact that under s 33X(2) the Court may dispense with sending an opt out notice where the relief sought does not include damages does not detract from the appellant's construction of s 33J. To the contrary, in exercising the discretion under s 33X(2) to dispense with giving notice, the Court must take into account the consequences of group members being bound by an adverse determination[19]. Similarly, it does not detract from the appellant's construction that s 33Y(5) and (8) contemplate that group members may not in fact receive an opt out notice. As the ALRC explained "the interests of group members should be protected as far as possible but the absence of notice and the continuation of the proceedings may not in fact be prejudicial to the interests of group members. Since a group member is not required to take any step in the proceedings, the absence of notice may not come to light until a much later date. Provided that the Court has power to ensure that a person has suffered no injustice by reason of not receiving notice the failure to give notice should not itself vitiate the proceeding"[20]. The Court can readily ameliorate such prejudice under s 33J(3) by extending the time to opt out for group members who did not receive a notice.

Ground 3: The exclusive jurisdiction clause should not be enforced

47. The Court retains a discretion whether to stay a proceeding the subject of a foreign exclusive jurisdiction clause[21]. The primary judge held that there were strong reasons for not enforcing the exclusive jurisdiction clause in favour of the United States Central District Court (PJ [331]-[340]). A review of that discretion must accord with the principles in *House v King* (1936) 55 CLR 499 at 504-505[22]. The primary judge's exercise of discretion, which was upheld by Rares J at [87]-[95] on appeal, should be restored.

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[19] *Femcare Ltd v Bright* (2000) 100 FCR 331, [67]-[68].
[20] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), [196].
[21] *The Eleftheria* [1970] P 94, 99-100; *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, 428-429.
[22] *Epic Games, Inc v Apple Inc* (2021) 286 FCR 105, [48]. See also FC [376].

48. **Juridical advantage:** Derrington J held that it was a *House v R* error in declining to enforce the exclusive jurisdiction clause for Stewart J to rely upon the significant advantage to Mr Ho of remaining in the Australian class action when the class action waiver clause was enforceable (FC [376]). However, for the reasons given in relation to grounds 1 and 2, Derrington J's conclusion that the class action waiver clause was enforceable was an error. It follows that Stewart J did not err and that it was an error for Derrington J to disturb the exercise of discretion on that basis.

49. **Public policy of the ACL:** The primary judge found by reference to the Full Court's decision in *Epic Games, Inc v Apple Inc* (2021) 286 FCR 105 at [110] that there were public policy considerations that the ACL claims should be heard by an Australian Court rather than in the United States District Court based on expert evidence (PJ [336]-[337]). All of the judges in the Full Court found that his Honour gave this consideration too much weight but as Rares J correctly stated at [87] the "primary judge did not weigh that consideration independently as providing a strong reason for a stay, but treated it as a factor in his overall evaluation" (FC [36]-[37], [87], [382]-[387]).

50. **Fracturing of litigation:** The primary reason given by Stewart J for not enforcing the exclusive jurisdiction clause was the fracturing of litigation that would ensue if parties to the US terms and conditions were forced to commence individual proceedings in the United States when essentially identical claims for the vast majority of passengers would be heard in the Australian class action and none of the existing 11 individual proceedings in the United States involved claims made under the ACL (PJ [332]-[335]). This would have the undesirable consequence of wasting the parties' and judicial resources but more importantly runs the risk of producing conflicting outcomes in different Courts which could bring the administration of justice into disrepute. Rares J agreed for the reasons given at [88]-[91] and added that to enforce the exclusive jurisdiction clause would negate the public policy of Part IVA of permitting persons, before the institution of a representative proceeding, to enter an enforceable contract that requires one of the parties to opt out of any such proceeding were it to be commenced.

51. Derrington J found that "heavy reliance" on the principle against multiple proceedings and the fracturing of litigation was "misplaced" because the parties to

the different proceedings were not identical such that "it would merely mean that different results were reached in different litigation between different parties" (FC [378]-[379]). The distinction that Derrington J has drawn is artificial when the claims of passengers arise out of the same ill-fated voyage and Mr Ho's claims are identical to the claims being advanced by the lead applicant in the representative proceeding other than with respect to damages. The distinction is particularly artificial in the context of a representative proceeding when s 33ZB will create a statutory estoppel for all remaining passengers in the proceeding in respect of the common questions of fact and law that were determined at the initial trial in September and October 2023[23]. The risk of conflicting outcomes in different Courts bringing the administration of justice into disrepute remains notwithstanding that the parties to those proceedings are not identical.

Part VII: Orders sought

52. The appellant seeks the orders set out in the Notice of Appeal (CAB 289-290).

Part VIII: Time required for presentation of oral argument

53. The appellant estimates that she will need approximately 2 hours for oral submissions in chief and 15 minutes in reply.

Dated: 5 May 2023

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[23] *Timbercorp Finance Pty Ltd (In Liq) v Collins* (2016) 259 CLR 212.

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

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT

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

No	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current (Compilation No 6, 29 July 1977 – present)	ss 51(i), (xx)
Statutory provisions			

No	Description	Version	Provisions
2.	*Competition and Consumer Act 2010* (Cth)	As at 30 October 2018 (Compilation No 115, 26 October 2018 – 13 March 2019)	ss 4, 4E, 5 Sch 2, Pt 2-3
3.	*Civil Procedure Act 2005* (NSW)	Current (Version 1 December 2021 – present)	Pt 10
4.	*Criminal Code Act 1995* (Cth)	Current (Compilation No 145, 10 November 22 – present)	Pt 2.7, Div 15
5.	*Fair Trading Act 1987* (NSW)	As at 30 October 2018 (Version 11 October 2018 – 30 October 2018)	ss 5A, 28, 32
6.	*Federal Court of Australia Act 1976* (Cth)	Current (Compilation No 56, 18 February 2022 – present)	Pt IVA
7	*Trade Practices Act 1974* (Cth)	As enacted	s 52
8.	*Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth)	As enacted	Sch 1, items 1, 6
9.	*Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth)	As enacted	Sch 1, item 1