HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S60/2022
File Title:	Page v. Sydney Seaplanes Pty Ltd trading as Sydney Seaplanes
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	05 Jul 2022

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **ALEXANDER MATHEW BRODIE PAGE**
Appellant

and

SYDNEY SEAPLANES PTY LIMITED
TRADING AS SYDNEY SEAPLANES ABN 95 112 379 629
Respondent

APPELLANT'S REPLY

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Reply

2 Sydney Seaplanes' written submissions (**RS**) adopt the reasoning of the Court of Appeal as its argument for dismissing the appeal {see, in particular, RS [11]-[12], [15], [18], [19], [36], [38]}. As such (and because the errors in the Court of Appeal's reasoning are addressed in Mr Page's submissions in chief (**AS**)), it is unnecessary exhaustively to address the arguments made in the RS. It is sufficient to address the following.

3 **RS [13]-[15], [31].** There is no dispute that enacted text is to be read contextually and purposively {AS [10]} and that context may require departure from the literal or grammatical meaning of text. That proposition, in addition to the well-established (to which it may be added: unchallenged) authorities deployed at RS [13], do not, however, grapple with the point made at AS [14]: the clarity and absence of any fetter with which the legislature defined the term "relevant order" should have militated against the creation or implication of a purpose or limit not expressed in the enacted text. The same analysis addresses the submission made at RS [31]: no explanation is proffered as to why the statutory fiction is to be introduced to the provision in question.

4 **RS [18]-[30].** These paragraphs proceed on the unexplained assumption {RS [18], [19]} that the Court of Appeal was correct in holding the context and purpose of the statute was limited to the specific and narrow purpose of addressing the (immediate) consequences of *Wakim*, or point to matters which are only supportive of Sydney Seaplanes' position if one assumes a key integer in the issues to be determined in the appeal: that the enacted text is to be read as being directed *solely* to the consequences of *Wakim* or that it be directed solely to the *immediate* consequences of *Wakim*.

5 The point is concisely demonstrated at RS [21]-[22]. There, Sydney Seaplanes accepts that the enacted text discloses Parliament contemplated actions by the legislature (regulations made under the *State Jurisdiction Act*) or the judiciary (future decisions of the High Court) post-dating *Wakim* as falling within its ambit but does not explain why this case falls outside that ambit. Tellingly, despite acknowledging the potential for issues arising out of future findings of invalidity ("*consequence of any future decisions of the High Court*"), RS [21]-[22] does not identify the limits of the enacted text, other than to assert the present case falls outside those (unstated) limits. RS [33] does not take Sydney Seaplanes' position any further: as outlined at AS [21], were it not for *Wakim*, Griffiths J would not have dismissed the Federal Court Proceedings.

6 A similar analysis applies to demonstrate the fallacies in the arguments put at RS [25]-[30]. In those paragraphs, Sydney Seaplanes asserts Mr Page's reliance on the fourth limb of the definition of "State matter" is misplaced because that limb also addresses the conferral of jurisdiction on the Federal Court by certain provisions of "applied administrative law[s]" being rendered invalid by the reasoning of *Wakim*. The argument, however, ignores Parliament's deliberate choice not to include those laws within the defined term "relevant State Act". The fact that Parliament so chose is a textual indicator of the breadth of the provision, including future matters, and against too readily reading unexpressed limitations into the enacted text.

7 **RS [36]-[38].** The subject of these paragraphs are addressed at AS [16]ff {see, in particular AS [24]-[25]}: in short, judicial impressions as to the extent to which the *State Jurisdiction Act* has ameliorated the position of a litigant who commences proceedings in the wrong Court are an unsafe foundation for the imposition of significant limitations (based on an unexpressed purpose) on enacted text.

Response to Sydney Seaplanes' notice of contention

8 The applicable principles are well established: "All tests for inconsistency which have been applied by this Court for the purpose of s 109 are tests for discerning whether a

"real conflict" exists between a Commonwealth law and a State law" {*Jemena Asset Management (3) Pty Limited v Coinvest Limited* (2011) 244 CLR 508 at [525] (the Court)}. It does not appear Sydney Seaplanes advances a contrary position.

9 Bell P was the only judge who addressed this issue in the Court of Appeal {CA [73]-[83]; CAB 80-83}. The reasoning of the then president was both conventional and compelling. The RS do not identify, assert, or demonstrate any error in that reasoning. As such, the notice of contention should be dismissed with costs.

10 The RS does not challenge the findings made by Bell P at CA [73] {CAB 80}, namely that: (a) an order made under section 11(2) results in a new proceeding that is "linked to, but operating independently of, the federal court proceeding"; and (b) section 34 prevails over section 11(3) if there is any inconsistency as between them. The fulcrum of the inconsistency asserted by Sydney Seaplanes is at RS [56]: "section 11(2) and (3)(b) of the *State Jurisdiction Act* permits the Supreme Court, by the exercise of discretion, to permit new proceeding for damages under the *State Carriers' Liability Act* to be brought more than two years after the time stipulated in section 34. That is inconsistent with the operation of section 34, which is an extinguishment provision. It is also inconsistent with central purpose behind section 34, to achieve uniformity by excluding resort to rules of domestic law". The substance of that proposition was rejected by Bell P {CA [75]; CAB 81}.

11 The then president was correct to reject the argument.

12 *First*, it is plain that "an action" was brought within two years, as required by section 34. That "action" was brought in the Federal Court, although incorrectly because of a want of jurisdiction. As a result of that want of jurisdiction, the "action" was dismissed. The commencement of the "action", however, was not negated or void *ab initio* because it was commenced in a Court which could not hear it. While it may be accepted that Mr Page commenced a new *proceeding* in the Supreme Court, that proceeding was for the same *action* that was wrongly commenced in the Federal Court.

13 *Second*, the deeming of the Supreme Court proceeding as having been commenced at an earlier point in time is not of the character asserted by Sydney Seaplanes. RS [56] glosses over the difference between a discretionary extension of time within which to bring a proceeding (contra, for example, the discretion conferred on a Court by section 56A(2) of the *Limitation Act 1969* (NSW) to extend the time by which a person can sue for defamation) and the deeming (solely because of and by reference to an earlier,

jurisdictionally flawed, action brought within time) of the new proceeding to have been commenced at an earlier point in time.

14 *Third*, RS [56] overstates the purpose of section 34 by suggesting it *excludes* resort to rules of domestic law. Section 34 derives from article 29 of the *Warsaw Convention*.[1] As the *Commonwealth Carriers' Liability Act* purports to give effect to the *Warsaw Convention*, that convention may be taken into account in resolving any uncertainty or ambiguity in interpreting the act {*Yager v The Queen* (1977) 139 CLR 28 at 43-44 (Mason J)}. Article 29.2 of the *Warsaw Convention* contemplates some matters of limitation being left to domestic courts: "The method of calculating the period of limitation shall be determined by the law of the Court seised of the case". Here, section 11 deems the Supreme Court proceeding to have been commenced within the period of limitation or, put another way, the calculation of the period of limitation (per force of a statutory fiction) to be conducted in a particular manner so as to bring Mr Page's claim to be within time.

Dated: 29 June 2022

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[1] Being the *Convention for the Unification of Certain Rules regarding to the International Carriage by Air* [1929] ICAO, signed at Warsaw on 12 October 1929 and entered into force on 13 February 1933. The convention is reproduced in Schedule 2 of the *Commonwealth Carriers' Liability Act*.