

THE TERRITORIAL SCOPE OF AUSTRALIA'S UNFAIR CONTRACT TERMS PROVISIONS

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Section 23 of the Australian Consumer Law, which is sch 2 of the Competition and Consumer Act 2010 (Cth), invalidates unfair terms in particular types of contract. Section 5(1) of the Act extends the application of the Australian Consumer Law to conduct outside Australia by (among others) corporations carrying on business within Australia. In Carnival plc v Karpik ('Ruby Princess'), the High Court of Australia held that s 5(1) applies to the unfair contract terms provisions without any further territorial limitation. The Court applied the provisions to a contract made in North America between a Canadian resident and a foreign company which was carrying on business in Australia through other transactions. This article investigates the territorial scope of the unfair contract terms provisions.

I INTRODUCTION

Part 2-3 of the Australian Consumer Law ('ACL'), which is sch 2 of the *Competition and Consumer Act 2010* (Cth) ('CCA'), contains provisions on unfair contract terms ('UCT provisions'). They invalidate a term in a particular type of contract if the term is unfair as defined in s 24. This article investigates the applicability of the UCT provisions in a cross-border case, ie a case in which not all elements are linked to Australia. This is present where the contract was made overseas, or at least one of the parties to the contract was based overseas when the contract was made,¹ or at least one of the obligations of the contract was or should be performed overseas.

The issue is not straightforward. The Australian common law has choice-of-law rules that specify the proper law of a contract, ie the legal system that an Australian court applies to determine the merits of a contractual dispute. It might be thought that an Australian court applies the UCT provisions to a contract if,

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¹ For the purposes of this article, a business is 'based' in the country in which it has its principal place of business or the place of business that has the closest connection to the contract, and an individual not acting in the course of a business is 'based' in the country in which the individual is ordinarily resident.

and only if, the law of an Australian jurisdiction governs the contract under those choice-of-law rules. However, the CCA contains provisions that delineate the territorial scope of the ACL as a law of the Commonwealth. Since the ACL can also apply as a law of a state or territory, uniform provisions in state and territory legislation delineate the territorial scope of the ACL as a law of a state or territory. It might therefore be thought that the applicability of the UCT provisions in cross-border cases is determined solely by the provisions in the CCA and in state or territory legislation that delineate the territorial scope of the ACL ('ACL application provisions').

The High Court of Australia considered the issue in *Karpik v Carnival plc* ('*Ruby Princess*').² The case arose out of the voyage of the vessel *Ruby Princess* from Sydney to New Zealand and return in March 2020. During the voyage, an outbreak of Covid-19 occurred, as a result of which passengers contracted the disease and fell ill or died, while others suffered distress, disappointment or psychiatric injury. A class action was brought in the Federal Court of Australia, pursuant to Part IVA of the *Federal Court Act 1976* (Cth), against the time charterer and operator of the *Ruby Princess* (a company incorporated in the UK) and the owner of the *Ruby Princess* (a company registered in Bermuda that had its headquarters in Florida and its principal place of business in California). No distinction was drawn in the proceedings between the two companies, and they were collectively referred to as 'Princess'.³

The class was divided into three sub-groups, including the 'US sub-group' which was represented by Mr Patrick Ho, a Canadian resident who had booked tickets on the voyage through a Canadian travel agent. Before the High Court, it was no longer in dispute that Mr Ho's contract contained particular standard terms, including the following three clauses: a clause choosing the general maritime law of the US as the law governing the contract; a clause referring all claims involving personal injury or death to the US District Courts for the Central District of California to the exclusion of all other courts in the world; and a clause in which the passenger waived any entitlement to participate in any class action.

Princess sought a stay of proceedings by virtue of the exclusive jurisdiction clause and the class action waiver clause. The High Court of Australia rejected the stay. While the Court expressed the view that the class action waiver clause was not contrary to Part IVA of the *Federal Court Act*, it held that the clause was void for being an unfair term under the UCT provisions and that there were strong reasons not to enforce the exclusive jurisdiction clause in exercising the discretion whether to stay proceedings. Crucially, the Court held that the UCT provisions applied to Mr Ho's contract — a contract concluded in North America between a Canadian resident and a foreign company.

² (2023) 98 ALJR 45 ('*Ruby Princess* HCA').

³ *Ibid* [2].

The High Court's statements on the territorial scope of the UCT provisions settled several questions that had hitherto been controversial. But some important questions were not addressed and new questions arise. This article investigates the territorial scope of the UCT provisions in all aspects. It engages with the arguments made by the High Court and by judges in the Full Federal Court in *Karpik*, but it is not confined to the issues addressed in *Karpik*.

Part II provides a brief overview of the UCT provisions, insofar as necessary for present purposes. Part III considers the relationship between forum statutes and the common law choice-of-law rules, insofar as necessary for present purposes. Part IV determines the territorial scope of the UCT provisions according to the ACL application provisions in the CCA and in state and territory legislation. Part V examines whether that scope is compatible with the comity of nations or whether it needs to be limited. Part VI investigates whether the territorial scope of the UCT provisions could have been limited through statutory interpretation had the High Court in *Karpik* not rejected any such limitation. Part VII contains the conclusion.

II THE UNFAIR CONTRACT TERMS PROVISIONS

With effect from 1 July 2010, the ACL was enacted as a new sch 2 of what was then the *Trade Practices Act 1974* (Cth) ('TPA').⁴ At that time, the ACL contained only provisions on unfair contract terms.⁵ With effect from 1 January 2011, the TPA became the CCA, and a large number of provisions on various matters were inserted into the ACL.⁶ The UCT provisions were renumbered (they are now in Part 2-3 of the ACL) but their content remained the same. Each state and territory enacted legislation making the ACL applicable as a law of that state or territory in certain circumstances.⁷

Section 23(1) of the ACL provides that a term of a 'consumer contract' is void if the term is 'unfair' and the contract is a 'standard form contract'.⁸ The term 'standard form contract' is not defined. Section 27(2) lists factors that a court must take into account in determining whether a contract is a 'standard form contract' but provides no test against which those factors are to be assessed. It may broadly be said that a contract is a 'standard form contract' for the purposes of Part 2-3 of the ACL if the terms other than the core terms were imposed by one

⁴ See *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth). This Act also inserted parallel provisions on unfair terms in financial products and services (ss 12BF–12BM) in the *Australian Securities and Investments Commission Act 2001* (Cth).

⁵ Identical provisions were enacted in New South Wales and Victoria with effect from 1 July 2010. See *Fair Trading Amendment (Unfair Contract Terms) Act 2010* (NSW); *Fair Trading Amendment (Unfair Contract Terms) Act 2010* (Vic).

⁶ See *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth).

⁷ See below n 53.

⁸ Part 2-3 of the ACL does not apply to certain types of term (s 26) and certain types of contract (s 28).

party and not individually negotiated.⁹ Section 24 defines the meaning of ‘unfair’. The details of this definition are not relevant for the purpose of this article.¹⁰

Section 23(3) states that a ‘consumer contract’ for the purpose of Part 2–3 of the ACL is a contract for the supply of goods or services or for the sale or grant of an interest in land where the supply, sale or grant is ‘to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption’.¹¹ It is not required that the person who supplies the goods or services, or sells or grants the interest in land, is acting in the course of a business. A ‘consumer contract’ may be present where neither party is acting in the course of a business.¹² Such a contract will not usually be a ‘standard form contract’, but it may be.¹³ Section 250(1) permits each party to a ‘consumer contract’ (as well as the regulator) to apply to a court to declare a term void. It is not only the person who acquires the goods, services or interest in land who is protected by pt 2–3 of the ACL. In the second reading speech, the minister introducing the relevant bill said that the UCT provisions (as originally enacted) aimed to protect consumers,¹⁴ but also said that the person who is advantaged by an impugned term is ‘usually a business’,¹⁵ meaning that it may not always be a business.

In 2015, the UCT provisions were amended with effect from 12 November 2016.¹⁶ This measure aimed to protect small businesses from unfair contract terms.¹⁷ Section 23(1) of the ACL was amended so as to apply not only to a ‘consumer contract’ but also to a ‘small business contract’ provided it is a ‘standard form contract’.¹⁸ The same test of unfairness applies. Like a ‘consumer contract’, a ‘small business contract’ is defined in s 23(4)(a) as a contract for the supply of goods or services or for the sale or grant of an interest in land. The version of s 23(4) and (5) that was enacted with effect from 12 November 2016 requires a contract to satisfy the following two conditions to qualify as a ‘small business contract’. First, the upfront price payable under the contract must not

⁹ See, eg, *Value Living for Seniors Pty Ltd v Kacar* [2023] VCAT 1270 [259]; *VA Holdings Pty Ltd v Global Capital Corp Pty Ltd* [2023] NSWSC 1522 [174]. For a discussion, see Sirko Harder, ‘Problems in Interpreting the Unfair Contract Terms Provisions of the Australian Consumer Law’ (2011) 34(3) *Australian Bar Review* 306, 311–13.

¹⁰ For a summary of the applicable principles, see *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3)* (2021) 153 ACSR 347 [65]–[73]. See also Jeannie Paterson, *Unfair Contract Terms in Australia* (Lawbook Co, 2011).

¹¹ For a discussion, see Harder (n 9) 307–10.

¹² The definition of ‘consumer contract’ in section 23(3) is thus unusual in international comparison. Cf *Consumer Rights Act 2015* (UK) s 61.

¹³ For example, the sale of residential property may be conducted on standard terms introduced by a real estate agent even though neither party to the contract of sale is acting in the course of a business.

¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6983 (Craig Emerson).

¹⁵ *Ibid* 6984 (Craig Emerson).

¹⁶ *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).

¹⁷ See Explanatory Memorandum, *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* (Cth) ch 2.

¹⁸ See *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).

exceed AUD300,000 or, where the contract has a duration of more than 12 months, AUD1m. Secondly, at the time the contract is entered into, at least one of the parties to the contract must be ‘a business that employs fewer than 20 persons’.¹⁹ Only such a party (as well as the regulator) may ask the court to declare a term in a ‘small business’ contract unfair.²⁰

Another revision of the UCT provisions was enacted in 2022 with effect from 9 November 2023.²¹ The two key aims were to strengthen the remedies and enforcement of the provisions and to expand the class of contracts covered by the provisions.²² New subsections of s 23 of the ACL now provide that particular conduct constitutes a contravention of those subsections where the conduct relates to an unfair term in a contract that is a ‘standard form contract’ and is either a ‘consumer contract’ or a ‘small business contract’. Section 23(2A) provides that a person contravenes this subsection if the person makes a contract containing an unfair term and the person ‘proposed’ that term.²³ Section 23(2B) provides that a person commits a separate contravention in respect of each term that is unfair and that the person proposed. Section 23(2C) provides that a person contravenes this subsection if the person applies or relies on, or purports to apply or rely on, an unfair term.²⁴ A new s 224(1)(a)(ia) permits the court to impose a penalty for a contravention of s 23(2A) or (2C).²⁵

The concept of ‘small business contract’ is still confined to a contract for the supply of goods or services or the sale or grant of an interest in land. But there is no longer a limit as to the upfront price payable under the contract, and s 23(4)(b) of the ACL now requires that at least one of the parties satisfies either or both of the following conditions: (i) the party makes the contract in the course of a business and employs fewer than 100 persons; (ii) the party’s turnover in the

¹⁹ Casual employees are not counted unless they are employed on a regular and systematic basis. For the question of whether employees of a related company are to be counted, see Peter Sise, ‘Can a Big Business Avail Itself of the Unfair Contract Terms Provisions in the Australian Consumer Law?’ (2018) 26(4) *Australian Journal of Competition and Consumer Law* 276.

²⁰ See the version of s 250(2) enacted with effect from 12 November 2016.

²¹ *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth).

²² Explanatory Memorandum, *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022* (Cth) 28 [2.16]–[2.17]. In addition, a new s 27(3) of the ACL sets out factors that do not prevent a contract from being a ‘standard form contract’, such as the opportunity to negotiate minor changes to the terms of the contract.

²³ It is not sufficient that a person merely drafts new standard terms for later use: Explanatory Memorandum, *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022* (Cth) 32 [2.24]. For criticism of penalising the inclusion of an unfair term in a ‘small business’ contract, see Mark Lewis, ‘Penalising the Inclusion of Unfair Terms in Standard Form Small Business Contracts — A Critical Analysis’ (2019) 47(4) *Australian Business Law Review* 309.

²⁴ The person must give effect to, or seek to enforce, an unfair term: Explanatory Memorandum, *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022* (Cth) 33 [2.26].

²⁵ In addition, a new s 243A of the ACL provides that where a term has been declared unfair under s 250, the court may make against a party advantaged by that term any order to redress loss or damage that has been caused to any person by the term, or prevent or reduce loss or damage that is likely to be so caused.

income year preceding the contract is less than AUD10m.²⁶ According to s 250(2), only such a party (as well as the regulator) may ask the court to declare a term in a 'small business' contract unfair.

III THE INTERACTION BETWEEN FORUM STATUTES AND THE COMMON LAW CHOICE-OF-LAW RULES

The common law has developed causes of action. It has also developed choice-of-law rules for those and comparable causes of action. Statute may create a cause of action. If a forum statute that does so does not contain a choice-of-law rule, the question arises how the statute's applicability in a cross-border setting ought to be determined. There are two schools of thought.

According to one school of thought, the process ought to start with the common law choice-of-law rules as they form the background for the statute's enactment.²⁷ If those rules identify the *lex fori* as the applicable law, the statute applies if it applies on its own terms. If the common law choice-of-law rules identify a foreign law as the applicable law, the statute applies only if it constitutes an internationally mandatory rule in the circumstances, ie it can be said that the statute demands its application to the particular facts irrespective of the choice-of-law rules otherwise applying. While the common law did not initially have a concept of internationally mandatory rules, it is now recognised in Australia that some statutory provisions are of such fundamental importance that a court in the enacting forum must apply them in certain circumstances irrespective of the law selected by the forum's choice-of-law rules.²⁸

According to the other school of thought, the process ought to start with the statute because a statute takes priority over the common law.²⁹ It does not follow that the court applies a forum statute in every case that is covered by the statute's substantive provisions. A statute that is silent on its territorial scope may be

²⁶ In counting the number of employees, a casual employee is not to be counted unless employed on a regular and systematic basis, and a part-time employee is to be counted as an appropriate fraction of a full-time equivalent: s 23(5).

²⁷ This approach is favoured, eg, by Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4(1) *Journal of Private International Law* 1; Christopher Bisping, 'Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974' (2012) 8(1) *Journal of Private International Law* 35; Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435.

²⁸ See, eg, *Old UGC Inc v Industrial Relations Commission of NSW* (2006) 225 CLR 274, 282–3 [22]–[23], 291–2 [55]–[59] ('*Old UGC*'); *Huntingdale Village Pty Ltd v Westgarth* (2018) 128 ACSR 168, [127] (Martin CJ).

²⁹ This approach is favoured, eg, by Michael Charles Pryles, 'The Applicability of Statutes to Multistate Transactions' (1972) 46(12) *Australian Law Journal* 629; Michael Douglas, 'Choice of Law in the Age of Statutes' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart, 2019) 201.

interpreted as applying in accordance with the common law choice-of-law rules.³⁰ However, the statute will not be interpreted in that way where the legislature intended to regulate certain conduct in certain circumstances. Thus, where a statute that regulates a particular type of contract was intended to apply to all contracts of that type that are concluded or performed in the enacting jurisdiction, the courts do not apply the common law choice-of-law rules for contract.³¹

Whatever the starting point of the choice-of-law process, it is sometimes clear that an Australian statute applies only in connection with the common law rules of the enacting jurisdiction. This is particularly the case where the statute changes some individual common law rules without replacing them with a comprehensive set of rules that could be applied independently of the common law. An example is the *Frustrated Contracts Act 1978* (NSW), which makes provision for the effects of the frustration of a contract on the obligations under that contract, these being different from the effects of frustration at common law. The Act presupposes that the contract has been frustrated, but makes no provision for the circumstances in which this is the case. Thus, the Act can only be applied to a contract that is subject to the common law doctrine of frustration. A court in New South Wales cannot therefore apply the Act to all contracts before it, as some of them may be governed by a civilian legal system that deals with supervening events in a different way.³² The application of the Act must be subject to the common law choice-of-law rules, either because they are the starting point of the choice-of-law process or because the Act makes them applicable by implication, so that the Act applies only to a contract governed by the law of New South Wales.³³

The UCT provisions do not fall into the same category. They require no more than the existence of a contract,³⁴ which is possible under any legal system. They do not conceptually require that the contract is otherwise governed by the Australian common law. Nor is their application conceptually impossible where the legal system that otherwise governs the contract has different rules on unfair contract terms. The UCT provisions could be given priority over those inconsistent rules. This would not be unusual from an international perspective. For example,

³⁰ *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 600–1 (Dixon J); *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124, 142–3 ('*Kay's Leasing Corporation*'); *Old UGC* (n 28) 283 [23], 291–2 [56]; *Ruby Princess* HCA (n 2) 51 [19]. For a criticism, see Adrian Briggs, 'A Note on the Application of the Statute Law of Singapore within its Private International Law' [2005] (July) *Singapore Journal of Legal Studies* 189, 196.

³¹ *Kay's Leasing Corporation* (n 30); *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418, 425 (Menzies J); *Old UGC* (n 28) 282–3 [22]–[23], 291–2 [55]–[59].

³² For a review of how a supervening event may affect a contract in various legal systems, in the particular context of the Covid-19 pandemic, see Laura Maria Franciosi, 'The Effects of Covid-19 on International Contracts: A Comparative Overview' (2020) 51(3) *Victoria University of Wellington Law Review* 413.

³³ The same applies *mutatis mutandis* to the *Frustrated Contracts Act 1988* (SA).

³⁴ It is not necessary to discuss whether 'contract' here should have the meaning it has in the Australian domestic law (excluding gifts) or whether it should have the wider meaning that it has in some other legal systems, including gifts.

s 74 of the *Consumer Rights Act 2015* (UK) provides that pt 2 of the Act, which regulates unfair contract terms in business-to-consumer contracts, applies despite the parties' choice of the law of a country other than the UK or any part of the UK if the contract has a close connection with the UK.³⁵ Thus, where the parties have chosen the law of New South Wales as the governing law but the contract has a close connection with the UK, a UK court will apply the unfair terms provisions of the UK Act, but will otherwise apply the law of New South Wales.³⁶ It would be unexceptional if an Australian court applied the UCT provisions to a contract otherwise governed by English law.

The High Court in *Karpik* did not consider the common law choice-of-law rules but said that the applicability of the UCT provisions to Mr Ho's contract was 'a question of statutory construction'.³⁷ This approach had already prevailed for the *TPA*,³⁸ the *CCA*,³⁹ and forum statutes in general.⁴⁰ It is justified for the *CCA*, which contains provisions on many aspects of competition and consumer law, creates a number of causes of action, and pursues public policy objectives.⁴¹ Crucially, the ACL application provisions contain express provisions on its territorial scope.

As explained in Part VI A below, an application of the common law choice-of-law rules would render the territorial scope of the UCT provisions too narrow. In particular, the parties could evade their application by choosing a foreign law as the proper law of the contract. If the process of determining the applicability of the UCT provisions to a particular contract started with the common law choice-of-law rules, the UCT provisions would, in appropriate circumstances, have to be regarded as being internationally mandatory in that they would at least override the parties' choice of a foreign law⁴² and would potentially also override the closest

³⁵ Section 32 contains a similar choice-of-law rule for Chapter 2 of Part 1, which implies particular terms in business-to-consumer contracts for the sale of goods.

³⁶ See *Eternity Sky Investments Ltd v Zhang* [2023] EWHC 1964 (Comm), [89]–[91].

³⁷ *Ruby Princess* HCA (n 2) [18] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

³⁸ See, eg, *Francis Travel Marketing Pty Ltd v Virgin Australia Airways Ltd* (1996) 39 NSWLR 160, 164; *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 14 [44] ('Bray'); *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388, 461–2 [349]–[350].

³⁹ *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, 334 [11] ('Moore'); *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, 224–5 [103]–[110] ('Valve FCAFC').

⁴⁰ See, eg, *Chubb Insurance Co of Australia Ltd v Moore* (2013) 302 ALR 101, 132 [144]; *Huntingdale Village Pty Ltd v Westgarth* (2018) 128 ACSR 168, [123]–[134], [162]–[173] and the cases cited in (n 30). The common law choice-of-law rules were used as the starting point in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 400 [25].

⁴¹ The *TPA* was described as 'a fundamental piece of remedial and protective legislation which gives effect to "matters of high public policy"': *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 [99] (Gummow J), citing *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, 256 (Lockhart J).

⁴² Examples of provisions that merely override the parties' choice of foreign law but not the closest connection test are: *Insurance Contracts Act 1984* (Cth) s 8 and *Contracts Review Act 1980* (NSW) s 17(3).

connection test.⁴³ In determining the circumstances in which the UCT provisions are internationally mandatory, the starting point would be the ACL application provisions in the CCA or in state or territory legislation. If those provisions made the UCT provisions applicable in too wide a range of circumstances, an implied territorial limitation would have to be considered. This convoluted process would ultimately boil down to an application of the UCT provisions in accordance with the ACL application provisions and a potential implied limitation. It is more straightforward to start with the ACL application provisions.

IV THE TERRITORIAL SCOPE OF THE UCT PROVISIONS UNDER THE ACL APPLICATION PROVISIONS

A *The Application Provisions for the ACL*

The ACL can apply as a law of the Commonwealth or as a law of a state or territory.⁴⁴

Pursuant to s 131(1) of the CCA, the ACL applies as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of ch 2, 3 or 4 of the ACL by corporations.⁴⁵ Pursuant to s 4(2) of the CCA, a reference in that Act to ‘conduct’ or ‘engaging in conduct’ includes the making of, or the giving effect to a provision of, a contract. The conduct or contravention must occur in Australia. This follows from a general presumption that an Australian statute applies only to conduct occurring within the enacting jurisdiction,⁴⁶ and from the fact that s 5(1) of the CCA makes express provision for the application of the ACL to conduct outside Australia.⁴⁷

Section 5(1) of the CCA provides that, among other provisions, the ACL (other than pt 5-3)⁴⁸ applies ‘to the engaging in conduct outside Australia’ by ‘bodies corporate incorporated or carrying on business within Australia’, ‘Australian citizens’, and ‘persons ordinarily resident within Australia’. This is a profound extension of the ACL’s territorial scope. The ACL applies simply because a relevant

⁴³ An example of a provision that overrides both the parties’ choice of a foreign law and the closest connection test is: *Carriage of Goods by Sea Act 1991* (Cth) s 11. The Act does not necessarily invalidate an agreement to arbitrate in a foreign country; see *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* (2024) 98 ALJR 445.

⁴⁴ See *Zervas v Burkitt (No 2)* [2019] NSWCA 236, [53]–[59].

⁴⁵ Section 6 of the *Competition and Consumer Act 2010* (Cth) (‘CCA’) extends the operation of particular provisions of the ACL and other parts of the CCA to conduct of persons who are not corporations.

⁴⁶ *Bray* (n 38) 15 [47] (Merkel J), citing *R v Jameson* [1896] 2 QB 425, 430 (Lord Russell CJ); *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* (2012) 266 FLR 243, [400] (Croft J), approvingly quoted in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237, [396].

⁴⁷ See, for the TPA, *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299, 355; *Bray* (n 38) 16–17 [50]–[55]; *Worldplay Services Pty Ltd v Australian Competition and Consumer Commission* (2005) 143 FCR 345, 350 [18] (‘Worldplay Services’).

⁴⁸ Part 5-3 of the ACL concerns country of origin representations and is not relevant to the UCT provisions.

party has a particular status (being a corporation incorporated or carrying on business within Australia, or a citizen or ordinary resident of Australia), even if there is no other connection with Australia.

In particular, the ACL applies to every conduct of a corporation that carries on business within Australia and elsewhere: section 5(1)(g). For this purpose, it is not required that the corporation has a place of business in Australia,⁴⁹ but the mere solicitation of customers in Australia (for example, through online advertisement) is not sufficient.⁵⁰ Crucially, s 5(1)(g) does not require that the impugned conduct was part of the corporation's business activities within Australia.⁵¹ In *Karpik*, s 5(1)(g) rendered the ACL applicable to a contract made in North America between a Canadian resident and a foreign company because the latter had sold and marketed cruises, including the voyage that was the subject of the proceedings, in Australia.⁵²

Legislation in each Australian state and territory sets out the circumstances in which the ACL applies as a law of that state or territory.⁵³ The provisions are uniform across all jurisdictions, thus removing the possibility of an intra-Australian conflict of laws. Subsection (1) of the uniform provisions stipulates that the ACL as a law of the respective jurisdiction applies to and in relation to persons carrying on business within the jurisdiction, bodies corporate incorporated or registered under the law of the jurisdiction, persons ordinarily resident in the jurisdiction, or persons otherwise connected with the jurisdiction. Subsection (2) of the uniform provisions stipulates that, subject to sub-s (1), the ACL as a law of the respective jurisdiction extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside the jurisdiction (whether within or outside Australia).

B The Applicability of the UCT Provisions by Virtue of a Contravention of the ACL

Section 131(1) of the CCA provides that the ACL applies as a law of the Commonwealth in relation to contraventions of ch 2, 3 or 4 of the ACL by

⁴⁹ *Bray* (n 38) 19 [63]; *Valve* FCAFC (n 39) 233 [145]; *Owners – Strata Plan No 87231 v 3A Composites GmbH* (2019) 369 ALR 315, 321 [31].

⁵⁰ *Valve* FCAFC (n 39) 233–5 [146]–[149]. However, it has been said that '[s]upplying goods on a regular basis to an Australian company for the purpose of sale to Australian consumers is "carrying on business" in Australia': *Gill v Ethicon Sàrl* (No 5) [2019] FCA 1905, [3144] (Katzmann J).

⁵¹ *Worldplay Services* (n 47) 354 [42] (Tamberlin J); *Australian Competition and Consumer Commission v Facebook, Inc* [2021] FCA 244, [34]. See also *Norcast SARL v Bradken Ltd* (No 2) (2013) 219 FCR 14, 73–77 [243]–[256].

⁵² *Ruby Princess* HCA (n 2) 56 [42].

⁵³ *Fair Trading (Australian Consumer Law) Act 1992* (ACT) s 11; *Fair Trading Act 1987* (NSW) s 32; *Consumer Affairs and Fair Trading Act 1990* (NT) s 31; *Fair Trading Act 1989* (Qld) s 20; *Fair Trading Act 1987* (SA) s 18; *Australian Consumer Law (Tasmania) Act 2010* (Tas) s 10; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 12; *Fair Trading Act 2010* (WA) s 24.

corporations. As a result of the 2022 amendments of the UCT provisions, certain conduct (namely to propose, apply or rely on an unfair term) now constitutes a contravention of s 23(2A) or (2C) of the ACL and thus of ch 2 of the ACL. It might be thought that this fact now renders the UCT provisions applicable as a law of the Commonwealth by virtue of s 131(1) of the CCA.

The contravention limb of s 131(1) of the CCA can render ss 23(2A)–(2C) and 224(1)(a)(iia) of the ACL applicable by virtue of contravening conduct where the UCT provisions already apply to the contract in question pursuant to another of the ACL application provisions. If the UCT provisions already apply to the contract, all of them apply and there is generally no need to make specific provision for the application of ss 23(2A)–(2C) and 224(1)(a)(iia) of the ACL. However, the contravention limb of s 131(1) of the CCA may be relevant in that it provides for an application of ss 23(2A)–(2C) and 224(1)(a)(iia) of the ACL *as a law of the Commonwealth*. Suppose that a contract has been made overseas between a foreign corporation and a resident of New South Wales; that the ACL as a law of New South Wales applies to that contract; and that a particular term in that contract is unfair pursuant to s 24 of the ACL. If the corporation applies or relies on the unfair term through conduct in Australia, the contravention limb of s 131(1) of the CCA will render ss 23(2C) and 224(1)(a)(iia) of the ACL applicable as a law of the Commonwealth.

The contravention limb of s 131(1) of the CCA should not be capable of making the UCT provision applicable to a contract to which they do not apply already. The mere fact that a corporation proposes, applies or relies on a particular term in Australia should not make this term subject to the UCT provisions. Otherwise, the UCT provisions could apply to a contract simply because litigation concerning the contract takes place in Australia by virtue of a jurisdiction clause in the contract, even though neither the contract nor the parties have any other connection with Australia.

In conclusion, the contravention limb of s 131(1) of the ACL cannot bring a contract within the scope of the UCT provisions.

C The Applicability of the UCT Provisions by Virtue of Certain Conduct

1 The Applicability of the Concept of Conduct to the UCT Provisions

As mentioned in Part IV A above, the ACL application provisions in the CCA and in state and territory legislation provide that conduct of certain persons outside Australia renders the ACL applicable. The High Court in *Karpik* held that s 5(1)(g) of the CCA can render the UCT provisions applicable.⁵⁴ Derrington J in the Full

⁵⁴ *Ruby Princess* HCA (n 2) 55–6 [41]–[42].

Federal Court had expressed the opposite view,⁵⁵ arguing that, since s 5(1)(g) refers to 'conduct', it can apply only to those ACL provisions that proscribe certain conduct, such as s 18, which proscribes misleading or deceptive conduct in trade or commerce.⁵⁶ The UCT provisions (apart from s 23(2A)–(2C) which were enacted after the Full Federal Court's decision) do not proscribe any conduct. They merely invalidate certain types of term in specific types of contract.⁵⁷ Derrington J expressed doubts as to the applicability of s 4(2) of the CCA, which defines 'conduct', to the UCT provisions,⁵⁸ but added that even if it did apply, it could not extend their operation as they are concerned only with the terms of the contract and not the entering into of a contract.⁵⁹

If accepted, Derrington J's argument, which was made for s 5(1)(g) of the CCA, would equally apply to s 5(1)(h) (which refers to conduct outside Australia by Australian citizens), s 5(1)(i) (which refers to conduct outside Australia by persons ordinarily resident within Australia) and s 131(1) insofar as it refers to conduct by corporations. Consequently, the only provision that could render the UCT provisions applicable as a law of the Commonwealth would be the contravention limb of s 131(1). But it was argued in Part IV B above that the contravention limb is not capable of doing this.

Even if it is thought that the new sub-ss 23(2A) and (2C) of the ACL enable the contravention limb of s 131(1) of the CCA to bring a particular contract within the scope of the UCT provisions, there would still be the question of how the UCT provisions applied as a law of the Commonwealth prior to the 2022 amendments, when no conduct relating to an unfair term constituted a contravention of the ACL. Prior to the 2022 amendments, ss 232(3), 237(1)(a)(ii) and 238(1)(b) of the ACL provided that the (purported) application or reliance on a term that a court had declared under s 250 to be an unfair term was to be treated *as if* the conduct were a contravention of Chapter 2. This implies that it was not a contravention. Still less did the (purported) application or reliance on a term that a court *subsequently* declared unfair constitute a contravention of the ACL.⁶⁰

Moreover, with effect from 1 July 2010, a reference to the ACL was inserted into s 5(1) of the TPA and a new s 130 was added to that Act.⁶¹ Section 130 provided: 'The Australian Consumer Law applies as a law of the Commonwealth to the conduct of corporations'. At that time, the ACL contained only the UCT provisions

⁵⁵ *Carnival plc v Karpik* (2022) 294 FCR 524, 602–5 [281]–[288] ('*Ruby Princess* FCAFC').

⁵⁶ *Ibid* 602 [282].

⁵⁷ *Ibid* 602–3 [284].

⁵⁸ *Ibid* 603 [286], observing that Northrop J in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 490–1 had expressed the view that s 4(2) only applied to Part IV (on restrictive trade practices) of what was then the TPA and is now the CCA.

⁵⁹ *Ruby Princess* FCAFC (n 55) 603 [287].

⁶⁰ See ACL s 15(a); Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) [2.118], [3.52]; Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) [2.62]; *Ruby Princess* HCA (n 2) [35].

⁶¹ *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth).

and nothing else. All the other provisions now in the ACL were added later when the Act was given its present name. Thus, as noted by the High Court in *Karpik*,⁶² s 130 in its original version and the reference to the ACL in s 5(1) were enacted specifically for the UCT provisions.⁶³ If the concept of ‘conduct’ were incapable of applying to the UCT provisions, ss 5(1)(ea) (referring to the ACL) and 130 of the *TPA* had no effect. There is a strong presumption that the legislature does not enact ineffective provisions.⁶⁴

Therefore, if the concept of conduct is considered inapplicable to the UCT provisions, no provision in the *CCA* renders them applicable as a law of the Commonwealth (or at least no provision did so prior to the 2022 amendments). In *Karpik*, Derrington J in the Full Federal Court expressed the view that the territorial scope of the UCT provisions should be determined solely under the common law choice-of-law rules for contract.⁶⁵ But it is often necessary to determine whether the UCT provisions apply as a law of the Commonwealth or as a law of a state or territory, not least because the Federal Court has jurisdiction only in the former category.⁶⁶ The common law choice-of-law rules are incapable of specifying whether the ACL applies as a law of the Commonwealth or as a law of a state or territory.

The High Court’s decision in *Karpik* that s 5(1)(g) of the *CCA* can render the UCT provisions applicable is therefore convincing. This must apply to all provisions in the *CCA* and in state and territory legislation that render the ACL applicable by virtue of particular conduct.

2 The Relevant Conduct

It is not immediately obvious what conduct renders the UCT provisions applicable. It could be the proposal of the standard terms, the formation of the contract, or the purported application or reliance on the standard terms.

The High Court in *Karpik* observed that Mr Ho’s contract was made outside Australia and that the giving effect to that contract, by Princess seeking to rely on the exclusive jurisdiction clause and the class action waiver clause, occurred in Australia.⁶⁷ The Court went on to say that it was sufficient for the applicability of

⁶² *Ruby Princess* HCA (n 2) [41].

⁶³ Incidentally, when a reference to the ACL (only containing the UCT provisions at the time) was inserted into section 5(1), the heading of section 5 was changed from ‘[e]xtended application of Parts IV, IVA, V, VC etc’ to ‘[e]xtended application of this Act to conduct outside Australia’. Thus, the enactment of the UCT provisions was the occasion for the insertion of the word ‘conduct’ into the heading of s 5.

⁶⁴ An application of s 5(1) to the UCT provisions was envisaged in the Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) [3.53].

⁶⁵ *Ruby Princess* FCAFC (n 55) 602 [281]–[292].

⁶⁶ See *CCA* s 86(1AA), (1). The states have no power to confer jurisdiction on a federal court: *Re Wakim, ex parte McNally* (1999) 198 CLR 511.

⁶⁷ *Ruby Princess* HCA (n 2) [42].

the UCT provisions to point to the making of Mr Ho's contract; even though it involved conduct outside Australia, s 5(1)(g) of the CCA rendered the UCT provisions applicable since Princess had been carrying on business in Australia.⁶⁸ Thus, the Court expressed no view on whether the reliance on a contractual term can render the UCT provisions applicable.

The purported application or reliance on a term should not constitute qualifying conduct. Otherwise, the unilateral action of one party could render the UCT provisions applicable, creating uncertainty. The applicability of the UCT provisions to a contract ought to be settled when the contract is made.

The choice is between the proposal of the standard terms during the contractual negotiations, in which case only the conduct of the proposer is qualifying conduct, and the formation of the contract in general (ie giving consent to the terms of the contract), in which case either party's conduct is qualifying conduct. The High Court in *Karpik* explained that the UCT provisions applied to Mr Ho's contract by virtue of s 5(1)(c) and (g) of the CCA because Princess, a corporation carrying on business in Australia, engaged in conduct outside Australia by making the contract with Mr Ho.⁶⁹ Nothing can be made of the fact that the Court referred to the conduct of Princess rather than that of Mr Ho. Since Mr Ho was not an Australian citizen or resident, his conduct outside Australia was not capable of rendering the ACL applicable.

Since Princess was the only party having a connection with Australia, the High Court was not required to distinguish between the making of Mr Ho's contract by Princess in general and the proposal of the standard terms by Princess in particular. Some remarks of the Court might imply that only conduct of the proposer of the standard terms can be qualifying conduct. The Court observed that the UCT provisions prescribe a norm of conduct,⁷⁰ which s 5(1)(c) and (g) of the CCA extend to the engaging in conduct outside Australia by a corporation carrying on business within Australia.⁷¹ In this context, the Court referred to 'standard form contracts with consumers made outside Australia by those identified in s 5(1)(g) to (i)'.⁷²

There are two arguments in favour of regarding the proposal of the standard terms as the qualifying conduct. The first is that, pursuant to s 23(2A) of the ACL, the proposal of an unfair contract term is now a contravention of the ACL. However, the issue currently under discussion is the applicability of the UCT provisions by virtue of conduct, not by virtue of a contravention of the ACL. A stronger argument is that, if either party's consent to the terms of the contract were qualifying conduct, the UCT provisions would apply to every qualifying contract made anywhere in the world by a corporation that does business in

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid 53 [26].

⁷¹ Ibid 56 [42].

⁷² Ibid 56 [43] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

Australia, an Australian citizen or an Australian resident, regardless of whether the contract partners are aware that they are dealing with such a person. The UCT provisions would apply to numerous contracts that have no other connection with Australia. It is doubtful that the legislatures intended the UCT provisions to have such an enormous extra-territorial reach.

However, it would not sit well with the object of the CCA ‘to enhance the welfare of Australians’ (s 2 of the CCA) if the UCT provisions applied only when a corporation that does business in Australia, an Australian citizen or and Australian resident proposes standard terms and not when such a person is subjected to standard terms by the other party. Australian consumers and small businesses who order goods or services from a supplier based overseas deserve the protection of the UCT provisions against the supplier’s standard terms where the supplier knows that the contract partner is based in Australia (because of the address or IP address to which the goods or services are supplied). An overseas supplier who chooses to supply goods or services into Australia should expect the application of protective Australian law.

If only the conduct of the proposer of the standard terms were qualifying conduct, the UCT provisions would not apply in those circumstances unless the overseas supplier falls into any of the categories in s 5(1)(g)-(h) of the CCA. Section 5(1)(g) may capture an overseas corporation that regularly supplies goods or services into Australia.⁷³ But the UCT provisions would not apply where the supplier only sporadically deals with Australian customers or is a natural person (who does not happen to be an Australian citizen), such as a self-employed professional.

It is not necessary for the purposes of this article to express a conclusive view on what conduct should qualify. It suffices to note that even the narrow interpretation, under which only the conduct of the proposer of the standard terms is qualifying conduct, provides the UCT provisions with a large extra-territorial effect, as demonstrated by *Karpik*.

V THE NEED FOR A LIMITATION OF THE TERRITORIAL SCOPE OF THE UCT PROVISIONS

A *Conflict with Comity*

An unqualified application of the ACL application provisions to the UCT provisions renders the latter’s territorial scope very wide. A contract made overseas between two parties based overseas would be subject to the UCT provisions simply because one of the parties happens to be an Australian citizen or is a company that

⁷³ *Australian Competition and Consumer Commission v Facebook, Inc* [2021] FCA 244, [33].

happens to do business within Australia through other transactions. In *Karpik*, the High Court applied the UCT provisions to a contract made in North America between a Canadian resident and a foreign company. This might be considered justified on the ground that the voyage that was the subject of the contract started and ended in Australia. But this fact was not relevant. The UCT provisions would have applied even if no part of the voyage had been in Australian waters. As Derrington J in the Full Federal Court observed, a European car manufacturer that sells cars in Australia would be subject to the UCT provisions even in relation to its sales of cars in other countries.⁷⁴ His Honour expressed the view that an application of the UCT provisions in such circumstances would not promote comity between Australia and other countries,⁷⁵ and the legislature cannot have intended such an application.⁷⁶ As Tattersall explains, '[c]omity requires the judicial systems of states to grant one another equal respect, meaning that the courts of one state will not seize jurisdiction over claims concerning domestic issues pertaining to another state'.⁷⁷

The High Court in *Karpik* made no express reference to comity. But it is clear that the Court saw no conflict between an unqualified application of the ACL application provisions to the UCT provisions and comity because it rejected the argument that the territorial scope of the UCT provisions needs to be limited through statutory interpretation to prevent absurd and capricious results.⁷⁸ The Court said 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'.⁷⁹ The Court added that 'Parliament is prescribing that a corporation that does business in Australia should be required, if it uses standard terms in a consumer or small business contract, to meet Australian norms of fairness, irrespective of whether the standard terms are in a contract made in Australia or one made overseas'.⁸⁰ It is one thing to require a corporation that does business in Australia to comply with Australian law in contracts that are parts of its Australian business activities. It is quite another thing to require a corporation that does business in Australia to comply with Australian law in every single contract it makes anywhere in the world. It would be a very bold step for a country's legislature to enact such a requirement, and it must be doubted that the legislatures enacting the ACL intended to take that step.

⁷⁴ *Ruby Princess* FCAFC (n 55) 607 [300].

⁷⁵ *Ibid.*

⁷⁶ *Ibid* 607 [301].

⁷⁷ Luke Tattersall, 'Derailing State Immunity: A Broad-Brush Approach to Jurisdiction under Claims for the Expropriation of Cultural Property' (2019) 26(2) *International Journal of Cultural Property* 181, 190. See also James Edelman and Madeleine Salinger, 'Comity in Private International Law and Fundamental Principles of Justice' in Andrew Dickinson and Edwin Peel (eds), *A Conflict of Laws Companion* (Oxford University Press, 2021) 327.

⁷⁸ *Ruby Princess* HCA (n 2) 58 [50].

⁷⁹ *Ibid* 55 [38] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

⁸⁰ *Ibid* 55 [40] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

Moreover, since the High Court in *Karpik* took the view that the territorial scope of the UCT provisions is determined exclusively in accordance with s 5(1) of the CCA without any qualification, it is not only s 5(1)(g) that applies without qualification. The same logically applies to s 5(1)(h) (Australian citizens) and s 5(1)(i) (persons ordinarily resident in Australia). If the view is taken that the person listed in s 5(1)(g), (h) or (i) does not need to be the party imposing the standard terms,⁸¹ the UCT provisions will apply to every contract made by an Australian citizen or resident anywhere in the world. It is not required that the contract partners of such a person are aware that they are dealing with an Australian citizen or resident. It cannot therefore be said that they have to accept the application of Australian law as the price of contracting with an Australian citizen or resident. The High Court in *Karpik* did not address those scenarios.

The High Court did comment on the argument made by Derrington J in the Full Federal Court that a European car manufacturer that sells cars in Australia should not be subject to the UCT provisions in relation to its sales of cars in other countries. The High Court said:

[T]he possibility that a consumer who purchased a car in Europe *could* take action against a European car manufacturer under s 23 of the ACL in the Federal Court of Australia is a very different question to whether a consumer would take such action and whether such an action would progress to judgment ... [I]n the absence of a connection beyond the extraterritorial operation of s 23 of the ACL, it would be open to a respondent to seek a stay of such a proceeding on the basis that the Court is an 'inappropriate forum' for the proceeding.⁸²

In this passage, the High Court gave two reasons for its view that the impact of its interpretation of the CCA in practice would be minor, and thus a conflict with comity avoided. First, consumers based outside Australia are unlikely to litigate in Australia. It is true that litigation in Australia is expensive, which will deter consumers in other countries from commencing individual proceedings in Australia for the sole purpose of rendering the UCT provisions applicable, considering also that the vague test of unfairness makes it difficult to predict whether a court will regard a particular term as unfair. However, foreign consumers will not be deterred from joining a class action in Australia, as demonstrated by the facts of *Karpik*. Moreover, it is not only consumers that may invoke the UCT provisions. As mentioned in Part II above, the UCT provisions may also be invoked by corporations, both in a 'consumer contract' and in a 'small business contract'. Corporations have deeper pockets and will not as easily be deterred by high litigation costs from commencing individual proceedings in Australia.

⁸¹ See Part IV C 2 above.

⁸² *Ruby Princess* HCA (n 2) 58 [50] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ) (emphasis in original). The Court cited rule 10.43A(2)(a) of the *Federal Court Rules 2011* (Cth) as the source of the phrase 'inappropriate forum'.

Secondly, the High Court observed that, where the contract has no connection with Australia other than that it is subject to the UCT provisions, the respondent may seek a stay of proceedings on the ground that Australia is an inappropriate forum for the dispute. The Court was implying that an application for a stay of proceedings in those circumstances will be successful, at least as a general rule. This is an important observation that warrants close scrutiny.

B Using the Jurisdiction Rules as a Filter

The determination of whether an Australian court will exercise jurisdiction in a case involving a foreign element involves two questions. The first is whether originating process can be served on the defendant (*prima facie* jurisdiction). Where this is the case, an Australian court may still refuse to exercise jurisdiction on the ground that it is an inappropriate forum for the resolution of the dispute (*forum non conveniens*). It must be scrutinised whether the rules relevant to those questions are capable of preventing an Australian court from applying the UCT provisions to a contract that has only a tenuous connection with Australia, as suggested by the High Court in *Karpik*.⁸³

1 Prima Facie Jurisdiction

Originating process may always be served on a defendant present in Australia⁸⁴ or New Zealand.⁸⁵ It may be served on a defendant present in another foreign country in particular circumstances, as specified by the rules for the issuing court. A discussion of all those jurisdictional gateways is not necessary for present purposes. What should be examined is whether the mere fact that the plaintiff is invoking the UCT provisions permits service of originating process overseas. Four jurisdictional gateways might be thought to do this.

One gateway is the fact that the contract to which the proceedings relate is governed by the law of the jurisdiction in which the process is issued,⁸⁶ or the law of any Australian jurisdiction.⁸⁷ This gateway is not satisfied merely because the UCT provisions apply to the contract, as this does not by itself make the law of an Australian jurisdiction the governing law of the contract.

⁸³ Ibid 58 [50].

⁸⁴ *Federal Court of Australia Act 1976* (Cth) s 18; *Service and Execution of Process Act 1992* (Cth) s 15.

⁸⁵ *Trans-Tasman Proceedings Act 2010* (Cth) s 9. The provision is constitutionally valid: *Zurich Insurance Co Ltd v Koper* (2023) 411 ALR 480.

⁸⁶ *Court Procedures Rules 2006* (ACT) r 6502(b)(iv); *Supreme Court Rules 1987* (NT) reg 7.01(f)(iii); *Rules of the Supreme Court 1971* (WA) ord 10 r 1(1)(e)(iii).

⁸⁷ *Federal Court Rules 2011* (Cth) r 10.42(b)(iv); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (b)(iv); *Uniform Civil Procedure Rules 1999* (Qld) r 125(b)(iv); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(b)(iv); *Supreme Court Rules 2000* (Tas) r 147A(b)(iv); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(b)(iv).

Another gateway (in some jurisdictions) is the fact that the proceeding ‘arises’ under an Australian enactment, which ‘applies expressly or by implication to an act or omission that was done or occurred outside Australia in the circumstances alleged’.⁸⁸ The latter phrase would capture the application of the ACL in general to conduct outside Australia pursuant to s 5(1) of the CCA⁸⁹ or the ACL application provisions of a state or territory.⁹⁰ However, the gateway should require that the Australian law provides for the claim.⁹¹ While the UCT provisions may invalidate the purported exclusion of a claim, they do not themselves provide for a claim. For the same reason, reliance on the UCT provisions should not satisfy the gateway (in most jurisdictions) that the proceedings relate to the construction, effect or enforcement of an Australian enactment.⁹²

Finally, in most jurisdictions, where none of the specific jurisdictional gateways applies, originating process may still be served overseas with the leave of the court if the proceedings have a real and substantial connection with Australia, Australia is an appropriate forum for the proceedings and the court should exercise jurisdiction.⁹³ These conditions should not be regarded as being satisfied by the mere fact that the UCT provisions apply to a contract involved in the proceedings.

If, as argued here, the applicability of the UCT provisions to a contract does not by itself permit service of originating process overseas, the plaintiff needs to find some other jurisdictional gateway, such as that the contract to which the

⁸⁸ *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (j)(iii); *Uniform Civil Procedure Rules 1999* (Qld) r 125(j)(iii); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(j)(iii); *Supreme Court Rules 2000* (Tas) r 147A(j)(iii); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(j)(iii).

⁸⁹ Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 5th ed, 2023) [2.60].

⁹⁰ Martin Davies et al, *Nygh’s Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) [3.80].

⁹¹ See, for a similar gateway in a previous version of the Victorian rules, *Brighton Automotive Holdings Pty Ltd v Honda Australia Pty Ltd* (2021) 65 VR 146 [40].

⁹² *Federal Court Rules 2011* (Cth) r 10.42(p); *Court Procedures Rules 2006* (ACT) r 6502(p) (requiring an ACT law or Commonwealth law affecting property in the ACT); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (p); *Uniform Civil Procedure Rules 1999* (Qld) r 126; *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(p); *Supreme Court Rules 2000* (Tas) r 147A(p); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(p).

⁹³ *Federal Court Rules 2011* (Cth) r 10.43; *Court Procedures Rules 2006* (ACT) r 6503 (requiring a connection with the ACT); *Uniform Civil Procedure Rules 2005* (NSW) r 11.5; *Uniform Civil Procedure Rules 1999* (Qld) r 126; *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 3; *Supreme Court Rules 2000* (Tas) r 147B; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.03. For a discussion, see Andrew Dickinson, ‘In Absentia: The Evolution and Reform of Australian Rules of Adjudicatory Jurisdiction’ in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart, 2019) 38–41; Michael Douglas and Vivienne Bath, ‘A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules’ (2017) 44(2) *Australian Bar Review* 160.

proceedings relate was made within the jurisdiction,⁹⁴ or was breached within the jurisdiction.⁹⁵ Since the UCT provisions may be invoked to invalidate the purported exclusion or limitation of liability in tort, it is worth noting that, with the exception of Western Australia, originating process for a claim in tort may be served overseas where damage resulting from the tort was sustained wholly or partly in the jurisdiction in which process is issued,⁹⁶ or anywhere in Australia.⁹⁷ Damage for this purpose is any compensable loss caused by the tort,⁹⁸ such as medical expenses caused by an injury sustained overseas.⁹⁹

2 Forum Non Conveniens

Where originating process may in principle be served on the defendant, an Australian court will not necessarily exercise jurisdiction. The exercise of jurisdiction is ultimately a discretionary decision.¹⁰⁰ Where the dispute could be litigated in a foreign country, the exercise of jurisdiction by Australian courts depends upon on the connection of the dispute with Australia, considering all factors including the location of the parties, the location of witnesses, the location of the subject matter of the contract, the existence of related proceedings and the applicable law.¹⁰¹ Where the alternative forum is New Zealand, an Australian court must stay the proceeding if New Zealand is the more appropriate place to litigate the dispute.¹⁰² Where the alternative forum is another foreign country, the rules of court permit an Australian court to stay the proceeding if the court is an

⁹⁴ *Federal Court Rules 2011* (Cth) r 10.42(b)(i); *Court Procedures Rules 2006* (ACT) r 6502(b)(i); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (b)(i); *Supreme Court Rules 1987* (NT) r 7.01(f)(i); *Uniform Civil Procedure Rules 1999* (Qld) r 125(b)(i); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(b)(i); *Supreme Court Rules 2000* (Tas) r 147A(b)(i); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(b)(i); *Rules of the Supreme Court 1971* (WA) ord 10 r 1(1)(e)(1).

⁹⁵ *Federal Court Rules 2011* (Cth) r 10.42(c); *Court Procedures Rules 2006* (ACT) r 6502(c); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (c); *Supreme Court Rules 1987* (NT) r 7.01(g); *Uniform Civil Procedure Rules 1999* (Qld) r 125(c); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(c); *Supreme Court Rules 2000* (Tas) r 147A(c); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(c); *Rules of the Supreme Court 1971* (WA) ord 10 r 1(1)(f).

⁹⁶ *Court Procedures Rules 2006* (ACT) r 6502(a)(ii); *Supreme Court Rules 1987* (NT) r 7.01(j).

⁹⁷ *Federal Court Rules 2011* (Cth) r 10.42(a)(ii); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (a)(ii); *Uniform Civil Procedure Rules 1999* (Qld) r 125(a)(ii); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(a)(ii); *Supreme Court Rules 2000* (Tas) r 147A(a)(ii); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(a)(ii).

⁹⁸ See, eg, *Darrell Lea Chocolate Shops Pty Ltd v Spanish–Polish Shipping Co Inc (The ‘Katowice II’)* (1990) 25 NSWLR 568, 577; *Roads and Traffic Authority (NSW) v Barrie Toepfer Earthmoving and Land Management Pty Ltd (No 7)* [2014] NSWSC 1188 [229].

⁹⁹ See, eg, *Flaherty v Girgis* (1985) 4 NSWLR 248, 266; *Tweedale v Carnival PLC* [2021] FCA 1633 [64].

¹⁰⁰ See *Agar v Hyde* (2000) 201 CLR 552, 570 [41]–[42], 601–2 [129]–[130].

¹⁰¹ For a detailed outline of the relevant principles, see Davies et al, *Nygh’s Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) ch 8.

¹⁰² *Trans–Tasman Proceedings Act 2010* (Cth) ss 17, 19.

‘inappropriate forum’ for the trial of the proceeding.¹⁰³ The High Court has held that it is not sufficient that the foreign country is a more appropriate forum to litigate the dispute; the proceeding can be stayed only if the Australian court is a clearly inappropriate forum.¹⁰⁴ This is a high threshold, and Australian courts rarely stay proceedings on the ground of *forum non conveniens*.

Such a stay removes the entire dispute from the Australian courts, based on the factors connecting the dispute with Australia at the time of the court’s decision on the stay application. The High Court in *Karpik* suggested that a stay should be granted in order to prevent the application of a particular set of rules (the UCT provisions) to a contract, based on the factors connecting the contract to Australia at the time of its formation. There are three discrepancies between the two exercises.

First, the stay of a proceeding on the ground of *forum non conveniens* removes the entire dispute from the Australian courts. The court cannot refuse to apply the UCT provisions while otherwise deciding on the merits of the dispute. Thus, where Australia is generally an appropriate forum for the dispute, the Australian court needs to decide whether to send the whole dispute to another country only because one party is invoking the UCT provisions and it would be inappropriate to apply them to the contract before the court. Strictly, the court needs to decide whether the impugned term is in fact void under the UCT provisions because a dispute that could otherwise be litigated in Australia should not be sent to a foreign court simply because one party makes an argument that will ultimately be unsuccessful. If the impugned term is void under the UCT provisions, the court should, strictly, determine whether the foreign court would enforce the term. If the foreign court would not enforce the impugned term, the applicability of the UCT provisions should not be a relevant factor in the *forum non conveniens* inquiry.¹⁰⁵ In the example of the European car manufacturer discussed in *Karpik*,¹⁰⁶ it would be unnecessary to stay Australian proceedings on the sole ground that the UCT provisions should not apply to the contract if the alternative foreign court would equally refuse to enforce the impugned term. The problem is that issues

¹⁰³ *Federal Court Rules 2011* (Cth) r 10.43A(2)(b); *Court Procedures Rules 2006* (ACT) r 6504(2)(b); *Uniform Civil Procedure Rules 2005* (NSW) r 11.6(2)(b); *Uniform Civil Procedure Rules 1999* (Qld) r 127(2)(b); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 4(2)(b); *Supreme Court Rules 2000* (Tas) r 147C(2)(b); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.05(2)(b).

¹⁰⁴ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564; *Puttick v Tenon Ltd* (2008) 238 CLR 265, 282 [29], 287 [38].

¹⁰⁵ See *PCH Offshore Pty Ltd v Dunn (No 2)* (2010) 273 ALR 167 [158]–[160]: the plaintiff’s reliance on the *Corporations Act 2001* (Cth) did not prevent a stay of proceedings as Azerbaijani law provided comparable relief. See also *Akai Pty Ltd v People’s Insurance Co Ltd* (1997) 188 CLR 418, 447; Richard Garnett, ‘Stay of Proceedings in Australia: A “Clearly Inappropriate” Test?’ (1999) 23(1) *Melbourne University Law Review* 30, 47–8.

¹⁰⁶ See Part V A above.

relating to the substance of the dispute in general,¹⁰⁷ and complex choice-of-law issues in particular,¹⁰⁸ should not be determined during the jurisdiction stage but only after trial.

Secondly, the propriety of applying the UCT provisions to a particular contract depends upon *its* connections to Australia. By contrast, the decision on whether Australia is an inappropriate forum depends upon the connection of the entire dispute to Australia. This includes the location of witnesses, the applicable law, the presence of an exclusive choice-of-court agreement, the availability of another forum, and the connection with other proceedings in Australia. Originating process may be served on an overseas defendant who is a necessary or proper party to proceedings properly brought against another defendant.¹⁰⁹ Where it is in the interest of justice to decide on the claims against both defendants together, the proceedings will not be stayed for only one defendant even if the contract between the plaintiff and that defendant has only a tenuous connection with Australia. *Karpik* is an example. The High Court refused to stay the proceedings brought by the US sub-group, and one reason for that decision was that it was more efficient to decide on the claims of all sub-groups in one class action.¹¹⁰

The applicable law is not generally a strong factor.¹¹¹ However, Australian courts usually refuse to stay the proceedings when the claim is based on protective Australian legislation and the alternative foreign court would not apply that legislation or equivalent foreign legislation.¹¹² In those circumstances, the Australian courts usually even refuse to give effect to an exclusive jurisdiction agreement in favour of a foreign court.¹¹³ The key legislation to which these rules

¹⁰⁷ *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337, 375 [82] (Lord Neuberger PSC): '[i]t is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost'.

¹⁰⁸ *Murakami v Wiryadi* (2010) 109 NSWLR 39, 55 [66]. See also *Puttick v Tenon Ltd* (2008) 238 CLR 265 [21], [24], [32].

¹⁰⁹ *Federal Court Rules 2011* (Cth) r 10.42(h)(i); *Court Procedures Rules 2006* (ACT) r 6502(h)(i); *Uniform Civil Procedure Rules 2005* (NSW) r 11.4, sch 6 para (h)(i); *Supreme Court Rules 1987* (NT) reg 7.01(1); *Uniform Civil Procedure Rules 1999* (Qld) r 125(h)(i); *Uniform Civil Rules 2020* (SA) r 82.4(2), sch 1 r 2(h)(i); *Supreme Court Rules 2000* (Tas) r 147A(h)(i); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.02(h)(i); *Rules of the Supreme Court 1971* (WA) ord 10 r 1(1)(h).

¹¹⁰ *Ruby Princess* HCA (n 2) 61 [69].

¹¹¹ See, for foreign law, *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 521 [81]; *Puttick v Tenon Ltd* (2008) 238 CLR 265, 282–3 [31]–[32].

¹¹² For the TPA, see *Eurogold Ltd v Oxus Holdings (Malta) Ltd* [2007] FCA 811, [60]; *Mineral Commodities Ltd v Promet Engineers Africa (Pty) Ltd* [2008] FCA 30, [22]; *Centrebet Pty Ltd v Baasland* [2013] NTSC 59, [162]. The Australian court may also grant an anti-suit injunction to restrain proceedings in a foreign court that would not apply the Australian legislation; see *Bolin Technology Co Ltd v BirdDog Technology Ltd* [2024] FCA 129.

¹¹³ *Akai Pty Ltd v People's Insurance Co Ltd* (1997) 188 CLR 418; *Proactive Building Solutions v Keck* [2013] NSWSC 1500. For criticism, see Richard Garnett, 'Determining the Appropriate Forum by the Applicable Law' (2022) 71(3) *International and Comparative Law Quarterly* 589, 617–23.

have been applied is the former *TPA*,¹¹⁴ and now the *CCA*¹¹⁵ and the *ACL*.¹¹⁶ None of these cases involved the UCT provisions, but they too are protective legislation and may warrant the same approach being taken.

However, if the mere fact that the UCT provisions apply to a contract before an Australian court and that the alternative foreign court would not apply those or equivalent provisions prevented a stay of the Australian proceedings, there could never be such a stay to prevent a territorial overreach of the UCT provisions, and the approach envisaged by the High Court in *Karpik* would be thwarted. In order to give effect to the High Court's suggestion, the approach generally taken in relation to protective Australian legislation must not be applied to the UCT provisions, which should simply constitute one (not dominant) factor in the *forum non conveniens* exercise. This may be justifiable on the ground that the UCT provisions are not the basis of the claim as they do not provide a cause of action. Nevertheless, there is something awkward about declaring Australia to be a clearly inappropriate forum for the sole purpose of preventing the application of protective Australian legislation.

Thirdly, the applicability of the UCT provisions to a particular contract depends upon the factors present at the time of its formation. Subsequent events cannot change this. Subsequent events can, however, inform the decision on whether to stay an Australian proceeding on the ground of *forum non conveniens* because the court considers all the factors present at the time of that decision. Australia may not be an inappropriate forum where one of the parties has relocated, or the subject matter of the contract has been moved, to Australia since the contract was made. This is particularly relevant if it is considered sufficient that either party to the contract (and not just the party who proposed the standard terms) falls into one of the categories in s 5(1)(g)–(i) of the *CCA*.¹¹⁷ An Australian citizen or resident who has been injured in a medical or other professional procedure overseas and incurred medical expenses in Australia may bring a tort action against the overseas professional in Australia (except Western Australia), based on the fact that damage was sustained in the jurisdiction.¹¹⁸ The Australian court may decide to exercise jurisdiction in those circumstances.¹¹⁹ If it does, the

¹¹⁴ *Green v Australian Industrial Investment Ltd* (1989) 25 FCR 532, 545; *Commonwealth Bank of Australia v White* [1999] 2 VR 681, [89]–[91]; *Clough Engineering Ltd v Oil & Natural Gas Corp Ltd* (2007) ATPR 42–166, [41].

¹¹⁵ *Epic Games, Inc v Apple Inc* (2021) 286 FCR 105; *Epic Games, Inc v Google LLC (Stay Application)* (2022) 399 ALR 119.

¹¹⁶ *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320; *Lew Footwear Holdings Pty Ltd v Madden International Ltd* (2014) 50 VR 1, [233]–[236]; *Home Ice Cream Pty Ltd v McNabb Technologies LLC (No 2)* [2018] FCA 1093, [19]; *Urban Moto Imports Pty Ltd v KTM AG* [2021] VSC 616; *Epic Games, Inc v Google LLC (Stay Application)* (2022) 399 ALR 119; *Ayers Rock SkyShip Pty Ltd v Lindstrand Technologies Ltd* [2022] FCA 1208. The exclusive jurisdiction clause was enforced in *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133.

¹¹⁷ See Part IV C 2 above.

¹¹⁸ See Part V B 1 above.

¹¹⁹ See *O'Reilly v Western Sussex Hospitals NHS Trust* [2010] NSWSC 909.

plaintiff can invoke the UCT provisions if the defendant relies on an exclusion or limitation of tortious liability in a qualifying contract between the parties.¹²⁰

There is one other problem. Australian proceedings will not be stayed on the ground of *forum non conveniens* unless the defendant applies for such stay. The possibility of stay is therefore unable to prevent a territorial overreach of the UCT provisions where the defendant is the party who is invoking them. This might be considered justified on the ground that the plaintiff has chosen to litigate in Australia and must therefore accept an application of mandatory Australian law. Where the plaintiff is forced to litigate in Australia because the contract contains an exclusive choice-of-court clause in favour of Australia, it can equally be argued that the consent to the clause is a consent to the application of mandatory Australian law. However, there is no choice where the plaintiff cannot litigate in the only alternative forum because, for example, that country experiences civil war or military conflict or the plaintiff would face persecution there.

In conclusion, while it may be possible to stay Australian proceedings in some cases in which the UCT provisions apply to a contract that has a tenuous connection with Australia, it is not possible in all such cases. The *forum non conveniens* exercise is concerned with the propriety of deciding the merits of a dispute in Australia, not with the territorial scope of legislation.¹²¹ It would be much better to limit the territorial scope of the UCT provisions through statutory interpretation. The possibility of doing so will be discussed next.

VI LIMITING THE TERRITORIAL SCOPE OF THE UCT PROVISIONS THROUGH STATUTORY INTERPRETATION

Since an unqualified application of s 5(1) of the CCA to the UCT provisions renders their scope extremely wide, a limitation of the scope through statutory interpretation must be considered. According to Ryan and Kiefel JJ, it 'is to be understood and implied that the Australian Parliament does not intend to deal with persons or matters over which, according to the comity of nations, jurisdiction belongs to some other sovereign or state'.¹²² In the area of private law,

¹²⁰ If the view is taken that the person proposing the standard terms must fall into one of the categories in section 5(1)(g)–(i), the UCT provisions will still apply here if the defendant is a corporation doing business in Australia, an Australian citizen or an Australian resident.

¹²¹ See generally Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4(1) *Journal of Private International Law* 1, 28–31.

¹²² *Worldplay Services* (n 47) [17]. See also *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 363; *Barcelo v Electrolytic Zinc Company of Australia Ltd* (1932) 48 CLR 391, 424 (Dixon J); *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 31 (Taylor J); *Re Maritime Union of Australia*; *Ex parte CSL Pacific* (2003) 214 CLR 397, [45]. For a discussion, see Thomas Schultz and Jason Mitchenson, 'Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts' (2016) 12(2) *Journal of Private International Law* 344, 351–3.

as mentioned in Part III, a statute may be interpreted as applying in accordance with the common law choice-of-law rules.

The High Court in *Karpik* rejected the application to the UCT provisions of any interpretative principle relating to the territorial scope of a forum statute: since s 5(1) of the *CCA* identifies the requisite connection between the UCT provisions and Australia, 'there is no basis for seeking to identify a further territorial connection, whether by implication or statutory presumption'.¹²³ This argument would be unassailable if s 5(1) of the *CCA* had been enacted at the same time as the UCT provisions. But it was not. Section 5(1) had been in the *TPA* since its enactment and was simply extended to the UCT provisions when they were enacted. There is no indication that the legislature appreciated the drastic effect of extending s 5(1) to the UCT provisions. Thus, the language of the *CCA* may not reflect the legislature's intention.

The High Court in *Karpik* was concerned with the ACL as a law of the Commonwealth. The Court made no reference to the ACL as a law of a state or territory. Since state and territory legislation contains express provisions on the territorial scope of the ACL, the High Court's reason for rejecting a limitation of the territorial scope of the ACL as a law of the Commonwealth extends also to the ACL as law of a state or territory. Thus, the High Court's decision in *Karpik* obliges courts to apply the UCT provisions completely in accordance with the ACL application provisions.

Nevertheless, it is worth exploring whether in the absence of this authority it would be possible to remove the conflict with comity through statutory interpretation. Some possible criteria were considered in *Karpik* by the High Court and by Derrington J in the Full Federal Court. These and other criteria will be scrutinised to determine whether the High Court could have come to a different outcome if it had not regarded the existence of provisions on the territorial scope as an outright bar to a limiting interpretation.

As the High Court in *Karpik* observed, statutory provisions cannot be read down where this would frustrate the object of the legislation.¹²⁴ Pursuant to s 2 of the *CCA*, the *CCA*'s object is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. This is the guide for the following discussion.

¹²³ *Ruby Princess* HCA (n 2) 56–7 [44] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ), citing *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, 965 [38], 970–1 [59]–[62]; *Kay's Leasing Corporation* (n 30) 142–3.

¹²⁴ *Ruby Princess* HCA (n 2) 56–7 [44], citing *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459, 481 [77]. See *Acts Interpretation Act 1901* (Cth) s 15AA.

A *The Law of An Australian Jurisdiction Governs the Contract*

The first limiting criterion to be considered is that the law of an Australian state or territory is the proper law of the contract under the common law choice-of-law rules. The proper law may generally be chosen by the parties (expressly or by implication) and is otherwise the law of the jurisdiction with which the contract as a whole has its closest and most real connection.¹²⁵ A reference of these rules to a foreign legal system is a reference to its internal rules rather than its choice-of-law rules.¹²⁶

This criterion must be rejected. Since the parties may choose the proper law of the contract, the UCT provisions could not apply where the parties chose a foreign law as the proper law of the contract. Where the bargaining power is unequal, the stronger party could impose such a choice of law on the weaker party. As the High Court in *Karpik* noted,¹²⁷ the simple step of adding a choice-of-law clause in the standard terms would be sufficient. The purpose of the UCT provisions of protecting parties, in particular parties in a weaker bargaining position, from unfair contract terms would be completely thwarted if the provisions could be evaded that easily.

The parties' choice of a foreign law may be ignored where it was made in bad faith,¹²⁸ or violates public policy.¹²⁹ However, these grounds are rarely invoked,¹³⁰ and they invalidate the parties' choice of a foreign law completely. But there is no reason why the choice should be disregarded for issues other than the fairness of the terms. It is far better not to limit the territorial scope of the UCT provisions to contracts governed by the law of an Australian jurisdiction in the first place.

In *Karpik*, Princess suggested that the UCT provisions, where they apply to a contract pursuant to the ACL application provisions, could be applied to a choice-of-law clause in the contract and would invalidate it where it is unfair.¹³¹ However, where a substantive term in the contract is unfair under the UCT provisions, the purported exclusion of their application by the choice of a foreign law as the proper law of the contract must logically be unfair too. In effect, Princess suggested limiting the territorial scope of the UCT provisions to contracts that

¹²⁵ *Bonython v Commonwealth* (1950) 81 CLR 486, 498; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 217, 224, 259–60; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 441–2; *Ship 'Sam Hawk' v Reiter Petroleum Inc* (2016) 246 FCR 337, [256], [258].

¹²⁶ In other words, there is no *renvoi*: *Proactive Building Solutions v Keck* [2013] NSWSC 1500, [27]–[29].
¹²⁷ *Ruby Princess* HCA (n 2) 57 [47].

¹²⁸ See *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 290; *Garsec Pty Ltd v His Majesty Sultan of Brunei* (2008) 250 ALR 682, 709 [128] (Campbell JA). The parties' choice of the proper law was held invalid on grounds of bad faith in *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378.

¹²⁹ *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 290; *Garsec Pty Ltd v His Majesty Sultan of Brunei* (2008) 250 ALR 682, 709 [128] (Campbell JA); *Re Bulong Nickel Pty Ltd* (2002) 42 ACSR 52, [39].

¹³⁰ See *Huntingdale Village Pty Ltd (CAN 085 048 531) (Recs and Mgrs Apptd) v Westgarth* (2018) 128 ACSR 168, [182].

¹³¹ See *Ruby Princess* HCA (n 2) 57 [47].

objectively have their closest connection with an Australian jurisdiction. This will be considered next.

B The Contract Has Its Closest Connection with An Australian Jurisdiction

The question arises whether it would be appropriate to limit the territorial scope of the UCT provisions to contracts that have their closest and most real connection with an Australian state or territory, employing the test used at common law to determine the proper law of the contract in the absence of a choice by the parties.¹³²

It is necessary to consider the effect of the closest connection test for the two types of contract to which the UCT provisions apply: a contract for the supply of goods or services; and a contract for the sale or grant of an interest in land. Since the court considers all of the factors of the individual case,¹³³ the outcome will not be the same for every contract of the same type. Nevertheless, some general tendencies can be observed.

In determining the proper law of a contract for the sale of land, the location of the land (the *situs*) is an important factor, which may be decisive even where the contract was made, and both parties reside, in a jurisdiction other than the *situs*.¹³⁴ Thus, where the land is situated in Australia, an Australian court is likely to find that the contract has its closest connection with the *situs*, and the UCT provisions apply. Where the land is situated overseas, an Australian court is also likely to find that the contract has its closest connection with the *situs*, in particular where at least one of the parties resides in the same country. The UCT provisions cannot be invoked, even if one of the parties is based in Australia. However, an Australian party (whether a business or consumer) who contemplates entering into a contract relating to land situated overseas can be expected to be sufficiently shrewd to anticipate foreign law to be relevant and to obtain legal advice before entering into the contract.

In *Karpik*, Derrington J in the Full Federal Court stated that contracts for the supply of goods or services in Australia are likely to have their closest connection with Australia.¹³⁵ However, his Honour cited no authority in support of this contention, and the authorities in fact suggest the opposite, at least for services. The courts tend to find the closest connection of a contract for services with the

¹³² See n 125. For the historical development of this test, see *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 661–2 [65]–[67] ('*Valve (No 3) FCA*').

¹³³ Including the parties' places of business or residence, the place of contracting, the places of performance, and the nature and subject matter of the contract: *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 437.

¹³⁴ *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565. See also *McClelland v Trustees Executors and Agency Co Ltd* (1936) 55 CLR 483.

¹³⁵ *Ruby Princess* FCAFC (n 55) [321].

place of the service provider, at least where the other party is a consumer. This is unremarkable where both parties are based in the same jurisdiction. In cases in which a contract for the provision of a tour through Europe was made in Australia between a corporation based in New South Wales and residents of New South Wales, it was common ground that the law of New South Wales was the proper law of the contract for the provision of the tour.¹³⁶

Importantly, a closest connection with the service provider's place of business has also been found where the parties were based in different countries. Where residents of New South Wales retained lawyers in New York to conduct litigation on their behalf in Pennsylvania, the proper law of the contract was said to be the law of New York.¹³⁷ In cases in which an overseas corporation provided online services to an Australian consumer, the contract was said to have its closest connection with the country in which the corporation had its principal place of business.¹³⁸ One argument for that conclusion was that the corporation used the same standard form contract for its dealings with consumers in multiple countries and a single proper law for all those contracts was desirable.¹³⁹

These examples demonstrate that an application of the closest connection test renders the territorial scope of the UCT provisions too narrow. An Australian court is more likely to find that a contract between a business and a consumer has its closest connection with the country in which the business is based. This is understandable as a business usually involves a number of resources (in particular employees) in its operations. But it means that where a corporation based overseas supplies goods or services to an Australian resident, it is not necessarily or indeed usually the case that the contract has its closest connection with that jurisdiction.

The territorial scope of the UCT provisions should not be limited to contracts that have their closest connection with an Australian jurisdiction as specified by the common law choice-of-law rules in the absence of a choice of the governing law by the parties.

C *The Contract was Made in Australia*

In *Karpik*, Derrington J in the Full Federal Court observed that 'there is nothing in the CCA or the ACL which suggests that the circumstances which render an unfair clause void arises from the fact that it was entered into in a part of Australia'.¹⁴⁰

¹³⁶ *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, [11]; *Moore* (n 39) [16].

¹³⁷ *Fleming v Marshall* (2011) 279 ALR 737, 754–5 [81]–[86]. It was a provisional view expressed in a decision on whether to stay the Australian proceedings.

¹³⁸ *Valve (No 3)* FCA (n 132) 663–5 [75]–[84]; *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133, [128].

¹³⁹ *Valve (No 3)* FCA (n 132) 665 [83]; *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133, [128]. This argument is not convincing, as the non-Australian consumers may be able to litigate in their home countries where different choice-of-law rules may be applied.

¹⁴⁰ *Ruby Princess* FCAFC (n 55) [294].

Nor could such a condition be implied, for two reasons. First, it is not always straightforward to determine where a contract was made, in particular for a contract made by electronic means. Secondly, the place of the contract may be fortuitous and does not provide a sufficient justification for the applicability or non-applicability of the UCT provisions. Suppose that the resident of a foreign country, while being on a short visit to Australia, enters (electronically) into a contract with a business in the foreign country for the supply of goods or services there. The business may not even be aware that its customer is present in Australia when making the order. Conversely, suppose that the agent of a small Australian business, while being overseas, enters into a contract with a large foreign business for the construction of a building in Australia. Even though the contract was not made in Australia, the Australian business deserves the protection of the UCT provisions.

D An Obligation Under the Contract Was or Should Have Been Performed in Australia

With regard to a 'consumer contract' for services, the High Court in *Karpik* rejected a limitation of the UCT provisions to services performed wholly or predominantly in Australia, as this would exclude contracts between an Australian consumer and an Australian-based company for services wholly or predominantly performed overseas.¹⁴¹ This concern could be addressed by regarding it as sufficient that any, even minor obligation under the contract was or should have been performed in Australia. Such a criterion is still underinclusive as it renders the UCT provisions inapplicable where, for example, a foreign company advertises a European river cruise online and an Australian resident books the cruise in Australia through the company's website.¹⁴² Even though no performance takes place in Australia,¹⁴³ there is a strong argument that the Australian resident should be protected against unfair terms used by the foreign company.

The last criterion is also overinclusive. In *Karpik*, Derrington J in the Full Federal Court convincingly argued that a passage contract for a round-the-world cruise concluded in the United States between entities domiciled there should not be subject to the UCT provisions only because part of the voyage is in Australia.¹⁴⁴ This would not leave the traveller without any protection of Australian law for injuries suffered in Australia. In particular, the traveller can invoke s 60 of the

¹⁴¹ *Ruby Princess* HCA (n 2) 57–8 [49].

¹⁴² This is a variation of the facts of *Moore* (n 39). The travel agent in that case was an Australian company.

¹⁴³ It is assumed that the place of payment is the creditor's place of business; see *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd* (2004) 61 NSWLR 451, [177]; *Eagle v Delta Haze Corp* [2000] VSC 513, [19].

¹⁴⁴ *Ruby Princess* FCAFC (n 55) [314].

ACL, which provides: 'If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.' The traveller can bring a claim under s 60 against the Australian entity that provided the relevant part of the tour,¹⁴⁵ as the consumer guarantees do not require a contract between the consumer and the supplier of the goods or services.¹⁴⁶ The terms of the contract between the traveller and the overseas corporation do not affect the claim under s 60 as parties cannot generally contract out of the consumer guarantees.¹⁴⁷ It is not necessary to subject those terms to the UCT provisions.

E At Least One Party is a Consumer or Small Business Based or Present in Australia

With regard to a 'consumer contract' for the supply of goods or services, the High Court in *Karpik* rejected a limitation of the UCT provisions to contracts that affect or are capable of affecting the acquisition of goods or services by a consumer in Australia, as this would ignore the language of s 5(1) of the CCA and s 23(3) of the ACL.¹⁴⁸ It is unclear whether the High Court was considering a consumer who, at the time of the contract, is ordinarily resident in Australia or physically present in Australia. Both such limitations should be rejected as inappropriate. As Derrington J in the Full Federal Court observed, a limitation to Australian residents is still overinclusive as it would render the UCT provisions applicable where an Australian resident, while travelling overseas, enters into a contract with a foreign company.¹⁴⁹ Nor should the UCT provisions apply merely because at least one of the parties is a consumer or small business who was physically present in Australia when the contract was made. The presence within or outside Australia at that time may be fortuitous and, as Derrington J observed, there is no justification for treating two parties differently solely because they were in different locations when entering into contracts with the same third party for the same service on the same terms.¹⁵⁰

¹⁴⁵ Consider the facts of *Wieck v Wayoutback Desert Safaris Pty Ltd* [2023] NSWSC 134: a resident of Germany booked an Australian tour with a German company and, after being injured in a tour bus in Australia, brought a claim under section 60 against the Australian companies that had provided that part of the tour. The court made a procedural decision and did not resolve the applicability of section 60.

¹⁴⁶ *Valve* FCAFC (n 39) [106].

¹⁴⁷ Section 64 invalidates a term that seeks to modify the consumer guarantee provisions, with a very limited exception in s 64A. Section 67 invalidates a term that seeks to apply a foreign law instead of the consumer guarantee provisions.

¹⁴⁸ *Ruby Princess* HCA (n 2) 57 [48].

¹⁴⁹ *Ruby Princess* FCAFC (n 55) [315].

¹⁵⁰ *Ibid* 612–13 [320].

F Both Parties are Based in Australia

The territorial scope of the UCT provisions should not be confined to contracts between two parties based in Australia. Such a limitation would render the provisions inapplicable where a foreign corporation advertises goods or services in Australia and supplies them to Australian residents. In those circumstances, the Australian residents ought to enjoy the protection of the UCT provisions, and the foreign corporation can reasonably expect their application by an Australian court.

Similar considerations apply where a small business based in Australia contracts with a large overseas business that has targeted customers in Australia. It might be argued that the definition of a ‘small business contract’ (after the 2022 amendments) implies that both parties are based in Australia. As mentioned before, one of the two alternative criteria for determining whether a business is large or small for this purpose is the annual turnover. In that context, s 23(4)(b)(ii) of the ACL refers to ‘the party’s last income year (within the meaning of the *Income Tax Assessment Act 1997*)’. This might be said to imply that the party must be liable to pay income tax in Australia, as the financial year runs from 1 July to 30 June of the following year in Australia¹⁵¹ but runs between different dates in other countries.¹⁵² However, s 4.10(2) of the *Income Tax Assessment Act 1997* (Cth) provides that the ‘income year’ is the financial year (ie 1 July to 30 June) or the company’s accounting period if it is different from the financial year. The ‘income year’ of a company based in a country in which the financial year does not run from 1 July to 30 June is that company’s accounting period. Thus, the definition of a ‘small business contract’ in the ACL can accommodate foreign companies. Similarly, the fact that s 23(4)(b)(ii) of the ACL expresses the turnover threshold in Australian Dollars and that s 23(6) and (7) refer to Australian GST legislation¹⁵³ in defining ‘turnover’ is not a clear indication that only a party that pays its tax in Australia can be a party to a ‘small business contract’ for the purposes of the ACL.

G The Contract was Made in ‘Trade or Commerce’

It should finally be considered whether the territorial scope of the UCT provisions could be limited to contracts made in ‘trade or commerce’ as defined identically in s 4(1) of the CCA and s 2(1) of the ACL. According to that definition, ‘trade or commerce’ means trade or commerce within Australia or between Australia and places outside Australia. It is necessary to consider when trade or commerce is between Australia and a place outside Australia for this purpose. This includes the case where a person or a tangible or intangible thing crosses a territorial border

¹⁵¹ *Income Tax Assessment Act 1997* (Cth) s 995.1(1).

¹⁵² In the UK, for example, the financial year runs from 6 April to 5 April of the following year.

¹⁵³ *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

(in particular the supply of foreign made goods to Australia),¹⁵⁴ in which case the contractual arrangements to effect such movement are included.¹⁵⁵ It also includes contracts concluded through the website of a foreign corporation that offers goods or services to persons in Australia.¹⁵⁶ By contrast, it is not sufficient that one party to a transaction is an Australian citizen or a corporation incorporated in Australia.¹⁵⁷

The criterion of 'trade or commerce' as defined would work where at least one party to the contract is a business or government agency and thus acts in trade or commerce. It would render the UCT provisions applicable where both parties are based in Australia and also where a foreign party supplies goods or services to Australia. The criterion would render the UCT provisions inapplicable where an Australian citizen, while being overseas, and a foreign party enter into a contract to be performed overseas. It would also render the provisions inapplicable to a contract that was concluded in Australia (for example at a trade fair) between two foreign corporations and which is to be performed overseas. All of this is appropriate.

Nevertheless, basic principles of statutory interpretation prevent the adoption of this criterion, for two reasons. First, as observed by Derrington J in *Karpik*,¹⁵⁸ the legislature made careful choices as to which ACL provisions do and which do not employ this criterion. For example, the consumer guarantees in ss 51–53 do not require the supply to occur in trade commerce whereas the consumer guarantees in ss 54–62 do require this. It must be assumed that the legislature made a conscious choice not to confine the scope of the UCT provisions to contracts made in trade or commerce.

Secondly, the criterion would render the UCT provisions inapplicable where neither party acts in trade or commerce. While it may be rare for two consumers to contract on standard terms, this is not impossible to occur even in a cross-border context. For example, a luxury item such as a vintage car may be sold from one consumer to another, and one party may insist on the inclusion in the contract of particular standard terms found online. The possibility of making such a transaction by way of a smart contract may increase the possibility of standard terms being used.¹⁵⁹ At least an Australian party ought to be protected by the UCT provisions in those circumstances. Therefore, while the criterion might work in practice because the excluded type of contract is rare to occur, a type of contract

¹⁵⁴ See, eg, *Philipsen v American Medical LLC* [2018] FCA 246, [24]; *Gill v Ethicon Sarl (No 5)* [2019] FCA 1905, [3130].

¹⁵⁵ *Wells v John R Lewis (International) Pty Ltd* (1975) 25 FLR 194, 204–6; *Swan v Downes* (1978) 34 FLR 36, 40–6.

¹⁵⁶ *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309, [32].

¹⁵⁷ *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* (2012) 266 FLR 243, [407].

¹⁵⁸ *Ruby Princess* FCAFC (n 55) [307].

¹⁵⁹ See generally Son T Nguyen, 'Consumer Protection Against Unfair Contract Terms in the Age of Smart Contracts' (2023) 51(4) *Federal Law Review* 487, 498–500.

that the UCT provisions expressly include in their scope cannot be removed from their scope through statutory interpretation.

In conclusion, even if, contrary to the High Court's decision in *Karpik*, a limitation of the territorial scope of the UCT provisions were not considered excluded by the clear language of the ACL application provisions, there is no limiting criterion that is compatible with both the language of the UCT provisions and the object of the CCA.

VII CONCLUSION

It is legitimate for the UCT provisions to have some extraterritorial effect. In particular, where a foreign corporation targets customers in Australia, it is justified and indeed important that a consumer or small business based in Australia is able to invoke the UCT provisions to impugn a term in the foreign corporation's standard terms. The problem is that the extraterritorial effect of the UCT provisions is much wider than that. If the territorial scope of the UCT provisions is determined solely in accordance with the ACL application provisions in the CCA and in state and territory legislation, the UCT provisions apply to every contract made anywhere in the world by a corporation that does business in Australia through other transactions, by an Australian citizen or an Australian resident, at least where that person is the party who proposed the standard terms. This is a remarkably wide scope, which can hardly be considered compliant with comity.

Nevertheless, the High Court in *Karpik* refused to entertain interpretative devices aimed at narrowing the territorial scope of the UCT provisions, arguing that this is precluded by the clear wording of s 5(1) of the CCA. The Court expressed confidence that the Australian courts will not exercise jurisdiction in respect of a contract that has no connection with Australia other than that it is subject to the UCT provisions. This observation may be seen to conflict with the Court's decision in the case before it. Residents of North America were permitted to join a class action in Australia even though their contracts with the defendants had only a tenuous connection with Australia and contained a class action waiver clause and an exclusive jurisdiction clause in favour of a US court. More generally, the jurisdiction rules are not able to prevent a conflict with comity.

The jurisdiction rules of the Australian courts permit service of the originating process in a wide range of circumstances. The courts do have a discretion not to exercise jurisdiction, but they can do so only where Australia is a clearly inappropriate forum for the dispute (unless the alternative forum is New Zealand where it is sufficient that New Zealand is a more appropriate forum). This is a high hurdle, and a stay of proceedings will be rare, even if the applicability of the UCT provisions as protective legislation is not regarded as a factor that, by itself, prevents a stay. Crucially, the *forum non conveniens* inquiry considers all the

factors of the dispute at the time of the court's decision on the stay application, and not only the factors relating specifically to the contract at the time of its formation. Even where there are no factors connecting the contract itself with Australia, the Australian court may not be a clearly inappropriate forum because of other factors at the time of the proceedings, such as the presence of a related action in Australia. It would be awkward to stay Australian proceedings for the sole purpose of preventing the application of Australian protective legislation.

The jurisdiction rules do not constitute a sufficient bar to the application of the UCT provisions to a contract that has a tenuous connection with Australia. Only a limitation on the provisions' territorial scope itself can achieve this properly. The High Court's decision in *Karpik* prevents courts from implying any limitation. But even if the courts were free to do so, a suitable criterion cannot be found for the current legislation.

Legislative reform is needed. Rules delineating the territorial scope of the UCT provisions ought to be inserted in the ACL. There could be different rules for a 'consumer contract' and a 'small business contract', or a set of alternative criteria for both types of contract. For example, the UCT provisions could be made applicable where the contract is made in 'trade or commerce' as defined in s 4(1) of the CCA and s 2(1) of the ACL, or where the law of an Australian jurisdiction is the proper law of the contract, a foreign choice-of-law clause being ignored for that purpose.

Legislative reform is in fact needed beyond the UCT provisions. In *Valve Corporation and Australian Competition and Consumer Commission*,¹⁶⁰ the Full Federal Court held that the consumer guarantee provisions in the ACL apply whenever a corporation based anywhere in the world supplies goods or services to a consumer (as defined in s 3 of the ACL) based in Australia (because such a supply constitutes conduct in Australia) regardless of the proper law of the contract. Comparing the UCT provisions with the consumer guarantee provisions, the High Court in *Karpik* said that the latter provisions apply only where the law of an Australian jurisdiction is the proper law of the contract, noting that s 67 of the ACL invalidates a choice-of-law clause to the contrary.¹⁶¹ Even though the High Court made no reference to the conflicting decision in *Valve*, lower courts may follow the High Court's comments and may now refuse to apply the consumer guarantee provisions where a consumer based in Australia acquires goods or services from an overseas supplier, on the ground that the contract has its closest connection with the supplier's country. The ACL ought to be amended so as to ensure the applicability of the consumer guarantee provisions whenever the supply of goods or services is part of business activities of the supplier directed at consumers based in Australia.

¹⁶⁰ *Valve* FCAFC (n 39) [106]–[116]. For a discussion, see Sirko Harder, 'The Territorial Scope of Australia's Consumer Guarantee Provisions' (2021) 17(2) *Journal of Private International Law* 255.

¹⁶¹ *Ruby Princess* HCA (n 2) 57 [46].