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SAILING TOO CLOSE TO THE WIND: *KARPIK V CARNIVAL PLC* (2023) 98 ALJR 45

I Introduction

On 8 March 2020, the *Ruby Princess* passenger cruise ship departed from Sydney, destined for New Zealand. The ship prematurely returned to Sydney on 19 March 2020 after an outbreak of COVID-19 on board, infecting more than 660 passengers and resulting in 28 deaths.[1] Ms Susan Karpik, a passenger who contracted COVID-19 while aboard, instituted representative proceedings under pt IVA of the *Federal Court of Australia Act 1976* (Cth) ('*FCAA*') for claims in tort and under the *Australian Consumer Law* ('*ACL*')[2] against Carnival plc and its subsidiary, Princess Cruise Lines Ltd (together, 'Princess').[3] The High Court unanimously held that pt 2-3 of the *ACL* had extraterritorial application to a class of cruise contracts formed outside of Australia with foreign corporations who were carrying on business within Australia.[4]

At the heart of *Karpik v Carnival Plc* ('*Karpik*')[5] is a caution against overreliance on canons of statutory construction where the wording of a statute demonstrates contrary Parliamentary intent. Indeed, the decision also serves as a warning to foreign corporations carrying on business in Australia that 'a price of doing so

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1 Jamie McKinnell, 'Ruby Princess Passengers Win Class Action Lawsuit Against Carnival Australia Over COVID Outbreak on Ill-fated Voyage', *ABC News* (online, 25 October 2023) <https://www.abc.net.au/news/2023-10-25/nsw-ruby-princess-passengers-win-class-action-carnival/103018412>; Maeve Bannister, 'Ruby Princess Liner Negligent, Misleading in COVID-19 Trip', *Australian Financial Review* (online, 25 October 2023) <https://www.afr.com/companies/tourism/ruby-princess-operator-negligent-for-covid-cruise-20231025-p5eevh>.

2 *Competition and Consumer Act 2010* (Cth) ('*CCA*') sch 2 ('*ACL*').

3 *Karpik v Carnival Plc* (2023) 98 ALJR 45 ('*Karpik*'). Carnival plc was the charterer and operator of the ship, while Princess Cruise Lines Ltd was the ship's owner and marketer of the cruises.

4 Carnival plc was incorporated in the United Kingdom, whilst Princess Cruise Lines Ltd was registered in Bermuda: ibid 49 [2].

5 *Karpik* (n 3).

is that the corporation is subject to and [must comply] with statutes intended to provide protection for consumers'.[6]

This case note examines: (1) the legislative landscape of the *ACL* and judicial development of the presumption against extraterritoriality; (2) the facts underlying *Karpik* and the findings of lower courts; (3) the High Court decision; and (4) the implications of *Karpik* on the future of the presumption, as well as for corporations relying on standard form contracts[7] and class action waivers in Australia.

II Background

A *The ACL*

In the late 2010s, Australia's consumer protections were considered 'largely effective',[8] 'sound', and when compared on an international level, 'broadly appropriate'.[9] But one thing was abundantly clear: 'there [was] scope to do much better'.[10] The introduction of the *Competition and Consumer Act 2010* (Cth) ('*CCA*') was the largest overhaul of Australian consumer law in over 25 years.[11] Australia's consumer law previously stemmed from over 20 pieces of law, across nine different jurisdictions.[12] Central to the previous regime was the *Trade Practices Act 1974* (Cth) ('*TPA*'),

6 Ibid 55 [38].

7 A standard form contract is defined in s 27 of the *ACL* by reference to a series of factors including the relative bargaining power of the parties, the number of similar contracts one party has made, and how much opportunity to negotiate the other party has.

8 Dr Steven Kennedy, 'An Introduction to the Australian Consumer Law' (Speech, Standing Committee of Officials of Consumer Affairs, 27 November 2009) 4.

9 Productivity Commission, *Review of Australia's Consumer Policy Framework: Productivity Commission Inquiry Report* (Final Report No 45, 30 April 2008) 7–8 ('*Productivity Commission Report*').

10 Ibid 11.

11 Kennedy (n 8) 2.

12 On a federal level, most of the regulatory regime was found within the *Trade Practices Act 1974* (Cth) ('*TPA*') and the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). Across the states and territories, there were the Fair Trading Acts: *Fair Trading Act 1987* (NSW); *Fair Trading Act 1999* (Vic) ('Victorian *FTA*'); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1987* (WA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1992* (ACT); *Consumer Affairs and Fair Trading Act 1990* (NT). Some states supplemented these statutes with further regulation: *Consumer Affairs Act 1971* (WA); *Consumer Transactions Act 1972* (SA); *Fair Trading (Consumer Affairs) Act 1973* (ACT). It was also common for the states and territories to have additional legislation relating to the selling of goods: *Sale of Goods Act 1923* (NSW); *Goods Act 1958* (Vic); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (WA), *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Sale of Goods Act 1954* (ACT); *Sale of Goods Act 1972* (NT).

which sat alongside state and territory legislation.[13] Whilst this mechanism provided a 'broad platform for consumer protection', there were 'systemic impediments in the framework'.[14] Flaws included regulatory complexity, perverse outcomes for consumers, lack of policy responsiveness to emerging needs and problems relating to contract terms and information disclosure.[15] As for a statutory 'unfair contract regime', nothing concrete existed. The *TPA* addressed unfair contract terms generically through misleading and deceptive conduct offences.[16] Victoria introduced some regulations governing the use of unfair or detrimental contract terms in consumer contracts — however, this was not reflected across the country.[17] Australia's consumer protections were complex, inconsistent and outdated.

The Productivity Commission found that a national scheme governing unfair contract terms, consumer protections, fair trading and product safety was necessary.[18] Thus, the *ACL* was born, operating in furtherance of the object of the *CCA*: enhancing 'the welfare of Australians … through the provision for consumer protection'.[19]

The *ACL* introduced an unfair contract terms regime to 'fix the deficiency' of the previous framework.[20] Specifically, ss 23 and 24 provide that:

> **23 Unfair terms of consumer contracts and small business contracts**
>
> (1) A term of a consumer contract or small business contract is void if:
> (a) the term is unfair; and
> (b) the contract is a standard form contract.
>
> (2) …
>
> (3) A ***consumer contract*** is a contract for:
> (a) a supply of goods or services; or
> (b) a sale or grant of an interest in land;
> to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

13 Ibid.

14 *Productivity Commission Report* (n 9) 7–8.

15 Ibid 9.

16 *TPA* (n 12) s 52.

17 Victorian *FTA* (n 12) pt 2B.

18 *Productivity Commission Report* (n 9) 19.

19 *CCA* (n 2) s 2.

20 *Productivity Commission Report* (n 9) 34.

> **24 Meaning of *unfair***
>
> (1) A term of a consumer contract or small business contract is ***unfair*** if:
> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
>
> (2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
> (a) the extent to which the term is transparent;
> (b) the contract as a whole.

A term is deemed unfair where all three elements in s 24(1) of the *ACL* are satisfied.[21] First, there must be a 'significant imbalance in the parties' rights and obligations'.[22] For example, in *Perera v Bold Properties (QLD) Pty Ltd*, a term allowing Bold Properties to unilaterally vary rates without opportunity for negotiation or termination was held to constitute a significant imbalance.[23] Second, the term must not be reasonably necessary to protect the legitimate interests of the advantaged party.[24] There is a presumption that the term is not reasonably necessary, with the onus on the reliant party to discharge the presumption.[25] Third, the term must cause detriment to the aggrieved party if relied upon,[26] whether financial or otherwise.[27]

B *The Presumption Against Extraterritoriality*

In the absence of express words as to the territorial reach of the legislative subject matter, the orthodox approach is that the law is 'fundamentally territorial' such that statutes are presumed to not operate extraterritorially.[28] That is, state or territory

21 See also examples of unfair terms set out in *ACL* (n 2) s 25.

22 *ACL* (n 2) s 24(1)(a).

23 [2023] QDC 99 [84].

24 *ACL* (n 2) s 24(1)(b).

25 Ibid s 24(4).

26 Ibid s 24(1)(c).

27 See, eg, *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436, [173].

28 Chief Justice Andrew Bell, 'Extraterritoriality in Australian Law' (Spigelman Oration, Banco Court, 27 April 2023) 9 [26]. See also: *Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development* (2018) 336 FLR 37, 73 [155] (Basten JA); *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 43 (Windeyer J), 22–23 (Kitto J, McTiernan J agreeing at 20); *Chubb Insurance Company of Australia Ltd v Moore* (2013) 302 ALR 101, 132 [145] (Emmett JA and Ball J, Bathurst CJ, Beazley P and MacFarlan JA agreeing at 103–4 [1]–[3]).

statutes only apply within that state or territory, and Commonwealth statutes only apply within Australia.[29] The origin of the common law presumption is found in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association*, in which O'Connor J remarked that '[m]ost statutes, if their general words were to be taken literally … would apply to the whole world, but they are always read as being *primâ facie* restricted in their operation within territorial limits'.[30] Shortly thereafter, Isaacs J commented in *Morgan v White* that the subjects 'in respect of which Parliament has legislated are presumed to be limited to those in the territory over which it has jurisdiction'.[31] The presumption may be displaced where: (1) the statute contains express contrary words;[32] (2) the construction would frustrate the operation of the statute;[33] or (3) extraterritorial effect is indicated in the 'object, subject matter or history of the enactment'.[34] Statutory presumptions have been introduced to the same effect,[35] but the common law presumption is capable of arising independently of statute.[36]

The traditional formulation of the presumption is grounded in historic notions of territorial sovereignty,[37] leading statutes to be understood as confined to that which 'is within the province of our law to affect or control'.[38] This framing was recently embraced by Kiefel CJ and Gageler J in *BHP Group Ltd v Impiombato* ('*Impiombato*') in which their Honours considered that the presumption was better described as a 'presumption in favour of international comity'.[39] Indeed, 'it is by

29 Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2017) 227.

30 (1908) 6 CLR 309, 363.

31 (1912) 15 CLR 1, 13.

32 See, eg: *Waller v Freehills* (2009) 177 FCR 507, 519–20 [50]–[53]; *XYZ v Commonwealth* (2006) 227 CLR 532, 535–6 [4] (Gleeson CJ).

33 See, eg, *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* (1996) 69 FCR 531, 535–6 (Lehane J, Lockhart and Foster JJ agreeing at 533).

34 *Schmidt v Government Insurance Office (NSW)* [1973] 1 NSWLR 59, 67–8, citing GFL Bridgman, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 7th ed, 1929) 124.

35 See, eg: the combined operation of ss 12(1)(b) and 5(2) of the *Interpretation Act 1987* (NSW); *Acts Interpretation Act 1901* (Cth) s 21(1)(b).

36 *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, 159 [28].

37 *BHP Group Ltd v Impiombato* (2022) 276 CLR 611, 623 [24] (Kiefel CJ and Gageler J) ('*Impiombato*').

38 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 (Dixon J) ('*Wanganui-Rangitikei*').

39 *Impiombato* (n 37) 623 [23] (Kiefel CJ and Gageler J). See also Stuart Dutson, 'The Territorial Application of Statutes' (1996) 22(1) *Monash University Law Review* 69, 76–7.

reason of the respect for the sovereignty of other nations that a state will not pass laws which purport to operate in or regulate conduct in other jurisdictions'.[40]

III The Case

A *Facts*

Within the representative proceedings brought by Ms Karpik, 696 passengers formed the United States ('US') subgroup, who were parties to the US Terms and Conditions. Relevantly, these Terms and Conditions included: (1) a class action waiver clause; (2) a choice of law clause applying the general maritime law of the US; and (3) an exclusive jurisdiction clause in favour of the US District Courts for the Central District of California in Los Angeles.[41] Princess sought a stay of proceedings insofar as they related to the US subgroup, arguing that the class action waiver clause meant these members could only pursue *individual* legal action.[42] Mr Patrick Ho, a Canadian passenger and representative of the US subgroup, resisted the application on the basis that the clause was void for unfairness under s 23 of the *ACL*.[43]

Four issues arose for determination by the primary judge, and on appeal to both the Full Court of the Federal Court of Australia ('FCFCA') and the High Court:

1. The extent of any extraterritorial application of s 23 of the *ACL*;
2. If s 23 did apply, whether the class action waiver clause was an unfair contract term;
3. Whether the class action waiver clause was void for being contrary to pt IVA of the *FCAA*; and
4. The enforceability of the exclusive jurisdiction clause.

B *Prior Proceedings*

The primary judge, Stewart J, refused the stay application on the basis that the US Terms and Conditions which Princess relied upon were not validly incorporated into Mr Ho's contract.[44] Nevertheless, his Honour went on to hold that, should those terms be incorporated into Mr Ho's contract, the *ACL* had extraterritorial application to that contract by operation of s 5(1)(g) of the *CCA*.[45] Justice Stewart also

40 Bell (n 28) 11 [27]. See also *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 424 (Dixon J), quoting *Niboyet v Niboyet* (1878) 4 PD 1, 7 (James LJ).

41 *Karpik* (n 3) 50–1 [13]–[16].

42 Ibid 59 [54].

43 Ibid 49 [3]–[4]. Note that the application was not resisted by Mr Ho directly, but by Ms Karpik as the initiator of representative proceedings.

44 *Karpik v Carnival plc* (2021) 157 ACSR 1, 19 [74].

45 Ibid 29 [126].

found that the class action waiver clause would be void for unfairness,[46] that the clause was not contrary to pt IVA of the *FCAA*[47] and that there were 'strong reasons for not enforcing the exclusive jurisdiction clause'.[48]

On appeal to the FCFCA, the Court unanimously held that the US Terms and Conditions were incorporated into Mr Ho's contract.[49] The majority (being Allsop CJ and Derrington J, with Rares J dissenting) allowed the appeal, enforcing the exclusive jurisdiction clause and staying the proceedings. The majority held that the class action waiver clause was not void for unfairness under the *ACL*[50] and that the clause was not otherwise unenforceable by reason of pt IVA of the *FCAA*.[51] Notably, the majority reserved a final view as to the extraterritorial application of the *ACL*.[52] Ms Karpik appealed to the High Court.

IV The Decision

A *Extraterritorial Application of the ACL*

The High Court held that s 23 of the *ACL*, read with ss 5(1)(c) and (g) of the *CCA*, extended the application of s 23 to Mr Ho's contract (and all members of the US subgroup), and consequently, that pt 2-3 of the *ACL* has extraterritorial application.[53] Crucially, the Court emphasised that in determining any extraterritorial application of a statute, the starting point must always be statutory construction of the local law.[54] This principle is consistent with the comments of Gordon, Edelman and Steward JJ in *Impiombato* that '[w]hether a restriction is supplied by the context or the nature of the subject matter is a question of statutory construction which *necessarily precedes the application of the presumption*'.[55] Indeed, following the interpretation of the statute, the presumption may have 'little or no place where some other restriction is supplied by context or subject matter'.[56] The Court characterised the presumption as 'an interpretive principle only', rather than 'a fundamental common law right'.[57] In direct contradiction to Princess' submissions, the Court stated that 'the application and force of the presumption depends upon the extent to which the provisions of a

46 Ibid 9 [21].

47 Ibid 28 [121].

48 Ibid 67 [331].

49 *Carnival plc v Karpik* (2022) 294 FCR 524, 541 [47] (Rares J), 591 [238] (Derrington J, Allsop CJ agreeing at 530 [1]).

50 Ibid 592 [245], 600 [272]–[273] (Derrington J), 532 [10] (Allsop CJ).

51 Ibid 532 [11]–[14] (Allsop CJ), 620–1 [353] (Derrington J).

52 Ibid 534 [20] (Allsop CJ), 601 [276] (Derrington J).

53 *Karpik* (n 3) 56 [42].

54 Ibid 52 [21].

55 *Impiombato* (n 37) 637-8 [61] (emphasis added).

56 *Karpik* (n 3) 52 [22], quoting *Wanganui-Rangitikei* (n 38) 601 (Dixon J).

57 *Karpik* (n 3) 51 [19].

statute depart from common expectations that Parliament's concern with the subject matter is limited to matters within its territory'.[58]

In identifying the correct approach to this inquiry, the Court rejected Princess' submissions that the first step is to determine the *lex causae* — the choice of applicable law — before construing a statute.[59] The Court relatedly took issue with Princess' reliance on *Akai Pty Ltd v People's Insurance Co Ltd* ('*Akai*') insofar as they sought to rely on the decision as authority for the proposition that 'if the lex causae is foreign law, the local statute cannot apply unless it demands application irrespective of the lex causae', with the Court confining *Akai* to its facts.[60]

In construing the statute, the Court turned to the combined operation of ss 5(1)(c) and (g) of the *CCA*, which together provide that the *ACL* (other than pt 5-3) extends to engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia. Here, engaging in conduct refers to 'doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract'.[61] The Court construed these provisions as demonstrating legislative intent that a corporation carrying on business in Australia who uses standard contract terms be required 'to meet Australian norms of fairness, irrespective of whether the standard terms are in a contract made in Australia or one made overseas'.[62] The wording of these provisions demonstrated that Parliament intended to provide for extraterritorial operation. Recourse to the presumption was unnecessary.

In relation to ss 5(1)(c) and (g), Princess argued that the absence of an additional express territorial limit in this generally worded provision required the identification of a statutory 'hinge' with a clear territorial connection.[63] The Court rejected this submission on the basis that this was not a generally worded provision requiring such an inquiry; rather, the specificity of ss 5(1)(c) and (g) demonstrate clear and express intent as to the extraterritorial reach of the statute.[64] Accordingly, the presumption had 'no role to play in light of [these] express contrary words' — rather, any application of the presumption would 'frustrate an object of the legislation'.[65] Nonetheless, the Court considered each of Princess' proposed limitations, namely:[66]

58 Ibid.

59 Ibid 51 [20], 52 [22].

60 Ibid 52 [23], citing *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

61 *CCA* (n 2) s 4(2)(a).

62 *Karpik* (n 3) 55 [40].

63 Ibid 56 [43]. See, eg, *Impiombato* (n 37) 656 [59] (Gordon, Edelman and Steward JJ).

64 *Karpik* (n 3) 56 [43].

65 Ibid 56–7 [44].

66 Ibid 57 [47]–[49].

1. Section 23 is only applicable where the proper law of the contract is Australian law;
2. The contract must be entered into 'while' the foreign company was engaged in business in Australia;
3. Section 23 should only apply to a contract which affects or is capable of affecting the acquisition of goods or services by a consumer in Australia; and
4. Section 23 only applies to contracts for services 'performed wholly or partially in' Australia.

The first limitation was dismissed on the basis that such a construction would allow parties to simply contract out of the ambit of s 23 through including a foreign choice of law clause; accordingly, this construction would be counterintuitive to the object of the *CCA* as beneficial consumer legislation.[67] The second and third limitations were rejected for being contrary to the text of the *ACL* and *CCA*.[68] The second was incompatible with the definition of 'engaging in conduct',[69] while the third was inconsistent with the definition of when a consumer is taken to have acquired goods or services.[70] The fourth limitation was refused because the proposed construction would frustrate the objectives of the *ACL* as s 23 would no longer apply to corporations incorporated within Australia who supplied contracts to Australian consumers for services performed wholly or predominantly overseas.[71]

B *Class Action Waiver Clause an Unfair Contract Term*

The High Court deemed the class action waiver clause void for unfairness under s 23 of the *ACL*.

1 *Section 24(1)(a): Significant Imbalance*

The Court held the class action waiver clause was unfair, as it was 'particularly one-way … [operating] to impose limitations on passengers but in no way [restricting] the options of the carrier'.[72] Whilst the clause did not impede Mr Ho's *right* to pursue individual action against Princess, the clause nonetheless imposed a significant imbalance because it 'had the effect of preventing or discouraging passengers from vindicating their legal rights'.[73]

67 Ibid 57 [47].

68 Ibid 57 [48].

69 *CCA* (n 2) s 4(2)(a).

70 Ibid s 3.

71 *Karpik* (n 3) 57 [49].

72 Ibid 58 [53].

73 Ibid 59 [54].

2 *Section 24(1)(b): Reasonably Necessary to Protect Legitimate Interests*

At the outset, the Court made clear that the intended operation of this limb required 'the respondent to establish, at the very least, that its legitimate interest is sufficiently compelling'.[74] Princess contended that the class action waiver clause protected its legitimate interests due to its preference for individual claims, arguing that the risk of engaging in class actions sometimes 'pressured' defendants to 'settle questionable claims'. Therefore, the clause mitigated the potentially 'devastating' outcome of a class action.[75] Princess failed on this limb. The Court held that, first, 'there is no legitimate interest in Princess seeking to prevent people from participating in a class action', and second, that Princess failed to address the critical issue of whether the clause was *reasonably necessary* to protect their interest.[76]

3 *Section 24(1)(c): Detriment*

In establishing detriment, 'more than a hypothetical case is required, although proof of actual detriment or that a term has been enforced is not necessary'.[77] By virtue of Princess' reliance on the class action waiver clause, 'Mr Ho would be denied the benefits of Part IVA of the FCA Act', constituting sufficient detriment.[78]

4 *Section 24(2)(a): Transparency*

A term is transparent if it is: (1) expressed in reasonably plain language; (2) legible; (3) presented clearly; and (4) readily available to any party affected by the term.[79] The Court provided significant guidance on the role of s 24(2)(a) in the inquiry, stating that 'the greater the imbalance or detriment inherent in the term, the greater the need for the term to be expressed and presented clearly'.[80] While the clause was legible, the process for accessing the clause was complex (involving navigating links and signing-in to various webpages), meaning the term was 'not being presented clearly', nor was it 'readily accessible'.[81]

C *Class Action Waiver Clause not Contrary to Part IVA of the FCAA*

Part IVA of the *FCAA* provides a procedural scheme for the grouping of existing claims. Importantly, s 33J provides a mechanism through which group members may opt-out from representative proceedings.

74 Ibid 53–4 [30], quoting Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 64 [5.28].

75 *Karpik* (n 3) 59 [56].

76 Ibid.

77 Ibid 59 [57].

78 Ibid.

79 *ACL* (n 2) s 24(3).

80 *Karpik* (n 3) 54 [32].

81 Ibid 59 [58].

Ms Karpik argued that the class action waiver clause was unenforceable because it ran contrary to pt IVA — that is, that the waiver of a class action right was inconsistent with the object of pt IVA in 'avoiding a multiplicity of proceedings and promoting the efficient administration of justice'.[82] Relevantly, a contract term is not enforceable if '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'.[83] In making this submission, Ms Karpik contended that the right to opt out in s 33J(2) of the *FCAA* should be interpreted as being subject to a temporal limitation, the effect of which was that any opting-out of a group member prior to a statutorily-prescribed time was void.[84]

The Court rejected Ms Karpik's submission on the basis that pt IVA of the *FCAA* 'accommodates and, in some cases, expressly provides for a person to take a step or steps at multiple points of time in the life of a dispute that would "remove" themselves from the regime provided for in pt IVA'.[85] Under pt IVA, group members retained their autonomy not to participate in representative proceedings — in fact, their right to do so was expressly permitted by s 33J. Accordingly, contracting away this right was not contrary to anything in pt IVA. The proposed temporal limitation failed on the text of pt IVA: the provisions impliedly contemplated opting-out from proceedings in a manner of ways which could occur before the proposed time limitation, and there was nothing on the wording to suggest this limitation was required.[86]

D *Strong Reasons for Not Enforcing the Exclusive Jurisdiction Clause*

Having found that the class action waiver clause was unfair and void, Princess' stay application was significantly weakened as they were deprived of 'the ability to rely on [the waiver clause] to support a stay'.[87] The voiding of the class action waiver clause also acted as a strong, countervailing reason not to enforce the exclusive jurisdiction clause.[88] With no waiver of his right to engage in representative proceedings, Mr Ho consequently had a 'strong juridical advantage in remaining as part of the class action in … Australia', as he may have been unable to participate in class action proceedings overseas.[89] Further reasoning for not enforcing the exclusive jurisdiction clause included the fracturing of litigation: duplicate individual proceedings in the

82 Ibid 60 [62].

83 *Price v Spoor* (2021) 270 CLR 450, 466–7 [39] (Gageler and Gordon JJ), quoting *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 456 (Windeyer J).

84 *Karpik* (n 3) 60 [63]–[64].

85 Ibid 60 [63].

86 Ibid 60 [64].

87 Ibid 61 [68].

88 Ibid.

89 Ibid.

US alongside the representative proceedings in Australia for 'essentially identical claims', risked the possibility of 'conflicting outcomes in different courts', potentially 'bringing the administration of justice into disrepute'.[90]

V Comment

A *Strength of the Presumption Against Extraterritoriality*

While interpretive canons are an important tool of statutory interpretation which promote consistency and stability in the law,[91] the High Court was at pains to emphasise that the presumption against extraterritoriality 'is an interpretive principle only' and not a 'fundamental common law right'.[92] *Karpik* is a stern reiteration of the principles in *Impiombato*, cementing the importance of first turning to the wording of a statute for indication of its territorial reach, before considering the common law presumption (which may have a negligible role to play).[93]

Evidently, the presumption is readily rebuttable by contrary legislative intention — so much so that the strength of the presumption may be waning.[94] Indeed, it is no longer the case that '[a]ll crime is local'.[95] The shift away from this orthodox approach is attributable to the phenomenon of globalisation, through which 'vastly more commercial activity traverses territorial borders and boundaries than when the statutory and common law presumptions were laid down'.[96] These changes have resulted in 'modern legislatures [being] more prepared and motivated to legislate with extraterritorial effect', making clear legislative drafting as to the territorial reach of statutes increasingly apposite.[97] The decision demonstrates a desire for legislative drafters to do more than merely rely on the presumption to determine the territorial reach of legislation.

Importantly, the Court's reasoning as to the extraterritorial application of the *ACL* is likely to apply to similarly drafted statutes, such as the unfair contract term

90 Ibid 61 [69].

91 William S Dodge, 'The New Presumption Against Extraterritoriality' (2020) 133(5) *Harvard Law Review* 1582, 1583–4.

92 *Karpik* (n 3) 51 [19].

93 *Impiombato* (n 37) 640 [69] (Gordon, Edelman and Steward JJ).

94 Bell (n 28) 9 [26].

95 *MacLeod v A-G (NSW)* [1891] AC 455, 458 (Lord Halsbury LC for the Court).

96 Jeffrey Barnes, Jacinta Dharmananda and Eamonn Moran, *Modern Statutory Interpretation: Framework, Principles and Practice* (Cambridge University Press, 2023) 642–3 [41.8], citing *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692, 701–2 [26] (Bell P) ('*DRJ*').

97 Bell (n 28) 33 [97]; *DRJ* (n 96) 702 [28], 705 [37] (Bell P).

provisions in the *Australian Securities and Investments Commission Act 2001* (Cth),[98] which has parallel provisions as to extraterritorial application.[99]

B *Implications for Corporations Carrying on Business in Australia*

The finding of unfairness in relation to the class action waiver clause sets a critical precedent for the mobilisation of s 23 to void similar clauses before courts in future. The decision serves as a warning to corporations seeking to rely on standard form contracts containing class action waiver clauses; indeed, *Karpik* makes clear that these protections could be widely relied upon, with reprieve even available for foreign consumers contracting overseas, provided the corporation is incorporated, or carries on business, in Australia.

The standard of fairness in Australia is distinct. For example, in the US, class action waiver clauses have generally been considered not to be fundamentally unfair terms.[100] The strength of Australian consumer protections may support the refusal to enforce an exclusive jurisdiction clause where an unfair class action waiver clause exists, in the paramount interest of consumer justice. It is also encouraging that the inclusion of a choice of law or exclusive jurisdiction clause was not decisive on the application of s 23, where the effect of application would oust the unfair contract term regime.

Karpik has undoubtedly increased the risk environment for foreign corporations carrying on business in Australia who rely on standard form contracts. It is clear too that litigation of breaches of the unfair contract terms regime will increase, with this being a target of the Australian Competition and Consumer Commission.[101] Harsher penalties, some to the tune of $50 million, have been introduced so that 'breaches are not seen as a cost of doing business, but rather as a significant impost', incentivising businesses to avoid reliance on unfair contract terms.[102]

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98 *ASIC Act* (n 12) pt 2 div 2 sub-div BA.

99 Ibid s 12AC.

100 See, eg: *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011); *Carter v Rent-A-Center Inc*, 718 Fed Appx 502, 504 (9th Cir, 2017); *DeLuca v Royal Caribbean Cruises Ltd*, 244 F Supp 3d 1342, 1348 (SD Fla, 2017). See also *Kohen v Pacific Investment Management Company LLC*, 571 F 3d 672, 677–8 (7th Cir, 2009).

101 Australian Competition and Consumer Commission, 'Businesses Urged to Remove Unfair Contract Terms Ahead of Law Changes' (Media Release No 115/23, 11 September 2023).

102 Australian Competition and Consumer Commission, 'ACCC Welcomes New Penalties and Expansion of the Unfair Contract Terms Laws' (Media Release No 153/22, 1 November 2022).

VI Conclusion

Karpik serves as a cautionary tale for corporations carrying on business in Australia, illustrating the perils of relying on class action waiver clauses in standard form consumer or small business contracts. This demonstration of judicial hesitancy in the enforcement of exclusive jurisdiction and choice of law clauses, where enforcement would have the consequence of inhibiting consumers' access to justice, is to be welcomed. After all, Australian consumer protections fundamentally aim to remedy the inequity in bargaining power in the consumer-supplier dynamic.[103] It is reassuring, then, that Australian courts are fiercely safeguarding these protections from being contracted away by powerful corporations.

103 Kate Tokeley, 'When Not All Sellers Are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace' (2017) 39(1) *Sydney Law Review* 59, 72–3.