

10 May 2016

### **Submission to review of Australian Consumer Law, May 2016**

I am a law academic specialising in the intersection of commercial maritime and consumer laws, particularly the requirement that a contract for services be rendered with due care and skill. My Ph.D examined the operation of the former TPA as regards commercial maritime law. I have recently written several articles concerning section 60 ACL: (services to be rendered with due care and skill) in the context of Australian consumers entering cruise contracts.<sup>1</sup>

There is lamentable complexity and uncertainty surrounding claims for personal injuries sustained in performance of a contract and in breach of the obligation to supply services with due care and skill under the ACL. This is exacerbated where the contract is for services provided partly or wholly outside Australia, and even more so where elements of the contract relate to the provision of recreational services.

#### **1. Section 60 ACL, and Section 275 ACL and the Civil Liability Acts.**

It is submitted that the law relating to personal injuries sustained in breach of a contractual guarantee under the ACL is unnecessarily complex and obscure, and it is not uniform between the States.<sup>2</sup> The reason for this is primarily the operation of s275.

Section 275 operates to 'uplift and apply' as a form of surrogate federal law, State provisions that would 'preclude or limit' liability. It predates the civil liability intervention but certain parts of the state Civil Liability Acts do appear to fall within the scope of s 275. In the context of personal injury claims arising from a breach of s60 ACL, the questions of particular concern is –which parts and sections of the various Civil Liability Acts (CLAs) are to be 'uplifted' and applied as surrogate federal laws? Is it purely the statutory rules regarding assessment of damages? Are CLA provisions that modify tests of liability to be uplifted as well? If and when s275 does not assist, will s79 and s80 of the *Judiciary Act* achieve the same purpose? Is the situation the same for 'statutory guarantees'

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<sup>1</sup>Cruise ship operators, their passengers, Australian Consumer Law and Civil Liability Acts Part One (2015) 29 *ANZ Maritime Law Journal* 93; Part Two (2016) 30 *ANZ Maritime Law Journal* (forthcoming: pre-publication copy available upon request).

<sup>2</sup> See Joachim Dietrich, 'Liability for personal injuries from recreational services and the new Australian Consumer law: Uniformity and simplification or still a mess?' (2011) 19 *Torts Law Journal* 55; Joachim Dietrich, 'Service guarantees and consequential loss under the Australian Consumer Law: the illusion of uniformity' (2012) 20 *Competition & Consumer Law Journal* 43.

under the ACL as it was for ‘implied warranties’ under the TPA? These are all real and vexed questions as recent NSW caselaw has shown.<sup>3</sup> The reasoning applied in those cases renders the uplift of CLA provisions dependent on the form of drafting adopted –at the risk of oversimplifying, the current thinking appears to be that provisions that say there is ‘no duty’ cannot be uplifted into the ACL, but ‘exclusions of liability’ can be. But the method of drafting employed in those provisions varies from from State to State. The result is an intricate patchwork of applicable and inapplicable CLA provisions, with a different patchwork for each State. The knock on effect on the uniformity of the consumer protection offered by the statutory guarantee is obvious.

The assessment of damages provisions of the State civil liability laws also contain significant differences between the States (and, for that matter, the Commonwealth’s version in Part VIB, although strangely it does not apply to statutory guarantees in the ACL.<sup>4</sup>) In addition, the CLAs are also very different as regards their extraterritorial application: it is not clear to what extent they would even apply to events and places outside Australia.<sup>5</sup> This creates another potential variation between States.

As a result, it is undoubtedly the case that a consumer seeking to pursue a claim in one State of Australia may well have quite a different set of parameters applied to their claim compared to a consumer in another State.

The interaction between section 275, the statutory guarantees and the Civil Liability Acts needs to be recast and recalibrated with uniformity in mind. In my view this means that the State CLAs should be explicitly excluded from the operation of the statutory guarantees in the ACL. In particular I propose that:

1. The determination of a failure to comply with the statutory guarantee should not be based on modifications effected by the CLA in force in that State.
2. The assessment of damages for personal injuries resulting from a breach of a statutory guarantee ought to be determined in accordance with the provisions within the CCA itself –provisions already contained within VIB.<sup>6</sup> As a result, the assessment of damages for a breach of the statutory guarantee would be uniform throughout Australia.
3. A review and update of Part VIB of the CCA be undertaken with the aim of ensuring its equivalency to the most benevolent version of the assessment of damages regimes found in any of the civil liability interventions currently

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<sup>3</sup> *Nair Smith v Perisher Blue Pty Ltd (No 2)* [2013] NSWSC 1463 (subsequently overturned) ; *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361; *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219. See also *Insight Vacations v Young* [2011] HCA 16, in which the High Court unanimously overturned the NSW Court of Appeal’s decision concerning whether the TPA equivalent of s275 could uplift s5N of the Civil Liability Act (NSW), and held that s5N did not extend to acts outside NSW.

<sup>4</sup> s87E(1)(a) does not list Part 3-2.

<sup>5</sup> See *Insight Vacations v Young* [2011] HCA 16

<sup>6</sup> This would require only an amendment to s87E(1)(a) to include Part 3-2.

operational in Australia. I would be opposed to a cap on general damages claims given the other constraints operating on the quantum of damages.<sup>7</sup> The adoption of the 'most generous regime' can be readily justified. It should not be forgotten that the s 60 guarantee concerns consumers who have entered a contract, and does not concern public liability at large. In relation to the s60 statutory guarantees a supplier will only be liable where it has caused injury to a person by failing to take care of a consumer's safety when **performing a contract** in which they are obliged to use due care and skill.<sup>8</sup> It is a potential liability which the supplier has chosen to adopt, and can insure against.

These changes would ensure all Australian consumers were subject to a uniform commonwealth law as regards personal injuries sustained by reason of a breach of a statutory guarantee. It would also remove the need to consider the extraterritorial limitations of any State based civil liability reforms.

A simpler but less complete solution would be for s275 to be limited as regards the civil liability Acts to the Part of those Acts that deals with assessment of damages. This would solve a major part of the problem, but would still not lead to a uniform outcome across Australia.

### **Jurisdictional trigger for application of ACL guarantees**

The application of the ACL to events occurring overseas certainly deserves scrutiny and improvement. There has been, quite rightly, a focus on goods purchased from overseas through the internet. But what of services purchased the same way? Again, passenger contracts are a good example. A passenger may contract over the internet for a cruise, and the cruise terms may say the contract is subject to the law of Florida, even though the cruise departs from an Australian port. (this example is taken directly from an international cruise company offering its cruises on an Australian website.) A passenger who wishes to determine whether the statutory guarantee provisions of the ACL will apply to that cruise contract will not find an easy answer. At present, s67 ACL requires an analysis as to what is the 'proper law' of the contract. That means something to lawyers – and even then, requires a process of deduction - but it means nothing to consumers.

I suggest that thought be given to reframing the jurisdictional trigger such that the ACL statutory guarantees apply if the service is offered for sale in Australia,<sup>9</sup> or the consumer is physically in Australia when the service is procured. For example, the new *Consumer Rights Act 2015* (UK) applies where the consumer is habitually resident within the UK, and the trader has pursued or

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7 Western Australia, for one, has no cap on non-economic loss claims for personal injuries.

8 It is my view that if a consumer sustains a catastrophic injury as a result of a breach of s60 by the supplier, then the damages payable to the consumer ought not be capped.

9 *Package Travel, Package Holidays and Package Tours Regulations 1992* SI No 1992/3288 (UK), REGULATION 3.

directed activities to the UK, even if the parties have chosen another law.<sup>10</sup> This test would be much easier to apply, and would not require a law degree to understand.

### **Considering a better form of consumer protection for contracts of carriage for passengers by sea – Athens Convention 2002**

I have been researching the position cruise ship passengers under Australian law for some time.<sup>11</sup> My research shows that Australian law, particularly Australian Consumer law when combined with the Civil Liability Acts, does not facilitate but instead bedevils such claims.<sup>12</sup> Further, passengers – even those with minor contractual complaints about defective performance - cannot bring their claims in consumer tribunals, but only in courts with Admiralty jurisdiction.<sup>13</sup>

There is a better solution, at least for claims relating to personal injury and property damage. Australia should become a State party to the newly in force *Athens Convention 2002*, which updates the 1974 Convention. Initial concerns about the workability of the insurance component of the Convention have now been overcome to the satisfaction of insurers and the IMO, and the Convention is now in force. The EU has adopted it by Regulation. This Convention is the sea equivalent of aviation conventions Australia has already adopted. *Athens 2002* renders the carrier strict liable for maritime accidents. It does cap claims, but the caps are now generous (upwards of \$750,000) and readily updated. In any event state parties can increase the cap. It also requires carriers to insure for passenger liabilities under the Convention, and permits passengers to sue the insurer direct. As Australia is not yet a State party, Australian passengers cannot access the insurance arranged under the Convention, nor can they sue the insurer direct.<sup>14</sup> The Convention also gives the passenger a choice of jurisdictions, including the place of departure or destination, or the place of the contract. Carriers cannot dispute jurisdiction if proceedings are commenced according to the Convention. In England there are almost no disputes as to forum and choice of law in passenger claims, and very little litigation concerning passenger claims.

If a ship tragedy were to occur, Australian passengers on board the vessel would be at a significant disadvantage as regards liability, onus of proof, procedure, evidence and enforcement compared to those passengers on board whose contracts are subject to the Athens Convention because they contracted in a country that is a signatory state.

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<sup>10</sup> *Consumer Rights Act 2015* (UK), Explanatory Notes, [27] See also s74 CRA.

<sup>11</sup> See above, n1. See also 'Australian Cruise Passengers travel in legal equivalent of steerage – considering the merits of a passenger liability regime for Australia' (2010) 38 *Australian Business Law Review* 127 – 142; 'The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 Trade Practices Act 1974 (Cth)' (2004) 18 *MLANZ Journal* 30.

<sup>12</sup> See articles at n1.

<sup>13</sup> *China Shipping v Kelly* [2010] NSWSC 1556, applied in *Morland v P&O Cruises, "The Pacific Jewel"* [2013] NSWCTTT 372.

<sup>14</sup> Unless the Convention applies by reason of the laws of some other place, such as if the passenger departed from a port in England. However, the Australian passenger would need to sue in that place, not in Australia, to ensure the application of the Convention.

Australia is a State party to similar conventions governing the rights of aviation passengers. The Maritime Law Association of Australia and New Zealand is on the record as being strongly in favour of Australia becoming a State party.<sup>15</sup> The IMO, CMI and International Chamber of Shipping are all encouraging ratification. As regards the merits of the Athens liability regime, Carnival Australia is on record as saying:

*Australia's consumer protection laws are a complicating factor when it comes to what might be covered in a cruise contract. We agree there is merit in considering whether a civil liability regime would give a clearer outcome.*<sup>16</sup>

Australian consumers have fallen in love with cruising (and rightly so). CLIA Australia reported in May 2015<sup>17</sup> that:

- in 2014, the passenger numbers in Australia rose over 20% from 2013;
- passenger numbers have enjoyed a 20% annual average growth over 12 years;
- one million Australians took a cruise in 2014: which equates to 4.2 % of the population and more per capita than the US market.

With Australians so eager to embrace international cruising, it is time the legal framework was put in place to provide a certain and standard regime for the benefit of passengers and cruise companies alike. Accordingly, I suggest that Treasury, the Attorney General's Department and the Department of Trade and Infrastructure actively pursue the ratification of the *Athens Convention 2002* for the benefit of Australian passengers.

Yours sincerely

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<sup>15</sup> Letter by President of MLAANZ to Department of Infrastructure & Transport, 2011. See also *White Australian Maritime Law* (Federation Press 2014) 5.4.

<sup>16</sup> Carnival Australia Submission 009, *Inquiry into the arrangements surrounding crimes committed at sea*, 13.

<sup>17</sup> <http://www.cruising.org.au/filelibrary/files/Australian%20Cruise%20Numbers%20Break%20Through%20the%20Magic%20Million%20Mark%20FINAL.pdf>



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