IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2021 03645

JAKE THOMAS — First Plaintiff

YUE XIAO — Second Plaintiff

v

THE A2 MILK COMPANY LTD (ARBN 158 331 965) — Defendant

JUDGE:	Button J
WHERE HELD:	Melbourne
DATE OF HEARING:	24 August 2022
DATE OF JUDGMENT:	28 November 2022
CASE MAY BE CITED AS:	Thomas v The a2 Milk Company Ltd [No 2]
MEDIUM NEUTRAL CITATION:	[2022] VSC 725

PRIVATE INTERNATIONAL LAW – Jurisdiction – Where proceeding brought claims alleging contravention of New Zealand statutes – Whether the Court has personal jurisdiction – Whether the Court has subject matter jurisdiction to hear claims under foreign statute – Where the defendant filed an unconditional appearance – *Constitution Act 1975* (Vic) s 85(1) – *Judiciary Act 1903* (Cth) s 39(2).

PRIVATE INTERNATIONAL LAW – Choice of law – Foreign law – Where assumed that New Zealand statute applies – Whether the Court can enforce claims in respect of foreign statute – Whether exclusionary rule regarding claims advancing foreign governmental interest applies – Whether particular New Zealand statutes exclude enforcement by foreign courts – Where the defendant adduced uncontradicted expert evidence on the content of foreign law – Whether particular remedial provisions under New Zealand statutes are procedural or substantive – *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 – *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 – *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 – *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 – *Fair Trading Act 1986* (NZ) – *Financial Markets Conduct Act 2013* (NZ).

PRACTICE AND PROCEDURE – Remedies – Whether the Court has power to grant declaratory relief in relation to alleged contraventions of New Zealand statutes – Whether the Court has power to award monetary compensation for loss or damage caused by alleged

breaches of New Zealand statutes – Where no tortious claim for breach of statutory duty – Where monetary compensation for contravention of statutory norm of conduct cannot be awarded absent an identified statutory entitlement.

PRACTICE AND PROCEDURE – Group proceeding – Determination of separate questions – Where there are substantially overlapping group proceedings in Victoria and New Zealand – Where group members in the Victorian group proceeding may need to decide whether to opt out having regard to the Supreme Court's jurisdiction to hear and determine claims under New Zealand law and its power to make an award of monetary compensation – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 47.04.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	R Doyle SC A Folie	Shine Lawyers Pty Ltd Slater & Gordon Limited
For the Defendant	B Cameron	Herbert Smith Freehills
As the Contradictor	A Pound SC S Rajanayagam	

TABLE OF CONTENTS

Introduction......1
The proceeding and the claims advanced......1
The preliminary questions, and their utility......3
Question 1: Jurisdiction......6
Personal, subject matter and territorial jurisdiction......6
Federal jurisdiction......9
Answer to Question 1......10
Question 2: Enforceability......10
Exclusionary rule in respect of claims advancing a foreign governmental interest......11
Whether the New Zealand statutes confer exclusive jurisdiction on New Zealand courts......13
Introduction to the issue, and the parties' positions......13
The FMC Act......17
The FT Act......23
Answer to Question 2......28
Question 3: Remedies......28
Declaratory relief......28
Monetary compensation......29
Power is to be distinguished from questions concerning the existence of rights and liabilities which occasion the exercise of the power......29
Conferral of power on the Supreme Court by State laws and the exercise of federal jurisdiction......31
The need to identify a cause of action to obtain monetary compensation for breaches of statute......34
Choice of law and 'torts': Pfeiffer, Zhang, Neilson and Amaca......39
Application to the present proceeding......48
The New Zealand relief provisions are part of the law of New Zealand on an issue of substance......48
Relief and the lex fori......52
Answer to Question 3......54

HER HONOUR:

Introduction

1 A group proceeding advances claims that the A2 Milk Company Ltd (**A2**) contravened provisions of New Zealand legislation concerning misleading or deceptive conduct, and continuous disclosure. The plaintiffs seek declaratory relief and monetary compensation in favour of a sub-set of group members. Three questions were posed, to be addressed on a preliminary basis, ahead of trial. Those questions concern whether this Court has jurisdiction over the claims under New Zealand legislation, whether those claims are enforceable in this Court, and whether this Court can (assuming the claims are made out) grant the relief sought. For the reasons set out below (and on the basis of certain assumptions set out below), in my view the claims can be advanced in this Court and this Court can (if the claims are made out) award declaratory relief and monetary compensation.

The proceeding and the claims advanced

2 Jake Thomas and Yue Xiao are the plaintiffs in the group proceeding brought against A2. Each plaintiff initially commenced a separate proceeding (respectively, the **Thomas Proceeding** and the **Xiao Proceeding**), but their proceedings were consolidated by orders made on 14 June 2022. Prior to the consolidation of the (then separate) proceedings, A2 filed unconditional notices of appearance in each proceeding.[1] At that stage, the claims advanced under New Zealand law were advanced in the Thomas Proceeding, but not in the Xiao Proceeding. Those claims are now advanced in the consolidated proceeding.

3 A2 was incorporated under the *Companies Act 1993* (NZ). Shares in A2 are listed on New Zealand's Exchange Main Board (**NZSX**) and on the Australian Stock Exchange (**ASX**).

4 Pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**), the plaintiffs bring claims on their own behalf and on behalf of group members who, at

---

1 Affidavit of Rohan Foley affirmed 21 July 2022 (**Foley Affidavit**), [7]–[8].

any time between 19 August 2020 and 9 May 2021, held an interest in fully paid ordinary shares in A2 that was either acquired by buying those shares on the ASX or the NZSX, or acquired before 19 August 2020 and retained until a date after 28 September 2020.

5 The plaintiffs contend that A2 breached its continuous disclosure obligations under s 674 of the *Corporations Act 2001* (Cth) (**Corporations Act**) and under s 270 of the *Financial Markets Conduct Act 2013* (NZ) (**FMC Act**).

6 The plaintiffs also contend that A2 engaged in misleading or deceptive conduct, contrary to s 1041H of the Corporations Act, s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), s 18 of the *Australian Consumer Law* (**ACL**), s 9 of the *Fair Trading Act 1986* (NZ) (**FT Act**) and s 19(2) of the FMC Act. The plaintiffs allege that the conduct engaged in by A2 in New Zealand (via the publication of information on the NZSX) was in breach of both Australian law[2] and New Zealand law, but do not contend that conduct in Australia (via the publication of information on the ASX) was in breach of New Zealand law.

7 The plaintiffs claim that they and group members suffered loss and damage because of the alleged contraventions and seek relief in relation to the alleged contraventions of Australian law and the alleged contraventions of New Zealand law. In respect of the latter, the prayer for relief seeks declarations and:

> C. The amount of loss or damage suffered because of the Defendant's contraventions of s 9 of the FT Act, s 19 of the FMC Act, rule 3.1.1 of the NZSX Listing Rules and s 270 of the FMC Act, pursuant to:
>
> (a) s 43 of the FT Act;
>
> (b) ss 494 and 495 of the FMC Act;
>
> (c) further or alternatively s 29(2), s 33Z(1)(e) or (g) of the Supreme Court Act 1986 (Vic), s 85(1) of the Constitution Act 1975 (Vic) and the inherent jurisdiction of the Court.[3]

---

[2] Having regard to s 12AC of the *ASIC Act* and s 5 of the *Competition and Consumer Act 2010* (Cth), which apply to certain conduct outside Australia.

[3] Although, at the hearing of the separate questions, the plaintiffs indicated they might refine this paragraph to omit (in substance) subparagraph (c): T13.18–24.

8 There are at least 296 group members who have either registered their interest in the proceeding or executed a legal costs agreement with Slater and Gordon, who are residents of New Zealand and who purchased shares in A2 on the NZSX.[4] There are also 177 group members who are New Zealand residents, and 385 group members who bought shares on the NZSX and who have registered their interest in the proceeding with Shine Lawyers.[5] There are also a number of group members who have registered their interest in the proceeding who purchased shares on both exchanges.[6]

The preliminary questions, and their utility

9 Given the novelty of their position in proceeding in the Supreme Court of Victoria alleging contraventions of New Zealand law, and seeking compensation and declaratory relief in respect of those contraventions, the plaintiffs sought the determination of certain questions separately before trial, pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (the **Rules**).

10 The questions were framed as follows in the plaintiffs' summons dated 15 June 2022:

> 1. Does the Supreme Court of Victoria have jurisdiction to determine the claims made by the plaintiffs in the proceeding S ECI 2021 03645 arising under the *Fair Trading Act 1986* (NZ) (**FT Act NZ**) and the *Financial Markets Conduct Act 2013* (NZ) (**FMC Act NZ**)?
>
> 2. Are the claims made against the defendant in the proceeding S ECI 2021 03645 under s 9 of the FT Act NZ and under ss 19(2) and 270 of the FMC Act NZ enforceable in the Supreme Court of Victoria?
>
> 3. In respect of any contravention by the defendant of s 9 of the FT Act NZ or ss 19(2) and 270 of the FMC Act NZ, does the Supreme Court of Victoria have power to:
>
> A. make a declaration that the defendant contravened the provisions; and
>
> B. award compensation for loss or damage suffered because of the defendant's contraventions, pursuant to s 43 of the FT Act NZ, ss 494 and 495 of FMC Act NZ, s 29(2) of the *Supreme Court Act 1986* (Vic), s 85(1) of the *Constitution Act 1975* (Vic) or the

---

4 Foley Affidavit, [12].

5 Foley Affidavit, [14].

6 Foley Affidavit, [13], [15].

inherent jurisdiction of the Court?

11 The application that the Court hear and determine certain preliminary questions was initially made in the Thomas Proceeding, supported by an affidavit of Kaitlin Ferris affirmed 1 June 2022 (the **Ferris Affidavit**). Orders were made in the consolidated proceeding on 15 June 2022 for the filing of a summons seeking the hearing and determination of the separate questions and for the appointment of Mr Alistair Pound SC as contradictor.

12 The need for the appointment of a contradictor arose because, despite some initial indications that it might contend that this Court lacked jurisdiction to hear and determine the claims made under New Zealand law, A2 decided to take a largely neutral stance.

13 In her affidavit, Ms Ferris referred to a proceeding issued by Kevin James Whyte in the High Court of New Zealand on 16 May 2022 (the **Whyte Proceeding**).[7] Claims are made by Mr Whyte on behalf of persons who bought shares in A2 on either the NZSX or the ASX, but the claims are made under New Zealand legislation only.[8] Those claims overlap substantially with the claims made in the proceeding in this Court. The Whyte Proceeding is an 'opt in' proceeding.

14 The utility of the separate questions being addressed at an early stage was said by Ms Ferris to arise from the need for those considering opting *in* to the Whyte Proceeding, and considering opting *out* of this proceeding, to know whether, insofar as their claims are made under New Zealand law, those claims are capable of being determined in this Court such that they may recover their loss by remaining members of the group in this proceeding.[9] Ms Ferris also referred to A2 having foreshadowed a potential application to stay the Whyte Proceeding under s 22 of the *Trans-Tasman Proceedings Act 2010* (NZ) (**Trans-Tasman Proceedings Act**).[10]

15 In my view, it is appropriate that the questions identified above be answered as

---

7 Ferris Affidavit, [8]–[9].
8 Ferris Affidavit, [9].
9 Ferris Affidavit, [10]–[11], [15].
10 Ferris Affidavit, [12].

preliminary questions, rather than awaiting determination in the course of an initial trial. Not only is it the 'first duty' of a court to identify whether or not it has jurisdiction,[11] but the present proceeding is an open class proceeding. The class members include persons who acquired shares in A2 on the NZSX. The class includes persons who have claims only under New Zealand law, persons with claims under both Australian and New Zealand law, and persons with claims only under Australian law. It is likely that there presently exists some overlap between the class members in this proceeding, and the persons represented by the Whyte Proceeding. In due course, it will be necessary for an opt out notice to be issued in this proceeding.[12] It may also be necessary to revisit the definition of the group if an overlap with the membership of the Whyte Proceeding persists.

16 It is desirable that group members decide whether or not to opt out on an informed basis, so far as is possible consistent with the norms and practices of adversarial litigation. While group members (obviously enough) need to decide whether to opt out without having a great deal of information going to the merits of the substantive claims and the likelihood of those claims being successfully prosecuted by the plaintiffs, there is no reason why they should be required to decide whether or not to opt out without even knowing whether this Court has jurisdiction to hear and determine the claims advanced under New Zealand law and — critically from the viewpoint of group members — the ability to make an award of monetary compensation, to the extent their claims are governed by New Zealand law.

17 Detailed written submissions were made by the plaintiffs dated 21 July 2022. The contradictor, with his junior counsel, provided detailed written submissions dated 8 August 2022. The defendant made written submissions in response, on 19 August 2022, and filed an expert report of Ms Jennifer Cooper QC (now KC) on aspects of the FT Act (the **Cooper Report**). The plaintiffs also filed submissions in reply to the contradictor's submissions, on 19 August 2022. The trial of the separate questions was

---

11 *Federated Engine-Drivers and Firemen's Association of Australasia v The Broken Hill Pty Co Ltd* (1911) 12 CLR 398 (***Federated Engine-Drivers***), 415 (Griffith CJ); *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226 (***Thurin***), [128] (McLeish, Niall and Walker JJA).

12 Supreme Court Act s 33J.

held on 24 August 2022. I wish to record my appreciation for the care and attention of all counsel and solicitors in developing the submissions. Many of the issues canvassed involve some complexity, and I have been much assisted by those submissions in formulating the views set out below.

18 In these reasons, I refer to the claims of 'group members'. Such references are to be understood as referring to group members insofar as they make claims for loss caused by contraventions of the FMC Act and the FT Act. References to the 'New Zealand law claims', or 'claims under New Zealand law', are to be understood as references to the claims of relevant group members for contraventions of the relevant provisions of those two New Zealand statutes and to recover loss caused by those contraventions.

Question 1: Jurisdiction

19 The first question addresses this Court's jurisdiction. It is framed as follows:

> Does the Supreme Court of Victoria have jurisdiction to determine the claims made by the plaintiffs in the proceeding S ECI 2021 03645 arising under the *Fair Trading Act 1986* (NZ) (**FT Act NZ**) and the *Financial Markets Conduct Act 2013* (NZ) (**FMC Act NZ**)?

20 Both the plaintiffs and the contradictor submitted that this question should be answered 'yes'.

Personal, subject matter and territorial jurisdiction

21 The word 'jurisdiction' means different things, depending on the context in which it is used. Care is required to avoid erroneously conflating its different dimensions.[13] Jurisdiction has a personal dimension, a subject matter dimension and a geographic, or territorial, dimension.[14]

22 While this Court exercises its jurisdiction in hearing group proceedings according to

---

13 *Plaintiff S164/2018 v Minister for Home Affairs* (2018) 92 ALJR 1039; [2018] HCA 51 (***Plaintiff S164/2018***), [6] (Edelman J).

14 *Plaintiff S164/2018*, [6] (Edelman J). See also *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, 246–7 [14]–[17] (French CJ, Gummow, Hayne and Crennan JJ); *Zurich Insurance plc v Koper* [2022] NSWCA 128 (***Zurich***), [46]–[47] (Bell CJ, with whom Ward P and Beech-Jones JA agreed). The High Court granted special leave to appeal from the decision in *Zurich* on 10 November 2022: Transcript of Proceedings, *Zurich Insurance plc v Koper* [2022] HCATrans 194.

Part 4A of the Supreme Court Act, Part 4A does not *confer* jurisdiction.[15] Rather, Part 4A and its equivalents[16] function as suites of procedural provisions.[17]

23 Personal jurisdiction is what makes the defendant answerable to a court's command.[18] It was, and is, the capacity to serve the originating process that is central to determining the bounds of personal jurisdiction.[19]

24 Personal jurisdiction can arise by virtue of:

(a) the defendant being present in the jurisdiction and served with the process;

(b) the plaintiff being authorised to serve, and serving, the defendant outside the jurisdiction; or

(c) consent or voluntary submission to the jurisdiction, which may be manifested by entry of an unconditional appearance, or taking a positive step in the proceeding (such as filing a defence or cross-claim).[20]

25 It is important not to conflate questions of jurisdiction and questions of the applicable law. Once personal jurisdiction has been established, the Court has jurisdiction, in the sense of authority to decide, but the assumption of jurisdiction 'raises no question as to the law to be applied in deciding the rights and duties of the parties'.[21]

26 This Court has personal jurisdiction over A2. It was served and, by filing an

---

15 See *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956; [2022] HCA 33 (***Impiombato***), [6] (Kiefel CJ and Gageler J), [47] (Gordon, Edelman and Steward JJ).

16 Such as, for example, Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**).

17 *Impiombato*, [54], [66], [68] (Gordon, Edelman and Steward JJ).

18 *Laurie v Carroll* (1958) 98 CLR 310 (***Laurie v Carroll***), 322–3 (Dixon CJ, Williams and Webb JJ). There, three members of the High Court explained that modern conceptions of the foundation of jurisdiction are founded on the old common law rule *non potest quis sine brevi agere* (no one can sue without a writ), where the writ was issued out of Chancery under the Great Seal in the name of the King.

19 *Laurie v Carroll*, 323 (Dixon CJ, Williams and Webb JJ).

20 *Zurich*, [50] (Bell CJ, with whom Ward P and Beech-Jones JA agreed); *John Russell & Co, Ltd v Cayzer, Irvine & Co, Ltd* [1916] 2 AC 298, 302 (Viscount Haldane); *Laurie v Carroll*, 323 (Dixon CJ, Williams and Webb JJ).

21 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (***Pfeiffer***), 521 [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (***Zhang***), 518 [68] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), noting that the distinction between jurisdiction and choice of law means that there is no obligation to plead foreign law to make a claim justiciable. It is the rules of court and general principles of pleading that may oblige the party to plead the relevant foreign law.

unconditional appearance, has submitted to this Court's jurisdiction.[22]

27 Personal jurisdiction is distinct from subject matter jurisdiction. Existence of the former does not confer, or establish, the existence of the latter.[23] Conversely, the existence of personal jurisdiction does not depend on the substance of the case advanced. In other words, while subject matter jurisdiction will determine whether the desired fruits of the exercise of personal jurisdiction are available, a finding that subject matter jurisdiction is wanting does not impugn a finding of personal jurisdiction.

28 This Court has subject matter jurisdiction in respect of the claims made under New Zealand law. The jurisdiction of the Supreme Court of Victoria, granted by s 85(1) of the *Constitution Act 1975* (Vic) (the **Constitution Act**), is unlimited. For superior courts with unlimited jurisdiction, it is personal jurisdiction — understood as the amenability of the defendant to service — that is likely to be the source of any material constraint on jurisdiction (rather than such limits arising from subject matter jurisdiction).

29 As the High Court said in *Laurie v Carroll*, for actions which are *in personam* and transitory, 'the jurisdiction of the Supreme Court of Victoria depends not in the least on subject matter but upon the amenability of the defendant to the writ expressing the Sovereign's command in right of the State of Victoria'.[24] To similar effect, Leeming JA observed (writing extrajudicially), that the generality of the grant of jurisdiction to the Supreme Courts of the various States means that 'subject matter jurisdiction will almost always exist in the absence of some other State or Commonwealth law'.[25] No 'other State or Commonwealth law' has been identified that relevantly qualifies the

---

22 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, 539 (Gibbs J).

23 For example, effecting service under the *Service and Execution of Process Act 1901* (Cth) was held not to confer on any court jurisdiction to hear or determine any suit which it would not have had jurisdiction to hear and determine if the writ of summons had been served within the State or part of the Commonwealth in which it was issued: *Flaherty v Girgis* (1987) 162 CLR 574 (***Flaherty***), 598 (Mason ACJ, Wilson and Dawson JJ). The distinction between personal and subject matter jurisdiction is further illustrated by the fact that the exercise of federal jurisdiction to effect service of a writ issued in a state court does not, once service has been effected, mean that the state court exercises federal jurisdiction in relation to the substantive subject matter (except to the extent that determination of the substantive issues involves the exercise of federal jurisdiction): *Flaherty*, 609 (Deane J).

24 *Laurie v Carroll*, 322 (Dixon CJ, Williams and Webb JJ).

25 Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (The Federation Press, 2nd ed, 2020), 137.

unlimited grant of jurisdiction such that the New Zealand law claims fall outside this Court's subject matter jurisdiction.

30 No issue of territorial jurisdiction arises in this proceeding. As the contradictor submitted, subject to provisions allowing extraterritorial service, the territorial limits of a court's jurisdiction are to be identified by reference to whether the defendant has been personally served with the originating process within those territorial limits (including any extension arising from authorised extraterritorial service).[26] No issue arises as to the effective service of A2. While incorporated in New Zealand, A2 is a registered foreign corporation under the Corporations Act and its unconditional notices of appearance cite its registered address in New South Wales. Further, and as the plaintiffs submitted, they do not advance claims requiring the Court to exercise authority over territory outside Victoria.

Federal jurisdiction

31 In this proceeding, claims are made under certain Commonwealth statutes. As such, this Court will be exercising federal jurisdiction in this proceeding. Where a State Supreme Court exercises federal jurisdiction pursuant to s 39(2) of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**), the bounds of the State court's jurisdiction define the limits of the jurisdiction conferred by the Federal Parliament. In other words, when a State court exercises federal jurisdiction, it does so within the bounds of its jurisdiction.[27] Authority also generally favours the view that non-federal claims determined by a State court in the same proceeding are determined in exercise of federal jurisdiction (there being no scope for the concurrent exercise of federal and State jurisdiction), as long as the non-federal claims form part of the same 'matter', and are not severable and distinct from the claims attracting federal jurisdiction.[28]

---

26 Contradictor's submissions, [27]. See also *McGlew v The New South Wales Malting Co Ltd* (1918) 25 CLR 416, 420 (Griffith CJ, Barton, Powers and Rich JJ); *Flaherty*, 598 (Mason ACJ, Wilson and Dawson JJ); *Zurich*, [28], [47] (Bell CJ, with whom Ward P and Beech-Jones JA agreed).

27 *Commonwealth v Dalton* (1924) 33 CLR 452, 455–6 (Isaacs and Rich JJ).

28 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 (***Moorgate Tobacco***), 471–2 (Gibbs J); *Felton v Mulligan* (1971) 124 CLR 367, 373–4 (Barwick CJ, whose observations were quoted with approval by the plurality in *Moorgate Tobacco*, 481–2 (Stephen, Mason, Aickin, and Wilson JJ) and were adopted by Gleeson CJ, Gaudron and Gummow JJ in *Australian Securities and Investments Commission v*

Consistently with that position, this Court will be exercising federal jurisdiction in determining all of the claims in this proceeding, including those advanced under New Zealand law.

Answer to Question 1

32 In my view, question 1 should be answered 'yes'.

Question 2: Enforceability

33 The second question is framed as follows:

> Are the claims made against the defendant in the proceeding S ECI 2021 03645 under s 9 of the FT Act NZ and under ss 19(2) and 270 of the FMC Act NZ enforceable in the Supreme Court of Victoria?

34 This question is directed to common law principles of private international law.

35 Where application of Australian choice of law principles directs attention to a foreign law, an Australian court can apply that foreign law in adjudicating claims involving litigants over which it has effective jurisdiction. As Gaudron, Gummow and Hayne JJ observed in *Lipohar v The Queen*, one or more issues in an action which is transitory 'may be determined by the court of the forum by reference to a "choice" it makes, under its common law rules, of the law of another "law area" as the lex causae'.[29]

36 I will return, in greater depth, to common law choice of law rules in connection with question 3, but for present purposes, the two relevant points are that: first, there is nothing novel in the proposition that foreign law may be applied by an Australian court if it is the lex causae; and secondly, the foreign law to be applied in a domestic court can include statute law (claims under foreign statutes fall under the wide conception of 'torts' in private international law).[30]

37 In relation to question 2, the two main issues the parties raised for my consideration

---

Edensor Nominees Pty Ltd (2001) 204 CLR 559 (***Edensor***), 571 [7]); *Thurin*, [48], [55], [64] (McLeish, Niall and Walker JJA).

[29] (1999) 200 CLR 485, 527 [105].

[30] See further paragraphs 123 to 133 below.

are:

(a) whether the Court should refuse to enforce the New Zealand law claims on the basis that they enliven the exclusionary rule in relation to statutes advancing a foreign 'governmental interest'; and

(b) whether, on their proper construction, the FT Act and the FMC Act confer exclusive jurisdiction on New Zealand courts.

Exclusionary rule in respect of claims advancing a foreign governmental interest

38 An Australian court may refuse to enforce claims made under foreign statutes where the claims seek to enforce a foreign 'governmental interest', for example, in connection with foreign penal laws or foreign revenue laws. This exclusionary rule was identified by the High Court in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (***Spycatcher***).[31] Determination of whether the enforcement of a particular statute will constitute enforcement of a 'governmental interest' turns on the 'scope, nature and purpose of the particular provisions being enforced and the facts of the case'.[32]

39 The provisions of New Zealand legislation sought to be enforced are:

(a) s 270 of the FMC Act, which obliges a listed issuer to notify information in accordance with the continuous disclosure provisions of the listing rules for, relevantly, the NZSX; and

(b) s 19(2) of the FMC Act and s 9 of the FT Act, which are contravened where a person engages in misleading or deceptive conduct in specified circumstances.

40 The plaintiffs submitted that the New Zealand law claims do not attract the exclusionary rule identified in *Spycatcher* on the basis that:

(a) no governmental interest is sought to be enlivened or vindicated;

---

31 (1988) 165 CLR 30, 40–2 (Mason CJ, Wilson, Deane, Dawson, Toohey, Gaudron JJ).

32 *Evans v European Bank Ltd* (2004) 61 NSWLR 75 (***Evans v European Bank***), 87 [44] (Spigelman CJ, with whom Handley and Santow JJA agreed).

(b) the claims of the relevant group members are made pursuant to provisions of the New Zealand statutes which render aspects of commercial conduct between businesses and consumers wrongful, and which permit the recovery of damages from corporate wrongdoers because of that conduct; and

(c) the private commercial character of the claims is confirmed by the purposes of the two statutes, being:

(i) in the case of the FMC Act, to promote the confident and informed participation of businesses, investors and consumers in the financial markets and to promote and facilitate the development of fair, efficient and transparent financial markets;[33] and

(ii) in the case of the FT Act, to 'contribute to a trading environment in which the interests of consumers are protected', 'businesses compete effectively' and 'consumers and businesses participate confidently'.[34]

41 The contradictor likewise submitted that the New Zealand law claims are not captured by the exclusionary rule against enforcement of 'governmental interests'. The contradictor highlighted that the concept of 'governmental interest' is not the same as that of the 'public interest', and that regulatory interventions may be made in the public interest which do not have the requisite governmental quality.[35] The contradictor submitted that the interests asserted are asserted by private litigants seeking orders directed to remedying loss they have suffered by reason of the asserted contraventions, and are not interests seeking the 'vindication of the public justice' (as Cardozo J put it in *Loucks v Standard Oil Co of New York*[36]).

42 For the reasons advanced by the plaintiffs and the contradictor, the claims advanced

---

33 FMC Act s 3. The plaintiffs also noted that s 270 of the FMC Act is in pt 5 of the Act, which has the following additional purposes in respect of financial product markets: promoting fair, orderly, and transparent financial product markets; and encouraging a diversity of financial product markets to take account of the different needs and objectives of issuers and investors: s 229.

34 FT Act s 1A.

35 Contradictor's submissions, [52], referring to *Evans v European Bank*, 87 [46] (Spigelman CJ, with whom Handley and Santow JJA agreed).

36 120 NE 198, 198 (1918), quoted with apparent approval by Spigelman CJ in *Evans v European Bank*, 88 [51].

by group members under the New Zealand statutes are not captured by the exclusionary rule in respect of claims advancing foreign governmental interests. While the New Zealand statutes serve a number of public policy objectives, the New Zealand law claims are advanced for the vindication of the private interests of group members.

Whether the New Zealand statutes confer exclusive jurisdiction on New Zealand courts

Introduction to the issue, and the parties' positions

43 To explain this issue, it is necessary to say something about the procedural development of the parties', and the contradictor's, positions on whether the terms of the FMC Act and FT Act indicated an intention on the part of the New Zealand legislature that only certain local courts can hear claims involving the relevant provisions of those Acts.

44 In their written submissions, the plaintiffs drew attention to a number of decisions[37] of Australian courts[38] which considered that, where on its proper interpretation a statute confers functions or powers on specific local courts to the exclusion of other courts, including foreign courts, a foreign court cannot hear and determine claims under that statute. However, where the relevant provision or provisions of the statute do no more than address the *distribution* of jurisdiction domestically as between local courts, there is no such barrier to a foreign court hearing claims under that statute.[39] The plaintiffs then set out their analysis of the FMC Act and the FT Act, before submitting that the relevant provisions of those Acts concerned the *distribution* of subject matter jurisdiction as between New Zealand courts and tribunals, and did not purport to restrict foreign courts from determining claims under the relevant statutory

---

37 *Re Douglas Webber Events Pty Ltd* (2014) 291 FLR 173; [2014] NSWSC 1544; *Epic Games Inc v Apple Inc* (2021) 151 ACSR 444; [2021] FCA 338; *Epic Games Inc v Apple Inc* (2021) 286 FCR 105 (***Epic Appeal***); *Karpik v Carnival plc* (2021) 157 ACSR 1; [2021] FCA 1082.

38 Mostly in the context of stay applications based on contractual choice of law forum clauses, and under the Trans-Tasman Proceedings Act.

39 Plaintiffs' submissions, [70].

provisions.[40]

45 The contradictor submitted (in response to the plaintiffs' submissions) that, '[w]here the law of the foreign country intends to confer jurisdiction to determine claims under a foreign statute exclusively on courts of that country, Australian courts should, as a matter of public policy, decline to enforce such claims'.[41] The contradictor identified that the question of whether the two New Zealand statutes allocate exclusive jurisdiction to local courts and tribunals is a question of New Zealand law involving the construction of those statutes in accordance with principles of statutory construction in New Zealand law.

46 After observing that, pursuant to s 97 of the Trans-Tasman Proceedings Act, it is not necessary for the plaintiffs to prove the coming into force of the New Zealand legislation, the contradictor observed that, in the absence of expert evidence as to the New Zealand law of statutory construction, this Court must presume that the foreign law is the same as the Australian law.[42] The contradictor then analysed the two New Zealand Acts, and submitted that the provisions of the FT Act constituted an exhaustive jurisdictional code, but that the FMC Act does not disclose an intention that claims under its provisions may only be brought in New Zealand courts.

47 In their reply submissions, the plaintiffs contended that there is no principle by which an Australian court should, as a matter of public policy, decline to enforce a foreign statute which vests jurisdiction for claims of contravention exclusively in the courts of the foreign country.[43]

48 The Cooper Report was tendered by the defendant to establish the law of New Zealand on the question of whether or not the FT Act constituted an exhaustive jurisdictional code. I will return to Ms Cooper's opinion in due course, but it suffices for the present to record that, in her opinion, the function of ss 37–39 of the FT Act is

---

40 Plaintiffs' submissions, [81]–[96].

41 Contradictor's submissions, [56].

42 The contradictor here relied on *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 (***Neilson***), 372 [125] (Gummow and Hayne JJ).

43 Plaintiffs' reply submissions, [5].

to define, for domestic purposes, which courts in New Zealand have jurisdiction to apply the FT Act, and those provisions 'do not evince a parliamentary intention that *only* the courts of New Zealand are to have the jurisdiction to enforce those statutory provisions'.[44]

49 After receiving the Cooper Report, the contradictor submitted that he no longer considered the argument (which had been advanced in his written submissions) concerning the FT Act to be open, once the foreign law had been established as a fact through Ms Cooper's expert opinion. The contradictor further submitted, by reference to the High Court's decision in *Neilson v Overseas Projects Corporation of Victoria Ltd* (***Neilson***), that questions of fact concerning foreign law can also be agreed by the parties. The contradictor referred to two relevant passages. In the first passage, Gummow and Hayne JJ, having noted the paucity of evidence about the foreign law in question, stated that:

> It is for the parties and their advisers to decide the ground upon which their battle is to be fought. The trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues that the parties tender for decision by the court.[45]

In the second passage, Kirby J made a similar observation:

> Under Australian law, courts are not deemed to know the law of foreign nations. That is why the **content of such law presents questions of fact, ordinarily to be pleaded by the party relying upon it and, unless agreed, proved by expert evidence.** It is true that the court receiving such evidence is not bound to accept it, including where it is uncontradicted. However, as Diplock LJ observed in *Sharif v Azad*, a court should be reluctant to reject such evidence unless it is patently absurd or inconsistent. It will be rare indeed that an Australian trial judge, required to make findings about the content of foreign law, will prefer his or her own conclusions as to the state of that law to expert testimony of a competent witness with proved training and qualifications.[46]

---

44 Cooper Report, [5.5] (emphasis in original).

45 *Neilson*, 370 [118] (citations omitted).

46 *Neilson*, 391 [185] (emphasis added, citations omitted). See also Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 4th ed, 2019) 256 [9.10], where the authors observe that foreign law may be established by admissions on the pleadings, citing in support the Privy Council's decision in *Prowse v The European & American Steam Shipping Co* (1860) 13 Moo PC 484; 15 ER 182. The position is the same in English law. In Lord Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol I, 321 [9-008], the authors

50 It may be, however, that a court will not act on agreements about matters of fact (including foreign law) if there is reason to doubt their correctness. In *Damberg v Damberg,* the relevant facts related to foreign law, namely the revenue law of Germany.[47] There, neither party adduced evidence about the content of German law, and asked the judge at first instance to assume that Australian and German law were identical. As to acting on admissions or agreements about facts, Heydon JA (with whom Spigelman CJ and Sheller JA agreed) said:

> In short, the courts are averse to pronouncing judgments on hypotheses which are not correct. To do so is tantamount to giving advisory opinions and to encouraging collusive litigation. On the other hand, the courts will act on admissions of or agreements about matters of fact where there is no reason to doubt their correctness. But they are reluctant to do so where there is reason to question the correctness of the facts admitted or agreed. A similar caution appears to apply in relation to an assumption or agreement that foreign law is the same as the lex fori.[48]

51 I have no reason to doubt the correctness of the parties' agreement as to the content of the law of New Zealand so far as it concerns the FT Act. If it be necessary to have a basis for not doubting the correctness of the agreement, the Cooper Report amply demonstrates that the agreement is well founded.

52 Given the parties' agreement, the contradictor submitted that the expert evidence of Ms Cooper was, strictly speaking, irrelevant.[49] The contradictor further submitted that the expert opinion was, in any event, supportive of the parties' agreement, and courts generally do not depart from uncontradicted expert evidence as to foreign law, except in rare cases, such as when the opinion is patently absurd or inconsistent.[50] Both the plaintiffs and the contradictor also relied on the passage of the judgment of Sheller JA in *James Hardie & Co Pty Ltd v Hall* where his Honour stated:

---

state that '[f]oreign law need not be proved if it is admitted'. See also Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) 4, where Professor Fentiman notes that one exception to the principle that foreign law must be formally proved is 'if the parties agree otherwise'.

47 (2001) 52 NSWLR 492 (***Damberg***).

48 *Damberg,* 522 [160].

49 The position may not, however, be that clear cut for the reasons set out by Heydon JA in *Damberg,* [148]–[164], addressing the circumstances in which a court is not required to accept, or act on, admissions made in different forms.

50 *Neilson*, 391 [185] (Kirby J).

> An Australian court should only in exceptional circumstances make a finding about the meaning and effect of a foreign statute, over many years applied daily in the country concerned, contrary to the uncontradicted evidence of a qualified expert in the law of that country.[51]

53 The correct construction of the FT Act effectively no longer being an issue for my determination (whether by virtue of the parties' agreement or having regard to the Cooper Report), the contradictor submitted that I need not decide whether or not there is a public policy by which Australian courts will decline to exercise jurisdiction to determine claims brought under foreign legislation where that legislation exclusively confers jurisdiction on the courts of that country.[52]

54 For completeness, it should be noted that approaching the questions on the basis of an agreement as to the fact of a foreign law does not involve this Court, in effect, acceding to jurisdiction by consent rather than satisfying itself as to jurisdiction.[53] That is because the fact of the foreign law is a fact which, once ascertained, is considered alongside other relevant factors in determining whether the Court has jurisdiction. Here, a contrary view as to the fact of the foreign law was raised by the contradictor as a potential exclusionary factor. However, the fact having been established by means of the parties' agreement (and the expert evidence), the objection falls away.

The FMC Act

55 The plaintiffs seek relief for alleged contraventions of ss 19(2) and 270 of the FMC Act. Sections 494 and 495[54] of the FMC Act make provision for compensatory orders for breaches of 'civil liability provisions'. Sections 19 and 270 are both civil liability provisions.[55]

---

51 (1998) 43 NSWLR 554 (***James Hardie***), 573.

52 T66.4–24, 67.26–68.14.

53 As the contradictor submitted (citing *Federated Engine-Drivers*, 415 (Griffith CJ); *Hazeldell Ltd v Commonwealth* (1924) 34 CLR 442, 446 (Isaacs ACJ)), it is the 'first duty' of a court to determine whether it has jurisdiction. While submission to this Court's jurisdiction by filing an unconditional appearance is effective in relation to personal jurisdiction, the parties to a proceeding cannot, by consent, confer subject matter jurisdiction on a court: *Ridley v Whipp* (1916) 22 CLR 381, 386 (Griffith CJ).

54 Sections 494 and 495 are within pt 8 of the FMC Act, entitled 'Enforcement, liability, and appeals'.

55 Pursuant to s 38, s 19 is a 'Part 2 fair dealing provision'. Pursuant to s 385, s 270 is a 'Part 5 market provision'. Section 485 provides that Part 2 fair dealing provisions and Part 5 market provisions are 'civil liability provisions'. For further discussion on the statutory scheme in relation to civil liability provisions, see below at paragraph 152.

56 Sections 494 and 495 provide as follows:

> **494 When court may make compensatory orders**
>
> (1) The court may make a compensatory order, on application by the FMA or any other person, if the court is satisfied that –
>
> (a) there is a contravention of a civil liability provision; and
>
> (b) a person (the aggrieved person) has suffered, or is likely to suffer, loss or damage because of the contravention.
>
> (2) The court may make a compensatory order whether or not the aggrieved person is a party to the proceedings.
>
> **495 Terms of compensatory orders**
>
> (1) If section 494 applies, the court may make any order it thinks just to compensate an aggrieved person in whole or in part for the loss or damage, or to prevent or reduce the loss or damage, referred to in that section.
>
> …

57 The FMC Act also contains a specific provision concerning the jurisdiction of courts in New Zealand:

> **538 Jurisdiction of courts in New Zealand**
>
> The High Court has exclusive jurisdiction to hear and determine proceedings in New Zealand under this Act, other than proceedings for offences.

Section 538 is contained in subpart 10 (entitled 'Miscellaneous') of Part 8 of the Act (entitled 'Enforcement, liability and appeals').

58 The word 'court' is defined in the FMC Act as follows:

> **court** means, in relation to any matter, the court before which the matter is to be determined (*see* section 538, which confers exclusive jurisdiction on the High Court in proceedings other than proceedings for offences).[56]

59 Both the contradictor and the plaintiffs submitted that the FMC Act does not disclose any intention that claims under its provisions may only be brought in New Zealand courts. The defendant did not make submissions on the FMC Act. The defendant may have chosen not to venture a view on the FMC Act because there was no divergence

---

56 FMC Act s 6 (definition of 'court') (emphasis in original).

between the contradictor and the plaintiffs on that Act (in contrast to the initial divergence in views between the contradictor and the plaintiffs in relation to the FT Act). Whatever the reason for the defendant's silence on the FMC Act, in the absence of any express agreement by the defendant with the plaintiffs' position, the New Zealand law on this point has not been established by agreement. Nor has it been established by the opinion of Ms Cooper. Accordingly, I will proceed to address the question of whether the FMC Act discloses an intention that claims may only be brought in New Zealand courts.

60 While Ms Cooper was not asked to, and did not, express an opinion on the FMC Act, she does give evidence of the law of New Zealand on the question of whether New Zealand statutes may be applied by foreign courts. Specifically, the Cooper Report states that the decision of the High Court of New Zealand in *Rimini Ltd v Manning Management & Marketing Ltd*[57] (which considered the FT Act) stands for the following propositions:

> [4.7.1] Unless Parliament has expressly or by clear implication said otherwise, it is open for foreign courts of similar standing to apply a New Zealand statute (where otherwise appropriate according to private international law); and
>
> [4.7.2] A provision in a statute which sets out for domestic purposes which Courts in New Zealand have jurisdiction to apply the statute will not displace the presumption in [4.7.1].

61 As the FMC Act does not expressly state that foreign courts may not apply the relevant provisions of that Act, the question is whether it does so by 'clear implication'. If the jurisdictional provisions of the FMC Act merely set out the distribution of jurisdiction for domestic purposes, that will not constitute such a 'clear implication'.

62 The laws of New Zealand include the *Interpretation Act 1999* (NZ) (**Interpretation Act**). Pursuant to s 97 of the Trans-Tasman Proceedings Act, formal proof of the Interpretation Act is not required. Accordingly, this Court may have regard to the Interpretation Act in construing the FMC Act in accordance with the laws of New Zealand regarding statutory construction. Otherwise, in the absence of any evidence

57 [2003] 3 NZLR 22 (***Rimini***).

(by way of expert opinion) of the laws of New Zealand as to statutory construction, I proceed on the basis that the law of New Zealand is the same as applies in this jurisdiction.[58]

63 The critical point, highlighted by both the contradictor and the plaintiffs, is that s 538 only applies to proceedings 'in New Zealand'. It says nothing about proceedings in courts in countries other than New Zealand, or whether a foreign court may hear and determine proceedings under the FMC Act. The words 'in New Zealand' must be given some work to do.[59]

64 If it were intended that foreign courts not hear *any* claims 'under' the FMC Act, the provision could simply have read: 'The High Court has exclusive jurisdiction to hear and determine proceedings ~~in New Zealand~~ under this Act, other than proceedings for offences'. The deletion of the struck through words would change the meaning of s 538, and would also make the body of the provision inconsistent with its heading, 'Jurisdiction of courts in New Zealand'. Words can only be deleted in the process of statutory construction if they can be given no sensible meaning or they would defeat the clear purpose of the provision.[60] That is not the position here. The words 'in New Zealand' do have work to do, and are far from nonsensical; rather, they effectively confine the ambit of the exclusive grant of jurisdiction.

65 Both ss 494 and 495 refer to 'the court'. While the definition of 'court' includes a parenthetical reference to s 538, and that parenthetical reference omits the qualifying language of 'in New Zealand' when describing the ambit of the High Court's exclusive jurisdiction, the parenthetical note cannot be construed as effectively amending s 538

---

[58] *Neilson*, 372 [125] (Gummow and Hayne JJ). See also at 411 [249] (Callinan J), 416–17 [267] (Heydon J); *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 (***Amaca***), 653 [103] (Spigelman CJ, with whom Santow and McColl JJA agreed); *United States Trust Co of New York v Australia & New Zealand Banking Group Ltd* (1995) 37 NSWLR 131 (***United States Trust Co of New York***), 147 (Sheller JA, with whom Mahoney and Meagher JJA agreed); *Damberg*, 505 [119] (Heydon JA, with whom Spigelman CJ and Sheller JA agreed).

[59] *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1997) 194 CLR 355, 382 [71] (McHugh, Gummow, Hayne and Kirby JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 266 [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 53, 62 [8] (Gleeson CJ); *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, 218 [276] (Tate JA).

[60] See Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) 127–8 [5.280], and the cases cited therein.

to omit the words 'in New Zealand'.[61]

66 Both the plaintiffs and the contradictor made the point that the generic term 'court' was used in the FMC Act because the Act also makes reference to foreign courts in subpart 7 of Part 9. That subpart is concerned with the enforcement of overseas pecuniary penalties in New Zealand. It refers, in s 584, to 'a judgment given by a court under a provision of the law of another country…', but thereafter refers to the court giving the judgment as the 'court of rendition', which term is defined in s 586. Given the use of a specific defined term in subpart 7, and the fact that the FMC Act defines the term 'court' using forward-looking language — 'the court before which the matter *is to be* determined' (whereas subpart 7 is concerned with judgments *already given* by foreign courts) —the fact that the FMC Act deals also with judgments of foreign courts does not, in my view, contribute materially to the analysis.

67 Similarly, the fact (relied on by the plaintiffs) that the FMC Act applies to some conduct occurring outside New Zealand does not, in my view, have any bearing on the question of construction in issue. Contrary to the plaintiffs' submission,[62] the application of the FMC Act to certain conduct occurring outside New Zealand by persons with a specified kind of connection with New Zealand,[63] does not positively support a proposition that claims in respect of such extraterritorial conduct, or intra-territorial conduct, could be brought in foreign courts. The extraterritorial application of the FMC Act is a neutral factor.

68 Sections 494 and 495 use the definite article 'the' in referring to 'the court'. I do not consider that the use of the definite article favours a construction of the FMC Act by which only a single, domestic court — by implication, the High Court of New Zealand — can determine claims alleging that civil liability provisions have been contravened and seeking compensation in respect of such contraventions. First, upon a natural construction of those provisions, references to 'the court' are references to the court to

---

61 The contradictor referred, in relation to this point, to *DPP (Vic) v Walters* (2015) 49 VR 356, 370 [51] (Maxwell P, Redlich, Tate and Priest JJA).

62 Plaintiffs' submissions, [88].

63 The plaintiffs referred to ss 33 and 239 of the FMC Act, which provide that certain provisions apply to specified conduct by certain persons outside New Zealand: Plaintiffs' submissions, [84].

which the application for compensation is made.

69 Secondly, the FMC Act does not use 'the court' in a manner that is distinct from its use of 'a court'. For example, s 23 (which prohibits a person from making unsubstantiated representations in trade) is a 'Part 2 fair dealing provision', being a provision in respect of which a compensatory order may be sought under ss 494 and 495. Section 24 specifies a number of matters to which 'a court' must have regard in assessing whether a person had reasonable grounds for the representation said to have been made in contravention of s 23. It would be a perverse reading of the FMC Act to construe it as demonstrating a legislative intention that allegations of contravention of s 23 could be brought before a court other than the High Court of New Zealand, including a foreign court, but claims for compensation for loss arising from the contravention could not.

70 Thirdly, if it had been intended that claims for contravention and compensation for breach of ss 19 and 270 could only be brought in the High Court of New Zealand, it may be expected that ss 494 and 495 would have referred to the 'High Court' (as does s 587).

71 Further, under s 5 of the Interpretation Act, headings to parts and sections are among the 'indications' to which regard may be had in ascertaining the meaning of an enactment. Preambles and notes are also included in the non-exhaustive list of 'indications'. The 'Overview' provided by s 5 of the FMC Act explains that:

> (h) Part 8 provides for enforcement and liability matters and for appeals, including—
>
> (i) providing the FMA and the High Court with certain powers to avoid, remedy, or mitigate any actual or likely adverse effects of contraventions of this Act or the regulations:
>
> (ii) the imposition of civil liability (including pecuniary penalty orders and compensation orders):
>
> (iii) offences:
>
> (iv) providing for appeals against the FMA's decisions or (in the case of financial advisers) the disciplinary committee's

decisions: …[64]

72 As may be seen, the provision of powers to the FMA (being the Financial Markets Authority) and the High Court are specifically identified in s 5(h)(i), whereas the reference to compensatory orders in s 5(h)(ii) is not described in terms which refer to any specific court. This corresponds with the arrangement of Part 8. Subpart 1 is headed 'FMA's enforcement powers', and confers various powers on the FMA, including, for example, the power to make 'stop orders'.[65] Subpart 2 is headed 'High Court's enforcement powers', and goes on to refer to the grant of injunctions, and also enables 'the court' (in context, the High Court) to make any order that the FMA could make under Part 8.[66] Subparts 1 and 2 of Part 8 tie back to s 5(h)(i). By contrast, subpart 3, headed 'Civil liability' then follows, without the use of the term 'court' being qualified in the same way as it is in subpart 2, which refers to the High Court. Subpart 3 ties back to s 5(h)(ii).

73 For the foregoing reasons, in my view the FMC Act does not expressly, or by clear implication, preclude foreign courts enforcing the relevant provisions of the FMC Act.

74 Accordingly, question 2 should be answered 'yes' in respect of the FMC Act.

The FT Act

75 I accept, for the reasons advanced by the contradictor (set out at paragraph 49 above) that:

(a) (subject to the observations of the NSW Court of Appeal in *Damberg* referred to above at paragraph 50) it is open to the parties to agree facts concerning foreign law; and

(b) the plaintiffs and the defendant have agreed that, on its proper construction, the FT Act allocates jurisdiction domestically and does not, expressly or by implication, preclude foreign courts enforcing the relevant provisions of the FT

---

64 FMC Act s 5(1)(h).
65 FMC Act s 462.
66 FMC Act ss 480, 483.

Act.

76 I do not consider that there is any reason to doubt the correctness of the parties' agreement as to the proper construction of the FT Act.

77 In any event, the law of New Zealand on the question has also been established by expert evidence. As noted above, the defendant obtained an opinion of Ms Cooper, an experienced member of senior counsel practising in commercial law in New Zealand. I accept that Ms Cooper has the necessary expertise and experience to give expert evidence on the question asked of her. The question that Ms Cooper was asked to address is as follows:

> As a matter of New Zealand law, are the claims made against the defendant in the preceding S ECI 2021 03654 under s 9 of the *Fair Trading Act 1980* (NZ) enforceable in the Supreme Court of Victoria[?]
>
> In answering this question, please address what references to "court" in section 43 of the *Fair Trading Act 1986* (NZ) mean, as a matter of New Zealand law, including whether that term is limited to courts located in New Zealand.[67]

78 Section 43(1) of the FT Act provides:

> **43 Other orders**
>
> (1) This section applies if, in proceedings under this Part or on the application of any person, a court or the Disputes Tribunal finds that a person (**person A**) has suffered, or is likely to suffer, loss or damage by conduct of another person (**person B**) that does or may constitute any of the following:
>
> (a) a contravention of a provision of Parts 1 to 4A (a **relevant provision**):
>
> (b) aiding, abetting, counselling, or procuring a contravention of a relevant provision:
>
> (c) inducing by threats, promises, or otherwise a contravention of a relevant provision:
>
> (d) being in any way directly or indirectly knowingly concerned in, or party to, a contravention of a relevant provision:
>
> (e) conspiring with any other person in the contravention of a relevant provision.

67 Affidavit of Jennifer Sarah Cooper affirmed 19 August 2022, [14].

79 Ms Cooper's research revealed limited case law addressing the question of whether a foreign court can and should give effect to a New Zealand statute. The two most relevant decisions Ms Cooper identified are *Rimini* and *YPG IP Ltd v Yellowbook.Com.Au Pty Ltd*.[68] In *Rimini*, an Australian corporate defendant and its principals raised an objection to jurisdiction in an application for interim relief relating to a franchise agreement which was governed by the laws of New Zealand.[69] The defendants contended that the proper forum was the Australian courts.[70] Randerson J considered whether it would be inappropriate or undesirable for Australian courts to apply New Zealand law. The Cooper Report sets out Randerson J's reasoning as follows:

> [4.6] Randerson J then addressed the plaintiff's argument that only New Zealand Courts had jurisdiction to grant relief under the Contractual Remedies Act, due to s 2 of the Act, which defined "Court" for the purposes of the Act as meaning the High Court, a District Court, or a Disputes Tribunal. The plaintiff submitted that, "because the Supreme Court of New South Wales was clearly not included in that definition, it could not grant remedies under the Act". The Court rejected this argument, reasoning as follows:
>
>> [44] The second question is whether the definition of "Court" would preclude Courts outside New Zealand from having jurisdiction to grant relief under the Contractual Remedies Act. In *Partnership Pacific Ltd v Mellsop* (1991) 5 PRNZ 619, Anderson J was confronted with a similar argument in relation to statutory definitions under Australian legislation (the Contracts Review Act 1980 and the Trade Practices Act 1974). His Honour stated at p 622:
>>
>>> "The definitions, as one would expect, define 'Court' in terms of domestic Courts. There is nothing extraordinary about that provision and nor is the New Zealand Court in any way inhibited from applying the proper law of a foreign country by virtue of such limitations in definition."
>>
>> [45] It is necessary to consider the definition of "Court" in the light of its statutory purpose which is clearly to define for domestic purposes which Courts in New Zealand have jurisdiction to apply the Act. The definition is silent about the Act's application by foreign Courts. Where a statute does not expressly or by clear implication exclude its application by foreign Courts, it must be open for foreign Courts of similar standing to apply it, subject to the ordinary limitations of private international law. To read the definition literally is to ignore the statutory purpose of defining "Court" for domestic purposes and would unnecessarily limit the application of the Act to exclude its

---

68 (High Court of New Zealand, Allan J, 13 July 2007) (***YPG***).

69 *Rimini*, 23–4 [1]–[4] (Randerson J).

70 *Rimini*, 24 [4] (Randerson J).

> application by foreign Courts.
>
> [46] It is commonplace for New Zealand legislation to define "Court": see, for example, s 2 of the Contractual Mistakes Act 1977, s 2 of the Credit Contracts Act 1981, and s 2 of the Fair Trading Act 1986. The literal interpretation suggested on behalf of the plaintiff would seriously limit the application of New Zealand statutes by foreign Courts where the parties have agreed New Zealand law is to apply and would inhibit the legitimate commercial expectations of persons and companies trading internationally.

[4.7] From the extract above it can be seen that *Rimini* stands for the following propositions:

> [4.7.1] Unless Parliament has expressly or by clear implication said otherwise, it is open for foreign courts of similar standing to apply a New Zealand statute (where otherwise appropriate according to private international law);
>
> [4.7.2] A provision in a statute which sets out for domestic purposes which Courts in New Zealand have jurisdiction to apply the statute will not displace the presumption in [4.7.1].

80 Ms Cooper noted that Randerson J's judgment in *Rimini* has been cited with apparent approval by Whata J in *Sequitur Hotels Pty Ltd v Satori Holdings Ltd*[71] and referred to by the authors of *The Conflict of Laws in New Zealand*.[72]

81 The Cooper Report then addressed, comprehensively, why the decision in *YPG*, which is inconsistent with *Rimini*, is not good authority. In *YPG*, Allan J found that Australian courts have no jurisdiction to deal with claims brought under the FT Act.[73] The report sets out why the only case cited in support of Allan J's conclusion does not support that conclusion, notes that *Rimini* was not referred to, and that deficiencies in the decision in *YPG* may be partly attributable to the fact that two of the defendants did not appear and the third defendant appeared in person, meaning that Allan J did not have the benefit of submissions from opposing counsel.[74]

82 Having concluded that the decision of Randerson J in *Rimini* is correct and the decision in *YPG* is not good authority, Ms Cooper set out her opinion concerning the

---

71 [2020] NZHC 2032, [66].

72 Maria Hook and Jack Wass, *The Conflict of Laws in New Zealand* (LexisNexis, 2020) 276–7 [4.6.1]–[4.6.2].

73 *YPG*, [25].

74 Cooper Report, [4.16]–[4.19].

application of New Zealand law to the question posed for her opinion as follows:

> [5.1] As stated above at [3.1], I have adopted the assumption that the *lex causae* for the relevant claims is New Zealand law. Applying *Rimini,* the remaining question is whether the FTA "expressly or by clear implication exclude[s] its application by foreign Courts".
>
> [5.2] Like the statute at issue in *Rimini,* the FTA is silent as to its application by foreign courts. Therefore, the issue is whether the FTA excludes by clear implication its application by foreign Courts.
>
> [5.3] The plaintiffs seek relief under s 43 of the FTA. Section 43 sets out the orders "[t]he court or the Disputes Tribunal" is empowered to make if it finds that a person has suffered, or is likely to suffer, loss or damage by the conduct of another person that does or may constitute, inter alia, a breach of s 9 of the FTA.
>
> [5.4] The term "court" is not defined in the FTA. However, ss 37 to 39 set out the jurisdiction of, respectively, the High Court, the District Court and the Disputes Tribunal.
>
> [5.5] I cannot see any basis for distinguishing *Rimini.* Like the definition of "Court" in the statute at issue in *Rimini,* the function of ss 37 to 39 of the FTA is to define for domestic purposes which courts in New Zealand have jurisdiction to apply the FTA. They do not evince a parliamentary intention that *only* the courts of New Zealand are to have jurisdiction to enforce those statutory provisions, any more than the definition of "Court" at issue in *Rimini* evinced such an intention. Therefore, in my view, these provisions do not displace the presumption that the FTA may be applied in appropriate circumstances by foreign courts.
>
> [5.6] For clarity, I note that my opinion is not based on the fact that "court" is *not* defined in the FTA, and therefore can be more broadly interpreted than it could if it were defined by reference to domestic courts. If "court" were defined in the FTA by reference to domestic courts, in my view *Rimini* would still apply and the result would be the same.
>
> [5.7] Finally, under New Zealand law, the presumption against extraterritoriality has no application in this context. The claims of this subset of group members for contraventions of New Zealand law are based on conduct by the defendant in New Zealand. The Supreme Court of Victoria is not being asked to apply the FTA extraterritorially. It follows, too, that the principles of international comity reflected by the presumption have no relevance here.

83 It is clear from the authorities referred to above (at paragraphs 49 to 50 and 52) that the Court should not lightly decline to accept an uncontested expert opinion. The paucity of authority on the relevant New Zealand law — which is a matter referred to by Ms Cooper — means that the observations made in *James Hardie* do not apply to the foreign law considered by Ms Cooper. Nevertheless, I have no reason to reject

Ms Cooper's opinion. It is careful, considered and is not patently absurd or inconsistent.[75]

Answer to Question 2

84 Accordingly, question 2 should be answered 'yes' in respect of both the FMC Act and the FT Act.

Question 3: Remedies

85 The third question is framed as follows:

> In respect of any contravention by the defendant of s 9 of the FT Act NZ or ss 19(2) and 270 of the FMC Act NZ, does the Supreme Court of Victoria have power to:
>
> A. make a declaration that the defendant contravened the provisions; and
>
> B. award compensation for loss or damage suffered because of the defendant's contraventions, pursuant to s 43 of the FT Act NZ, ss 494 and 495 of FMC Act NZ, s 29(2) of the *Supreme Court Act 1986* (Vic), s 85(1) of the *Constitution Act 1975* (Vic) or the inherent jurisdiction of the Court?

Declaratory relief

86 The first part of question 3 addresses declaratory relief. The plaintiffs and the contradictor submitted that there was no difficulty in answering question 3 in the affirmative so far as declaratory relief is concerned. I agree with their submissions.

87 This Court has power to grant declaratory relief under s 36 of the Supreme Court Act. In addition, this Court, like all superior courts, has inherent power to grant declaratory relief.[76] Where a State court exercises federal jurisdiction, s 36 of the Supreme Court Act is picked up by s 79 of the Judiciary Act.[77] There is also no impediment to granting declaratory relief in proceedings brought under Part 4A of the Supreme Court Act.[78] The grant of declaratory relief is discretionary,[79] but question 3 raises no issue

---

75 *James Hardie*, 573 (Sheller JA), cited in *Neilson*, [185] (Kirby J).
76 *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 (***CGU***), 346 [13] (French CJ, Kiefel, Bell and Keane JJ).
77 *CGU*, 347 [13].
78 Section 33Z(1)(c) of the Supreme Court Act.
79 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581–2 (Mason CJ, Dawson, Toohey and Gaudron JJ).

concerning the ultimate exercise of the discretion.

Monetary compensation

88 As may be seen, the second part of the question is framed in terms which identify a range of potential bases for the 'power' to award compensation for loss or damage suffered because of the defendant's contraventions of the FMC Act and the FT Act. The bases include s 43 of the FT Act (which is set out at paragraph 78 above), and ss 494 and 495 of the FMC Act (which are set out at paragraph 56 above). I will refer to s 43 of the FT Act and ss 494 and 495 of the FMC Act as the **New Zealand relief provisions**. In addition to the New Zealand relief provisions, question 3 identifies s 29(2) of the Supreme Court Act, s 85(1) of the Constitution Act and the inherent jurisdiction of the Court as potential bases for the 'power' in question.

Power is to be distinguished from questions concerning the existence of rights and liabilities which occasion the exercise of the power

89 In order to put the discussion which follows in context, it is necessary to say something about the way in which question 3 is framed, and the submissions which were made about it, as some confusion arose in the course of the hearing concerning the place of the New Zealand relief provisions in the analysis.

90 The plaintiffs' submissions referred, at a number of points, to the plaintiffs seeking relief 'under' the New Zealand relief provisions.[80] But elsewhere, the plaintiffs' submissions stated that they referred to those provisions *only* in order to indicate the remedies that would be available in a New Zealand court.[81] In that sense, the New Zealand relief provisions were treated as merely illustrative, and the existence of a 'power' to grant monetary compensation was regarded as a sufficient basis to award compensation, without the need to identify any specific legislative provisions entitling the plaintiffs and group members to compensation for loss suffered due to contraventions of the specific provisions in question. The contradictor's submissions also characterised the plaintiffs' claims as claims for damages 'under' the New

---

[80] See, eg, Plaintiffs' submissions, [20], [81], [89].
[81] Plaintiffs' submissions, [100]–[101].

Zealand relief provisions.[82]

91 As the argument proceeded at the hearing, the plaintiffs and the contradictor clarified the role of the New Zealand relief provisions by reference to Australian choice of law principles. They also developed the concept of 'power' in a way that more clearly distinguished between the Court's 'power' to order remedies of a particular kind, and the separate, but related, question of whether there will be an occasion for the Court to exercise that power having regard to the body of law which determines the parties' rights and liabilities.

92 In my view, question 3 is not well framed to expose the distinct issues that need to be addressed. Question 3 refers to the ultimate relief that may be ordered; *viz*, the award of compensation for the contravention of specific statutory provisions. As such, it does not clearly distinguish between the concept of the Court's 'power' to make orders of a particular kind in the abstract, and the identification of the legal basis constituting the occasion on which the Court may exercise its powers to grant compensation for loss or damage in respect of the contraventions alleged.

93 The substantive issue raised by question 3 is whether, assuming that the lex causae is the law of New Zealand[83] and that the plaintiffs succeed in establishing contraventions of the New Zealand provisions in issue, this Court will be able to award monetary compensation to the plaintiffs and group members who establish loss with the necessary causal connection. In my view, this substantive issue must be addressed by distinguishing the concept of the Court's 'power' to grant relief of a certain kind from the question of whether there may exist a legal basis upon which to exercise that power, having regard to private international law principles.

94 To foreshadow the course of reasoning that follows: I first address the need to identify sources of 'power' that are local. The powers of this Court rest on local (Victorian)

---

82 Contradictor's submissions, [19]–[20].

83 Both the contradictor and the plaintiffs approached the question on the basis that the Court was not being asked to determine, but to assume, that the lex causae was the law of New Zealand: Contradictor's submissions, [22]; Plaintiffs' submissions, [18].

law; foreign legislatures cannot confer 'power' on this Court.

95 I then address the need to identify a statutory basis for recovery of compensation for loss or damage caused by contraventions of statutory norms (there being no tortious claims in respect of the alleged statutory contraventions in the present proceeding).

96 I next address the private international law principles relevant to the consideration of whether the New Zealand relief provisions form part of the substantive law of New Zealand so that, assuming the lex causae is the law of New Zealand, those provisions establish an entitlement on the part of relevant group members to recover their loss or damage.

Conferral of power on the Supreme Court by State laws and the exercise of federal jurisdiction

97 It is the laws of Victoria that establish the Supreme Court of Victoria and which vest powers in it under State law. To put the proposition in the negative, parliaments of overseas countries cannot vest powers in this Court (or any other court established by an Australian polity), just as they cannot create courts in a foreign jurisdiction.[84]

98 The laws of Victoria include the Constitution Act and the Supreme Court Act.

99 The Supreme Court of the State of Victoria is established by s 75(1) of the Constitution Act. Sections 85(1) and 83(3) of the Constitution Act provide that:

> **85 Powers and jurisdiction of the Court**
>
> (1) Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.
>
> [Section 85(2) has been repealed]
>
> (3) The Court has and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as it had immediately before the commencement of the **Supreme Court Act 1986**.[85]

---

84 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 573 [108] (Gummow and Hayne JJ).

85 Emphasis in original.

100 Section 29(2) of the Supreme Court Act provides as follows:

> (2) Every court referred to in subsection (1) [being every court exercising jurisdiction in Victoria in any civil proceeding] must give the same effect as before the commencement of this Act—
>
> (a) to all equitable estates, titles, rights, reliefs, defences and counter-claims, and to all equitable duties and liabilities; and
>
> (b) subject thereto, to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or created by any Act—
>
> and, subject to the provisions of this or any other Act, must so exercise its jurisdiction in every proceeding before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of proceedings concerning any of those matters is avoided.

101 When State courts exercise federal jurisdiction, s 79(1) of the Judiciary Act operates to 'pick up' certain State laws and thus equip the State courts with the powers necessary for the determination of matters in federal jurisdiction. As explained by Kiefel CJ in *Rizeq v Western Australia*:

> Section 79(1) is not directed to the rights and duties of persons. It is directed to courts exercising federal jurisdiction. Its purpose is to fill a gap in laws which will regulate matters coming before those courts and to provide those courts with powers necessary for the hearing or determination of those matters. The laws upon which s 79 operates should be understood in this way.
>
> The examples given in s 79(1) of laws relating to procedure and evidence are, clearly enough, laws necessary for the hearing of a matter. State laws which provide a court with powers to make particular orders, grant injunctive relief or impose a penalty are necessary for the determination of a matter. These are not State laws which can operate of their own force upon courts exercising federal jurisdiction. It is necessary that s 79 operate upon them so that they may be "picked up" and applied.[86]

102 Similarly, in *Rizeq*, the plurality stated:

> [Section] 79 of the *Judiciary Act* takes the text of State laws conferring or governing powers that State courts have when exercising State jurisdiction and applies that text as Commonwealth law to confer or govern powers that State courts and federal courts have when exercising federal jurisdiction.[87]

103 In *Rizeq*, Kiefel CJ observed that the bounds of s 79(1) are not to be understood by

---

86 (2017) 262 CLR 1 (***Rizeq***), 15 [20]–[21] (citations omitted).

87 *Rizeq*, 35 [87] (Bell, Gageler, Keane, Nettle and Gordon JJ).

classifying State laws as 'substantive' or 'procedural', but by reference to the purpose of s 79(1) in connection with the courts to which it is directed.[88] Where State courts exercise federal jurisdiction, they are invested with authority to decide certain matters, but the investment of that authority to decide does not determine the law to be applied.[89] Having regard to the purpose of s 79(1), Kiefel CJ observed that it is 'not directed to the rights and duties of persons' but to the gap-filling exercise her Honour went on to set out.

104 In my view, there can be no real scope to doubt that, when this Court hears matters in exercise of its federal jurisdiction (including any issues which form part of the same matter, but which involve the application of the law of New Zealand as the substantive law), it has, and may utilise, its power to grant declaratory relief, and to award monetary compensation *if* the law being applied by it entitles a person (be it a plaintiff or group member) to monetary compensation. Monetary relief may be awarded in proceedings brought under Part 4A of the Supreme Court Act.[90]

105 Question 3 also refers to this Court's inherent jurisdiction. To the extent that it was suggested by the plaintiffs that this Court's inherent jurisdiction means that orders for monetary compensation could be made without reference to a statutory source establishing an entitlement to compensation, I do not accept that is the case. The contradictor noted in his submissions that he had 'not located any authority for the proposition that there is inherent jurisdiction to award damages for contraventions of statute (whether foreign or domestic)'.[91] This is consistent with the position, which I address below, requiring the plaintiffs and relevant group members to identify a statutory cause of action, by reference to which this Court may exercise its power to order monetary compensation.

106 By its 'inherent jurisdiction', a court has power to prevent the abuse of its process and

---

88 *Rizeq*, 14–15 [18]-[19].

89 *Rizeq*, 12 [7], 12–13 [9] (Kiefel CJ), 23–4 [52]–[54] (Bell, Gageler, Keane, Nettle and Gordon JJ).

90 Section 33Z(1)(e) of the Supreme Court Act.

91 Contradictor's submissions, [100].

to punish for contempt.[92] However, the status of the Supreme Court of Victoria as a superior court of unlimited jurisdiction does not assist the plaintiffs in relation to the issue of whether this Court could ultimately award compensation to the plaintiffs and group members for established contraventions of the New Zealand statutes. Unless the statutory norm of conduct is one, the breach of which gives rise to a claim in tort for breach of statutory duty — which is not this case — compensation is granted to persons suffering loss when and where a statute stipulates that such persons are entitled to monetary compensation. The occasion for the exercise of power to grant compensation depends on that entitlement. The power to award compensation is unlike the powers superior courts have to prevent the abuse of their processes or to punish for contempt, or which arise as a necessary adjunct to the effective adjudication of the proceeding.[93]

The need to identify a cause of action to obtain monetary compensation for breaches of statute

107 I do not consider that, simply because this Court has the power to order monetary compensation and grant declaratory relief, it would be open to this Court to make orders for monetary compensation for breach of the New Zealand statutes simply upon being satisfied of the alleged contraventions and that loss has been caused by those contraventions. As noted above, the existence of a power needs to be distinguished from the occasion for, and manner of, its exercise. In litigation between private parties, courts exercise their powers to quell controversies and give effect to the parties' rights and liabilities; the exercise of power is not at large. As explained by Edelman J in *Rizeq*, 'the power exercised within the authority to decide is the power "to make, declare, or apply the law"'[94] and the 'exercise of power *gives effect to* a right, duty or liability'.[95]

---

92 *Baker v The Queen (No 2)* [2022] VSCA 171 (***Baker***), [19] (Emerton P, Priest and Niall JJA), quoting *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J).

93 See *Baker*, [21], [27]. See also *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 17–18 [37]–[38] (French CJ, Kiefel, Bell, Gageler and Gordon JJ), referred to in *Baker*, [23].

94 *Rizeq*, 48 [130], quoting Peter Stephen Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1824), 21.

95 *Rizeq*, 48 [130] (emphasis in original).

108 Similarly, the High Court in *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* said, in relation to s 22 of the Federal Court Act (which provides for the complete and final determination of matters, and has some features in common with s 29(2) of the Supreme Court Act) and s 23 (which confers general powers on the Federal Court):

> **Section 22** [of the Federal Court Act] is a "Judicature Act" provision, designed to ensure that the Court can grant relief which is appropriate to both legal and equitable claims and to avoid multiplicity of proceedings. Its effect is to enable the Court to dispose of all rights, legal and equitable, in the one action, so far as that is possible … **It does not confer authority to grant an injunction in circumstances where a plaintiff has no case for relief by way of injunction under the general law or by statute**. So also with **s. 23**; it arms the Court with power to make all kinds of orders and to issue all kinds of writs as may be appropriate, but it **does not provide authority for granting an injunction where there is otherwise no case for injunctive relief**.[96]

109 Under Australian law, a person adversely affected by another person's breach of a statute does not have an automatic right to monetary compensation for loss or damage caused by that other person's breach of statute. In the absence of any evidence that New Zealand law differs, I apply the assumption that the law of New Zealand is the same on this point.[97] Indeed, if the law of New Zealand were otherwise, the New Zealand relief provisions would be unnecessary. In general, some persons adversely affected by a breach of a statute may have a claim for breach of statutory duty, and some may have a cause of action created by a statutory provision which provides (by whatever precise formulation) that a person suffering loss or damage caused by the contravention may obtain an order for monetary compensation.

110 As explained by Leeming JA in *Vickery v The Owners – Strata Plan No 80412*,[98] the tort of breach of statutory duty is a cause of action at common law which arises where a statute not only imposes a duty, but also gives rise to a cause of action in tort, sounding in damages.[99] Such claims may be contrasted with cases in which a breach of statute

---

96 (1981) 148 CLR 150 (***Thomson***), 161 (emphasis added) (Gibbs CJ, Stephen, Mason and Wilson JJ).

97 *Amaca*, 653 [103] (Spigelman CJ, with whom Santow and McColl JJA agreed). See also *Neilson*, 372 [125] (Gummow and Hayne JJ), 411 [249] (Callinan J), 416–17 [267] (Heydon J); *United States Trust Co of New York*, 147 (Sheller JA, with whom Mahoney and Meagher JJA agreed); *Damberg*, 505 [119] (Heydon JA, with whom Spigelman CJ and Sheller JA agreed).

98 (2020) 103 NSWLR 352 (***Vickery***).

99 *Vickery*, 375 [85]. See also *Vickery*, 376 [87]–[88].

is relied upon as supporting an element of another cause of action, such as negligence.[100]

111 In *Vickery*, Leeming JA contrasted common law claims for damages arising from an implied cause of action arising from the terms of the statute with claims for damages for breach of statutory duties which have linked provisions conferring a right to damages on the person affected, giving s 236 of the ACL as an example. As Leeming JA explained:

> In both cases, statute imposes a duty. But the right to damages for losses caused by the breach of statutory duty is derived from the common law; in the case of the Australian Consumer Law, it is derived from statute. There are many other instances of regimes which directly impose norms of conduct and entitle persons to bring proceedings recovering damages.
>
> …
>
> These regimes might all be described as instances of "breach of statutory duty", but it is not usual in Anglo-Australian law to do so. It is more usual to refer to an action to enforce a statutory right as a statutory cause of action: see *Stryke Corporation Pty Ltd v Miskovic* [2007] NSWCA 72 at [5].[101]

112 In *Vickery*, Leeming JA found that s 106(5) of the *Strata Schemes Management Act 2015* (NSW)[102] gave rise to a tortious cause of action (rather than a statutory cause of action),[103] whereas Basten JA (with whose conclusions White JA agreed) reached the opposite conclusion.[104] In the course of his Honour's reasoning, Basten JA observed that where a statute expressly provides for a cause of action in damages (as do the New Zealand relief provisions), the High Court has 'eschewed treating the remedial purpose of the statute as necessarily reflecting a cause of action, or requiring an assessment of damages, as if a common law cause of action'. His Honour gave, as examples, s 236 of the ACL, and its predecessor, s 82 of the *Trade Practices Act 1974*

---

100 *Vickery*, 359 [15] (Basten JA, considering and explaining the judgment of Dixon J in *O'Connor v SP Bray Ltd* (1937) 56 CLR 464, 477–8).

101 *Vickery*, 375–6 [85].

102 Section 106(1) imposed duties on an owners corporation in relation to the maintenance of properties, and s 106(5) provided that the owner of a lot 'may recover from the owners corporation, as damages for breach for statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation'.

103 *Vickery*, 377 [91]–[92].

104 *Vickery*, 359–60 [16]–[19].

(Cth) (the **TPA**),[105] which was addressed by the High Court in *Henville v Walker*[106] and in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Ltd*.[107]

113 Many statutes creating such statutory causes of action establish a norm of conduct in one section, and a right to compensation on the part of a person adversely affected by the contravention, in another section.[108] As Gleeson CJ, Gaudron and Gummow JJ identified in *Edensor*, a single statutory provision may have one or more of these different characteristics:

> There is a further point to be made here. A law may in the one provision create the norm of legal liability, and go on to provide (i) a remedy and (ii) a curial forum to administer that remedy. *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*, in which s 58E of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) was construed and held valid, provides a classic instance of this species of law. **Other laws may prescribe a norm of conduct, but leave to another law or laws the provision of a remedy and the conferral of jurisdiction. Section 52 of the Trade Practices Act is a well-recognised example of this species.** It prescribes the relevant norm of conduct and other provisions, such as ss 80, 82 and 87, provide remedies, while s 86 confers jurisdiction to administer them.[109]

114 Prior to the reforms which saw the introduction of the ACL, the norm of conduct prohibiting misleading or deceptive conduct in trade or commerce was found in s 52 of the TPA, and s 82 enabled a person who suffered loss or damage by conduct in contravention of (inter alia) s 52 to recover the amount of the loss or damage, and also specified the time within which an action could be commenced. The Full Court of the Federal Court in *Western Australia v Wardley Australia Ltd* described s 82 as the kind of provision which has a 'double function', creating both a right and a remedy.[110] Section 82 was, as Spender, Gummow and Lee JJ stated, a provision which 'confers a right to recover', which is exercisable against the contravenor, and some other persons (such as any person involved in the contravention).[111] The Full Court's decision was

---

105 *Vickery*, 359–60 [17] (Basten JA).

106 (2001) 206 CLR 459, 470 [18] (Gleeson CJ).

107 (2002) 210 CLR 109, 124 [42] (Gaudron, Gummow and Hayne JJ).

108 To set out but one example, s 674 of the Corporations Act imposes a norm of conduct requiring that listed disclosing entities disclose certain information, and s 1317HA enables a person who suffers loss or damage resulting from the contravention of various provisions to obtain compensation.

109 *Edensor*, 590–1 [66] (citation omitted, emphasis added).

110 (1991) 30 FCR 245 (***Wardley***), 257 (Spender, Gummow and Lee JJ).

111 *Wardley*, 257.

affirmed on appeal by the High Court, with Mason CJ, Dawson, Gaudron and McHugh JJ describing s 82 as a provision creating a statutory cause of action.[112] Even where, as a matter of drafting, a provision is expressed in terms stating that a court 'may' make certain orders, that provision creates a right on the part of the person who may apply to the court to make orders of that kind.[113]

115 There is no suggestion in this proceeding that the claims of the plaintiffs and group members for compensation for the alleged breach of the New Zealand provisions constitute common law (tortious) claims of the kind which Basten JA and Leeming JA distinguished from claims to compensation advanced in enforcing what Basten JA described as a 'cause of action for damages' expressly created by statute.[114]

116 Given that I do not accept that this Court could, or would, order monetary compensation without reference to a statutory provision entitling the plaintiffs and group members to compensation for loss or damage, the question then arises whether the New Zealand relief provisions supply the necessary statutory basis.

117 As referred to above, through the course of oral submissions, the distinction between power and the occasion for the exercise of power was more clearly drawn. The plaintiffs ultimately submitted that the New Zealand relief provisions formed part of the substantive law of New Zealand as follows:

> [T]he substantive law of New Zealand includes in our submission s 43 but this court doesn't use s 43 to grant the remedy.[115] It applies all of the New Zealand law in order to work out if there's been a contravention, if damages can be awarded. But in awarding them, it avails itself of its power under a State Act.[116]

118 The contradictor, while describing the question of whether the New Zealand relief provisions would be applied as part of the substantive law of New Zealand as

---

112 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525.

113 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 (***Ex parte Barrett***), 153 (Latham CJ). See also *Chappell (as Executor of the Estate of Hitchcock) v Goldspan Investments Pty Ltd* [2021] WASCA 205, [39] where Buss P and Mitchell JA confirmed that the 'statutory cause of action conferred by' s 82(1) of the TPA cannot be assigned.

114 *Vickery*, 359–60 [16]–[17].

115 Discussion in submissions used s 43 of the FT Act as an example of the New Zealand relief provisions.

116 T100.9–15.

'difficult' in light of the caveat in *Zhang* (to which I return below), submitted that:

> Essentially, the court is applying the substantive law of New Zealand. The substantive law of New Zealand creates a right to damages. The substantive law of New Zealand might also make provision about what heads of damage are available or how the quantum of damages should be assessed. And this court, applying its own choice of law rules would, ordinarily apply those rules. That is what *Pfeiffer v Rogerson* says. That is what our court, in respect of interstate torts, that is what the High Court in *Zhang* came very close to saying, but left open for future reference.[117]

119 For the reasons set out below, I agree with the submissions of the plaintiffs and the contradictor that the New Zealand relief provisions relevantly form part of the substantive law of New Zealand, which is to be applied to the determination of the New Zealand law claims (on the assumption that the lex causae is the law of New Zealand). It is not necessary, in order to address question 3, to determine whether any subsequent issues as may arise concerning whether, for example, heads of damage or quantification, would be resolved by reference to the law of New Zealand, or the law of the forum (noting the caveat expressed by the High Court in *Zhang*, to which I return).

Choice of law and 'torts': Pfeiffer, Zhang, Neilson and Amaca

120 The application of choice of law rules may, but will not necessarily, direct attention to laws other than those of the forum.[118] Where an Australian court selects a non-Australian lex causae, it does so in the application of Australian, not foreign, law.[119] Where a foreign lex causae is selected, the 'rights and duties of the litigants' are determined according to that lex causae.[120]

121 The application of choice of law rules is to be approached having regard to the traditional distinction between substantive law (to which choice of law rules are applied) and procedural law, which is governed by the lex fori alone.[121] This

---

117 T72.8–18.

118 *Pfeiffer*, 528–9 [47] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

119 *Zhang*, 517 [67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

120 *Zhang*, 517 [67].

121 *Pfeiffer*, 528 [46], 543 [97] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), referring to *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1 (***McKain***), 40 (Brennan, Dawson, Toohey and McHugh JJ).

distinction continues to be used, notwithstanding the difficulties which attend its application. Those difficulties were acknowledged by the High Court in *Pfeiffer*. There, the plurality (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) observed that '[t]here is much history that lies behind the distinction, but search as one may, it is hard to find, if not impossible, to identify some unifying principle which would assist in making the distinction in a particular case'.[122] However, the plurality persisted in using this distinction because it 'is clearly recognised for a number of forensic purposes'.[123]

122 In *Pfeiffer*, a workman sued his employer in tort in the Supreme Court of the Australian Capital Territory. The laws of the ACT did not impose any limit on the amount of damages that could be awarded for non-economic loss, whereas the laws of NSW did. The accident causing the workman's injury occurred in NSW.

123 While the workman's claim alleged negligence (and so was a claim in tort, as that term is understood in a domestic legal context), as the plurality confirmed, the term 'tort' has a wider meaning in the choice of law context. As their Honours stated:

> It should be noted that the term 'tort' is used in this context to denote not merely civil wrongs known to the common law but also acts or omissions which by statute are rendered wrongful in the sense that a civil action lies to recover damages occasioned thereby.[124]

124 The plurality identified the following two guiding principles underpinning the need to distinguish between substantive and procedural issues:[125]

> First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum (but does in the place where a wrong was committed) should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum. **Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters**

---

122 *Pfeiffer*, 542–3 [97].

123 *Pfeiffer*, 543 [97], citing *McKain*, 40. Justice Kirby in *Pfeiffer* also affirmed the utility of the distinction as one that was 'well settled', however conceded that it was also 'sometimes controversial' and 'the boundaries between the two categories are indistinct': at 533–4 [131].

124 *Pfeiffer*, 519 [21].

125 *Pfeiffer*, 543–4 [99] (citations in original, emphasis added).

> **that, on their face, appear to be concerned with issues of substance**, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain*,[126] "rules which are directed to governing or regulating the mode or conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive.[127]

125 The plurality concluded, then, that:

(a) the application of limitation periods should be regarded as a question of substance, and not procedure, and therefore governed by the lex loci delicti; and

(b) '*all* questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti'.[128]

126 The plurality in *Pfeiffer* made it clear that the High Court was not addressing the principles to be applied to *international* (as opposed to intranational) torts (understood in the wider sense of the word). Their Honours emphasised that the Court was putting 'issues that might arise in an international context entirely to one side' and highlighted the significance of federation and the common law being the common law *of Australia* to the determination of the case.[129]

127 Taking due account of the nature of Australian federalism, the plurality concluded that the lex loci delicti should be applied by courts in Australia as the law governing 'all questions of substance to be determined in a proceeding arising from an intranational tort', and that laws that bear on the 'existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws'.[130]

128 Although the High Court's conclusion in *Pfeiffer* — that the lex loci delicti is to be applied to all questions of substance (including laws bearing upon remedies) — was

---

126 (1991) 174 CLR 1, 26–7.
127 *Stevens v Head* (1993) 176 CLR 433, 445 (Mason CJ).
128 *Pfeiffer*, 544 [100] (emphasis in original).
129 *Pfeiffer*, 514–15 [2].
130 *Pfeiffer*, 544 [102].

explicitly confined to intranational torts, various themes and observations of the plurality shed light on the proper analysis of international torts.

129 First, the connection between the operation of choice of law rules, and the undesirability of different outcomes being obtained depending on where litigation is conducted,[131] is a theme which survives the translation from the intra-Australian context, to the international context. As the plurality observed, such disparate outcomes are more likely if the forum does not give effect to the law of the place of the commission of the tort (the lex loci delicti) but instead applies the law of the forum (the lex fori).[132]

130 Secondly, the plurality's adoption of a broad conception of the matters which constitute matters of substance — and a correspondingly narrow conception of matters of procedure — has application outside the intra-Australian context. As the plurality observed, characterising a question as one of substance does not, ipso facto, mean that the law of the foreign forum will be the law to which choice of law rules will direct attention.[133]

131 The same members of the High Court constituted the plurality in *Zhang*, which addressed the question of whether the conclusion reached in *Pfieffer* should extend to international torts.

132 Zhang was injured in a car accident in New Caledonia and, being a resident of New South Wales, brought proceedings in the Supreme Court of NSW alleging negligence in the design and manufacture of the Renault car he was driving when the accident occurred in New Caledonia. The Renault companies sought a stay of the NSW action on the ground that the Supreme Court of NSW was an inappropriate forum for the trial.

133 The plurality held that the 'double actionability' rule does not apply in Australia to

---

131 *Pfeiffer*, 518 [17], 528 [44]. See also *Neilson*, 342 [13] (Gleeson CJ), 363 [89]–[90] (Gummow and Hayne JJ).
132 *Pfeiffer*, 518 [17].
133 *Pfeiffer*, 544 [100].

'international torts'.[134] Given the context of that holding, and the surrounding discussion, their Honours' references in the passages quoted above and below to 'torts' and 'foreign torts' are to be understood as references to 'torts' as that term is used in the choice of law context, and as it was explained by the High Court in *Pfeiffer*.[135] In this context, the term 'tort' includes 'acts or omissions which by statute are rendered wrongful in the sense that a civil action lies to recover damages occasioned thereby'.[136]

134 The plurality in *Zhang* put the central question concerning the extension of *Pfeiffer* as follows:

> The question then is whether, consistently with *Pfeiffer*, and by way of extension to it, it is the lex loci delicti which should be applied by courts in Australia governing **questions of substance** to be determined in a proceeding arising from a foreign tort.[137]

135 The plurality concluded that the answer was 'yes' but added a caveat, as follows:

> The submission by the Renault companies is that the reasoning and conclusion in *Pfeiffer* that the substantive law for the **determination of rights and liabilities** in respect of intra-Australian torts is the lex loci delicti should be extended to foreign torts, despite the absence of the significant factor of federal considerations, and that this should be without the addition of any ''flexible exception''. That submission should be accepted.
>
> To that outcome, several caveats should be entered. In *Pfeiffer*, reference is made to the difficulty in identifying a unifying principle which assists in making the distinction, in this universe of discourse, between questions of substance and those of procedure. **The conclusion was reached that the application of limitation periods should continue to be governed by the lex loci delicti and, secondly, that: ''*all* questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti.'' (Original emphasis.) We**

---

134 *Zhang*, 515 [59]–[60] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

135 See also the passages in Lord Collins (ed), *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell, 13th ed, 2000) vol 2, 1517–19 and Adrian Briggs, 'Choice of Law in Tort and Delict' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 519, 512–22, referred to by the plurality in *Zhang* at 520 [74] n 147. Moreover, as the plurality concluded that, applying their holding extending *Pfeiffer* to foreign torts, the determinative law was not the law of NSW (as it was not the law of the place of the wrong), it follows that no narrow (common law) conception of 'torts' underpinned their analysis as the law creating the wrong in French law (which applied in New Caledonia) was the *French Civil Code* (as is clear from the judgment of Kirby J). The *French Civil Code* art 1382 provided: 'Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.' Art 1383 provided: 'Each one is liable for the damage which he causes not only by his own act but also by his negligence or imprudence.': *Zhang*, 549 [165] n 327 (Kirby J).

136 *Pfeiffer*, 519 [21].

137 *Zhang*, 515 [61] (emphasis added).

> **would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort**….[138]

136 In *Neilson*, the High Court returned to the theme (identified above in relation to *Pfeiffer*) that choice of law rules are informed by trying to avoid parties obtaining advantages by forum shopping. There, Gummow and Hayne JJ stated that:

> Once Australian choice of law rules direct attention to the law of a foreign jurisdiction, basic considerations of justice require that, as far as possible, the **rights and obligations of the parties should be the same** whether the dispute is litigated in the courts of that foreign jurisdiction or is determined in the Australian forum.[139]

137 Of course, as *Neilson* itself illustrates, the lex loci delicti may itself apply the law of the forum, or of a third jurisdiction.[140] In *Neilson*, an Australian living in the People's Republic of China was injured by a fall in an apartment provided by an Australian company. The Chinese *Principles of Civil Law* art 136 imposed a one year limitations period, but art 146 provided that, if both parties are nationals of the same country or domiciled in the same country, 'the law of their own country or of their place of domicile may also be applied'. The lex loci delicti included art 146, with its rider. As explained by Gummow and Hayne JJ, in applying the lex loci delicti, the trial judge should have inquired how a *Chinese* court would exercise the discretion afforded by art 146, rather than treating it as empowering him to choose to apply Australian law.[141]

138 In *Neilson*, Gummow and Hayne JJ confirmed that the 'rights and obligations' of the parties are to be regarded as matters of substance (so that different outcomes would

---

138 *Zhang*, 520 [75]–[76] (citations omitted, emphasis in bold added). The High Court also reserved for another occasion further consideration of the rule in *British South Africa Co v Companhia de Moçambique* [1893] AC 602 and the standing of *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, but neither reservation is relevant to the present issues as neither foreign land nor foreign patents are involved. The plurality did not explain why they reserved for another occasion the question of whether '*all* questions about the kinds of damage, or amount of damages that may be recovered' ought to be regarded as matters of substantive law for the purposes of international torts. It may be that the caveat was included given the terms of the Australian Law Reform Commission's 1992 report titled *Choice of Law*, which was raised by the respondent in argument in *Zhang* and recommended (at 137 [10.45]) a different position be adopted with respect to the substance/procedure distinction in intra- and inter- national torts: Transcript of Proceedings, *Regie National des Usines Renault SA v Zhang* [2001] HCATrans 336 (9 August 2001), 7013–34.

139 *Neilson*, 363 [90] (emphasis added).

140 *Neilson*, 367 [103] (Gummow and Hayne JJ).

141 *Neilson*, 369 [113]. See also 342–3 [15]–[16] (Gleeson CJ).

not obtain based on the forum in which the proceeding is heard).[142] However, the High Court did not return to consider the caveat articulated by the plurality in *Zhang* concerning whether '*all* questions about the kinds of damage, or amount of damages' are substantive issues to be governed by the lex loci delicti.[143]

139 There are, however, some indications in subsequent cases that the High Court's decision in *Zhang* has not been treated as suggesting that a narrow view ought to be taken of the bounds of the matters governed by substantive law in international torts. As set out above, the plurality confirmed in *Zhang* that the parties' 'rights and liabilities' constituted matters determined by the substantive law, and limited the caveat to whether 'all' questions about the 'kinds of damage, or amount of damages', would likewise be treated as substantive issues. Given the plurality's emphasis on the word 'all' in articulating the caveat, it appears that the plurality accepted that at least 'some' questions about the 'kinds of damage, or amount of damages' would be treated as substantive issues governed by the lex loci delicti, but was not prepared to embrace the broader proposition that 'all' such questions would be considered substantive issues.

140 In *McGregor v Potts*, Brereton J considered it 'likely' that English law would govern questions of limitation and quantum of damages (along with determining questions of liability) if the proceeding were litigated in NSW.[144]

141 Of more relevance, however, is the judgment of the Court of Appeal of NSW in *Amaca,* in which the Court found that that the *Accident Insurance Act 1998* (NZ) applied to bar the bringing of proceedings in the NSW Dust Tribunal. This issue arose because the plaintiff, who was exposed to and inhaled asbestos dust and fibres in the 1960s while employed in New Zealand, subsequently brought claims against the defendant, Amaca, in NSW in 2002. The plaintiff, who sustained personal injuries covered by the

---

142 *Neilson*, 357 [63], 363 [90], 364 [93], 366–7 [100] (Gummow and Hayne JJ).

143 Some textbook writers have treated *Neilson* as lending tacit support to the principle in *Pfeiffer* (that *all* questions concerning damages are substantive) as applying to foreign torts as 'no opportunity was taken to treat the damages available under the foreign Chinese law as procedural': Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 4th ed, 2019), 208 [7.40].

144 (2005) 68 NSWLR 109, 122 [54].

Act, was prevented from bringing proceedings 'independently of this Act … in any court in New Zealand'. The defendant argued that the reference to 'any court in New Zealand' should be construed to extend to courts in Australia, such that no claim could be brought in the Dust Tribunal in NSW.

142 In addressing the central issue, Spigelman CJ (with whom Santow and McColl JJA agreed) highlighted that the rationale underpinning the High Court's decision in *Pfeiffer* and the basis upon which 'Australian law adopted the lex loci delicti as the choice of law rule' was the 'no advantage' principle.[145] That principle forms part of the 'content of the Australian choice of law rule' according to which 'a plaintiff should receive no advantage from suing in the Australian forum which the plaintiff would not obtain in the lex loci delicti'.[146]

143 While couched in terms of 'no advantage' — to reflect the discouragement of forum shopping by plaintiffs — the importance of the broader objective of promoting certainty must be recognised. The objective of promoting certainty extends to the interests of the tortfeasor (the defendant). Certainty is promoted by ensuring that the same result is reached, whichever forum is chosen. The importance of certainty was highlighted by the High Court in *Pfeiffer*, when the plurality stated:

> [83] It is as well then to compare the consequences of the application, in cases of intranational torts, of the lex loci delicti with the consequences of applying the lex fori. If the lex loci delicti is applied, subject to the possible difficulty of locating the tort, liability is fixed and certain; if the lex fori is applied, the existence, extent and enforceability of liability varies according to the number of forums to which the plaintiff may resort and according to the differences between the laws of those forums and, in cases in federal jurisdiction, according to where the court sits.
>
> [84] From the perspective of the tortfeasor (or in many cases an insurer of the tortfeasor) application of the lex loci delicti fixes liability by reference to geography and it is, to that extent, easier to promote laws giving a favourable outcome by, for example, limiting liability. If the lex fori is applied, the tortfeasor is exposed to a spectrum of laws imposing liability.[147]

---

145 *Amaca*, 649 [81], 650 [87].

146 *Amaca*, 649 [81]–[82].

147 *Pfeiffer*, 539–40 [83]–[84], quoted in *Amaca*, 650–1 [90].

144 In *Amaca*, Spigelman CJ quoted these and other observations made in *Pfeiffer*, which were framed by reference to intranational torts, and also the observations made by the High Court in *Zhang* concerning the importance of certainty in international torts. There, the plurality stated:

> [66] The selection of the lex loci delicti as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the lex causae engenders doubt as to liability and impedes settlement. It is true that to undertake proof of foreign law is a different and more onerous task than, in the case of an intra-Australian tort, to establish the content of federal, State and Territory law. But proof of foreign law is concomitant of reliance upon any choice of law rule which selects a non-Australian lex causae.[148]

145 Applying the 'no advantage principle', Spigelman CJ concluded that the substantive law includes any prohibition on instituting proceedings.[149] Applying the observations of Gummow and Hayne JJ in *Neilson* concerning applying the whole of the law of the place of the commission of the tort in order to identify 'what the foreign jurisdiction would do if the matter were litigated there',[150] Spigelman CJ asked and answered the question as follows:

> In the present case, the answer to the question "what the foreign jurisdiction would do" is that proceedings for a New Zealand tort could not be instituted in New Zealand and, therefore, they cannot be instituted in New South Wales.[151]

146 Accordingly, and on the basis that abandonment of the 'double actionability' rule did not involve abandonment of a requirement of 'actionability' in the lex loci delicti, but instead imposed a 'single actionability' rule, Spigelman CJ found that there was no 'actionability' in the lex loci delicti as the claim could not be advanced in New Zealand.[152]

147 There was, however, an additional and alternate basis upon which Spigelman CJ considered the matter could not proceed in NSW. That was, applying the substantive

---

148 *Zhang*, 517 [66], quoted in *Amaca*, 651 [91].
149 *Amaca*, 649 [82].
150 *Neilson*, 368 [107], quoted in *Amaca*, 652 [99].
151 *Amaca*, 652 [100].
152 *Amaca*, 648 [67]–[70], 649 [77], 652 [100].

law of New Zealand, that the law should be understood as prohibiting the institution of proceedings generally, even though (the New Zealand legislature being unable to issue directives to foreign courts) the *Accident Insurance Act 1998* (NZ) only referred expressly to New Zealand courts.[153] As such, it may be seen that a broad approach was taken by the NSW Court of Appeal to both the ambit of, and the construction of, the substantive law of the lex loci delicti (there, New Zealand).

Application to the present proceeding

The New Zealand relief provisions are part of the law of New Zealand on an issue of substance

148 Turning then to the present proceeding. In answering question 3, I assume that, for the claims made for contravention of the New Zealand statutes, the lex causae is the law of New Zealand. The focus, then, in addressing question 3, is whether, on that assumption, group members could recover monetary compensation. For the reasons that follow, in my view, the New Zealand relief provisions are provisions which confer on the plaintiffs and group members a cause of action by which they may seek monetary compensation for contravention of the relevant New Zealand statutes. They are provisions which establish the rights and liabilities of the parties, and so are laws going to substantive issues, according to the principles set out in *Pfeiffer* and *Zhang*. Accordingly, if the contraventions of the New Zealand statutes are established and the plaintiffs and group members suffered loss as a result, the occasion will arise for this Court to exercise its powers to make orders granting monetary compensation in applying the law governing the claims and giving effect to the rights of the plaintiffs and group members.[154]

149 It is clear from the discussion of *Pfeiffer*, *Zhang*, *Neilson* and *Amaca* above that Australia's choice of law rules adopt, as an organising principle, what Spigelman CJ described in *Amaca* as the 'no advantage' principle. As detailed above, the nomenclature used reflects the objective of not promoting forum shopping by plaintiffs, but the principle, so characterised, has a broader foundation. That broader

---

153 *Amaca*, 652 [101], 658 [130].

154 See the observations of Edelman J in *Rizeq*, referred to at paragraph 107 above.

foundation is the promotion of certainty, by ensuring that the outcomes for litigants are the same wherever the suit is brought.

150 If the New Zealand remedial provisions were not treated as part of the substantive law of New Zealand, it would have one of two consequences, both of which would be inimical to the objectives repeatedly identified by the High Court as underpinning Australia's choice of law rules. Either the plaintiffs and group members could seek orders for monetary compensation without any statutory cause of action being identified (ie without reference to the New Zealand relief provisions and simply by relying on this Court's power to make orders for financial compensation), or they could not seek any orders for monetary compensation from this Court at all (there being no domestic statutory provision that could be relied on to establish the right to be compensated for loss caused by contraventions of the relevant foreign statutory norms).

151 Neither of those outcomes obtains, however, as it is clear, in my view, that the New Zealand remedial provisions are properly to be regarded as part of the substantive law of New Zealand, and to be applied by this Court (assuming the lex causae is the law of New Zealand) in determining the rights and liabilities of the parties and group members.

152 Section 38(2) of the FMC Act provides that a contravention of any of ss 19 to 23 'may give rise to civil liability' and refers to subpart 3 of Part 8 (which is titled 'Civil Liability'). Section 38(1) also provides that section 19 is among the group of provisions that are 'Part 2 fair dealing provisions'. Pursuant to ss 385(1)–(3), a contravention of s 270 (continuous disclosure) 'may give rise to civil liability', and the provision again refers to subpart 3 of Part 8. Sections 385(1) and (3) provide that s 270 is among the sections which are 'Part 5 market provisions'. Pursuant to s 485, both 'Part 5 market provisions' and 'Part 2 fair dealing provisions' are 'civil liability provisions', to which subpart 3 of Part 8 applies.

153 Sections 494 and 495 are found in subpart 3 of Part 8. It is those provisions which

equip a person to obtain a compensatory order against the contravenor. While expressed in permissive terms —'[t]he court may make a compensatory order' and 'the court may make any order it thinks just to compensate' — those are the provisions that confer a cause of action on the aggrieved person.[155]

154 In expressing the ambit of issues of substance, to which the lex loci delicti is to be applied, the precise language used by the High Court has varied, but the substance has remained the same. Sections 494 and 495 are provisions which address issues of substance, whichever formulation is adopted. Those provisions go to the 'existence, extent or enforceability of the rights or duties of the parties' (*Pfeiffer*),[156] the 'existence, extent or enforceability of remedies, rights and obligations' (*Pfeiffer*),[157] the 'determination of rights and liabilities' (*Zhang*),[158] and the 'rights and obligations of the parties' (*Neilson*).[159] Sections 494 and 495 are not provisions which, adopting the words of Mason CJ in *McKain* (as quoted with approval in *Pfeiffer*) are directed to 'governing or regulating the mode or conduct of court proceedings'.[160]

155 Characterising ss 494 and 495 of the FMC Act as provisions conferring a cause of action (notwithstanding the inclusion of permissive language) is consistent with the approach taken by the NSW Court of Appeal to s 106(5) of the *Strata Schemes Management Act 2015* (NSW) in *Vickery* and the characterisation of provisions such as s 82 of the former TPA by the Full Court of the Federal Court and by the High Court in *Wardley*.[161] It is also consistent with the approach of the NSW Court of Appeal in *Amaca*, which highlights the substantive approach taken to determining the foreign law.

156 It is ss 494 and 495 that, as a matter of New Zealand law, stipulate that a person who has suffered loss or damage because of certain contraventions may obtain monetary

---

155 In *Ex parte Barrett*, 155, Latham CJ confirmed that '[a] right is created by the provision that a court may make an order' and that '[t]he fact that the court may not be bound to make an order, but may exercise a discretion, does not alter the effect of such a provision'.

156 *Pfeiffer*, 543 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

157 *Pfeiffer*, 544 [100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

158 *Zhang*, 520 [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

159 *Neilson*, 363 [90] (Gummow and Hayne JJ).

160 *McKain*, 26–7, quoted in *Pfeiffer*, 543–4 [99].

161 See paragraph 114 above.

compensation. Absent such a provision, and applying the assumption that the law of New Zealand does not confer a free-standing common law right to compensation on persons adversely affected by a breach of a statute (as to which see paragraph 109 above), such aggrieved persons would have no cause of action by which monetary compensation could be obtained.

157 Nor, in my view, do ss 494 and 495 of the FMC Act fall within the bounds of the caveat of the plurality in *Zhang*, insofar as they create a cause of action with an entitlement to recover 'loss or damage'. In *Zhang*, the plurality reserved for another occasion whether to embrace, for international torts, the holding in *Pfeiffer* that '*all* questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the lex loci delicti'.[162] Question 3 is confined to the recoverability of 'loss or damage'. The question does not require that I, and I do not, reach any final view on whether any issues that may arise concerning the 'kinds of damage, or amount of damages' that may be recovered would be governed by ss 494 and 495 of the FMC Act (or other principles of New Zealand law) or Australian law (if indeed there is any difference).

158 The analysis in relation to s 43 of the FT Act is the same. Section 43 of the FT Act, like ss 494 and 495 of the FMC Act, enables a person who has suffered loss or damage 'by' a contravention of identified provisions to seek an order that the contravenor pay the amount of the loss or damage. Section 43 thereby establishes the rights of such persons to obtain compensation, and the liability of the contravenor to pay it (upon court order).

159 The architecture of the FT Act and the FMC Act is of a kind that is familiar in this jurisdiction. Norms of conduct are established by specific provisions, and the consequences of contraventions (including as to aggrieved persons having a statutory cause of action to obtain compensation) are set out in other provisions. Besides anything else, adopting this style of drafting is economical as it allows the consequences (so far as the rights and liabilities of the parties are concerned) of

---

162 *Zhang*, 520 [75]–[76], quoting *Pfeiffer*, 544 [100] (emphasis in original).

identified groups of contraventions to be set out once, rather than being repeated in, or alongside, each provision establishing a norm of conduct. For example, ss 494 and 495 of the FMC apply to 'civil liability provisions', which is a term incorporating a number of groups of provisions including, relevantly, 'Part 2 fair dealing provisions' and 'Part 5 market provisions'.[163]

160 By separately addressing the norm of conduct, and the consequences of a contravention of that norm, the scheme of the legislation adopts the second methodology identified in *Edensor* whereby 'laws may prescribe a norm of conduct, but leave to another law or laws the provision of a remedy and the conferral of jurisdiction' (see paragraph 113 above). But the two methodologies do not achieve different ends. It would be incongruous indeed if a provision such as s 43 of the FT Act were *not* to form part of the substantive law of New Zealand (on the basis that it addresses remedies), where adopting a drafting style using a composite provision (ie a single provision addressing both the norm of conduct and the consequences of contravention), would result in a provision that could not sensibly be bifurcated, with only part of the provision considered to be substantive.

Relief and the lex fori

161 The contradictor submitted that '[t]he availability of particular remedies to enforce a foreign right is a question governed by the *lex fori*'.[164] The decision of *General Steam Navigation Co v Guillou*,[165] and *Nygh's Conflict of Laws in Australia*, were cited in support. It was not entirely clear from the contradictor's written submissions whether, by the 'availability' of remedies, the contradictor intended to submit that the question of whether or not the plaintiffs and group members could obtain orders for monetary compensation was to be determined by the law of the forum, ie without any reliance on the New Zealand relief provisions. I would not accept any submission to that effect for reasons already set out. As is clear from the relevant passage in *Nygh's*

---

163 See FMC Act s 485.

164 Contradictor's submissions, [89].

165 (1843) 11 M&W 877, 895; 152 ER 1061, 1069 (Parke B for the Court) was cited in support, noting the case is cited in Martin Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019), 420 [16.44].

Conflict of Laws in Australia, the proposition there advanced is more limited. It goes no further than, in substance, confirming that a plaintiff seeking to enforce a foreign right can only invoke 'local forms of action' and can only obtain relief in a form which the forum recognises.[166] As the High Court said in *Pfeiffer,* 'litigants who resort to a court to obtain relief must take the court as they find it' and 'cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate'.[167]

162 The application of this proposition is demonstrated by *Phrantzes v Argenti*.[168] There, the plaintiff, a Greek national, recently married in England, brought proceedings against her father, also a Greek national. Both resided in England, but the daughter sought to bring a claim that under Greek law she was entitled on her marriage to be provided by her father with a dowry.

163 Lord Parker CJ concluded (having regard to the expert evidence on Greek laws and practices) that the plaintiff's right was not the right to the payment of a sum of money, but 'the right to an order condemning the father to instruct a notary public to draw up a dowry contract in accordance with the directions of the court, and to enter into that contract with the son-in-law who may not even be a party to the proceedings'.[169] As the only remedies which the English courts would grant would be declaratory relief and, at most, an order for payment to the plaintiff of the amount found to be appropriate, Lord Parker CJ found that that would be 'to enforce a right which the plaintiff does not possess under Greek law'.[170] In short, the English court had no machinery which would enable it to give relief consistent with the plaintiff's rights under Greek law.

164 In the present proceeding, there is no issue of the kind that arose in *Argenti.* Under the New Zealand law, plaintiffs and group members who establish contraventions and associated loss or damage may be entitled to orders for monetary compensation.

---

166 *Nygh's Conflict of Laws in Australia*, 420 [16.44].
167 *Pfeiffer*, 543 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
168 [1960] 2 QB 19 (***Argenti***).
169 *Argenti*, 34.
170 *Argenti*, 36.

Orders of that kind (and orders granting declaratory relief) are well within the bounds of the forms of relief that are routinely granted by this Court.

Answer to Question 3

165 In my view, question 3 should be answered as follows:

> In respect of any contravention by the defendant of s 9 of the FT Act or ss 19(2) or 270 of the FMC Act, and assuming that the lex causae is the law of New Zealand:
>
> (a) the Supreme Court of Victoria may make a declaration that the defendant has contravened the provisions;
>
> (b) the law of New Zealand includes the statutory causes of action conferred by s 43 of the FM Act, and by ss 494 and 495 of the FMC Act; and
>
> (c) the Supreme Court of Victoria has the power to award compensation to those plaintiffs or group members who suffered loss or damage because of established contraventions of s 9 of the FT Act or ss 19(2) or 270 of the FMC Act.

CERTIFICATE

I certify that this and the 54 preceding pages are a true copy of the reasons for judgment of Justice Button of the Supreme Court of Victoria delivered on 28 November 2022.

DATED this twenty-eighth day of November 2022.

....
Associate