

## Article Information

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## The consequences of disappointing customers: the importance of limiting liability

**A recent class action settlement approval judgement highlights the difficulties and risks associated with claiming damages for distress and disappointment. Tom Griffith and Madison Millward discuss the case, and what it means for claims for disappointment damages.**

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**Case:** *Jackson v Carnival plc t/as P&O Cruises Australia (Settlement Approval)* [2025] FCA 127

### Carnival Cruises Case

1. The class action concerned a cruise which departed Brisbane in May 2017 and encountered rough conditions given that a cyclone was forming in the Pacific Ocean along the vessel's intended path. The Applicant, a passenger on the cruise, commenced the proceedings on behalf of herself and other passengers. Due to the rough conditions, activities on board the vessel were restricted, facilities were closed and the cruise did not stop at multiple ports as planned. The cruise ship, Pacific Aria, was operated by Carnival plc t/as P&O Cruises Australia ('Carnival'). The Applicant sought damages under *Australian Consumer Law* for loss (section 267(3)) and for distress and disappointment (section 267(4)).

2. The overall award of damages for class members was modest. Derrington J, approving the settlement, noted that:

*It would come as a surprise to no one that the tickets purchased by the class members for the cruise contained terms that expressly rejected any guarantee that the vessel would proceed on any particular journey or pursuant to any particular itinerary. The reasons for that are obvious, if not notorious, given the patently obvious vicissitudes of sea voyages. Necessarily, the Terms and Conditions of Carriage included the entitlement of Carnival to alter, in any way necessary, the circumstances of the cruise. On that basis, Carnival denied that it did not appropriately provide the services for which the parties had bargained. It further asserts that, at the time the Pacific Aria departed from Brisbane, there was a reasonable anticipation that it could undertake an appropriate voyage. In those circumstances, it denied any liability to the applicant.*<sup>[1]</sup>

3. Under Section 60 of *Australian Consumer Law*, there is a guarantee that services will be rendered with due care and skill. The Applicant argued that Carnival did not render the cruise with the required level of due care and skill, that it was not "reasonably for the advertised purpose" and it did not achieve the result expected. Under section 267(4) of *Australian Consumer Law*, damages for distress and disappointment can be 'awarded for a cruise operator's failure to provide the holiday experience that was promised'.<sup>[2]</sup>

4. Under the settlement, Carnival agreed to pay \$1,100,000 for the Applicant's legal fees, \$100,000 for the administration of the settlement, \$944 per passenger (being the median cost of a ticket on the cruise) and approximately \$900 per passenger of additional compensation. This made the total settlement sum \$2,416,000.<sup>[3]</sup> There were approximately 660 members being represented in the class action. The damages class members' received in the settlement were considered to be 'substantially more than what they would have likely achieved at trial.'<sup>[4]</sup>

5. The key issue considered by Derrington J in deciding whether to approve the settlement was the merits of the Applicant's case on Carnival's liability. The judge noted that '[n]o reasonable person could imagine that a cruise line operator guarantees perfect weather and sailing conditions both enroute and at any port intended to be visited.'<sup>[5]</sup>

6. The judge was very positive about the settlement describing it as an “*exceptionally good outcome*” for the members of the class action.<sup>[6]</sup> The judge commented that it was unlikely Carnival settled due to litigation prospects and more likely did so for commercial reasons such as to avoid negative media and adverse publicity.<sup>[7]</sup>

7. The settlement was approved and Derrington J made the remarks:

*‘It is to be accepted that this case presented substantial risk to the applicant and the class members. In that light, the quantum of that which they are to receive under the proposed settlement is substantial and one which does not seem to be discounted for the risks which were actually faced. The proposed settlement has all the hallmarks of a commercial settlement by Carnival, rather than one which accurately reflects its prospects in the litigation. It represents a very good settlement for the applicant and class members, and this fortifies the conclusion that it is fair and reasonable, at least from their perspective.’<sup>[8]</sup>*

### **Scenic Tours Case**

8. The settlement stands in contrast to the outcome in a similar case of damages for disappointment, *Moore v Scenic Tours Pty Ltd* <sup>[2020] HCA 17</sup>. Scenic Tours was responsible for multiple European river cruises which were disrupted due to high river water levels. This disruption meant significant changes had to be made to the advertised itineraries including a 10-day cruise becoming only 3-days of cruising and instead travellers spending many hours travelling by bus. This led to a disappointed customer, Mr Moore, filing an application in a representative capacity on behalf of passengers who had booked and paid for affected cruises claiming damages for contravention of the guarantee provisions of *Australian Consumer Law*. These guarantees included that:

8.1 Scenic Tours would provide services with due care and skill<sup>[9]</sup>

8.2 That the services would be fit for the purpose for which they were acquired<sup>[10]</sup>

8.3 That the services could be reasonably expected to achieve the result the passengers wished to achieve<sup>[11]</sup>

9. Scenic had provided a brochure that included the benefits and facilities available on the cruise, marketing the cruises as a luxurious “once in a lifetime” opportunity.<sup>[12]</sup>

10. The claim sought compensation for the reduction in value of the services and damages for loss and disappointment suffered. The primary judge found that Scenic Tours had breached consumer guarantees for multiple of the cruises.<sup>[13]</sup> This decision was overturned by the Court of Appeal of the Supreme Court of New South Wales. The matter was then appealed to the High Court.

11. The High Court upheld the primary judge’s orders on damages for disappointment and distress under section 267(4) of the Australian Consumer Law, setting aside the orders made by the Court of Appeal.<sup>[14]</sup>

12. When determining damages for distress and disappointment, the Court compared “the expectations against the reality”.<sup>[15]</sup> *‘Each case must be assessed according to the distress and disappointment which a person has suffered, and having regard to all of the facts and circumstances which are proved for that individual.’<sup>[16]</sup>*

13. For Mr Moore, the primary judge awarded \$10,990 compensation (the amount paid for the cruise) as Scenic Tours failed to provide timely information about the disruption and either cancel the cruise or offer Mr Moore the option to cancel.<sup>[17]</sup> A total of \$2,000 in damages was awarded for Mr Moore’s “disappointment and distress.”<sup>[18]</sup> It was noted that Mr Moore limited his damages claim to this sum and his Honour considered this to be “modest” and would have awarded a higher sum.<sup>[19]</sup>

### **Consideration**

14. In approving the Carnival settlement, the Court stated that the Applicant would have had difficulties establishing that Carnival was liable. Only part of the cruise was impacted and therefore, it would have been difficult for class members to walk away with more than a partial refund if the matter went to trial.<sup>[20]</sup>

15. This cruise appears not to have been impacted to the extent of that in the Scenic Tours matter, but still demonstrates the court’s support for awarding damages for distress and disappointment.

16. It is also worthwhile to note that the relevant contracts in the Carnival case contained terms that rejected any guarantees that the cruise would stick to the itinerary ‘*given the patently obvious vicissitudes of sea voyages*’ further protecting and limiting its liability.

### **Key Takeaways**

17. These cases are especially relevant to service providers who offer experiences or operate in the travel and hospitality industries. They reinforce the importance of having comprehensive terms and conditions to seek to limit your liability should a customer walk away disappointed from an experience that did not meet their expectations.

18. Service providers need to be prepared that there is a risk of liability when it comes to their service not being delivered as advertised. If there is a risk of weather changes having a substantial adverse affect on the experience, it is best to alert the customer or potential customers of that risk and the specific possible outcomes with a view to seeking to ensure liability is limited to the maximum extent possible.

[1] *Jackson v Carnival plc t/as P&O Cruises Australia (Settlement Approval)* [2025] FCA 127, [5].

[2] *Jackson v Carnival plc t/as P&O Cruises Australia (Settlement Approval)* [2025] FCA 127, [23].

[3] *Ibid* [14].

[4] *Ibid* [24]

[5] *Ibid* [18]

[6] *Ibid* [19]

[7] *Ibid* [20]

[8] *Ibid* [25]

[9] *Competition and Consumer Act 2010* (Cth), Sch 2, s 60.

[10] *Competition and Consumer Act 2010* (Cth), Sch 2, s 61(1).

[11] *Ibid* s 61(2).

[12] *Moore v Scenic Tours Pty Ltd* [2020] HCA 17, [6].

[13] *Moore v Scenic Tours Pty Ltd* (No 2) [2017] NSWSC 733.

[14] *Moore v Scenic Tours Pty Ltd* [2020] HCA 17, [2].

[15] *Ibid* [46].

[16] *Moore v Scenic Tours Pty Ltd* (No 2) [2017] NSWSC 733, [913].

[17] *Ibid* [944].

[18] *Ibid* [920].

[19] *Ibid* [919].

[20] *Jackson v Carnival plc t/as P&O Cruises Australia (Settlement Approval)* [2025] FCA 127, [22].