IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S285 of 2019

BETWEEN:

DAVID MOORE
Appellant

and

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SCENIC TOURS PTY LTD
Respondent

APPELLANT'S REPLY

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Part I: Internet publication

1. This submission is in a form suitable for publication on the internet.

Part II: Reply

Ground 1

2. ***Judiciary Act:*** As to RS[27], it was and is important to understand how s79 of the Judiciary Act operates in the present case. However, Scenic raises no ultimate issue with Moore's approach to s79, and Moore agrees that Ground 1 turns on the construction of s275 ACL.

3. ***Text of s275 ACL:*** Scenic's reading of s275 ACL is unmoored from the statutory text. Scenic contends that s275 speaks of "liability … for *the recovery of damages or compensation for* the failure to comply with the guarantee" (RS[12], emphasis added). Putting aside the observation that this reads together the concepts of "liability" and "recovery" in a manner that Scenic suggests is impermissible (RS[13]), the proffered construction inserts into the section words that are not there. The "liability" identified in s275 is liability *for* the breach of contract and for the failure to comply with the statutory guarantee (cf RS[12]) – the natural import of which is the wrongdoer's legal responsibility to the innocent party for that wrong. In stark contrast to ss267(3)-(4) ACL, enacted at the same time as s275, s275 contains no reference to "compensation" or "damages" at all.

4. The textual hook for those concepts cannot be found in the word "recovery" (cf RS[13]), which takes its colour from the balance of the provision. What is being "recover[ed]" is not damages but "*any* liability" (emphasis added). That phrase, while awkward, conveys the meaning of an entitlement to a remedy flowing from the legal wrong. Scenic's attempt to tailor "recovery" within s275 ACL to "the recovery of that for which ss267(3) or (4) provide" (RS[13]) has echoes of revisionist history, given that s275's language dates from a time when the TPA contained implied contractual warranties rather than statutory guarantees and attendant remedies (see RS[23], [26]). But in any event, a comparison of these provisions highlights that "recovery" within s275 concerns a point anterior to the "recovery" in ss267(3)-(4). The former is the right to any recourse at all in respect of a liability. The latter is the award of compensation or damages in a particular amount, in respect of a proven liability that (by ss60-62 ACL read with the entitlement under ss267(1) and (3)(b) or (4) to bring an action) sounds in a remedy.

5. ***2004 legislative history:*** There is nothing in the legislative history to suggest that Parliament had provisions such as s16 CLA "in mind" when it introduced s74(2A) TPA (cf RS[19]). The

fact that s74(2A) did not mention "damages", "awards", "amounts" of damages or heads of loss militates against that proposition. Scenic's explanation also sits uncomfortably with the cognate Act introducing Pt VIB into the TPA (see AS[26]), which relevantly created a Commonwealth scheme for damages caps in respect of certain TPA claims. Parliament considered, and rejected, an alternative policy option consisting of "amend[ing] these Parts of the TPA to provide that the rules relating to quantum of damages ... for personal injury or death be determined in accordance with relevant State and Territory civil liability laws".[1] Thus, where the Commonwealth sought to impose formulas for the assessment and award of personal injury damages under the TPA, it did so by enacting its own regime.

10 6. Section 74(2A) TPA responded to the decision in *Wallis*, and both ss74(2A) and 87AB were directed towards "support[ing] state professional standards laws".[2] Those State laws were consistent with the *Wallis* form: they capped the extent of a professional's occupational liability for a wrong without altering the principles governing the assessment and quantification of damages for the wrong (see AS[23]-[25]). Each of the provisions relied upon by Scenic at RS[14]-[16] is of the same character. But a law imposing a monetary ceiling on *liability* is very different from a law imposing a formula by which a court awarding a remedy for a proven contractual liability calculates damages for one identified type of loss (cf RS[26]). The full extent of the carrier's contractual liability under the State law in *Wallis* was $20 per package, but that does not answer the separate issue of quantum of damages. Within that
20 monetary ceiling (representing the limit of the carrier's secondary obligation: AS[24]), the further principles applied by a court to assess and quantify the plaintiff's recoverable losses may result in any number of different awards (cf RS[25]-[26]).

7. ***2010 legislative history:*** Nor is Scenic's loose conception of "liability" in s275 supported by the 2010 legislative history (cf RS[23]). The relevant innovation of the ACL was not just to create new statutory guarantees (ss60-62) and establish a cause of action for failure to comply with them (ss267(1), (3)-(4)). Critically, ss267(3)-(4) also prescribed the *scope and measure of damages* that could be awarded thereunder – a proposition Scenic does not contest. However, Parliament neither subjected the new provisions to the damages caps in CCA Pt VIB

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[1] Explanatory Memorandum, Trade Practices Amendment (Personal Injuries and Death) Bill (No 2) 2004 (Cth) at [3.26], [3.53].

[2] Consideration in Detail Speech for the Treasury Legislation Amendment (Professional Standards) Bill 2003 (Cth), House of Representatives, Hansard, 16 June 2004 at p30484.

nor expanded the wording of new s275 ACL to pick up State damages rules explicitly. The Explanatory Memorandum evidences no interest in State laws governing assessment and quantum of damages (AS n19; RS[23]). Thus, the better view is that Parliament intended new ss267(3)-(4) to have their full, expansive, effect when a court determined the appropriate relief.

Ground 2

8. ***A "single territorial hinge"?*** Scenic's primary basis for rejecting Ground 2 is that there is an "established approach of identifying a single territorial hinge" to determine a statute's geographic reach (RS[31]) – in other words, that isolation of the statute's "central concern" will inexorably lead to the identification of only one geographic limiting factor, after which no further territorial limitation(s) should be considered: RS[30]-[34]. That rigid approach is not supported by the text of s 12 of the *Interpretation Act 1987* (NSW),[3] principle or logic. Nor does this Court's analysis in *Insight HCA* of the particular territorial connection appropriate in the context of s 5N CLA determine this case. The correct question is whether, having regard to Pt 2 CLA's context and subject matter, including its text, structure and history, there is a further "matter or thing in and of" NSW as well as the connection to NSW courts. Undertaking that exercise is no more difficult than any other interpretive task (cf RS[33]).
9. ***Text, context and purpose:*** Section 16 CLA applies in respect of an "award of personal injury damages" (s11A(1)), being an award of "damages that relate to the death of or injury to a person" (s11). The latter compound expression evidences a concern with two matters or things: a damages award; and an event consisting of a personal injury or death. Section 11A(2) then demonstrates that the award and the event only arise for the court's consideration in the context of a "claim". To align Pt 2 CLA's reach with its evident mischief, it is necessary to give more than just the damages award a territorial hook to NSW (cf RS[34], [43]). However, Scenic's suggestion that s 16 CLA could well have some geographic link to the proper law of the contract (RS[50]) finds no foothold in the statutory text; the only section referring to contract in Pt 2, s 11A(2), provides that contractual claims are treated exactly the same as all other claims for personal injury damages. The argument also erroneously invokes the CCA actions in fact brought in this case to influence the proper construction of s 16 CLA.
10. As explained at AS[36]-[38], Parliament's central concern in enacting the CLA was the impact of local courts' damages awards on the *local* activities of *local* councils, community groups

[3] Note also s 8 (gender and number), and s 12's heading ("References to New South Wales to be implied").

and other bodies (small businesses and tourist operators), with the consequent effect on public liability insurance premiums being "the closure of a number of [local] public facilities and the ceasing of a number of [local] public recreational activities" (PJ[902]). There was no concern expressed with the award of damages by NSW courts against *interstate* defendants who undertook no activities at "our beaches and parks", "our roads and schools" etc[4] – nor with *interstate or foreign activities* that local bodies voluntarily engaged in, exposing themselves to claims under interstate[5] or foreign[6] law (see AS[40], cf RS[42]-[43]). In 2002, Parliament hoped[7] or expected[8] that interstate activities could be regulated along similar lines to Pt 2 CLA. Against that backdrop, an interpretation of Pt 2 CLA that does not capture locals operating or
10 doing business outside NSW is neither fortuitous nor arbitrary (cf RS[46]).

11. Further, Pt 2 CLA was a central plank of Parliament's two stage "tort law reforms", and sought to address the same mischief as Pt 1A in preventing "negligence" claims from being "refashioned" into other claims to circumvent its restrictions[9] (cf RS[38]-[41]). In those circumstances, the first "unstated assumption" in *Insight HCA* at [16], which this Court addressed towards the CLA generally (cf RS[39]), is consistent with Pt 2's evident focus on torts causing personal injuries (see AS[37]).

12. ***Forum shopping:*** Scenic seeks to evade the systemic problem identified at AS[41] by contending that the present terms of State and Territory civil liability legislation do not permit the identification of more favourable jurisdictions for plaintiffs (RS[47]). That criticism misses
20 the point. It is unlikely that Parliament enacted a detailed regime regulating personal injury damages in "the most litigious [community] in Australia", with objectives that included reducing personal injury litigation in that community, and yet provided for that regime to have an extended application that could serve as a pull factor for plaintiffs or defendants in State jurisdiction depending on the perceived disadvantages from time to time of other jurisdictions' legislation. Scenic's purported forum shopping counter-example (RS[47]) is of little direct

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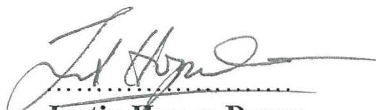
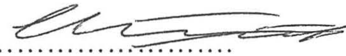
[4] Second Reading Speech, Civil Liability Bill, NSW Legislative Assembly, Hansard, 28 May 2002, pp2085-2088 (**CL Bill 2RS**) at p2085.
[5] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [102].
[6] *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.
[7] In the CL Bill 2RS, the Premier anticipated sending the Bill and actuarial advice to interstate counterparts: p2088.
[8] In the Second Reading Speech for the Civil Liability Amendment (Personal Responsibility) Bill, the Premier, having noted the desirability of national consistency "in this area", identified that Queensland would later introduce further CLA-type reforms: NSW Legislative Assembly, Hansard, 23 October 2002 at p5765. Queensland then enacted a scheme for assessing general damages for personal injury: *Civil Liability Act 2003* (Qld), ss61-62.
[9] CL Bill 2RS at pp2085-2086.

relevance on this point, given that Commonwealth law controls the identification and application of the laws that bind courts in the exercise of federal jurisdiction (see AS[29]-[31]).

Ground 3

13. ***The true character of the claimed loss:*** Determining whether there is a claim for damages that "relate to … injury to a person" (s 11 CLA) requires close attention to the cause of action and nature of the alleged wrong (contra RS[60]). Focusing on the "nature of the damage", labels given to it, or "common law conceptions" of damages (RS[62]), in a vacuum does not elucidate whether there is a sufficient connection between the damages and a personal injury. For example, a damages claim for false imprisonment on account of deprivation of liberty is not a
10 claim for "personal injury damages" as the loss compensated in that context is not an injury.[10]
14. Scenic has not grappled with Moore's key argument: he sought damages under the ACL for a loss consisting of the failure to receive a state of mind (one of pleasure, relaxation and freedom from molestation) which had been statutorily guaranteed to him. The claim had as its analogue the "holiday cases" in contract, where the contractual breach is the loss of the promised peacefulness and comfort and the degree of disappointment or distress is the measure of the failure to meet the expectations.[11] Where those benefits do *not* occur, absent physical injury, compensation for "disappointment" as the healthy appreciation of that loss is not related to any personal injury. Nor is it an "impairment" of the mind even on an "ordinary" understanding (cf RS[56]), or a "deterioration" or "injurious lessening or weakening" (cf RS[55]).
20 15. Finally, if there be any ambiguity in the meaning of "injury", "impairment" or "non-economic loss" within the CLA: neither the legislative history of Pt 2 CLA, nor the Ipp Report, nor the *Health Care Liability Act 2001* (NSW) indicated any concern with the award of damages against local tourist operators who failed to provide a promised service, or more broadly, with damages for loss of expectation (contra RS[62]-[65]).

Dated: 19 December 2019

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[10] See *New South Wales v Williamson* (2012) 428 CLR 417 at [34].

[11] See *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 364, 368, 371; *Milner v Carnival Plc* [2010] 3 All ER 701 at [35]; Walker and Lewins, 'Dashed Expectations? The Impact of Civil Liability Legislation on Contractual Damages for Disappointment and Distress' (2014) 42 *Australian Business Law Review* 465; cf RS[61]-[62].

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ANNEXURE

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES & STATUTORY INSTRUMENTS REFERRED TO IN THE APPELLANT'S REPLY

	Legislation	*Version*
	Commonwealth	
1.	Competition and Consumer Act 2010 (Cth)	12/04/2013
2.	Judiciary Act 1903 (Cth)	25/08/2018 (current)
3.	Trade Practices Act 1974 (Cth)	22/06/2004
		13/07/2004
4.	Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004 (Cth)	13/07/2004 (as made)
5.	Treasury Legislation Amendment (Professional Standards) Act 2004 (Cth)	13/07/2004 (as made)
	New South Wales	
6.	Civil Liability Act 2002 (NSW)	18/06/2002 (as made)
		03/06/2013
7.	Health Care Liability Act 2001 (NSW)	18/06/2002
8.	Interpretation Act 1987 (NSW)	28/11/2018 (current)
	Queensland	
9.	Civil Liability Act 2003 (Qld)	09/04/2003 (as made)

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