UNFAIR CONTRACT TERMS: INSIGHTS FROM THE PAST YEAR

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27 FEBRUARY 2025

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WHAT WILL WE COVER TODAY?

A look into the year that was following the introduction of UCT reforms on 9 November 2023…

- **Part 1**: **Regulatory action post-reform**
  - What have we heard from the ACCC / ASIC?
- **Part 2**: **A major case law update post-reform**
  - Confirmed extraterritorial application of the UCT regime: *Karpik v Carnival*
- **Part 3: Practical matters arising post-reform**
  - What key challenges have clients and contract lawyers had to contend with in applying the new UCT regime to existing business practices?
  - Practical issue 1: How does the UCT regime apply to 'master agreements' – e.g. Master Services Agreements under which POs / SOWs are issued?
  - Practical issue 2: Does the UCT regime apply to government?

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PART 1: REGULATORY ACTION POST-REFORM

UCT REGULATORY ACTION

- No public announcements from ACCC or ASIC of any specific compliance or enforcement action taken under new UCT regime
- The ACCC has however made some general comments:
  - **December 2023**: ACCC warns franchisors to urgently review and amend standard form franchise agreements or 'be prepared for potential enforcement action' after a review of franchising contracts found wide-ranging concerns
  - **March 2024**: ACCC Chair notes in the 2024-2025 compliance and enforcement priorities address that there are UCT matters 'currently under investigation'
  - **February 2025**: ACCC notes in the 2025-2026 compliance and enforcement priorities address that UCT matters continue to remain a priority.

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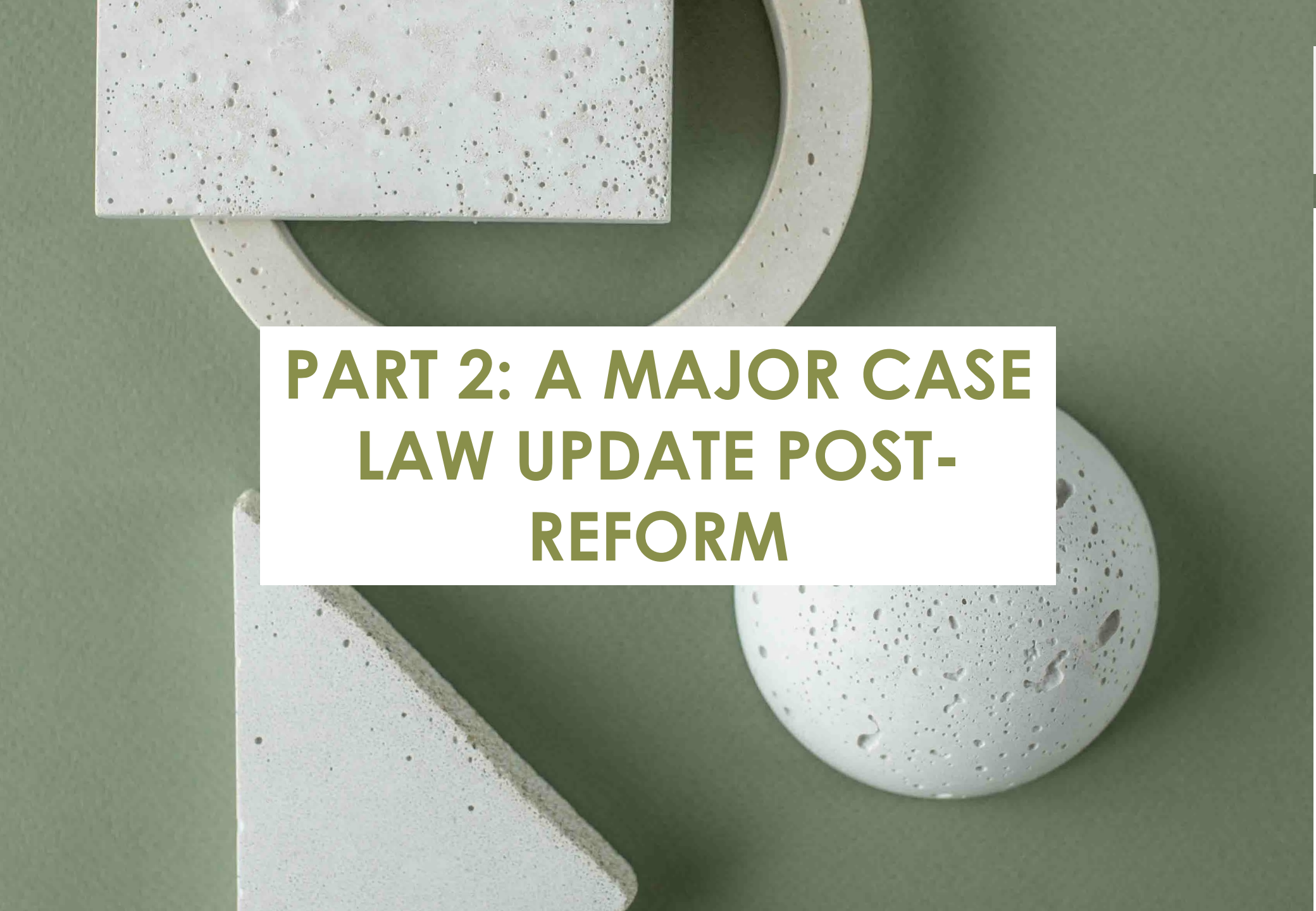


PART 2: A MAJOR CASE LAW UPDATE POST-REFORM

CASE LAW UPDATE: KARPIK V CARNIVAL

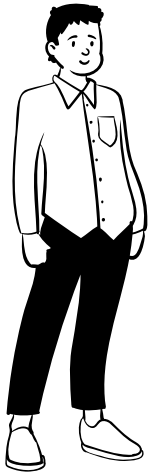
Karpik v Carnival plc [2023] HCA 39

Ruby Princess
(foreign company carrying on business in Australia - subject to class action from passengers affected by COVID-19)

CONTRACT
Choice of law: US maritime law

Exclusive jurisdiction: US District Courts of California

Class action waiver



Mr Ho
(Canadian passenger of the Ruby Princess)

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CASE LAW UPDATE: KARPIK V CARNIVAL

Princess Argument:

- The class action in relation to Mr Ho should be stayed
- Exclusive jurisdiction clause meant inappropriate forum
- Class action waiver meant Mr Ho had waived his rights

Passenger Argument:

- The UCT regime (specifically s23 – ACL UCT test) applied despite choice of law / exclusive jurisdiction clause
- The class action waiver was unfair under UCT regime and thus void

QUESTIONS FOR THE COURT

1. Was s23 capable of applying to Mr Ho's contract – was there extraterritorial application?
2. If s23 did apply, was the class action waiver unfair under s23?

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CASE LAW UPDATE: KARPIK V CARNIVAL

Question 1: Was s23 capable of applying to Mr Ho's contract – was there extraterritorial application?

- The High Court said **yes**
- Section 5(1) of the *Competition and Consumer Act 2001* (Cth) (**CCA**) extends the majority of the ACL to conduct outside of Australia by companies incorporated in Australia or that are carrying on business in Australia
- The choice of law clause did not prevent the extraterritorial application of the UCT regime – the High Court said if this was the case, parties could effectively contract out of the UCT regime by including foreign choice of law clauses
- While the UCT regime does not contain any extra words that might indicate extraterritorial application e.g. "in trade or commerce" (defined in ACL as trade or commerce occurring inside or outside of Australia) – this was not an issue for the High Court, who said that s5(1) of the CCA was clear and there was no need to identify a further territorial connection

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CASE LAW UPDATE: KARPIK V CARNIVAL

Question 1: Was s23 capable of applying to Mr Ho's contract – was there extraterritorial application?

- What did this mean in practice? The UCT regime applied to the contract between Princess and Mr Ho despite that:
  - Neither was an Australian resident / company
  - The contract was made outside of Australia
  - The contract was governed by a foreign law
- While the conduct occurred in Australia, the High Court said this was not relevant to its finding that the UCT regime had extraterritorial application by reason of s5(1) of the CCA
- The High Court reasoned that if a corporation carries on business in Australia, then "a price of doing so" is compliance with local consumer protections

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CASE LAW UPDATE: KARPIK V CARNIVAL

Question 1: Was s23 capable of applying to Mr Ho's contract – was there extraterritorial application?

- The High Court acknowledged the potential ramifications of its findings, but said the "absurd and capricious results" that could result from the extraterritorial application of s23 were "overstated"
- An example given to the High Court was:

  A company which manufactures cars in Europe and sells them in Australia is subject to the operation of s 23 in relation to its sale of cars in other European countries.

- The High Court said while this was consistent with its findings, there would be practical limitations that would apply – e.g. a party could assert inappropriate forum, and if proceedings were brought in a foreign court, it would be for that foreign court to decide whether or not UCT regime applied

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CASE LAW UPDATE: KARPIK V CARNIVAL

Question 2: Was the class action waiver unfair?

- The High Court said **yes**
- The clause imposed limitations on passengers but in no way restricted Princess' operations
- Even though it did not impede Mr Ho's individual right to sue, it prevented / discouraged passengers from vindicating their legal rights where doing so individually was cost prohibitive
- The High Court was particularly influenced by the lack of overall transparency – while the clause itself was legible, the process was not transparent. Mr Ho only viewed the waiver once he received the booking confirmation email, clicked on a link and navigated to a webpage, signed into the webpage and selected the contract that applied to him from a total of three different contract options
- "*the greater the imbalance or detriment inherent in [a] term, the greater the need for the term to be expressed and presented clearly; and conversely, where a term has been readily available to an affected party, and is clearly presented and plainly expressed, the imbalance and detriment it creates may need to be of a greater magnitude*".

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CASE LAW UPDATE: KARPIK V CARNIVAL

Summary – implications of Karpik v Carnival

1. Foreign companies that carry on business in Australian can be subject to the UCT regime – even in relation to customers / suppliers outside of Australia
2. Australian companies can be subject to the UCT regime even in relation to customers / suppliers outside of Australia
3. The above is likely not impacted by the choice of law clause or any election of exclusive / non-exclusive jurisdiction
4. Transparency issues can be broader than simply the text of a clause – they might arise as a result of the overall contracting process

** However, as noted by the High Court, questions of practical application would need to be considered e.g. whether a foreign court would uphold the application of Australian local laws in a contract between foreign business and foreign customer.*

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PART 3: PRACTICAL MATTERS ARISING POST-REFORM

KEY CHALLENGES POST-REFORM

Key challenges for clients and contract lawyers alike:

1. **Lack of contested case law** – difficult to know at what point a term would be considered 'reasonably necessary to protect a legitimate interest' when UCT principles have primarily developed out of uncontested action where the respondents co-operated with regulators and consent orders were submitted.
2. **Lack of industry guidance** – adjusting contract terms for UCT risk has proven to be a challenge in some industries with firmly established industry norms / that are already heavily regulated (e.g. construction, property, education). Many clients have had to accept potential UCT risk in proceeding with long-standing commercial positions in the absence of specific regulatory guidance.
3. **Balancing legal / commercial consideration** - whether a term is 'reasonably necessary to protect a legitimate interest' requires internal consideration framed in the context of the particular business and wider industry. Limitations on how far the legal analysis can go in assisting with this assessment under the current legal framework (e.g. in light of points 1 and 2 above).

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PRACTICAL ISSUE 1: MASTER AGREEMENTS

- **Master agreements**: agreements setting up overarching arrangements under which some form of 'instrument' is established to acquire goods or services in future, e.g.
  - Master services agreement under which SOWs are issued
  - Standing offer supply agreement under which POs are placed
- New UCT reforms came into effect **9 November 2023** – on and from that date, any contraventions of UCT provisions can attract significant pecuniary penalties
- <u>The question is</u>: If a master agreement is executed *before* effective date of UCT reform, but an instrument (e.g. SOW/PO) is issued *after* that effective date – does the former or new UCT regime apply?

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THE APPLICATION OF THE NEW UCT REGIME

First necessary to understand how and when the new UCT regime applies to contracts:

Contract type	Does the UCT regime apply?
Contract made before 9 November 2023 that is not renewed or varied	No
Contract made before 9 November 2023 renewed after 9 November 2023	Yes
Contract made before 9 November 2023 varied after 9 November 2023	Yes, but only in relation to the varied terms
Contract made after 9 November 2023	Yes

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WHERE DO MASTER AGREEMENTS FIT IN?

- Dependent on the proper interpretation of the master agreement and instrument
- Is the instrument in question:
  - simply carrying out an ordering process that is pre-defined under the master agreement? If so, former UCT regime will continue to apply; or
  - creating a new contract that incorporates the terms of the master agreement? If so, the new UCT regime will apply to instruments issued on or after 9 November 2023
- Necessary to closely consider the drafting of the documents. While case law principles are lacking, there are some signs we can look for…

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INTERPRETING MASTER AGREEMENTS

- Signs that an instrument **may** create a new contract include:
  - A specific statement to that effect e.g. "*if the supplier accepts an order, a new contract is formed on the terms and conditions of this agreement*"
  - Language suggesting contract formation – e.g. describing an offer and acceptance in relation to the instrument
  - Language describing the instrument as incorporating the terms of the master agreement – might infer the instrument is a separate and distinct contract made up of the pre-agreed master terms
  - A framework where the instrument can introduce new terms and conditions to the arrangement, either legal or commercial terms
- Signs that an instrument **may not** create a new contract include:
  - Language suggesting the instrument does not form a new contract – e.g. absence of contract formation language, language describing the instrument as being 'governed' by the master agreement, etc.
  - A definition under the master agreement that includes the instrument as comprising part of the 'core' agreement, or clauses which state that the master agreement includes or incorporates the instrument
  - Drafting which suggests that the instrument is merely an administrative step in performing the master agreement – e.g. where price mechanism is established in master agreement and the instrument is really just directing particulars like volume of goods/services

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PRACTICAL ISSUE 2: UCT AND GOVERNMENT

- A complex question – to what extent does the UCT regime apply to government entities?
- There is a common law presumption that the Crown is immune from statutory obligations unless specified or implied by relevant legislation
- So what does the *Competition and Consumer Act 2010* (Cth) (**CCA**) and other relevant legislation say?

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LEGISLATIVE POSITION AT A GLANCE

- **Commonwealth**:
  - CCA s2A: The Crown is bound by the UCT regime where it is 'carrying on a business' (either directly or through an authority)
  - The Crown is exempt from pecuniary penalties however (but not its authorities)
- **State / Territory**:
  - Fair trading legislation in each State and Territory governs the point – adopting the text of the ACL and providing for the same position as the Commonwealth
- **Local government**
  - NSW: local government legislation makes it clear that a council does not have the status, privileges and immunities of the Crown and legislation applies to it in the same way as a body corporate
  - Remaining States / Territories: depends on interpretation of the legislation establishing the entity – may be an 'authority' of the Crown in right of a State or Territory in which case same position as State / Territory above (but if not, likely same position as NSW)

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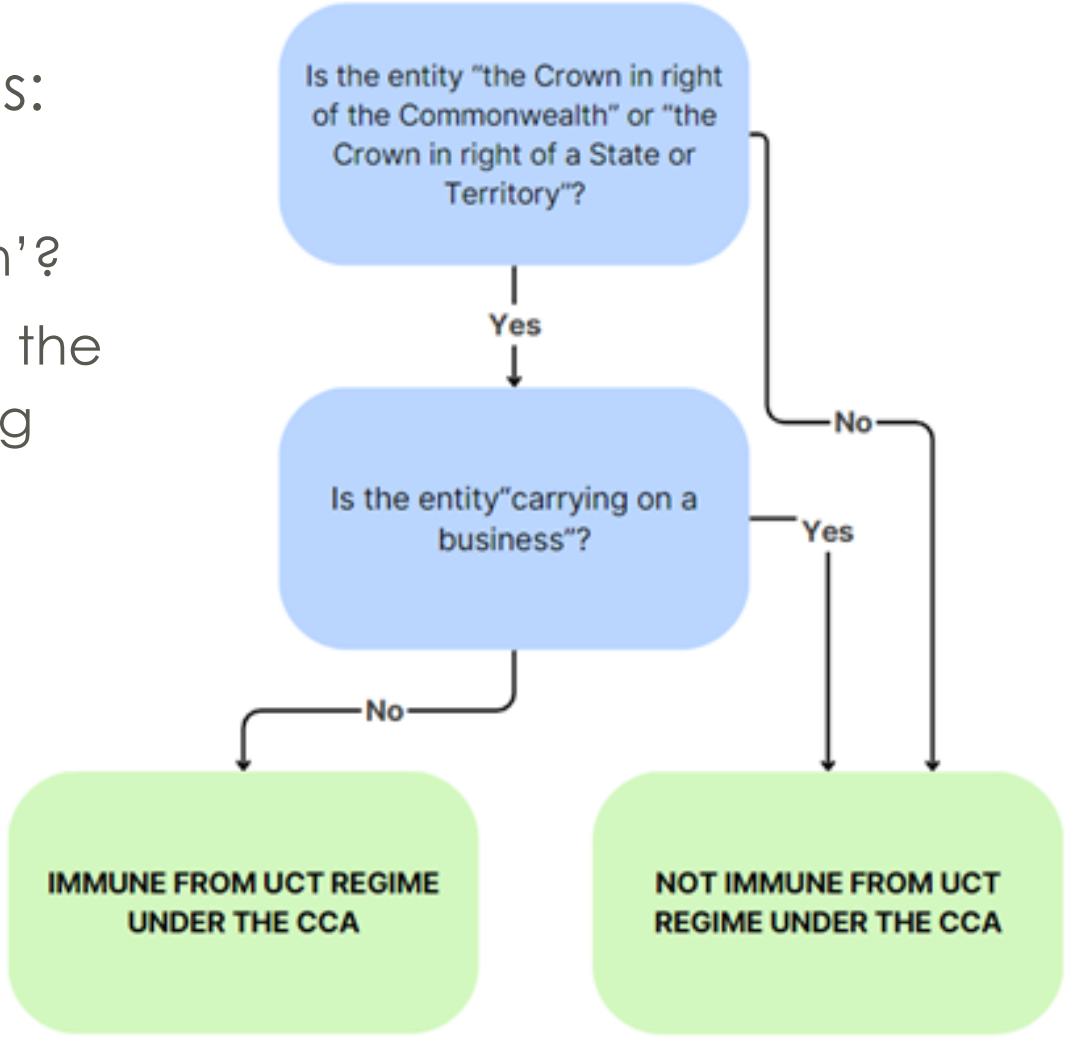
APPLYING THE LEGISLATION

Necessary considerations:

1. Is the government entity actually part of 'the Crown'?
2. If it is part of 'the Crown', is the government entity 'carrying on a business'?



WHEN IS A GOVERNMENT ENTITY 'THE CROWN'?

- A point to be determined with reference to the legislation establishing the government entity. Consider:
  - The activities that are engaged in under that legislation
  - The nature and extent of governmental or ministerial control
- High-level case law examples:
  - A Victorian government department was found to be part of the Crown in circumstances where the department head was appointed / could be removed by the Premier and had to otherwise carry out its functions 'subject to the direction and control of the Minister'
  - An entity was found not to be part of the Crown, despite having 'close ties' with government and receiving government funding, given a lack of governmental control over the entity and the entity's own description of itself in its materials as an 'industry-owned corporation'

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WHEN IS THE CROWN 'CARRYING ON A BUSINESS'?

- A factual and context-dependent enquiry
- 'Business' generally denotes activities carried out for profit on a continuous and repetitive basis (however repetitiveness alone is insufficient)
- Certain activities specified under s2C CCA as not 'carrying on a business', including:
  - Imposing or collecting taxes, levies or licence fees
  - Granting, refusing to grant, revoking, suspending or varying licenses
  - Transactions involving only persons acting for the Crown
- High-level case law examples:
  - The Commonwealth was found to be carrying on a printing and design services business (the Australian Government Publishing Service) despite that these services were rendered in connection with the government
  - Department of defence was found not to be carrying on a business when it acquired industrial quantities of chinaware to be used at mealtimes by members of the armed forces – the acquisition was 'inextricably linked with a function of government' and did not 'have the flavour of a commercial enterprise'

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QUESTIONS?

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For more information and to stay up to date with the UCT regime, see our UCT article series here: https://hwlebsworth.com.au/uct-101-article-series/

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