CLOSING THE COURTHOUSE DOOR? AVOIDING CLASS ACTIONS THROUGH ARBITRATION CLAUSES IN AUSTRALIA

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The potential of arbitration clauses to, at least in theory, circumvent the operation of the class action regime has been viewed as a 'tantalising' prospect for those seeking to minimise exposure to class action litigation in Australia. Despite being the subject of much judicial consideration overseas, whether arbitration clauses may in fact operate to immunise corporations from class actions is an issue that has not yet arisen before the courts in Australia. Following a brief consideration of the policy objectives of the federal class action regime and the framework of arbitration as a dispute resolution mechanism in Australia, this article considers the obstacles that exist under the Australian law for respondents seeking to rely on arbitration clauses in this manner.

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I Introduction

Class actions provide access to justice for victims of widescale misconduct, facilitate judicial economy and provide significant deterrence from institutional and corporate wrongdoing.[1] However, for powerful and well-resourced perpetrators of such misconduct, class actions increase the potential of redress being sought against them and may shift the balance of power in favour of claimants once redress is sought.[2] In this sense, for some, class actions may represent an unwanted constraint on decision-making freedom.[3] It is therefore unsurprising that the potential for arbitration clauses to be used in a wide range of contracts to, in effect, eliminate or greatly reduce the possibility of class actions being brought by groups of potential claimants has been referred to as a 'tantalising' prospect in Australia.[4] This is notwithstanding the detrimental impact that this may have on the ability of individuals to vindicate their rights, and the consequences that may flow from a reduced

[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–5 (Michael Duffy, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3023 (Siegfried Spindler); Deborah R Hensler, 'The Globalization of Class Actions: An Overview' (2009) 622(1) *ANNALS of the American Academy of Political and Social Science* 7, 9.

[2] Hensler (n 1) 8–10.

[3] Ibid 25.

[4] King & Wood Mallesons, 'Can Arbitration Eliminate the Risk of Class Actions', *Insights* (Web Page, 18 September 2013) <https://www.kwm.com/en/au/knowledge/insights/can-arbitration-eliminate-the-risk-of-class-actions-20130918>, archived at <https://perma.cc/F3RX-3G9B>.

threat of enforcement action.[5] Despite being the subject of extensive judicial consideration overseas, whether arbitration clauses may effectively operate to 'immunise' corporations from class actions is an issue that has not yet arisen before the courts in Australia.[6] However, as arbitration clauses are now part of everyday life in Australia,[7] it is only a matter of time before this significant issue comes before the courts for determination.

This article commences at Part II with a brief introduction to the purposes and utility of the class action regime in Australia. This Part sets out the policy objectives of pt IVA of the *Federal Court of Australia Act 1976* (Cth) ('*Federal Court Act*') and details the benefits that a well-functioning class action regime confers on both potential claimants and the wider community, so that one may appreciate what is at stake if class actions may be avoided through the operation of arbitration clauses.

Part III then provides an overview of arbitration as a means of alternative dispute resolution in Australia. This Part commences with a discussion of the nature of arbitration and the prohibition on judicial intervention in the arbitral process, including the requirement that a court must stay judicial proceedings and refer the parties to arbitration where the parties have entered into a valid arbitration agreement.[8] As the 'foundation of the arbitral process is the agreement by which the parties refer their disputes to arbitration',[9] this Part makes clear that the parties to an arbitration agreement have the flexibility to prescribe the procedural and substantive aspects of the way in which the dispute will (and will not) be resolved. While this has conventionally involved the parties agreeing to the seat of the arbitration, the substantive law governing the dispute and the number and/or characteristics of arbitrators,[10] it is revealed that parties are now using arbitration agreements to expressly require

[5] See Theodore Eisenberg, Geoffrey P Miller and Emily Sherwin, 'Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts' (2008) 41(4) *University of Michigan Journal of Law Reform* 871, 872–4.

[6] Richard Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39(4) *Sydney Law Review* 569, 569.

[7] Ibid.

[8] See *International Arbitration Act 1974* (Cth) s 7(2).

[9] John K Arthur and Rudi Cohrssen, 'Arbitration and ADR in Australia: Meeting the Needs of International Trade and Commerce' (September 2015) *Australian Alternative Dispute Resolution Law Bulletin* 76. See also Michael Pryles, 'The Case for International Arbitration' (2003) *AMPLA Yearbook* 2.

[10] Arthur and Cohrssen (n 9) 76.

that proceedings only be commenced by claimants on an individual basis, thereby precluding aggregated or group claims of any kind.[11]

Part IV canvasses how the courts of overseas jurisdictions have dealt with the public policy tension between class actions and mandatory arbitration clauses, commencing with a discussion of the United States' hard-line approach to rigorously enforcing arbitration agreements according to their terms.[12] While the Canadian courts have adopted a similar approach to the United States in the past,[13] Part IV demonstrates that the Canadian courts have more recently evinced a willingness to consider the intent of the legislature when disputes with a public interest component are sought to be resolved by arbitration.[14] This Part concludes with a consideration of a seminal decision of the High Court of England and Wales, indicating that a more nuanced and contextual approach has been adopted in the United Kingdom with a focus on whether the arbitration clause in question is unfair.[15]

From this standpoint, Part V considers the legal obstacles that a party seeking to rely on an arbitration clause may have to overcome when preventing a claimant from having their rights vindicated under pt IVA of the *Federal Court Act*. First, although an arbitration clause will not be void solely because it obviates a statutory regime,[16] the dispute covered by the arbitration clause must be 'arbitrable' in the sense that it must not involve such a sufficient element of legitimate public interest so as to render arbitration of the dispute inappropriate.[17] Second, a party may contravene the prohibition on unconscionable conduct by entering into, or giving effect to, an arbitration agreement that restricts the manner in which an action may be brought in arbitration, especially if an arbitration clause is a calculated means of predation on the weak, poor or vulnerable that involves secrecy, trickery or a lack of honesty or transparency.[18] Third, in the event that an arbitration agreement

[11] King & Wood Mallesons (n 4).

[12] See, eg, *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011) ('*Concepcion*').

[13] See, eg, *Dell Computer Corporation v Union des Consommateurs* [2007] 2 SCR 801 ('*Dell*').

[14] See, eg, *Seidel v TELUS Communications Inc* [2011] 1 SCR 531 ('*Seidel*'); *Heller v Uber Technologies Inc* (2019) 145 OR (3d) 81 ('*Heller*').

[15] *Mylcrist Builders Ltd v Buck* [2009] 2 All ER (Comm) 259 ('*Mylcrist*').

[16] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 107 [239]–[240] (Allsop J, Finn J agreeing at 52 [5], Finkelstein J agreeing at 52 [9]) ('*Comandate Marine*').

[17] Ibid 97–8 [197]–[200].

[18] See *Australian Securities and Investments Commission v Kobelt* (2019) 368 ALR 1, 8 [14] (Kiefel CJ and Bell J) ('*Kobelt*'), citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 274 [296] (Allsop CJ) ('*Paciocco*'). For a discussion of transparency

causes a significant and detrimental imbalance between the parties that is not reasonably necessary to protect a party's legitimate interests, the unfair terms regime may render an arbitration agreement void.[19]

II The Objectives and Utility of Class Actions in Australia

A *Background to Pt IVA*

In February 1977, the Attorney-General, Mr Robert Ellicott QC, requested that the Law Reform Commission ('LRC') consider whether the existing law relating to class actions in federal courts (and courts exercising federal jurisdiction) was adequate and whether any changes to the existing law were desirable.[20] Almost 12 years later, in December 1988,[21] the LRC provided Parliament with a response through its final report, titled *Grouped Proceedings in the Federal Court* ('*LRC Report*').[22] The *LRC Report* concluded that the existing law could be improved and recommended a federal class action procedure be introduced that would increase access to justice, promote the efficient use of judicial and legal resources and enhance compliance with the law.[23] Legislation largely reflecting these recommendations was introduced to Parliament in September 1991 through the Federal Court of Australia Amendment Bill 1991 (Cth) and, on 4 March 1992, a federal class action regime came into operation through pt IVA of the *Federal Court Act*.[24] A representative proceeding may be commenced under this regime if three threshold requirements are satisfied, namely that:

1 seven or more persons have claims against the same person; and

as a relevant factor in determining unconscionability, see *Kobelt* (n 18) 41 [159], 56–7 [245]–[248] (Nettle and Gordon JJ).

19 *Competition and Consumer Act 2010* (Cth) sch 2, s 23 ('*ACL*'); *Australian Securities and Investments Commission Act 2001* (Cth) s 12BF ('*ASIC Act*').

20 Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) 1 [1] ('*LRC Report*').

21 'Grouped Proceedings in the Federal Court', *Australian Law Reform Commission* (Web Page) <https://www.alrc.gov.au/inquiry/grouped-proceedings-in-the-federal-court/>, archived at <https://perma.cc/Z983-XNEU>.

22 *LRC Report* (n 20).

23 Ibid 146 [354]–[355], 147 [357].

24 See *Federal Court of Australia Amendment Act 1991* (Cth) s 2, inserting *Federal Court of Australia Act 1976* (Cth) pt IVA ('*Federal Court Act*').

2 the claims are in respect, or arise out of, the same, similar or related circumstances; and

3 the claims of the group give rise to a substantial common issue of law or fact.[25]

The introduction of similar regimes has followed at the state and territory level,[26] although this article will focus solely on the provisions of pt IVA of the *Federal Court Act*.

B *Purposes of the Class Action Regime*

An effective class action regime has been referred to as an essential part of a legal system's response to multiple or far-reaching wrongdoing in an increasingly complex world.[27] The broad objectives of the class action procedure contained in pt IVA of the *Federal Court Act* were described by the Attorney-General during the second reading speech of the Federal Court of Australia Amendment Bill 1991 (Cth):

> The new procedure will enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources …
>
> The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.
>
> The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or in-

[25] *Federal Court Act* (n 24) s 33C(1). See also Vince Morabito, 'Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29(1) *Sydney Law Review* 5, 7; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266 [26] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

[26] See Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report, December 2018) 47 [2.1].

[27] Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3023 (Siegfried Spindler).

> vestors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.[28]

These two purposes will each be examined as follows, along with one further objective of the regime that is often recognised by the courts and scholars alike, namely its function in regulating behaviour.[29] It is only once these public policy objectives are recognised that one can appreciate what is at stake if arbitration clauses can be used to circumvent the class action regime.

1 *Access to Justice*

(a) Centrality to the Rule of Law

While access to justice can mean different things to different people, it is a concept that broadly refers to the ideal that all people can and should have equal and effective means to enforce their legal rights and protect their legitimate interests.[30] The centrality of this notion of access to justice in societies that seek to uphold the rule of law was recently highlighted in an extra-curial speech by Baroness Hale of the Supreme Court of the United Kingdom. Baroness Hale explained:

> We are a society and an economy built on the rule of law. Business[people] need to know that their contracts will be enforced by an independent and incorruptible judiciary. But everyone else in society also needs to know that their legal rights will be observed and legal obligations enforced. … If not, the strong will resort to extra-legal methods of enforcement and the weak will go to the wall.[31]

[28] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–5 (Michael Duffy, Attorney-General).

[29] See, eg, Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399, 404; *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 67 [8] (Finkelstein J) ('*Kirby*').

[30] Ronald Sackville, 'Law and Poverty: A Paradox' (2018) 41(1) *University of New South Wales Law Journal* 80, 88. See also Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 13.

[31] Baroness Hale, 'Opening Address' (Speech, Law Centres Federation Annual Conference, 25 November 2011) 1. These remarks were made in the context of proposed changes to legal aid funding.

Although access to justice has also been characterised as a mere catchphrase or shibboleth that justifies unwarranted incursions on the administration of justice,[32] it must be borne in mind that even the most effective justice system is of no avail if it cannot be utilised by those it seeks to serve.[33] It is for this reason that access to justice is now regarded as a fundamental social need and 'human right, the importance of which cannot be doubted'.[34]

(b) Objective of Pt IVA

Both the *LRC Report* and the second reading speech make clear that access to justice is a central objective of the federal class action regime as it provides victims of widespread misconduct an opportunity to obtain redress in circumstances where it might not otherwise be possible or practical to do so through ordinary *inter partes* litigation.[35] Reasons for inaction may include an individual's ignorance of the law and/or legal processes, the time-consuming nature of litigation, the high cost of taking action (especially where any losses incurred are small) and an unwillingness to expose oneself to adverse costs consequences if one's action is unsuccessful.[36] Through the mechanism of pt IVA, victims of misconduct are able to aggregate their claims through a representative applicant,[37] who prosecutes the claim on behalf of others, often with the assistance of lawyers engaged on a no-win, no-fee basis,[38] and/or with the assistance of a litigation funder in order to reduce the financial

[32] Justice PA Keane, 'Access to Justice and Other Shibboleths' (Speech, Judicial Conference of Australia Colloquium, 10 October 2009) 1, 32.

[33] Sir Anthony Mason, 'PILCH: Access to Justice and the Rule of Law' (Spring 2004) *Victorian Bar News* 43, quoted in Justice Bernard Murphy, 'The Problem of Legal Costs: Lump Sum Costs Orders in the Federal Court' (Speech, National Costs Law Conference, 17 February 2017) 1 <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/20170217>, archived at <https://perma.cc/JTF6-CQC4>.

[34] Murphy (n 33). See also Murphy and Morabito (n 30) 13; *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 450–1 [144]–[145] (Kirby J); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

[35] *LRC Report* (n 20) 146 [354], 147 [357]; Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General); *Perera v GetSwift Ltd* (2018) 263 FCR 1, 13 [23] (Lee J).

[36] *LRC Report* (n 20) 8–10 [14]–[17]; Caron Beaton-Wells, 'Private Enforcement of Competition Law in Australia: Inching Forwards?' (2016) 39(3) *Melbourne University Law Review* 681, 722 n 152.

[37] *LRC Report* (n 20) 18 [40].

[38] Murphy and Morabito (n 30) 28.

exposure of the representative applicant.[39] In practical terms, since its introduction in March 1992, pt IVA has enabled millions of Australians to have their rights vindicated, resulting in the payment of over $4 billion in compensation to victims of misconduct.[40] In circumstances where such a large number of people have been able to 'recover compensation that they would otherwise not have been able to obtain', it is apparent that the class action regime is fulfilling its purpose in providing access to justice.[41]

2 *Judicial Economy*

Judicial economy refers to '[e]fficiency in the operation of the courts and the judicial system', especially the 'efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources'.[42] The class actions mechanism in pt IVA is intended to drive these efficiencies through dealing with claims by groups of people in common, similar or related circumstances and enabling common issues of law or fact to be dealt with in one proceeding.[43] This is especially the case where misconduct is far-reaching and the courts (as well as respondents) may otherwise be vexed by hundreds or thousands of lawsuits arising out of the same or similar circumstances. Although it has been argued that class actions fail to realise their objective of enhancing judicial economy as they provide a means for so-called 'individually non-recoverable' claims that would otherwise not have been brought to find their way into the court system,[44] this view ignores the reality that a well-functioning class action regime avoids duplicative hearings for individually recoverable claims and avoids the risk of inconsistent outcomes between similarly situated applicants.[45]

[39] Beaton-Wells (n 36) 722–3 n 152.

[40] This is based on compensation obtained through judicially-approved settlement agreements: Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments' (Research Report, Department of Business Law and Taxation, Monash University, January 2019) 7–8.

[41] Supreme Court of Victoria, 'Court Approves Distribution of Almost $700 Million to Victims of the 2009 Black Saturday Disaster' (Media Release, 7 December 2016) 2.

[42] *Black's Law Dictionary* (10th ed, 2014) 'judicial economy'.

[43] *LRC Report* (n 20) 146.

[44] See Roger Bernstein, 'Judicial Economy and Class Actions' (1978) 7(2) *Journal of Legal Studies* 349, 349–53.

[45] See ibid 352–5; Explanatory Memorandum, Federal Court of Australia Amendment Bill 1991 (Cth) 2 [5]; *LRC Report* (n 20) 33 [66].

3 *Private Regulation*

While regulation has traditionally been viewed as the function of public organs, it is now accepted that modern regulatory regimes are 'complex technical systems' with a variety of public and private components.[46] The importance of private enforcement action in a comprehensive regulatory framework has been highlighted by the Australian Competition and Consumer Commission as follows:

> [P]rivate enforcement can be a significant complement to public enforcement in building compliance and deterring [illegal] conduct. Effective deterrence occurs where sanctions … outweigh the gains associated with a contravention. The threat of increased 'sanctions' in the form of damages payouts resulting from private litigation can play a vital role in a firm's consideration of the costs and benefits of engaging in [illegal] conduct.[47]

Prior to the introduction of the class action regime, the LRC recognised that class actions had the potential to play an important role in Australia's regulatory landscape, appreciating that an increase in access to legal remedies through class actions could result in a greater degree of compliance with the law, thereby preventing or discouraging activities which might cause loss or injury to others.[48]

The effect of corporations taking 'greater care not to contravene the law' in an attempt to avoid an increased risk of class action litigation and the payment of compensation and reputational costs[49] is particularly apparent in the context of securities class actions. In *Kirby v Centro Properties Ltd* ('*Kirby*'), Finkelstein J explained:

> [T]hese actions promote investor confidence in the integrity of the securities market. They enable investors to recover past losses caused by the wrongful conduct of companies and deter future securities laws violations.[50]

[46] Deborah R Hensler, 'Can Private Class Actions Enforce Economic Regulations? Do They? Should They?' in Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar Publishing, 2016) 238, 269.

[47] Australian Competition and Consumer Commission, Submission to the Competition Policy Review Panel, *Competition Policy Review* (26 November 2014) 79. These comments were made in the context of deterring anti-competitive conduct.

[48] *LRC Report* (n 20) 33 [67].

[49] Jason Harris and Michael Legg, 'What Price Investor Protection? Class Actions vs Corporate Rescue' (2009) 17(4) *Insolvency Law Journal* 185, 190.

[50] *Kirby* (n 29) 67 [8].

In particular, the credible threat of enforcement action through class actions should result in 'better information to the capital markets and lower the overall cost of equity capital because of greater confidence in the integrity of information disclosed to the market and the pricing of both debt and equity securities based on that information'.[51] In this sense, the class action regime may be viewed as an important and effective 'weapon' of enforcement that is both a 'necessary supplement' and complement to public regulatory action.[52]

III Arbitration

A *Background*

In *The Rule of Law*, Lord Bingham described arbitration as involving

> the appointment of an independent arbitrator, often chosen by the parties, to rule on their dispute according to the terms of reference they [provide]. This can only be done by agreement, … but where it is done the arbitrator has authority to make an award which is binding on the parties and enforceable by the process of the courts.[53]

In Australia, the *International Arbitration Act 1974* (Cth) ('*IAA*') gives force of law to the *UNCITRAL Model Law on International Commercial Arbitration* ('*Model Law*'), as adopted in 1985 by the United Nations Commission on International Trade Law,[54] as well as 'giv[ing] effect to Australia's international obligations' as a party to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*') adopted in 1958 by the United Nations Conference on International Commercial Arbitration.[55]

[51] Harris and Legg (n 49) 190.

[52] *Kirby* (n 29) 67–8 [8], citing *Bateman Eichler, Hill Richards Inc v Berner* 472 US 299, 310 (Brennan J for Brennan, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ, Burger CJ concurring) (1985).

[53] Lord Bingham, *The Rule of Law* (Allen Lane, 2010) 86, quoted in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 558 [45] (Hayne, Crennan, Kiefel and Bell JJ) ('*TCL*'). This article considers the term 'arbitration' in its private sense, although arbitration may also be concerned with the enforcement of public rights derived from statute: at 558 n 114.

[54] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17 (7 July 2006) annex I ('*Model Law*'). See also *TCL* (n 53) 543 [1] (French CJ and Gageler J).

[55] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('*New York Conven-*

While the *IAA* deals with international arbitration disputes involving parties that carry on business in different nation states, similar regimes largely following the *Model Law* and the *New York Convention* have also been enacted in the states and territories of Australia for disputes involving domestic parties.[56] As the international and domestic arbitration regimes in Australia are 'closely aligned',[57] this article will make reference only to the *IAA*.

Under the *IAA* and the *Model Law*, the courts are required to, inter alia, facilitate the enforcement and recognition of arbitration agreements and arbitral awards.[58] An arbitral award is final and binding, and errors of fact or law committed by the arbitrator are not legitimate bases for curial intervention through appeal or other means.[59] Importantly, under the *IAA* and the *Model Law*, the courts are strictly prohibited from intervening in the arbitral process unless such intervention falls within certain narrowly defined areas.[60] Notably, the legislation provides that where proceedings are instituted in a court by a party to an arbitration agreement against another party to the agreement and the proceedings involve the determination of a matter that is capable of settlement by arbitration, 'on the application of a party to the agreement, the court shall … stay the proceedings … and refer the parties to arbitration in respect of that matter'.[61] If the requirements of this section are satisfied, 'then the court has no discretion to retain the matter'.[62] Importantly, this requirement is subject to the arbitration agreement being considered 'null and void, inoperative or incapable of being performed'.[63]

tion'); *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 377 [57] (Allsop CJ, Middleton and Foster JJ) ('*Castel*').

56 See Leon Trakman, 'The Reform of Commercial Arbitration in Australia: Recent and Prospective Developments' in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing, 2018) 251, 254.

57 Ibid.

58 Explanatory Memorandum, International Arbitration Amendment Bill 2009 (Cth) 3.

59 *TCL* (n 53) 568 [81] (Hayne, Crennan, Kiefel and Bell JJ), cited in *Castel* (n 55) 392 [105].

60 See *TCL* (n 53) 561 [53]. See also Chief Justice James Allsop and Justice Clyde Croft, 'Judicial Support of Arbitration' (Conference Paper, Asia Pacific Regional Arbitration Group Conference, 28 March 2014).

61 *International Arbitration Act 1974* (Cth) s 7(2) ('*IAA*'). See also Garnett (n 6) 571.

62 Garnett (n 6) 571.

63 *IAA* (n 61) s 7(5).

B *Class Arbitration in Australia?*

Although the *IAA* expressly permits consolidation of arbitral proceedings that contain common questions of law or fact and/or where the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions,[64] the *IAA* does not expressly recognise the existence of representative arbitral proceedings or 'class arbitration' in which arbitrations are brought by a single representative party on behalf of similarly-situated claimants (usually consumers), each with identical arbitration agreements with the same defendant.[65] Nevertheless, in accordance with the fundamental principle that arbitration is strictly a matter of consent,[66] it is likely that Australian courts will follow the position in the United States by recognising class arbitration where parties with identical arbitration agreements with the same respondent expressly and unequivocally agree that such a mechanism may be used.[67] However, due to the private nature of arbitration and the fact that, even overseas, class arbitration is something of a 'mythical beast' that is 'rarely seen',[68] it is unlikely that class arbitration can be relied upon to properly facilitate the public policy objectives of pt IVA.[69]

C *Requiring Proceedings to Be Brought on an Individual Basis*

As the jurisdictional 'foundation of the arbitral process is the agreement by which the parties refer their disputes to arbitration',[70] the arbitration agreement may prescribe both procedural and substantive aspects of the way in which the dispute will (and will not) be resolved between the parties.[71] Commonly, this includes the parties prescribing the 'seat' of the arbitration,

[64] Ibid s 24.

[65] For a discussion of the class arbitration mechanism, see Gary Born and Claudio Salas, 'The United States Supreme Court and Class Arbitration: A Tragedy of Errors' [2012] (1) *Journal of Dispute Resolution* 21, 21–2.

[66] *TCL* (n 53) 546 [9], 554 [29] (French CJ and Gageler J), 575 [108]–[109] (Hayne, Crennan, Kiefel and Bell JJ).

[67] See Born and Salas (n 65) 22; *Lamps Plus Inc v Varela* (US Sup Ct, No 17–988, 24 April 2019) slip op 6, 12–13 (Roberts CJ for Roberts CJ, Thomas, Alito, Gorsuch and Kavanaugh JJ) ('*Lamps Plus*').

[68] Kelly Thompson Cochran and Eric J Mogilnicki, 'Current Issues in Consumer Arbitration' (2005) 60(2) *Business Lawyer* 785, 791.

[69] See *LRC Report* (n 20) 14 [30].

[70] Arthur and Cohrssen (n 9) 76. See also Pryles (n 9) 2.

[71] Arthur and Cohrssen (n 9) 76.

the substantive law governing the dispute, the number and characteristics of the arbitrators, the procedural rules to be applied in the conduct of the arbitration, as well as any confidentiality obligations pertaining to the dispute.[72] Given the flexibility of the arbitral process, an arbitration agreement may also prescribe that proceedings must be brought by a claimant on an individual basis and that parties may not seek to aggregate proceedings or resort to a class action regime of any kind.[73]

An arbitration clause that seeks to limit the vindication of legal rights to individually arbitrated proceedings may be viewed by some as a novel concept. However, such arbitration clauses are now being used by a wide range of companies operating in Australia. By way of example, music streaming service Spotify, which in 2018 was visited by nearly 2.2 million Australians in an average four-week period,[74] incorporates into its standard form terms of service a broad arbitration agreement requiring claims to only be brought against the company on an individual basis.[75] The use of such clauses in Australia to further confine the prospect of group proceedings is unsurprising when leading dispute resolution law firms continue to speculate that arbitration clauses might be the 'antidote' to the threat of class actions in Australia.[76] As King & Wood Mallesons note:

> By having a broad arbitration clause which covers all types of claims which might arise, and by choosing procedures which do not allow for consolidation or class action arbitration, a party can theoretically immunise itself from class actions. All claims, falling under the arbitration clause, would have to be individually arbitrated.[77]

[72] Ibid.

[73] King & Wood Mallesons (n 4).

[74] Roy Morgan, 'YouTube Music Set to Challenge Fast Growing Spotify and SoundCloud' (Press Release, Finding No 7636, 24 June 2018) <http://www.roymorgan.com/findings/7636-youtube-set-to-shake-up-streaming-music-websites-march-2018-201806231627>, archived at <https://perma.cc/8TTU-8ESD>.

[75] 'Spotify Terms and Conditions of Use', *Spotify* (Web Page, 13 February 2019) cl 24.2 <https://www.spotify.com/au/legal/end-user-agreement/>, archived at <https://perma.cc/2BJN-8B68>.

[76] Ruth Overington, 'Are Arbitration Clauses the Antidote to Class Actions?', *The Australian Financial Review* (online, 22 September 2016) <https://www.afr.com/companies/professional-services/are-arbitration-clauses-the-antidote-to-class-actions-20160922-grm3gj>, archived at <https://perma.cc/R27B-D3S6>.

[77] King & Wood Mallesons (n 4).

However, as will be considered below, in the event that the primary function of an arbitration agreement is to make it more difficult for a potential claimant to seek redress,[78] the courts may view this as problematic.

IV Overseas Judicial Consideration

Whether arbitration clauses will, in fact, be able to 'immunise' corporations from group proceedings or class actions in the manner desired is an issue that has not yet arisen before the courts in Australia.[79] When the time comes, the Australian courts are likely to look at the extensive overseas authority for guidance on how the tension between class actions and mandatory arbitration clauses should be treated.

A *United States*

For many years, courts across the United States treated arbitration clauses, including those that only permitted parties to pursue claims in an individual capacity, as inherently unconscionable and in breach of the so-called 'vindication doctrine' where it was irrational to pursue an individual statutory claim through arbitration because the cost of arbitration outweighed the potential recovery.[80] In *Szetela v Discover Bank* ('*Szetela*'), the California Court of Appeal explained why arbitration agreements that sought to prohibit group proceedings were problematic, both from the perspective of precluding access to justice and impeding an important means of private enforcement:

> This [arbitration clause] is clearly meant to prevent customers, such as [the representative applicant] and those [they seek] to represent, from seeking redress for relatively small amounts of money … Fully aware that few customers will go to the time and trouble of suing in small claims court, [the respondent] has …

[78] Empirical research conducted in the United States has suggested that the primary goal of mandatory arbitration clauses in consumer contracts may be to preclude aggregate claims against corporations and that large corporations' assertions that mandatory arbitration clauses provide consumers with a superior form of dispute resolution could be disingenuous when viewed against the reality that these corporations appear to be choosing litigation as the preferred means of resolving disputes in the majority of individually-negotiated business-to-business contracts: Eisenberg, Miller and Sherwin (n 5) 876.

[79] Garnett (n 6) 569.

[80] Ramona L Lampley, '"Underdog Arbitration": A Plan for Transparency' (2015) 90(4) *Washington Law Review* 1727, 1737–41. See also *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc*, 473 US 614, 637 (Blackmun J for Burger CJ, Blackmun, White, Rehnquist and O'Connor JJ) (1985).

> sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.[81]

However, in a more recent line of cases, the Supreme Court of the United States ('US Supreme Court') has favoured the enforcement of arbitration clauses, including those that require proceedings to be brought on an individual basis, as long as a claimant is found to have 'received adequate notice and given consent to be bound by the clause'.[82]

In *AT&T Mobility LLC v Concepcion* ('*Concepcion*'), Vincent and Liza Concepcion sued AT&T in the United States District Court for the Southern District of California ('District Court') for false advertising when they were charged sales tax on the retail value of phones said to be provided for free under their service contract.[83] When their proceeding was consolidated with a class action concerning similar claims, AT&T sought a stay of proceedings on the basis that the arbitration clause in the parties' service agreements expressly prohibited class actions.[84] Relying on the California Supreme Court's *Discover Bank v Superior Court* decision,[85] both the District Court and the Ninth Circuit held that the arbitration provision was unconscionable and therefore void on the basis that it disallowed class-wide proceedings without adequately substituting for the deterrent effects of class actions.[86] However, the US Supreme Court reversed the decision of the Ninth Circuit and upheld AT&T's appeal, finding that arbitration clauses that purport to prevent class-wide proceedings were not in themselves unconscionable and that refusing to enforce the class action waiver would have a disproportionate impact on the consensual nature of arbitration agreements.[87] In circumstances where there was a tension 'between the public policy in favour of class action litigation and the "liberal federal policy favoring arbitration"'[88] in the

[81] 97 Cal App 4th 1094, 1101 (Moore J, Sills PJ and Rylaarsdam J concurring) (2002) ('*Szetela*'). See generally Linda J Demaine and Deborah R Hensler, '"Volunteering" to Arbitrate through Predispute Arbitration Clauses: The Average Consumer's Experience' (2004) 67(1–2) *Law and Contemporary Problems* 55, 73.

[82] Garnett (n 6) 587–90. See also Lampley (n 80) 1736–44.

[83] *Concepcion* (n 12) 337 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ).

[84] Ibid 336–7; Garnett (n 6) 587.

[85] 36 Cal 4th 148 (2005).

[86] *Concepcion* (n 12) 338. See also Garnett (n 6) 587.

[87] *Concepcion* (n 12) 352; Garnett (n 6) 587.

[88] *Concepcion* (n 12) 339, 346.

United States Arbitration Act,[89] the intent of Congress prevailed in holding the parties to the terms of their arbitration agreement.

Despite concerns that arbitration clauses, including those that preclude group claims, may be used as a mechanism to avoid meritorious actions and 'insulate wrongdoers from liability',[90] since *Concepcion*, the US Supreme Court has continually upheld the principle in the *United States Arbitration Act* that arbitration is a 'matter of contract' and accordingly, that the 'courts must "rigorously enforce" arbitration agreements according to their terms'.[91] Therefore, unless eroded by legislative amendment or regulatory action, the US Supreme Court has given a clear indication that arbitration in the consumer, employment and even healthcare arenas is 'here to stay' and that arbitration is an adequate forum even for litigants who must proceed on an individual basis with low-value claims.[92]

B *Canada*

In *Dell Computer Corporation v Union des Consommateurs* ('*Dell*'), after being satisfied that a consumer had access to a website containing all relevant terms and conditions of sale, the Canadian Supreme Court held that an arbitration clause incorporated into terms and conditions of sale was valid, notwithstanding it incorporated a class action waiver.[93] The Court held that, although class actions have a public interest function in facilitating access to justice,[94] the class action regime was a procedural mechanism that did not confer any new substantive rights on the claimant and therefore the determination of the substantive matters for consideration were not matters of public order that had to be determined by way of judicial proceedings.[95]

[89] 9 USC §§ 1–16 (1947).

[90] See Garnett (n 6) 588, quoting *American Express Co v Italian Colors Restaurant*, 570 US 228, 253 (Kagan J for Ginsburg, Breyer and Kagan JJ) (2013) ('*Italian Colors*').

[91] *Italian Colors* (n 90) 232–3 (Scalia J for Roberts CJ, Scalia, Kennedy and Alito JJ, Thomas J agreeing at 239), quoting *Dean Witter Reynolds Inc v Byrd*, 470 US 213, 221 (Marshall J for the Court, White J agreeing at 224) (1985). See also *DIRECTV Inc v Imburgia* (US Sup Ct, No 14–462, 14 December 2015) slip op 5, 10 (Breyer J for Roberts CJ, Scalia, Kennedy, Breyer, Alito and Kagan JJ); *Lamps Plus* (n 67) slip op 12–13 (Roberts CJ for Roberts CJ, Thomas, Alito, Gorsuch and Kavanaugh JJ).

[92] Lampley (n 80) 1729.

[93] *Dell* (n 13) 854 [100]–[101], 855 [105] (Deschamps J for McLachlin CJ, Binnie, Deschamps, Abella, Charron and Rothstein JJ).

[94] Ibid 855 [105]–[106].

[95] Ibid 855–7 [105]–[110].

In *Seidel v TELUS Communications Inc* ('*Seidel*'), the Canadian Supreme Court distinguished *Dell* and held that, while arbitration clauses were generally enforceable, they must adhere to any legislative intention to exclude arbitration.[96] In *Seidel*, the service contract between the parties contained a clearly worded arbitration clause referring the parties to private and confidential mediation and arbitration, and purporting to waive any right to commence or participate in a class action. However, as s 172 of the *Business Practices and Consumer Protection Act* (BC) provided that a person could seek an action for a declaration and/or injunction in respect of breaches of the *Act*,[97] even if they had suffered no loss or damage but were purely a 'consumer [activist]' or 'self-appointed private [enforcer]' seeking to implement the standards of consumer protection under the *Act*,[98] a narrow 5:4 majority of the Court held that this provision had unique public interest features that would not be served by private and confidential arbitration.[99] In responding to criticism of the minority that the majority were showing 'hostility towards arbitration',[100] Binnie J stated that 'the Court's job is neither to promote nor detract from private and confidential arbitration' but rather 'to give effect to the intent of the legislature as manifested in the provisions of its statutes'.[101] In this instance, it was the intent of the legislature to exclude arbitration from determining this matter of public interest.

In *Heller v Uber Technologies Inc*, the claimant was an Uber driver that brought a class action on behalf of all Uber drivers in Ontario, seeking to recognise Uber drivers as employees so that they could be afforded employee benefits and entitlements under the applicable legislation.[102] Due to the presence of an arbitration agreement in the contracts between drivers and Uber that required all disputes to be brought through arbitration in the Netherlands, Uber sought to stay the class action and to have the proceedings referred to arbitration.[103] On appeal, the Ontario Court of Appeal relevantly found that the arbitration agreement was unenforceable as it represented an unfair bargain, reached without legal advice having been provided, in

[96] *Seidel* (n 14) 565–6 [41]–[42] (Binnie J for McLachlin CJ, Binnie, Fish, Rothstein and Cromwell JJ).

[97] *Business Practices and Consumer Protections Act*, SBC 2004, s 172.

[98] *Seidel* (n 14) 545 [6].

[99] Ibid 562–3 [36]–[37].

[100] Ibid 589–90 [101] (LeBel and Deschamps JJ).

[101] Ibid 544 [3].

[102] *Heller* (n 14) 83–4 [2]–[4] (Nordheimer JA for the Court).

[103] Ibid 85 [11], 86 [16].

circumstances where there was a significant inequality of bargaining power between Uber and the driver and where Uber knowingly sought to incorporate the arbitration clause in order to favour its own interests over the interests of its drivers.[104] The decision of the Ontario Court of Appeal has now been appealed and will soon be decided by the Canadian Supreme Court.[105] This decision is likely to provide further clarity to those in Canada seeking to vindicate their rights through a class action in the presence of a widely framed arbitration clause, especially in light of the divergent views taken by the Canadian Supreme Court in *Dell* and *Seidel*.

C *European Union*

In the European Union, unlike in other jurisdictions, arbitration clauses have been regarded as 'attempts by battle-hardened traders to impose unconscionable terms on vulnerable, inexperienced consumers'.[106] After all, the European Court of Justice has continually held that the *Directive on Unfair Terms in Consumer Contracts*[107] is an important rule of public policy that requires a national court to consider, of its own motion, whether an arbitration agreement is void on the basis that it is unfair.[108]

In one such decision of a national court, *Mylcrist Builders Ltd v Buck* ('*Mylcrist*'), the High Court of England and Wales took a particularly nuanced approach in determining whether an arbitration award, resulting from a consumer contract, ought to be enforced.[109] The Court closely considered the terms of the contract, the circumstances in which the contract was concluded and the nature of the work undertaken in performance of the contract, and held that the terms seeking to mandate arbitration did not comply with the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) as they limited access to the courts and thereby caused a significant imbalance to the detri-

[104] Ibid 97–8 [68].

[105] *Uber Technologies Inc v Heller* (Supreme Court of Canada, No 38534, 23 May 2019).

[106] Garnett (n 6) 594.

[107] *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

[108] See, eg, *Mostaza Claro v Centro Móvil Milenium SL* (C-168/05) [2006] ECR I-10421, I-10449 [38]–[39]. In *Asturcom Telecomunicaciones SL v Rodríguez Nogueira* (C-40/08) [2009] ECR I-9579, I-9619–20 [59], the European Court of Justice also held that a national court, when hearing an annulment or enforcement application of an arbitral award must, of its own motion, consider whether an arbitration clause is unfair under the Directive. See also Garnett (n 6) 593.

[109] *Mylcrist* (n 15).

ment of the consumer.[110] This was especially the case where the sum in dispute was small (about £5,200), but the fee payable to the arbitrator was 'comparatively significant' (over £2,000),[111] and this was more than would have been payable in costs had the matter been litigated.[112] The arbitration clause was also found to be unfair as it was included in the trader's standard terms without being drawn to the consumer's attention in accordance with the requirement for fair and open dealing between the parties.[113] The arbitration clause was accordingly rendered void and the award made by the arbitral tribunal unenforceable.[114]

V Australian Law

There is nothing in the text or legislative history of the legislation concerning either representative or arbitral proceedings, whether at federal or state level, that confers discretion on a court to retain a matter falling within the scope of a valid arbitration agreement solely because it is initiated as a class action. However, if a potential claimant is 'seeking to escape the clutches of an arbitration clause'[115] and rely on the class action mechanism in pt IVA, Australian law provides a number of avenues that may be relied on in response to an argument that the Federal Court is precluded from hearing such an action and is compelled to refer the parties to arbitration.

A *Obviating a Statutory Regime*

As detailed above, pt IVA of the *Federal Court Act* has a clear public-interest function in facilitating access to justice, promoting judicial economy and encouraging greater adherence to the law. One may therefore claim that excluding the operation of pt IVA through an arbitration clause ought not be permitted on the basis that it is inconsistent with the operation of a statutory regime enacted by Parliament. This is consistent with the view reached by Warren J in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* ('*A Best Floor Sanding*') where her Honour held that a mandatory arbitration clause

110 Ibid 270–2 [52]–[60] (Ramsey J).

111 Ibid 262 [14], 271 [55].

112 Garnett (n 6) 585.

113 *Mylcrist* (n 15) 271 [56].

114 Ibid 272 [61].

115 Garnett (n 6) 574.

was invalid where it obviated a statutory regime for winding up companies under the *Corporations Act 1989* (Cth).[116] In light of the public nature of this statutory regime, her Honour remarked that '[s]uch matters cannot and ought not be subject to private contractual arrangement.'[117] Although not concerning the operation of a mandatory arbitration clause, the High Court of Australia in *Westfield Management Ltd v AMP Capital Property Nominees Ltd* similarly explained that a party seeking to contract out of certain statutory provisions of the *Corporations Act 2001* (Cth) ('*Corporations Act*') should not be permitted to do so.[118] A majority of the Court held:

> It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text.[119]

However, more recently, the authorities appear to have moved away from the view expressed in *A Best Floor Sanding*, as there is now a 'stronger emphasis on the principle that arbitration agreements should be construed with a broad, liberal, and flexible approach',[120] and that arbitration will not be precluded merely because it obviates the operation of a statutory regime with a clear public function.[121] Therefore, a potential claimant seeking to avoid the operation of an arbitration clause by arguing that such a clause impermissibly obviates the operation of the statutory regime contained in pt IVA is unlikely to find success in such an argument.

[116] [1999] VSC 170, [18] (Warren J) ('*A Best Floor Sanding*').

[117] Ibid [13]. See also James Emmerig, 'Can an Australian Company Use a Dispute Resolution Clause in Its Constitution to Bar Shareholder Class Actions?' (2015) 33(8) *Company and Securities Law Journal* 513, 518.

[118] (2012) 247 CLR 129, 143–4 [46] (French CJ, Crennan, Kiefel and Bell JJ).

[119] Ibid.

[120] *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (2015) 331 ALR 108, 132 [147] (Edelman J) (Federal Court of Australia). See also *Comandate Marine* (n 16) 87 [164] (Allsop J, Finn J agreeing at 51–2 [1]–[8], Finkelstein J agreeing at 52 [9]).

[121] *Comandate Marine* (n 16) 107–8 [239]–[240].

B *Arbitrability*

The term 'arbitrability' has its origins in the *Convention on the Execution of Foreign Arbitral Awards*, where it was a condition of recognition or enforcement in art 1(2)(b) that 'the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon.'[122] Arbitrability is a central concept to the *New York Convention*[123] and the *Model Law*,[124] and is required by Australian law to be considered when determining whether a dispute is of the kind that is properly within the domain of arbitration.[125] In particular, s 7(2)(b) of the *IAA* requires that there be a matter capable of settlement by arbitration before a stay of court proceedings can be ordered.

While national laws have traditionally viewed disputes concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency as not arbitrable,[126] the case law in Australia now suggests that the precise circumstances of the dispute sought to be referred to arbitration must be assessed before making a determination regarding arbitrability. In particular, in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* ('*Comandate Marine*'), Allsop J held that in determining whether a matter is not arbitrable, one must consider whether there is 'a sufficient element of legitimate public interest … making the enforceable private resolution of disputes concerning [it] outside the national court system inappropriate.'[127]

Nevertheless, the authorities make clear that a matter will not be precluded from arbitration solely because the subject matter of the arbitration concerns questions that arise under Australian legislation that serve important public policy objectives.[128] For example, in *Comandate Marine*, although Allsop J acknowledged that the *Trade Practices Act 1974* (Cth) ('*TPA*') was 'a statute of

[122] *Comandate Marine* (n 16) 97 [199] (Allsop J), citing *Convention on the Execution of Foreign Arbitral Awards*, signed 26 September 1927, 92 LNTS 301 (entered into force 25 July 1929) art 1(2)(b).

[123] *New York Convention* (n 55) arts II(1), V(2)(a).

[124] *Model Law* (n 54) arts 34(2)(b)(i), 36(1)(b)(i).

[125] *Comandate Marine* (n 16) 97–8 [200]–[201].

[126] Ibid 98 [200], quoted in *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792, 796 [15] (Croft J) (Supreme Court of Victoria).

[127] *Comandate Marine* (n 16) 98 [200].

[128] Ibid 96–7 [195]–[196]; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143, 159 [50] (Jagot J) ('*Casaceli*') (Federal Court of Australia); *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, [193]–[194] (Austin J) ('*ACD Tridon*'), quoted in *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452, 478 [147] (Foster J) ('*WDR Delaware*').

the highest importance' in the field of consumer protection,[129] the 'requirement to enforce a foreign arbitration agreement in s 7 of the *IAA* was a competing public policy that trumped the policy in the *TPA*'.[130] Moreover, in *Robotunits Pty Ltd v Mennel*, Croft J held that it was not inappropriate for a dispute involving the *Corporations Act* to be resolved by arbitration even though third parties or statutory bodies, such as the Australian Securities and Investments Commission, might have an interest in the proceeding or sufficient standing to bring an action.[131] His Honour explained that, after all, the settlement of such matters by private arbitration would not interfere with the powers of regulatory bodies.[132]

While the courts have repeatedly held that there is nothing special about trade practices legislation or the *Corporations Act* that make their respective subject matters broadly incapable of arbitration due to reasons of public policy,[133] the case law to date has largely focused on sophisticated parties to commercial contracts attempting to 'surround their claims with an aura of important public policy issues' in an attempt to evade the grasp of arbitration clauses willfully entered into.[134] In such cases, it is unsurprising that the courts have been unsympathetic to the arbitrability objections of these parties. However, in circumstances involving a greater power imbalance between the parties, such as where a consumer has entered into a standard form contract with a large corporation that contains an arbitration clause, arguably 'the balance of competing public policies' may instead 'fall on the side' of the consumer.[135] For instance, if a consumer commences a class action on the basis that they are the victim of widespread misleading or deceptive conduct, a strong argument may be made that the proceeding should not be referred to arbitration as it concerns matters of significant public policy in protecting consumers at large and regulating corporate behaviour. Moreover, persuasive arguments may be made that such matters should be dealt with in an open forum so that other consumers and/or statutory authorities may be made aware of the misconduct alleged and decide whether to prosecute their own claims (whether on a civil or criminal basis). After all, in *Comandate Marine*,

[129] *Comandate Marine* (n 16) 96 [195].

[130] Garnett (n 6) 577.

[131] (2015) 49 VR 323, 354 [70].

[132] Ibid.

[133] See, eg, *ACD Tridon* (n 128) [192], quoted in *WDR Delaware* (n 128) 478 [147].

[134] *Casaceli* (n 128) 159 [50]. See also *Comandate Marine* (n 16) 106 [236].

[135] Garnett (n 6) 578.

Allsop J suggested that where a *TPA* claim involved *public* deception as opposed to simply resolving the rights of the parties to the dispute, then the public interest in having the matter publicly resolved by a court may prevail over arbitration.[136]

Accordingly, if the subject-matter of a class action concerns a sufficient element of legitimate public interest that renders these disputes inappropriate to be resolved through arbitration, it may be that such a dispute is required to be determined exclusively by the exercise of judicial power,[137] including through pt IVA.

C *Unconscionable Conduct*

Alternatively, it may be that an arbitration clause that purports to exclude class actions breaches the legislative prohibition on unconscionable conduct in the *Australian Consumer Law* ('*ACL*')[138] or the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). Both the *ACL* and the *ASIC Act* prohibit conduct that is, in all the circumstances, unconscionable.[139] While the *ACL* prohibition is confined to conduct in respect of the supply or acquisition of goods or services, the *ASIC Act* prohibition is concerned with conduct in connection with the supply or acquisition of financial services.[140]

As the legislation defines 'conduct' to include the 'making, or giving effect to a provision of, a contract or arrangement',[141] entering into and/or giving effect to an arbitration agreement of a certain kind or in certain circumstances is conduct capable of being considered unconscionable. However, in order to determine whether such conduct is unconscionable, one must 'identify a relevant normative standard' and 'measure the impugned conduct against that normative standard'.[142] The difficulty that exists in this respect lies in the fact

[136] Garnett (n 6) 575, citing *Comandate Marine* (n 16) 93 [186].

[137] See *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 351 (Deane and Gaudron JJ).

[138] *ACL* (n 19).

[139] Ibid s 21(1); *ASIC Act* (n 19) s 12CB(1). See Michelle Sharpe, '"More Than a Feeling": Finding Statutory Unconscionable Conduct' (2019) 27(2) *Australian Journal of Competition and Consumer Law* 108, 108.

[140] Sharpe (n 139) 108.

[141] *Competition and Consumer Act 2010* (Cth) s 4(2)(a) ('*CCA*'); *ASIC Act* (n 19) s 12BA(2)(a)(i).

[142] Sharpe (n 139) 108. See also *Paciocco* (n 18) 266 [262] (Allsop CJ, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398], 296 [405]); *Australian Competition and*

that the term 'unconscionable' is not defined in the legislation and, while this term is to be understood as bearing its ordinary meaning,[143] there is no 'monolithic moral force' to the notion of 'conscience'.[144] Nevertheless, the values that inform the standard of conscience fixed by the legislation were identified by Kiefel CJ and Bell J in *Australian Securities and Investments Commission v Kobelt* as including 'certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made',[145] and in particular:

> the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage …[146]

The *ACL* and the *ASIC Act* also provide 'express guidance as to the norms and values that are relevant to inform the meaning of unconscionability and its practical application'[147] through a list of non-exhaustive factors to which the Court may have regard.[148] These factors relevantly include the relative strengths of the bargaining positions of the supplier and the service recipient,[149] whether the service recipient was required to comply with conditions that were not reasonably necessary to protect the legitimate interests of the supplier,[150] whether the terms were capable of comprehension by the service recipient,[151] the terms and conditions of the contract (if any),[152] the extent to which the supplier was willing to negotiate these terms and conditions,[153] and

Consumer Commission v Lux Distributors Pty Ltd (2013) ATPR ¶42-447, 43,463 [23] (Allsop CJ, Jacobson and Gordon JJ).

143 *Kobelt* (n 18) 8 [14] (Kiefel CJ and Bell J).

144 Ibid 66 [280] (Edelman J).

145 Ibid 8 [14], citing *Paciocco* (n 18) 274 [296].

146 *Kobelt* (n 18) 8 [14], quoting *Paciocco* (n 18) 274 [296].

147 *Paciocco* (n 18) 270 [279], 276 [306].

148 *ACL* (n 19) s 22; *ASIC Act* (n 19) s 12CC(1). See also Sharpe (n 139) 110; *Australian Competition and Consumer Commission v Oceana Commercial Pty Ltd* (2004) ATPR (Digest) ¶46-255, 54,328 [181] (Heerey, Sundberg and Dowsett JJ).

149 *ACL* (n 19) s 22(1)(a); *ASIC Act* (n 19) s 12CC(1)(a).

150 *ACL* (n 19) s 22(1)(b); *ASIC Act* (n 19) s 12CC(1)(b).

151 *ACL* (n 19) s 22(1)(c); *ASIC Act* (n 19) s 12CC(1)(c).

152 *ACL* (n 19) s 22(1)(j)(ii); *ASIC Act* (n 19) s 12CC(1)(j)(ii).

153 *ACL* (n 19) s 22(1)(j)(i); *ASIC Act* (n 19) s 12CC(1)(j)(i).

the extent to which the parties acted in good faith.[154] No one factor or group of factors is primary or determinative and all of the relevant factors must be taken into account.[155]

If the impugned conduct involves merely entering into and/or giving effect to an arbitration agreement, unconscionable conduct is unlikely to assist a party seeking redress in the courts as s 21(2)(b) of the *ACL* and s 12CB(2) of the *ASIC Act* state that the prohibition on unconscionable conduct does not apply to conduct that is engaged in only because the person engaging in the conduct refers a relevant dispute to arbitration.

Nevertheless, depending on the circumstances of the case, it may be alleged that a party has engaged in unconscionable conduct by entering into or giving effect to an arbitration agreement that restricts the manner in which an action may be brought in arbitration. This may be seen in an arbitration clause that only permits individual claims to be brought against a respondent, thereby precluding the rights of individuals to aggregate their claims. As the High Court of Australia unanimously held in *Kakavas v Crown Melbourne Ltd* that '[h]eedlessness of, or indifference to, the best interests of the other party is not sufficient' to establish unconscionability,[156] it is unlikely that a party will be able to rely on the prohibition on unconscionable conduct purely because they are bound by an arbitration clause of this kind. However, if an arbitration clause is a calculated means of predation on the weak, poor and/or vulnerable that involves secrecy, trickery and/or a lack of honesty,[157] entering or giving effect to an arbitration clause that requires claimants to bring their claims on an individual basis may fall foul of the statutory normative standard and be regarded as unconscionable. This will especially be the case if it can be established, as was the case in *Szetela*, that a corporation is using such a provision to prevent customers from seeking redress for relatively minor claims and thereby creating for itself 'virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights'.[158]

[154] *ACL* (n 19) s 22(1)(l); *ASIC Act* (n 19) s 12CC(1)(l).

[155] *Kobelt* (n 18) 41 [155] (Nettle and Gordon JJ).

[156] (2013) 250 CLR 392, 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ), quoted in *Kobelt* (n 18) 31 [118] (Keane J).

[157] *Paciocco* (n 18) 274 [296], quoted in *Kobelt* (n 18) 8 [14]. See also Sharpe (n 139) 117.

[158] *Szetela* (n 81) 1101. See also Eisenberg, Miller and Sherwin (n 5) 874–6.

D *Unfair Terms*

The unfair contract provisions of the *ACL* and the *ASIC Act* render void unfair contract terms in certain standard form consumer contracts and small business contracts.[159] While the focus of the unconscionability prohibitions is on the dominant party[160] (with the terms of any contract between the parties being a matter for consideration by the court), the focus of the unfair contract terms provisions in the *ACL* and the *ASIC Act* is on whether certain terms are 'unfair',[161] which involves a lower moral or ethical standard than unconscionability.[162] The unfair terms regime may therefore provide consumers and small businesses seeking to rely on the class action regime with a valuable means of rendering an arbitration agreement void.

1 *The Meaning of 'Unfair'*

Under the *ACL* and the *ASIC Act*, a term will be considered unfair if it satisfies three limbs, namely:

1 it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

2 it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

3 it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.[163]

In determining whether a term is unfair, the legislation states that a court may take into account any matters it thinks relevant, but must consider the extent to which the term is transparent and the contract as a whole.[164]

[159] *ACL* (n 19) s 23(1); *ASIC Act* (n 19) s 12BF(1).

[160] *Kobelt* (n 18) 17 [56] (Kiefel CJ and Bell J), 22 [81] (Gageler J), 53–4 [232]–[233] (Nettle and Gordon JJ); SG Corones and Philip H Clarke, *Australian Consumer Law: Commentary and Materials* (Lawbook, 5th ed, 2015) 327 [7.05].

[161] Corones and Clarke (n 160) 328 [7.05].

[162] *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436, [34] (Banks-Smith J), citing *Paciocco* (n 18) 287 [363]; *Kobelt* (n 18) 31 [118]–[119] (Keane J).

[163] *ACL* (n 19) s 24(1); *ASIC Act* (n 19) s 12BG(1).

[164] *ACL* (n 19) s 24(2); *ASIC Act* (n 19) s 12BG(2).

2 *Application to Arbitration Clauses*

The legislation provides a non-exhaustive list of examples of terms which may be unfair, depending on the circumstances of the case.[165] Relevantly, an arbitration clause may accord with the legislative example of a term that 'limits, or has the effect of limiting, one party's right to sue another party'[166] if it has the practical effect of excluding or hindering a consumer's right to take legal action or exercise a legal remedy. However, as Edelman J made clear in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd*, while these legislative examples provide statutory guidance on the types of terms which may be of concern and cannot be ignored, they do not prohibit the use of such terms and do not create a presumption that those terms are unfair.[167] Rather, as noted above, the relevant arbitration clause must still be considered by reference to the three statutory elements of unfairness, having regard to the transparency of the term in question, the contract as a whole and the surrounding circumstances of the case.[168]

(a) Significant Imbalance

First, in considering whether an arbitration clause causes 'a significant imbalance in the parties' rights and obligations arising under the contract',[169] a court will assess the rights and obligations of the parties in light of that clause,[170] including whether a party has incurred any disadvantage, risk or additional duty.[171] In *Re Law and MCI Technologies Pty Ltd*, the Victorian Civil and Administrative Tribunal held that an exclusive Queensland jurisdiction clause in certain software licensing agreements was unenforceable as the rights conferred by consumer protection legislation would be eroded if the consumer had to take legal action in an interstate court or tribunal.[172] While

[165] *ACL* (n 19) s 25; *ASIC Act* (n 19) s 12BH. See also Corones and Clarke (n 161) 337–8 [7.90].

[166] *ACL* (n 19) s 25(k); *ASIC Act* (n 19) s 12BH(1)(k).

[167] (2015) 239 FCR 33, 42 [44] ('*Chrisco Hampers*'), quoting Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 67 [5.44].

[168] See *ACL* (n 19) ss 24(1)–(2); *ASIC Act* (n 19) ss 12BG(1)–(2).

[169] *ACL* (n 19) s 24(1)(a); *ASIC Act* (n 19) s 12BG(1)(a).

[170] See *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* (2016) ATPR ¶42-517, 43,057-11–13 [56]–[75] (Gilmour J) ('*CLA Trading*'); *Chrisco Hampers* (n 167) 44 [51].

[171] *CLA Trading* (n 170) 43,057-8–9 [54]; *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq)* [2015] FCA 368, [950] (North J).

[172] (2006) 24 VAR 225, 235 [48] (Morris J). See also Gaye Middleton, 'Fair Go! Are Jurisdiction Clauses in Online Consumer Contracts Unfair?' [2011] (103) *Precedent* 31, 33.

the precise terms of any agreement would have to be considered in context, the same may be the case if an arbitration clause required parties to prosecute claims in a foreign or interstate arbitral tribunal or on an individual basis. Further, as Demaine and Hensler point out, even if an arbitration clause contains a mutual restriction on the parties, such as a prohibition on aggregated proceedings, such a prohibition will not usually impact the parties to a consumer contract equally.[173] As was stated by the Californian Court of Appeal in *Szetela*:

> Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which [the class action preclusion provision] might negatively impact [the business], because credit card companies typically do not sue their customers in class action lawsuits.[174]

Therefore, in practice, in the types of contracts to which the unfair terms regime applies, it will often be the consumer or the small business who is more significantly impacted by an arbitration agreement, especially if that agreement requires a claimant to prosecute their claim on an individual basis or in a distant or unfamiliar location. However, whether an arbitration agreement gives rise to a significant imbalance between the parties will be a matter for the claimant to prove in each case.[175]

(b) Reasonably Necessary to Protect Legitimate Interests

Second, due to the operation of a rebuttable presumption,[176] the party seeking to rely on an arbitration clause must establish that they have a 'legitimate interest' and that the provision they are seeking to rely on is reasonably necessary to protect that interest. In other words, there must be a reasonable justification for the significant imbalance in the rights and obligations of the parties under the contract.[177] The guide to the unfair contract terms law produced by consumer protection agencies states that this limb may warrant evidence concerning 'relevant material relating to a business's costs and structure, the need to mitigate risks, or particular industry practices'.[178] For a party using arbitration solely as a means of precluding class actions, establish-

[173] Demaine and Hensler (n 81) 72–3.

[174] *Szetela* (n 81) 1101.

[175] See Corones and Clarke (n 161) 330 [7.40].

[176] *ACL* (n 19) s 24(4); *ASIC Act* (n 19) s 12BG(4).

[177] *CLA Trading* (n 170) 43,057-11 [57].

[178] *Unfair Contract Terms: A Guide for Businesses and Legal Practitioners* (March 2016) 11.

ing a legitimate interest in the use of the arbitral process may be difficult. Moreover, if a party has sought to limit the manner in which a dispute may be arbitrated in an attempt to avoid aggregated proceedings of any kind, discharging this rebuttable presumption will prove particularly challenging. For example, it is difficult to see how a requirement that proceedings be commenced by way of arbitration on an individual basis is reasonably necessary to protect a party's legitimate interest. In fact, as noted above, in a number of cases overseas, the courts have determined that such clauses serve illegitimate interests as they only seek to insulate corporations from challenges to their alleged misconduct.[179]

(c) Detriment

Third, it is necessary to satisfy the court that the term would cause detriment to a party (whether financial or otherwise) if it were applied or relied upon.[180] Whether a party incurs detriment as a result of an arbitration clause will depend on the circumstances of the parties, the nature of the dispute and the terms of the arbitration clause in question. In order to ensure the enforceability of an arbitration agreement, the parties to such an agreement may seek to ensure that a potential claimant is no worse off than they would be if they could vindicate their rights through a class action. For example, in *Concepcion*, AT&T ensured that consumers bound by an arbitration agreement would have the benefit of:

1 a consumer-friendly notice of arbitration that was readily accessible;

2 the supplier paying all arbitration costs for non-frivolous claims and assurances that it would not seek to recover its own costs;

3 for small claims, the choice to have the arbitration held in person, on the phone or on the papers; and

4 the arbitration being held in close proximity to the consumer's place of residence.[181]

However, in the absence of such safeguards, an arbitration clause that obviates the ability of a party to vindicate their rights through pt IVA may result in

[179] See, eg, *Szetela* (n 81) 1101; *Bragg v Linden Research Inc*, 487 F Supp 2d 593, 611 (Robreno J) (ED Pa, 2007); *Comb v PayPal Inc*, 218 F Supp 2d 1165, 1176 (Fogel J) (ND Cal, 2002). See also Middleton (n 172) 33; Eisenberg, Miller and Sherwin (n 5) 876.

[180] *ACL* (n 19) s 24(1)(c); *ASIC Act* (n 19) s 12BG(1)(c).

[181] *Concepcion* (n 12) 336–7.

detriment being incurred by a potential claimant, including the significant time, effort and cost of a party pursuing their claim in an arbitral forum.

Whether an arbitration clause is unfair will be considered on a case-by-case basis in light of the three-limb legislative test, while having regard to the contract as a whole and the relevant circumstances of the case.[182] However, for the reasons set out above, it may be difficult for a party seeking to rely on an arbitration clause to establish that such a clause is reasonably necessary to protect their legitimate interests, especially if that clause restricts the manner in which proceedings may be brought by arbitration. Similar to the position adopted in the United Kingdom,[183] and more recently in Canada,[184] despite the parties entering into an arbitration agreement that seeks to exclude the jurisdiction of the courts, the unfair terms regime in Australia is likely to provide a significant safeguard for consumers and small businesses seeking redress under pt IVA of the *Federal Court Act*.[185]

VI Conclusion

Despite the impact that it may have on victims of widescale misconduct and the community at large, the potential of arbitration clauses to, at least in theory, circumvent the operation of pt IVA has been referred to as a 'tantalising' prospect for those seeking to minimise exposure to class action litigation in Australia.[186] While this issue is yet to come before the courts in Australia, the law provides avenues for certain claimants 'seeking to escape the clutches of an arbitration clause'[187] to instead rely on the class action mechanism in pt IVA.

[182] Middleton (n 172) 34.

[183] See *Mylcrist* (n 15).

[184] See *Seidel* (n 14).

[185] See Garnett (n 6) 594.

[186] King & Wood Mallesons (n 4).

[187] Garnett (n 6) 574.