

NOTICE OF FILING

Details of Filing

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File Title:	DEBRAH JACKSON v CARNIVAL PLC (ARBN 23 107 998 443)
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Form 17
Rule 8.06(1)(a)

Amended Statement of claim

No. **QUD183 of 2023**

Federal Court of Australia
District Registry: Queensland
Division: General

DEBRAH JACKSON

Applicant

CARNIVAL PLC (ARBN 23 107 998 443)

Respondent

The Parties

1. The Applicant commences this action in her own right and as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1974* (Cth) (the **Act**).
2. At all material times the Applicant;
 - (a) was a natural person over the age of 18 years old; and
 - (b) was and remains a person capable of suing in her own right.
3. At all material times the Respondent:
 - (a) was registered as a foreign company carrying on business in Australia pursuant to Division 2 of Part 5B.2 of the *Corporations Act 2001* (Cth) (the **Corporations Act**) and is able to be sued;

Filed on behalf of (name & role of party)

Debrah Jackson, the Lead Applicant

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- (b) operated under the name “P&O Cruises Australia”.
4. In May 2017, the Respondent operated a number of cruises on ships which departed from Australia.

The Fateful Cruise

5. The Applicant booked and paid for a 7-day cruise operated by the Respondent which departed Brisbane on 5 May 2017 (the **Cruise**) on a ship called “Pacific Aria” (the **Ship**).

Particulars

- A. The Applicant booked the Cruise and made payment for the Cruise through at Travel Agent called “Tripaway Cruise & Travel” located in Tweed Heads in the State of New South Wales.
 - B. The Cruise was booked by the Applicant on or about 7 March 2017.
 - C. The cost of the Cruise for the Applicant and her husband (who accompanied her on the Cruise) was \$2,700.00.
 - D. The Applicant has provided the Respondent with copies of both the Terms and Conditions provided to her at the time of purchase and her ticket.
6. The Cruise had the following advertised itinerary:
- (a) 05 May 2011 depart Brisbane;
 - (b) 06 May 2011 at sea;
 - (c) 07 May 2011 Noumea;
 - (d) 08 May 2011 Lifou Island;

- (e) 09 May 2011 Port Villa;
- (f) 10 May 2011 at sea;
- (g) 11 May 2011 at sea;
- (h) 12 May 2011 return Brisbane.

(the Itinerary)

Particulars

- A. The Itinerary was advertised by P&O Australia.
- B. The Itinerary was advertised on the Respondent's website <https://www.pocruises.com.au/> and in the P&O brochure. The Applicant cannot provide full particularise of how else the Itinerary was advertised until after discovery by the Respondent;
- C. The Itinerary was advertised at least between January 2017 to April 2017. The Applicant cannot provide full particularise of when the Itinerary was advertised until after discovery by the Respondent.

Group Members

- 7. A Group Member in these proceedings is a person who:
 - (a) was a passenger on the Cruise;
 - (b) was a “consumer” as that term is defined in s. 3 of the *Australian Consumer Law* (in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the **ACL**).
- 8. For the sake of clarity, the Applicant is a group member.

Application of Statute Supply of Services

- 9. By operating the Cruise, the Respondent:

- (a) ~~supplied passengers with the rights, benefits, facilities and privileges associated with traveling on a cruise ship in the South Pacific including the use, amusement, entertainment, recreation and instruction found on the Ship and permitting passengers to disembark and visit various foreign ports;~~ a cruise ship holiday experience aboard the Ship which was comprised by all of the following rights, benefits, facilities and privileges for the duration of the Itinerary: -
- (i) sea passage from Brisbane to Noumea, Lifou, Port Vila and return to Brisbane;
 - (ii) facilities to disembark and visit such foreign ports;
 - (iii) facilities for relaxation including the Oasis and the Lido pool deck;
 - (iv) on-board entertainment, including comedy nights, an open-air cinema to watch movies and original live performance shows in the Marquee;
 - (v) themed events for passengers including a high-end Gatsby night cocktail party and the P&O White party, which was described as being the “biggest night on the ship”;
 - (vi) on-board activities including deck games, a deck for walking and viewing the sea (Promenade deck), rock climbing, a flying fox, a tennis court, a basketball court and the P&O Edge Adventure Park;
 - (vii) a “stress less” experience;
 - (viii) an “escape to a remote island or local hideaway”;
 - (ix) a “dream holiday” which could be made an “event”;
 - (x) the means of “floating away” from “troubles”;
 - (xi) the “fastest way to slow down”;

- (xii) holiday enjoyment when a passenger took a “step onboard – no stress”:

(collectively the **Services**):

- (b) “supplied” the Applicant and other group members with a “service” the Service as that term is defined in s. 3 of the ACL (the **supply of the Services**)

10. At all material times the Applicant was a “*consumer*” as that term is defined in s. 3 of the ACL as:

- (a) the value of the Services supplied by the Respondent to the Applicant did not exceed \$40,000;

- (b) the Services were acquired by the Applicant for personal use.

11. At all material times the Respondent supplied the Services in “*trade or commerce*” as that term is defined in s. 2 of the ACL.

12. The Respondent marketed the Cruise by means of ~~brochures and television a~~ brochure or brochures, its website and other media advertisements and thereby represented:

- (a) ~~represented that the Cruise had~~ would be a pleasurable and recreational ~~attributes~~ enjoyable holiday experience in that it would involve ~~relaxation, fun, the use of the Ship’s facilities and visits to foreign ports of interest~~ each of the rights, benefits, facilities and privileges particularised in paragraph 9 above;

- (b) ~~indicated~~ that the Cruise would be a “stress less” experience;

- (c) ~~indicated~~ that the ~~Curies~~ Cruise would involve an “escape to a remote island or local hideaway”;

- (d) ~~indicated~~ that the Cruise would be a “dream holiday” which could be made an “event”;
- (e) ~~said~~ that the Cruise would result in the “floating away” of her “troubles”;
- (f) ~~indicated~~ that the Cruise was the “fastest way to slow down”;
- (g) ~~indicated~~ that as soon as she took a step onboard there would be “no stress”;

(Representations)

and invited travellers to make bookings on the Cruise.

Particulars

- A. The Applicant repeats and relies on Particulars B and C to paragraph 6 herein as to the methods and type of marketing used by the Respondent, and as to how each of the Representations were made.
- B. The Representations were both express and implied and are found in the Respondent’s advertising. Further particulars cannot be provided until after discovery by the Respondent.

13. In ~~supplying the Services to the Applicant~~ respect of the supply of the Services, the Respondent guaranteed that the ~~services~~ Services would be rendered with due care and skill (the ***due care and skill guarantee***).

Particulars of implication

- A. The due care and skill guarantee is provided as a matter of law by s 60 of the ACL
14. Further, the Applicant made known to the Respondent that the particular purpose for the acquisition of the Services was to acquire ~~the experience of enjoying travel and accommodation on a Ship in the South Pacific, the use of the facilities provided onboard the ship and to be able to visit a number of foreign ports~~ a pleasurable and

enjoyable holiday experience which would involve each of the rights, benefits, facilities and privileges pleaded in paragraph 9 above (the **Purpose**).

Particulars of implication

- A. The Purpose was made known by the Applicant to the Respondent by implication which arose from:
 - (i) the marketing of the Cruise by the Respondent as pleaded in paragraph 12 herein;
 - (ii) the fact that the Respondent held itself out as supplying recreation services; and
 - (iii) the purpose and nature of the transaction entered into by way of the Applicant booking and paying for a cruise holiday on the ~~Ship~~ ship in the South Pacific.
- B. The Respondent held itself out as supplying recreation services by reason of the Representations.
- C. The type of recreation services supplied by the Respondent are the Services.
- D. The purpose and the nature of the transactions entered by the Applicant was to undertake the Cruise.

- 15. Further the Applicant made known to the Respondent that the desired result that she wished to achieve from the ~~acquisition~~ supply of the Services was ~~the experience of enjoying travel and accommodation on a Ship in the South Pacific, the use of the facilities provided onboard the ship and visits to a number of foreign ports~~ a pleasurable and enjoyable holiday experience that would involve each of the rights, benefits, facilities and privileges particularised in paragraph 9 above (the **Result**).

Particulars of implication

- A. The Result was made known by the Applicant to the Respondent by implication which arose from:
- (i) the marketing of the Cruise by the Respondent as pleaded in paragraph 12 herein;
 - (ii) the fact that the Respondent held itself out as supplying ~~recreation services and nature~~ such Services; and
 - (iii) the purpose of the transaction entered into by way of the Applicant booking and paying the Respondent for a cruise holiday on the Ship in the South Pacific.
- B. The Applicant repeats and relies on the particulars B, C and D to paragraph 14 herein.

16. In the premises, in supplying the Services to the Applicant, the Respondent guaranteed that:

- (a) the Services would achieve the Purpose (the **Purpose Guarantee**);

Particulars of implication

- A. The Purpose Guarantee is provided as a matter of law by s 61(1) of the ACL
- (b) the Services would achieve the Result (the **Result Guarantee**).

Particulars of implication

- A. The Result Guarantee is provided as a matter of law by s61(2) of the ACL.

16A. Having regard to:

- (a) the contents of the brochures its website and other media advertisements (set out in paragraph 12 herein); and that
- (b) no control could be exercised by a passenger over the provision of the Cruise and the levels of the Services that were to be provided,

the Applicant relied on, and it was not unreasonable for Group Members to rely on, the Respondent's skill and judgment in providing Services of a standard sufficient to meet the Purpose Guarantee and the Result Guarantee.

Cyclone Donna - strength

- 17. On 1 May 2017, a severe tropical cyclone began to form about 1,455 km west-northwest of Nadi (Fiji) (the **Storm**).
- 18. The Storm was issued with a tropical cyclone formation alert by the Joint Typhoon Warning Centre (**JTWC**) at 21:00 CUT (Coordinated Universal Time) on 1 May 2017 (which was 9am 2 May 2017, Brisbane time, Queensland).
- 19. On 2 May 2017, the JTWC designated the Storm as a tropical depression.
- 20. The Australian Tropical Cyclone Scale sets the following wind measurements for cyclones under the following categories:

Category	Sustained wind speed (km/h)	Wind gusts (km/h)
1	63-88	<125
2	89-117	125-169
3	118-159	170-224
4	160-169	225-279
5	>200	>280

- 21. On 3 May 2017, the Fiji Meteorological Service (**FMS**) indicated that the Storm had intensified into a category 1 cyclone on the Australian Tropical Cyclone scale and was named tropical eyelone Cyclone Donna (**Cyclone Donna**).

22. Cyclone Donna intensified and was progressively reclassified by the FMS as follows:
 - (a) on 3 May 2017, a category 2 cyclone by 18:00 UTC on 3 May 2017 (4am 4 May 2017 Brisbane time);
 - (b) on 4 May 2017, a category 3 cyclone; and
 - (c) on 6 May 2017, a category 4 cyclone.
23. On 3 May ~~2018~~ 2017, the JTWC classified Cyclone Donna as being equivalent to a Category 1 hurricane on the Saffir-Simpson scale.
24. On 4 May 2017, the JTWC increased the classification of Cyclone Donna to a Category 3.
25. Late on 6 May 2017, the JTWC altered the classification of Cyclone Donna back to a category 1 equivalent on the Saffir-Simpson scale, with the FMS indicating the same day that Cyclone Donna had weakened to a category 3 cyclone on the Australian Tropical Cyclone scale.
26. Early on 7 May 2017, Cyclone Donna was upgraded by the FMS to a category 4 cyclone for the second time.
27. Shortly afterward the JTWC estimated that Cyclone Donna had intensified to a category 4 equivalent (completely skipping the category 3 status) on the Saffir-Simpson scale.
28. On 8 May 2017, the FWS upgraded Cyclone Donna to a Category 5 cyclone estimating that the Storm possessed 10-minute sustained winds of 205 km/h.
29. On 9 May 2017, Cyclone Donna was reduced to a category 4 cyclone.
30. On 10 May 2017, Cyclone Donna was reduced a category 1 cyclone.

Cyclone Donna - Path

31. Cyclone Donna initially formed about 1455 km west-northwest of Nandi and tracked eastwards through the northern island of Vanuatu.
32. Cyclone Donna turned west and by 6 May tracked back through Vanuatu and turned south towards Noumea, New Caledonia and then followed a southerly direction approximately parallel to the Australian coastline.

Knowledge of the Cyclone

33. Information regarding the categorisation, strength and projected path of Cyclone Donna was publicly and contemporaneously published:
 - (a) on the internet by the FWS, JTWC and the Bureau of Meteorology;
 - (b) on the internet when a search was made for the weather in the South Pacific basin, Noumea, Lifou Island or Port Villa.
34. On or about 4 May 2017, the Australian Government through the ~~DFA~~ Smartertraveller internet site warned holiday makers to reconsider their travel plans to Vanuatu because of Cyclone Donna stating: *"we advise Australians to reconsider travel to Vanuatu due to the likely impact of the cyclone"*.

The Cruise

35. At about 2pm on 5 May 2017, the Ship departed Brisbane at which time:
 - (a) Cyclone Donna had been classified by the FWS as a category 3 cyclone under the Australian Tropical Cyclone scale which meant that the cyclone could have sustained winds of up to 159 km/h with gusts of wind up to 224 km/h;
 - (b) the route of the Ship took it directly into the path of the cyclone.
36. At about 2pm on 7 May 2017, the Ship arrived in Noumea.

37. On 7 May 2011, Cyclone Donna was upgraded to a category 4 cyclone which meant that it could have sustained winds of up to 169 km/h with gusts of wind up to 279 km/h.
38. The trip between Brisbane and Noumea was rough, with the last 24 hours before arrival at Noumea the sea being very rough and:
- (a) no activities were open onboard the Ship;
 - (b) it was difficult to move around; and
 - (c) the environment was unpleasant.

Particulars

- A. The facilities which were not open onboard the Ship when it was a sea were as follows (an "x" indicates facilities that were not available)

	<u>6 May</u>	<u>7 May</u>	<u>8 May</u>	<u>9 May</u>	<u>10 May</u>	<u>11 May</u>
<u>Oasis pool</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Oasis sun lounges</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>P&O Edge Adventure Park</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Lido pool</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Lido hot tubs</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Lido deck (partial)</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Tennis court</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Basketball court</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Flying fox</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Rock climbing climb</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>

<u>Golf putting</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Table tennis</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Quoits</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>
<u>Promenade deck</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>	<u>x</u>

B. During the period of the Cruise, onboard entertainment of comedy events, live performance show in the Marquee, cinema and themed events did not take place on several occasions which the Applicant cannot particularise until after discovery has been provided.

C. The following spaces were closed and could not be traversed or accessed from 6 May 2017 to 11 May 2017:

(a) The Promenade (walking) deck;

(b) Deck 12 external areas;

(c) Oasis.

D. The following spaces were impaired:

(a) the Lido deck was very slippery from water and high winds on 6 May and 7 May (until the Ship arrived in Noumea) and then again after departure from Noumea on 8 May until early 12 May.

(b) Interior corridors on the Promenade deck after departure from Noumea on 9 and 10 May by reason of sea water ingress and doors in those corridors being closed to restrict such ingress;

(c) The Dome on deck 12 by reason of water coming in through light fixtures on 8, 9 and 10 May.

- E. Elevator access was restricted with some elevators being closed.
- F. The heaving, swaying and surging motion of the Ship while in rough seas generated by the cyclonic conditions particularised in paragraphs 17 to 32 above impeded walking or any similar physical activity.
- G. Further particulars will be provided following discovery by the Respondent.

- 39. Shortly before arriving in Noumea, passengers were informed by general broadcast that the Ship would be staying in Noumea about 24 hours and then departing for the return voyage to Brisbane and that no other ports would be visited.
- 40. At Noumea, passengers could disembark from the Ship. Most businesses were closed and were locked down because of Cyclone Donna.
- 41. While in Noumea, as a result of Cyclone Donna, the weather got worse becoming gloomier and the winds increased.
- 42. At about 4pm on 8 May 2017, the Ship departed Noumea for Brisbane.
- 43. The Ship did not call at Lifou Island or Port Villa or any other port on its return voyage.
- 44. The seas were very rough for the entire return voyage back to Brisbane with the result that:
 - (a) the severity of the seas caused furniture to move, tables to overturn and the Ship to list and to stay in a listing position for about an hour; and
 - (b) water ingressed down corridors and into some cabins.
- 45. Passengers including the Applicant found the experience caused by the listing of the ship to be very frightening and she was fearful for ~~his~~ her own safety.

46. Because of the weather, during the trip from Noumea to Brisbane:
 - (a) most of the facilities including the pools and spas were closed;
 - (b) live performances were cancelled;
 - (c) lifts were unable to operate which meant that the stairs had to be used when travelling between decks;
 - (d) the ~~smoking~~ Promenade deck was closed;
 - (e) the environment was unpleasant.
47. On 12 May 2012, the Ship arrived back in Brisbane.
48. Prior to departure neither the Applicant or any other Group Member was informed by the Respondent that there would ~~to~~ be any impact on the Cruise or the advertised route that the Cruise was to take caused by the weather.

Breach of Due Care and Skill Guarantee

49. At the time the Services were provided there was a risk which was reasonably foreseeable to the Respondent, or would have been reasonably foreseeable to a reasonably prudent cruise operation in the position of the Respondent, that:
 - (a) the Representations could not be fulfilled in that the marketed benefits of the Cruise, namely that it would be pleasurable and for recreation and would involve relaxation, fun, the use of the ship's extensive facilities and the visit to foreign ports could not be provided because of the existence of Cyclone Donna in the area into which the Ship proposed to travel;
 - (b) the supply of the Services could not be achieved in that the rights, benefits, facilities and privileges associated with traveling on a ship in the South Pacific including the use, amusement, entertainment, recreation and instruction found on the Ship and permitting passengers to disembark and visit various foreign ports could not be provided because of the existence of Cyclone Donna in the area into which the Ship proposed to travel.

50. The risks referred to in paragraph 49 herein was were not insignificant because of:

- (a) the existence of Cyclone Donna;
- (b) the strength of Cyclone Donna;
- (c) the projected path of Cyclone Donna.

51. At the time the Ship departed from Brisbane the Respondent knew, or a reasonable and prudent cruise operator in the position of the Respondent would to have known, of the existence of Cyclone Donna and that:

- (a) it had been classified as a category 3 cyclone under the Australian Tropical Cyclone scale which meant that the cyclone could have sustained winds of up to 159 km/h with gusts of wind up to 224 km/h;
- (b) the cyclone was active in the area into which the Ship intended to travel;
- (c) the effect of the cyclone on the Cruise meant that the voyage would be very rough with the facilities onboard the Ship being either closed or limited by the weather;
- (d) it had the potential to prevent the Services from being supplied;
- (e) it had the potential to prevent passengers enjoying the Cruise and to make the Cruise unenjoyable;
- (f) it had the potential to prevent the delivery of on-board activities and entertainment;
- (g) it had the potential to make the facilities on the Ship intended for use by passengers in connection with the supply of the Services either unusable or inaccessible
- (h) passengers' enjoyment of the Cruise would be reduced because of the weather;

- (i) the Cruise would not be pleasurable, recreational, relaxing or fun for passengers;
- (j) that it would not be possible to visit the ports advertised on the Itinerary because of the weather;

(the risks)

52. The risks referred to in paragraph 51 herein could have been avoided by the Respondent either by:

- (a) cancelling the Cruise; or
- (b) altering the route of the Cruise so as to avoid or limit the impact of Cyclone Donna.

52A Because of the existence of Cyclone Donna in the area into which the Ship proposed to travel and the features of the cyclone pleaded herein, the exercise of due care and skill in the supply of the Services necessitated the Respondent to:

- (a) consider the extent to which the Supply would likely be undeliverable;
- (b) delay to the departure of the Cruise to determine (a);
- (c) cancelling or re-schedule the Cruise so that it could be undertaken when the weather was more favourable to permit the Services to be supplied;
- (d) alter the proposed route of the Cruise so as to avoid the impact of Cyclone Donna and thereby make it more likely that the Services could be supplied;
- (e) make enquiries prior to the departure of the Cruise into the weather conditions pertaining in the area into which the Cruise was to travel;
- (f) make enquiries prior to the departure of the Cruise into the nature and extent of Cyclone Donna and its projected path;
- (g) prior to the embarkation of passengers, offering passengers an alternative cruise in lieu of the Cruise departing on 5 March 2017;

- (h) at or prior to departure, altering the proposed route of the Cruise so as to avoid the impact of Cyclone Donna and thereby make it more likely that the passengers could enjoy the benefits of the Cruise;
- (i) during the course of the Cruise, choosing a route which would avoid (as much as possible) the impact of Cyclone Donna and thereby make it more likely that the passengers could enjoy the benefits of the Cruise;
- (j) at or prior to departure of the Cruise:
 - i. warning passengers that the weather conditions were such that they would be unable to enjoy or substantially enjoy the benefit of the Cruise; and/or
 - ii. offering passengers the opportunity to cancel the Cruise.

53. In the premises of the facts pleaded in paragraph 49 to 52A herein, the ~~Services were supplied by the Respondent to the Applicant without due care and skill and in breach of the due care and skill guarantee~~ Respondent failed to exercise due care and skill in relation to the supply of the Services and thereby breached the due care and skill guarantee.

54. The Respondent failed to exercise due care and skill in ~~supplying~~ the supply of the Services by:

- (a) ~~failing to make any or any proper enquiry prior to the departure of the Cruise into the weather conditions pertaining in the area into which the Cruise was to travel~~ consider or to adequately consider the extent to which the supply of the Services would likely be undeliverable;
- (b) ~~failing to make any or any proper enquiry prior to the departure of the Cruise into the nature and extent of Cyclone Donna and its projected path~~ delay the departure of the Cruise to determine (a);
- (c) ~~failing to cancel or delay re-schedule~~ the Cruise so that it could be undertaken when the weather was more favourable and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise to permit the Services to be supplied;

- (d) ~~prior to his embarkation failing to offer the Applicant an alternative cruise in lieu of the Cruise departing on 5 March 2017~~ failing to alter the proposed route of the Cruise so as to avoid the impact of Cyclone Donna and thereby make it more likely that the Services could be supplied;
- (e) ~~at or prior to departure, failing to alter the proposed route of the Cruise so as to avoid the impact of Cyclone Donna and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise~~ failing to make any or any enquiry(ies) prior to the departure of the Cruise into the weather conditions pertaining in the area into which the Cruise was to travel;
- (f) ~~during the course of the Cruise, failing to choose a route which would avoid (as much as possible) the impact of Cyclone Donna and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise~~ failing to make any or any enquiry(ies) prior to the departure of the Cruise into the nature and extent of Cyclone Donna and its projected path;
- (g) ~~at or prior to the departure of the Cruise, failing to offer the Applicant the opportunity to cancel the Cruise~~ failing to cancel or delay the Cruise so that it could be undertaken when the weather was more favourable and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise;
- (h) ~~failing to warn the Applicant and other group members prior to their departure that the weather conditions were such that they would be unable to enjoy or substantially enjoy the benefit of the Cruise~~ prior to his embarkation failing to offer the Applicant an alternative cruise in lieu of the Cruise departing on 5 March 2017;
- (i) at or prior to departure, failing to alter the proposed route of the Cruise so as to avoid the impact of Cyclone Donna and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise;
- (j) during the course of the Cruise, failing to choose a route which would avoid (as much as possible) the impact of Cyclone Donna and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise;
- (k) at or prior to departure of the Cruise, failing to:

- i. warn passengers that the weather conditions were such that they would be unable to enjoy or substantially enjoy the benefit of the Cruise; and/or
- ii. offer passengers the opportunity to cancel the Cruise.

55. The ~~provision of the Services~~ breach of the guarantee by the Respondent ~~pleaded in paragraph 53 herein~~ constituted a “*major failure*” as that term is defined in s 268 of the ACL as:

- (a) if a reasonable consumer had been acquainted with both the facts pleaded in paragraphs ~~[insert]~~ 17 to 48 herein and the Respondent’s failures with regard to the provision of the Services referred to in paragraphs 51 to 54 then that consumer would not have acquired the Services;

and/or alternatively

- (b) the Services were not reasonably ~~unfit~~ for the particular purpose for which they were acquired in that that Applicant did not enjoy or substantially enjoy travel and accommodation on a ship in the South Pacific, the use of the facilities provided onboard the ship and the ability to visit a number of foreign ports;

and, in the premises:

- (c) the supply of the Services could not be remedied after such time as the Cruise commenced or, alternatively, after such time as the Cruise failed to embark on an alternative route;
- (d) the supply of the Services did not occur.

Breach of the Purpose Guarantee.

56. In the premises of the facts pleaded in paragraphs ~~50~~ 49 to 55 herein the Services ~~were not reasonably fit for~~ did not achieve and were not reasonably capable of achieving the Purpose and ~~were in breach of the~~ Respondent breached the Purpose Guarantee.

Breach of the Result Guarantee

57. In the premises of the facts pleaded in paragraphs 49 to 55 herein the Services did not achieve the Result and ~~were in breach~~ the Respondent breached the Result Guarantee.

Damages

58. ~~As a result of the Respondent's breach of its statutory duty and statutory warranties as described herein, the Applicant has suffered loss and damage~~ The Respondent's breach of the Duty of Care Guarantee, the Purpose Guarantee and/or the Result Guarantee:
- (a) cannot be remedied; or
- (b) is a "major failure" as that term is defined in s 268 of the ACL (for the reasons pleaded in paragraph 55 herein).
59. ~~In the premises, the Respondent is liable to provide compensation to the Applicant pursuant to section 267 and/or 268 of the ACL in such sum as determined by the Court for breach of statutory warranties~~ As it took place, the Cruise would not have been a marketable tour package in that a fully informed, reasonable consumer would not have purchased a ticket on the Cruise.
60. In the premises the Cruise does not have a market value.
61. The cost of the Applicant's ticket for the Cruise was \$1,350.00.
62. If the Respondent breached of the Duty of Care Guarantee, the Purpose Guarantee and/or the Result Guarantee in the manner pleaded herein, then it was reasonably foreseeable to the Respondent (or a reasonable entity in the position

of the Respondent) that the Applicant would suffer loss or damage arising from such breach or breaches being comprised of:

(a) distress and disappointment; and

(b) wasted additional expenses.

63. The Applicant incurred the following additional expenses due to her being a passenger on the Cruise:

(a) car parking expenses of \$144.00; and

(b) expenses while onboard the ship of \$600.00.

64. As a result of the Respondent's breach of the Duty of Care and Skill Guarantee, the Purpose Guarantee and/or the Result Guarantee the Applicant claims:

(a) compensation pursuant to s 267(3)(b) of the ACL in the amount of \$1,350.00 being the reduction in the value of the Services below the price paid. As there was no value in the Services provided (as a fully informed reasonable consumer would not have purchased a ticket on the Cruise) the Applicant seeks the full value of the cost of her ticket;

(b) loss and damage pursuant to s 267(4) of the ACL compensation for distress and disappointment in the sum of \$12,000.00 or such other sum as may be determined by the Court;

(c) pursuant to s 267(4) of the ACL for the following wasted expenditure being addition expenses caused solely by her being on the Cruise:

(k) parking a vehicle at Eagle Farm for the purpose of undertaking the Cruise in the sum of \$144.00;

(ii) expenses onboard the ship in the sum of \$600.00.

(d) interest on any compensation or damage ordered by the Court.

Date: ~~4 May 2023~~ 8 August 2023



Signed by Peter Barton Carter
Lawyer for the Lead Applicant

This amended pleading was prepared by Douglas J Campbell KC and Blair A Hall of Counsel.

Certificate of lawyer

I, Peter Barton Carter, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: : ~~4 May 2023~~ 8 August 2023



Signed by Peter Carter
Lawyer for the Lead Applicant