HIGH COURT OF AUSTRALIA

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Important Information

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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 REPLY

Part I: Certification

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

Part II: Argument

Appeal Ground 1 and Contention Grounds 1 and 2: Application of s 23

2. **Overview:** Paragraphs 9 to 23 of the respondents' submissions raise an argument which was never advanced in either Court below. It is an argument which falsely attributes to this Court a holding that whenever a substantive right or obligation is in dispute the Court must first apply choice of law rules before construing a forum statute which is otherwise relevant. According to this supposed holding, if the *lex causae* is foreign law, the local statute cannot apply unless it "*demands*" application irrespective of the *lex causae*. Further, it is said that this is a fundamental common law right that attracts the principle of legality.

3. In short: (a) no judge below has adopted this approach, not even Derrington J; (b) none of the High Court authorities cited by the respondents support this approach

and the cases cited by the respondents concern very different issues to the present; (c) the respondents' approach is contrary to decisions of this Court[1], including by Dixon J, one of this Court's stronger proponents of the *lex causae*, who stated that the "*rule*" that legislative provisions do not apply to cases which, according to the rules of private international law, are governed by foreign law "*is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter*"[2]; (d) to the extent that decisions of other jurisdictions are relevant, the respondents' submissions have been rejected in at least the Supreme Court of New Zealand and the House of Lords[3], decisions which have not been referred to by the respondents (with the position in Canada and the United States sufficiently diffuse to justify a separate academic article); (e) the presumption against extraterritoriality (which is what this case is about) is not a fundamental common law right which invokes the principle of legality but is no more than a principle of statutory interpretation which "*may have little or no role to play*"[4] and which is of decreasing relevance in a globalised world[5]; and (f) the respondents' submissions subvert the supremacy of statute over the common law and fetter unduly the Parliament's ability to legislate effectively when there is a foreign element[6].

4. Taking *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 as an example of one of this Court's authorities which supposedly supports the respondents' argument. That was a very different case. Section 8 of the *Insurance Contracts Act 1984* (Cth), unlike s 23 of the ACL, expressly extended the Act to contracts of

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[1] ***Wanganui****-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 597, 600-601, 606-607, 611-613; ***Kay's Leasing*** *Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124, 142-144; *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 436, 442-443; ***Old UGC*** *Inc v The Industrial Relations Commission of New South Wales* (2006) 225 CLR 274, [22]-[23], [55]-[58]; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, [27]-[36]; *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239, [4]. See also other relevant first instance and intermediate appellate authority: *Chubb Insurance Co of Australia Ltd v Moore* (2013) 302 ALR 101, [197]-[205]; ***ACCC v Valve*** *Corp (No 3)* (2016) 337 ALR 647, [90]-[125]; *Valve Corp v ACCC* (2017) 258 FCR 190, [110]-[116]; ***Huntingdale Village*** *Pty Ltd v Westgarth* (2018) 128 ACSR 168, [162]-[173].

[2] *Wanganui*, 601.

[3] *Brown v* ***New Zealand Basing*** *Ltd* [2018] 1 NZLR 255, [8], [76]; ***Office of Fair Trading*** *v Lloyds TSB Bank plc* [2008] 1 AC 316, [7], [12], [27].

[4] *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, [43]. See also *Masri v Consolidated Contractors International UK (No 2)* [2009] QB 503, [31]; *Huntingdale Village*, [167].

[5] A Bell, "2023 Spigelman Oration: Extraterritoriality in Australian Law", [69].

[6] See discussion in M Douglas, "**Choice of Law in the Age of Statutes**: A Defence of Statutory Interpretation After Valve", *Commercial Issues in Private International Law* (2019); A Briggs, "A Note on the Application of the Statute Law in Singapore within its Private International Law" [2005] *Singapore Journal of Legal Studies* 189.

insurance the proper law of which was an Australian State or Territory, or would be an Australian State or Territory but for a choice of law clause. Contrary to RS [10], *Akai* is not authority for the general proposition that "*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 state 'demands application … irrespective of the identity of the lex causae'*". Toohey, Gaudron and Gummow JJ clearly stated in *Akai* at 443 "*In the present case, the statute, a law of the Commonwealth, is a law directly in force in the New South Wales forum. The question is then whether, according to its terms, the statute applies to the particular contract of insurance in issue*."

5. The issues raised by grounds 1 and 2 in the notice of contention should be dismissed and the application of s 23 of the ACL should be approached through the prism of statutory construction which has otherwise framed the dispute between the parties. It also follows that RS [24]-[46] must be approached with caution because they interweave arguments which seek to defend Derrington J's approach (which departs from the approach of Stewart J and was doubted by Allsop CJ) with arguments which hinge on the misguided approach in grounds 1 and 2 of the notice of contention.

6. **Section 5(1) extends s 23:** The respondents give three reasons why s 5(1) does not apply to s 23, none of which should be accepted. *First*, it is submitted that s 5(1) does not apply to s 23 because s 5(1) concerns "*engaging in conduct*" and s 23 does not proscribe any conduct (RS [27]-[29]). That artificial distinction should not be drawn for the reasons already given by the appellant and the Commonwealth. The respondents have not grappled with why s 5(1) expressly applies to s 23 if it was not intended to extend its operation (AS [19]). *Second*, it is contended that s 5(1) should not be given a beneficial construction within consumer protection legislation because of the "*oddity*" created by the appellant and Commonwealth's construction which would see s 23 not applying to an Australian-law governed contract between an Australian small business and a foreign corporation that does not carry on business in Australia (RS [30]). The appellant does not accept that s 23 would not apply to the example given by the respondents which does not arise on the present facts. In any event, the example offers no reason for not giving s 5(1) a beneficial construction. Section 5(1) proceeds on the assumption that, but for that subsection,

s 23 would not otherwise apply[7]. Section 5(1) has the effect of extending the operation of s 23. *Third*, the respondents seek to downplay the significance of the *Trade Practices Amendment (Australian Consumer Law) Act (No 1)* (Cth), which amended s 5(1) to apply specifically to the unfair contracts terms legislation, on the basis that the amendments were only ever intended as a "*first step*" to the introduction of other provisions within the ACL (RS [31]). Irrespective of whether the amendments were only ever intended as a first step, the legislative history reveals that Parliament's intention was that s 5(1) would apply to the unfair contracts legislation in what is now Part 2-3 of the ACL.

7. **No additional limitation:** The task of identifying a statutory "*hinge*" arises only in respect of what are sometimes described as 'generally worded statutes' "*where there is no express provision relevantly addressing the territorial reach of the subject matter of the statute*"[8] (cf RS [33]-[35]). The respondents falsely characterise s 23 as a generally worded statute calling for the need to identify a statutory hinge because they ignore that the statute through s 5(1) has already provided the specificity as to its extraterritorial reach which includes standard form contracts with consumers and small businesses that are made outside of Australia by the persons identified in paragraphs (g) to (i)[9]. To conjure up a need to identify a further statutory nexus, notwithstanding the application of s 5(1) to s 23, the respondents have drawn a false dichotomy between the "*scope*" or "*operation*" of the statute in s 5(1) and its "*application*" in s 23 (RS [9], [13], [19]-[20], [25], [33]-[35]). However, the scope and application of the statute are relevantly one in the same[10]. If the statute operates in respect of Mr Ho's contract, it can apply to Mr Ho's contract.

8. **Norm of conduct:** The respondents point to different provisions within the ACL which require expressly a further territorial nexus with Australia in addition to s 5(1) and contend that "*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*" (RS [36]-[40]). However, there are many other provisions like s 23 within what was the *Trade Practices Act 1974*

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[7] *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 24; *Bray v* ***F Hoffman-La Roche*** *Ltd* (2002) 118 FCR 1, [50].
[8] *Impiombato*, [59]; *DRJ v Commissioner of Victims Rights (No 2)* (2022) 103 NSWLR 692, [34]-[35], [157].
[9] *F Hoffman-La Roche*, [50]-[52].
[10] M Davies et al *Nygh's Conflict of Laws in Australia* (10th ed, 2020), 486-487; *New Zealand Basing*, [8]; Choice of Law in the Age of Statutes, 223.

(Cth) and what is now the ACL which do not require a territorial connection with Australia in addition to s 5(1)[11]. In respect of such a provision it was correctly stated that "*Australia has an interest in regulating the situation where … a corporation incorporated within Australia carries out an act in the United States that is contrary to Australian law"* and that "*the protection of consumers outside Australia … can be perceived to promote the welfare of Australians by enhancing foreign confidence in Australia's ability to promote competition and fair trading outside Australia"*[12]. By s 5(1), the Australian Parliament has chosen to enact a norm of conduct that Australian corporations and citizens, as well as foreign corporations that choose to carry on business in Australia and foreign citizens who choose to ordinarily reside in Australia, cannot seek to enforce unfair terms in standard form contracts with consumers and small businesses irrespective of whether that occurs inside or outside Australia. There is nothing absurd or irrational about such a construction.

9. **Section 67:** The respondents' reliance upon the absence of an equivalent provision to s 67 in Part 2-3 of the ACL is misplaced (RS [42]-[43]). Section 67(a) of the ACL provides that Division 1 of Part 3-2 applies if the proper law of the contract would be the law of any part of Australia but for a term of the contract that provides otherwise[13]. There is no textual or other basis to the submission at RS [42]-[43] that there is no equivalent to s 67 in Part 2-3 because the "*choice of law rules*" already operate to ignore a potentially unfair foreign choice of law clause by applying s 23 if the contract, without that clause, was otherwise governed by the law of a place in Australia. Accordingly, if as the respondents contend, Part 2-3 only applies to contracts governed by Australian law, parties could contract out of Part 2-3 by including a foreign choice of law clause in a contract of adhesion with consumers and small businesses. This tells strongly against the construction of ss 5(1) and 23 propounded by the respondents[14].

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[11] See ACL, ss 39 (unsolicited cards), 43 (assertion of right to payment for unauthorised entries or advertisements), 44 (participation in pyramid schemes), 51 (guarantee as to title), 52 (guarantee as to undisturbed possession), 53 (guarantee as to undisclosed securities).
[12] *Worldplay Services Pty Ltd v ACCC* (2005) 143 FCR 345, [42]-[43].
[13] Edelman J correctly accepted in *ACCC v Valve* at [102] in respect of a contract governed by Washington State law which had its closest and most real connection to the law of Washington State that "*in the absence of s 67, Division 1 would apply to any contract irrespective of its proper law*".
[14] *Kay's Leasing*, 142-143; *Old UGC*, [22]-[23], [56]; *R v Independent Broad-Based Anti-Corruption Commission* (2016) 256 CLR 459, [77]; FC [29]-[33].

10. **The presumption:** It should be noted at the outset that the respondents' construction of s 23 would also result in some extraterritorial application. For example, if s 23 is construed to apply to a contract governed by Australian law, s 23 would apply to a contract with an Australian choice of law clause that was made outside of Australia by two foreign counterparties to perform services outside of Australia. However, the presumption against extraterritoriality has no operation in the proper construction of s 23 for at least the following reasons. *First*, the statute itself through s 5(1) expressly provides for the circumstances in which s 23 is to have extraterritorial application[15]. *Second*, there is a countervailing presumption that legislation applies to both locals and foreigners within the territory to which the enactment extends[16]. Section 5(1) only extends the operation of s 23 to a foreign corporation if they carry on business within Australia. On the respondents' construction, s 23 would apply to foreign corporations and citizens with no territorial connection with Australia beyond the proper law of the contract. *Third*, the presumption that statutory provisions are understood as having no application to matters governed by foreign law is inapt in the present statutory context. Section 23 does not apply to contracts containing foreign choice of law clauses that are the subject of negotiations between commercial parties, but to contracts of adhesion entered into with consumers and small businesses. *Fourth*, the application of choice of law rules would defeat the purpose of Part 2-3 of the ACL by being easily circumvented through the inclusion of a foreign choice of law clause[17].

11. **Place of performance:** If, contrary to the appellant's primary position, a further connection with Australia is required, either in addition to or instead of s 5(1), it is that the contract was not wholly performed outside of Australia. Section 23(1) applies to "*consumer contracts*" and "*small business contracts*" which are defined in s 23(3) and (4) to be "*contracts for the supply of goods or services, or a sale or grant of an interest in land*". Section 23(1) does not prohibit the entry into, or enforcement of, a standard form consumer or small business contract containing an unfair term. Rather s 23(1) operates to render such terms void. This suggests that s 23(1) is centrally concerned with the performance of consumer and small business contracts. In the case of a contract for the sale or grant of an interest in land, this be where the

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[15] *Wanganui*, 601; FC [24].
[16] *Walker v New South Wales* (1994) 182 CLR 45, 49-50. See also *Office of Fair Trading*, [4].
[17] *Kay's Leasing*, 142-143; FC [29]-[33].

land is located. For a contract for services, the place of performance is where the services are supplied. If this construction is accepted, it can hardly be assumed that the Commonwealth Parliament intended that legislation which protects consumers and small businesses from unfair terms in standard form contracts would only apply if the subject matter of the contract was wholly or predominantly in Australia as it would create a substantial lacuna in the operation of beneficial and protective consumer legislation (cf FC [314]). Accordingly, on this alternate construction, s 23 would still apply to Mr Ho's passage contract from Sydney and to Sydney via New Zealand even though the services were only partially performed in Australia and were mostly supplied on the High Seas and in New Zealand.

Appeal Ground 2(a): The class action waiver clause is an unfair term

12. **A significant imbalance:** The fact that the class action waiver clause would be enforceable in the foreign jurisdiction the subject of the choice of law and forum clauses is beside the point (cf RS [52]). Section 23 proceeds on the basis that the unfair term is otherwise a contractually valid and enforceable term.

13. It is not a "*bald assertion*" by the appellant but rather a finding by the primary judge that the class action waiver clause had the effect of preventing, or at least discouraging, Mr Ho from vindicating his legal rights if the cost to him to do so individually was not economically viable or at least questionable (cf RS [53]; J [144]). It is far from speculative, and a matter of common sense, that the clause would create such an imbalance at the time that the contract was entered into (cf RS [53]).

14. **No legitimate interest:** Other than to mischaracterise the appellant's submissions at [34]-[35], RS [54]-[56] does not engage with them or the absence of any evidence that the clause was reasonably necessary to protect Princess' legitimate interest. Princess has not discharged its onus of establishing that the class action waiver clause was reasonably necessary to protect its legitimate interests.

15. **Detriment:** Contrary to RS [57], Derrington J did not find that there was a mere "*possibility*" of detriment if the class action waiver clause was relied upon. His Honour found 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 the risk and outlay of expenses and the like*". Mr Ho has established that the class action waiver clause would cause detriment if it were to be applied (cf RS [58]).

16. **Transparency:** Section 23 proceeds on the assumption that the unfair term was a term of the consumer or small business contract. Accordingly, it does not follow from the fact that there was sufficient notice for the incorporation of the class action waiver clause that there was sufficient notice such that the clause was also transparent (RS [59]). It is plain from the facts recorded in the appellant's chronology that the class action waiver clause was not transparent within the meaning of s 24(3).

Appeal Ground 2(b) and Contention Ground 3: The class action waiver clause is contrary to Part IVA

17. The respondents' submissions fail to grapple with the key arguments being put by the appellant and the Commonwealth and with the full reasons of Rares J. The true issue is whether Part IVA embodies two fundamental choices by Parliament – for an opt out rather than opt in procedure and for opt out to occur only under a process whereby the Court has control over the information on which group members will make that decision – and what follows as a matter of public interest, not merely private right, from these choices. While s 33J protects individual autonomy and freedom of choice (cf RS [66]), it does so within the larger scheme and the context of ss 33K(4), 33X and 33Y (FC [64]). A person is made a group member involuntarily: s 33E. The twin public interests of efficiency and equity (FC [55]) are advanced by the person remaining a group member and being bound by the determination of common questions unless and until that person has made a positive choice, on the basis of the information which the Court has determined necessary for that choice, to leave the representative proceeding.

18. The class action waiver clause is repugnant to that scheme and those public interest choices because it would see persons compelled to opt out of the action because of an earlier choice made at the time of contract without the benefit of the information the Parliament has intended is necessary for the opt out decision to be effective.

19. The vice in the clause, measured against the purposes of the scheme, is not merely a timing one – whether s 33J precludes a person from opt out at any time (cf RS [65]-[67] – it is that the clause, if permitted to operate, places in the hands of a potential defendant, prior to the representative action commencing or the contract even being performed, the ability to destroy the utility of the prospective representative action as a mechanism to advance Parliament's goals of equity and efficiency.

20. As to RS [69], exclusive jurisdiction and arbitration clauses raise different considerations because the enforcement of those clauses will not result in a multiplicity of proceedings within the Federal Court of Australia. It is the multiplicity of proceedings in a Commonwealth Court, as opposed to before a private arbitrator or a foreign court, that the Commonwealth has an interest in preventing[18], which is not a mere private right. Similarly, the logical consequence of the appellant's submissions is not that "*any settlement or covenant to sue entered into after commencement of proceeding but before notice would be void*" as it will also not result in a multiplicity of proceedings within the Federal Court.

Appeal Ground 3: The exclusive jurisdiction clause should not be enforced

21. If the class action waiver clause is void or unenforceable (but not otherwise), it follows that the majority erred in re-exercising the primary judge's discretion not to enforce the exclusive jurisdiction clause (cf RS [75]; AS [48]).

22. **Juridical advantage:** The juridical advantage of a group member participating in a representative proceeding cannot be dismissed as a "*mere procedural advantage*" in the relevant sense (cf RS [77]). A Court would not ordinarily consider a procedural advantage when determining a stay application because it invites a comparison between the quality of justice available in the two jurisdictions[19]. For example, a fraud claim would not be permitted to proceed in England because the claimant would have the benefit of more extensive discovery than in the foreign jurisdiction[20]. However, the fact that the Federal Court would not enforce the class action waiver clause whereas the US District Court would does not involve a comparison of the merits of the two courts but reflects differences in the substantive law of the two jurisdictions.

23. **Fracturing:** The respondents make two arguments against the fracturing that would ensue if the proceedings were stayed. *First*, it is submitted that the principle against the fracturing of proceedings does not apply because a representative proceeding is no more than "*a combination of a number of individual claims*" (RS [79]). However, rather than just being a combination of individual claims, the initial trial of the

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[18] See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [12] in the context of the cognate provisions in Part 4A of the *Supreme Court Act 1986* (Vic).
[19] *Aratra Potato Co Ltd v Egyptian Navigation Co* [1981] 2 Lloyd's Rep 119, 126-127.
[20] *Trendtex Trading Corp v Credit Suisse* [1982] AC 679.

representative proceeding determines all common questions of fact and law giving rise to a statutory estoppel for all group members and the respondents (AS [51]). Importantly, this includes the identical claims being advanced by the appellant and Mr Ho under the ACL which are not being litigated in the eleven individual proceedings in the United States (cf RS [79]). If Mr Ho were forced to commence proceedings in the US District Court, there is the risk of inconsistent findings and wasted costs, which underpins the principle against the fracturing of litigation. *Second*, it is said that if a stay is not granted "*the parties' agreement would be set at nought because of the conduct of third parties*" which is wrong because: (a) Princess is seeking to enforce Mr Ho's purported obligation to opt out of these proceedings which has nothing to do with the conduct of third parties; and (b) the Court always retains a discretion whether to enforce an exclusive jurisdiction clause (RS [80]).

Dated: 23 June 2023

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ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT

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

No	Description	Version	Provisions
Statutory provisions			
1.	*Competition and Consumer Act 2010* (Cth)	As at 30 October 2018 (Compilation No 115, 26 October 2018 – 13 March 2019)	s 5 Sch 2, ss 23, 39, 43, 44, 51, 52, 53, 67
2.	*Federal Court of Australia Act 1976* (Cth)	Current (Compilation No 56, 18 February 2022 – present)	Pt IVA

No	Description	Version	Provisions
3.	*Insurance Contracts Act 1984* (Cth)	As enacted	s 8