WRAYS

The Ruby Princess Voyage.

A class action, a High Court decision on unfair contract terms, and a lesson for foreign businesses operating in Australia

Overview – Why is this decision important?

In a recent decision relating to the ill-fated Ruby Princess voyage in March 2020, the High Court of Australia has provided important guidance regarding the extraterritorial application of the unfair contract terms ("UCT") regime under the Australian Consumer Law ("ACL") (Karpik v Carnival plc [2023] HCA 39).

In particular, the High Court has held that the ACL's UCT regime applies broadly – even to standard form contracts made outside Australia between a foreign corporation and non-Australian residents – as long as the foreign corporation in question also carries on business within Australia. Further, the UCT regime will apply even if the standard form contract nominates the law of a foreign jurisdiction as the governing law of the contract.

Accordingly, foreign businesses which have direct operations in Australia, or which otherwise carry on business here, should be aware of this decision and the implications for the standard form templates they use with consumers and small businesses – both within and outside Australia.

The Facts – What happened?

The Ruby Princess cruise ship departed Sydney on 8 March 2020, with just over 2,600 passengers on board. The passengers included Australian residents, as well as citizens from the US and several other countries. Following its departure, there was an outbreak of COVID-19 on the ship, so the voyage was cut short and the Ruby Princess docked back in Sydney on 19 March 2020. A number of passengers contracted COVID-19 and some of those passengers died.

A class action was commenced in the Federal Court of Australia on behalf of the passengers on the ship, with the applicant asserting claims in tort and under the ACL against Carnival plc and its subsidiary, Princess Cruise Lines Limited (collectively, "Carnival") (being the time charterer and operator, and the owner, of the Ruby Princess, respectively). Both of the Carnival entities were incorporated and based overseas.

Carnival sought a stay of the claims by the subgroup of US-based passengers, relying on a set of terms and conditions alleged to form part of the contract between Carnival and those US passengers (the "US Terms & Conditions"). In particular, Carnival relied on the following provisions in the US Terms & Conditions:

- An exclusive jurisdiction clause, which provided for claims to be brought in courts in Los Angeles, California, to the exclusion of all other courts; and
- A class action waiver clause, pursuant to which the relevant passengers agreed to litigate any lawsuit on an individual basis rather than as part of a class action.

In response, the applicant asserted that:

- Section 23 of the ACL, which (relevantly) deals with unfair terms in standard form consumer contracts, applied to the US passengers' contracts; and
- The class action waiver clause in the US Terms & Conditions was "unfair" within the meaning of the ACL's UCT regime, and therefore, that the clause was void and unenforceable by Carnival.

What were the issues in the case?

In relation to the UCT regime, the High Court identified two issues for determination:

1. Whether the UCT regime in section 23 of the ACL has extraterritorial operation, so as to apply to the US passengers' contracts (being contracts made outside Australia); and

2. If section 23 did apply as described above, whether the class action waiver clause was unfair, and therefore, void and unenforceable.

The High Court's decision

Application of the UCT regime to the contracts with US passengers

The High Court found that section 23 of the ACL did apply to the US passengers' contracts, despite the fact those contracts were made outside Australia, by non-Australian parties, and were not governed by Australian law.

This finding was based on the Court's interpretation of section 5(1) of the Competition and Consumer Act 2010 ("CCA") (the ACL being Schedule 2 to the CCA), which extends the application of the ACL "to the engaging in conduct outside Australia by ... bodies corporate incorporated or carrying on business within Australia...". In a unanimous decision, the High Court held that, where a corporation carries on business within Australia, the ACL applies to the conduct of that corporation engaged in outside Australia, regardless of whether the corporation is a domestic or a foreign corporation.

The High Court stated that: "If a corporation carries on business in Australia, then a price of doing so is that the corporation is subject to and complies with statutes intended to provide protection for consumers", and further, that "[t]here is nothing irrational in [the norm of conduct in section 23] extending to foreign corporations that choose to carry on business in Australia so that they cannot seek to enforce unfair terms within a standard form consumer or small business contract, irrespective of whether that occurs inside or outside Australia."

In so finding, the Court confirmed that the UCT regime:

- Can apply to contracts governed by foreign law (the US Terms & Conditions contained a choice of law clause applying the general maritime law of the United States);

- Is not limited to contracts entered into "while" a foreign company is engaged in business in Australia; and

- Is not limited to terms in contracts affecting the acquisition of goods and services in Australia.

Their Honours considered that the "absurd and capricious results" that were said to arise from this finding were "overstated" (for reasons discussed at paragraph 50 of the High Court's judgment).

In this case, it was clear that Carnival carried on business within Australia. Carnival also relevantly "engaged in conduct outside Australia" by making the contracts with the US passengers, thus triggering the operation of section 23 of the ACL when read with section 5(1) of the CCA. On that basis, the High Court found that section 23 applied to the contracts entered into by the US passengers.

Was the class action waiver clause unfair?

Having found that section 23 of the ACL applied to the US passengers' contracts, the High Court went on to consider whether the class action waiver clause in the US Terms & Conditions was unfair, and void as a result.

A term in a standard form consumer contract is "unfair" if it meets all of the following criteria:

- The term would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

A court must also take into account the extent to which the term is transparent, and the contract as a whole.

Analysing the class action waiver clause against these criteria, the High Court found that the clause was unfair for the following reasons:

- The clause imposed limitations on passengers but in no way restricted the options of the carrier (and it sat within a broader contractual provision that already imposed various limits on the consumer but not on Carnival);
- Although the clause did not affect the existence of consumers' individual rights to sue, or their capacity to exercise those rights, it did have the effect of preventing or discouraging passengers from vindicating their legal rights where the cost to do so individually may be uneconomical;
- Carnival did not have a legitimate interest in seeking to prevent people from participating in a class action (the Court did not accept Carnival's argument that it had a legitimate in facing a number of individual claims, rather than a class action, to avoid being pressured into settling questionable claims); and
- If Carnival relied on the class action waiver clause, the US passengers would suffer a detriment – namely, being denied the benefits of participating in the representative proceeding in Australia.

Relevantly, the High Court also found that the class action waiver clause was not transparent, because it was not presented clearly and was not readily available to passengers. The Court found that "given the imbalance and detriment inherent in the term, there should have been a greater degree of transparency."

Other Findings

In relation to the exclusive jurisdiction clause, the High Court noted that courts retain a discretion whether to stay a proceeding the subject of a foreign exclusive jurisdiction clause, but that proceedings will generally be stayed unless there are strong countervailing reasons not to do so. In this case, the Court found that there were strong reasons for not granting the stay, including that:

- The US passengers had a strong juridical advantage in remaining as part of the class action in the Federal Court of Australia, as they may not be able to participate in a class action in the United States (where the class action waiver clause may be enforceable); and
- Enforcement of the exclusive jurisdiction clause would also fracture the litigation, forcing the US passengers to commence individual proceedings in the US and wasting their time and money in a situation where essentially identical claims are being heard in the class action in Australia.

Key Takeaways

The High Court decision in this case is significant, and confirms that the UCT regime in the ACL applies broadly – even to contracts made outside Australia, between two non-Australian parties, and regardless of the governing law of the contract.

Companies incorporated and based outside Australia, but whose operations nonetheless touch on or involve Australia in some way, should be aware that the UCT regime under the ACL may apply to their standard form contracts with consumers or small businesses – even those with no direct or obvious connection to Australia.

However, as noted by the High Court itself, the practical significance of the decision should not be overstated:

- Although a party to such a contract could, theoretically, attempt to enforce its rights under the ACL's UCT regime in an Australian court or overseas, whether or not they would choose to do so, and whether or not such an action would successfully progress to judgment, is another question entirely;
- Everything will turn on the circumstances of the case, including the nature and extent of the issues involved, the connection of the parties to the relevant jurisdiction, and the forum in which the proceedings are commenced.

The High Court's decision follows closely on the heels of significant reforms to the UCT regime which commenced on 9 November 2023, and which include new prohibitions on the inclusion of, and reliance on, unfair terms in standard form contracts, as well as large financial penalties for contravening these prohibitions. These reforms raise the stakes even higher for both domestic and foreign corporations using standard form contracts falling, or potentially falling, within the scope of the UCT regime.

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