

CRUISE SHIP PASSENGERS AND AUSTRALIAN LAW: KNOWN PROBLEMS AND SOME NEW ANSWERS

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1 Introduction

Australia is considering whether to accede to the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 2002 (Athens 2002)*, an international convention that seeks to standardise the legal regime applicable to passengers carried by sea.¹ This is a welcome development; the author has long advocated for it.² While *Athens 2002* is a compromise, it would benefit Australian consumers in a number of ways.³

This paper outlines the current position of cruise ship passengers under Australian law, by way of background to the discussion about *Athens 2002* by others at the Global Shipping Forum.⁴

In Australia, the substantive law applicable to passengers is no longer found primarily in common law. The tale is really that of two contradictory legislative regimes each protecting their own policy patch, although the common law still has an occasional part to play. The common law notions of incorporation of terms, and place of the contract, proper law, and questions of service out of the jurisdiction will bob up from time to time. Notably, these questions have diminished importance in countries that have implemented the *Athens Convention*.

The two legislative regimes in question are the *Australian Consumer Law*, as a schedule to the *Competition and Consumer Act 2010 (Cth) (CCA)* and the State based Civil Liability regimes, which came about after the *Review of the Law of Negligence 2002 (Ipp Report)*. I have discussed the background, provisions and interactions of these regimes in earlier issues of this journal.⁵ Rather than reprise those papers, I propose a mere summary, followed by a summary of some new developments. As we shall see, there are still plenty of remaining questions.

The Australian law applicable to passengers carried by sea is labyrinthine⁶ and complex. Recent cases provide some welcome clarity on a few points, but there is still uncertainty. Some of that uncertainty is because we do not know whether the High Court will affirm the sometimes controversial views of the lower courts. A High Court ruling would be welcome in a number of areas, although the reality is that it is extremely rare for passenger claims to be heard in the High Court. Most passenger claims are for modest amounts and passengers are often of modest means. This ensures that litigation is a last resort. Claims usually fizzle out or settle before a court can consider these questions.⁷

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¹ Department of Infrastructure, Regional Development and Cities, Discussion Paper: *Carriage of Passengers and their Luggage by Sea*, November 2017. Information about the consultation, and submissions, can be found here: https://infrastructure.gov.au/maritime/business/liability/damage_luggage.aspx.

² *Carriage of Passengers by Sea* (Sweet & Maxwell, 2016); 'Cruise Ship Operators, their Passengers, *Australian Consumer Law* and State *Civil Liability Acts – Part 1*' (2015) 29 *ANZ Maritime Law Journal* 93 – 110; 'Cruise Ship Operators, their Passengers, *Australian Consumer Law* and State *Civil Liability Acts – Part 2*' (2016) 30 *ANZ Maritime Law Journal* 12- 27. '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; 27.

³ See above, n1.

⁴ It seeks to avoid duplicating topics that have been allocated to others at the Global Shipping Forum 2018. For example, it does not cover formation of contracts, or incorporation or interpretation of terms; nor the specific provisions of the *Athens Convention*, nor conflict of law issues. Due to space constraints this paper avoids repeating matters raised in the published works cited in fn 2 above; rather it takes those papers as a springboard to consider recent developments and remaining issues.

⁵ *Ibid.*

⁶ Justice Steven Rares used this term to describe modern Commonwealth legislation, including the *Australian Consumer Law*: Stephen Rares, *Striking the Modern Balance Between Freedom of Contract and Consumer Rights* 14th International Association of Consumer Law Conference, Sydney, 2 July 2013.

⁷ A recent exception is *Moore v Scenic Tours* [2017] NSWSC 1555. The matter has recently been the subject of a Court of Appeal judgment [2018] NSWCA 238 and leave to appeal to the High Court has been sought. This is discussed further below.

2 Part 1 - Known Problems: Strong Consumer Protection Meets Recast Tort Law

At common law, carriers are obliged to exercise due care in the carriage of passengers. Traditionally this duty was subject to the terms of the contract of carriage. Thankfully, long gone are the days where a carrier could exclude all liability for injury caused by its negligence.⁸

Where the *Australian Consumer Law* (ACL) applies,⁹ carriers are bound by a statutory guarantee to exercise due care and skill in the carriage of their passengers. Under that same law, carriers are also obliged to ensure that the services should be reasonably expected to achieve the result made known to the supplier, and the services must be reasonably fit for purpose. Formerly implied terms and now statutory guarantees,¹⁰ these protections are found in s60 and s61 of the ACL. Any attempt to exclude the guarantees is void pursuant to s 64 ACL.¹¹ This protection is bolstered by other provisions scattered throughout the ACL: the prohibition on misrepresenting rights under a contract, and unfair terms provisions, amongst others. Relevant provisions of the ACL are set out in an appendix to this paper.

The nature of the obligations imposed on service providers under the consumer guarantees are not particularly problematic. The duty of due care and skill closely aligns with a carrier's common law obligation (although there are some difficulties determining whether and when it might apply to a contract entered or performed outside Australia. We will come to that shortly.) However, insofar as they involve a duty to take reasonable care to avoid injury or death, the legal position is not straightforward. That is because of the exceptions, and qualifications inherent in the ACL, as well as the impact of the apparent 'uplift' of State laws¹² such as the *Civil Liability Acts*.¹³ These render the relatively simple guarantees into something rather more difficult to navigate.

Here, I outline three primary issues with Australian law as would particularly concern cruise passenger claims.

2.1 Three Known Problems

2.1.1 'Recreational Services'

As already discussed, the ACL imposes a statutory guarantee on service providers to exercise due care and skill in the provision of services in trade and commerce. Generally this guarantee cannot be excluded (s64) but there is an exception – a 'carveout'. It is permissible for service providers to exclude liabilities in relation to injuries sustained during the provision of recreational services. The carveout can be found in the parent Act, the *Competition and Consumer Act 2010* (Cth), s139A.¹⁴

The carveout is quite restricted. First, the definition of 'recreational services' in the CCA is fairly narrow.¹⁵ For example, it seems unlikely that an entire cruise could be considered a 'recreational service', but that argument has not yet been run. Secondly, to trigger s139A, an exclusion clause needs to be carefully crafted to fall within it: that means excluding only injury or death, not also property damage.¹⁶ Thirdly, any such exclusion clause must be part of the contract, which throws up common law questions of formation and incorporation of terms.

Some questions that remains unanswered are: just what will constitute recreational services? It is at least arguable that liability arising from any activity involving significant physical exertion or risk can be excluded. Does that

⁸ Although some domestic ferry operators maintain such clauses in their terms and conditions.

⁹ The application of the ACL is discussed further in Part Two below.

¹⁰ In 2010 the *Trade Practices Act 1974* (Cth) was replaced by the *Competition and Consumer Act 2010* (Cth) (CCA). Most of the consumer protection provisions moved into the second Schedule (titled the Australian Consumer Law). Many of the provisions are identical or substantially similar to the TPA provisions. One significant change, though, is that the implied contractual warranties were converted into statutory guarantees.

¹¹ Subject to the carve-out in s139A CCA, which is discussed under the next heading.

¹² Either via s275 ACL, or s79 and 80 of the *Judiciary Act 1903* (Cth).

¹³ A collective name given to the various State Acts that enacted the Ipp Report recommendations. The relevant Statutes are: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas.); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

¹⁴ This and other relevant provisions from the CCA and ACL are set out in an appendix to this paper.

¹⁵ In contrast to the broader definition found in the CLAs.

¹⁶ *Motorcycling Events Group Australia Pty Ltd v Kelly* (2013) 303 ALR 583; *Perisher Blue Pty Ltd v Nair-Smith* (2015) 320 ALR 235.

include vigorous disco dancing? Water slides? Kids climbing a climbing wall with a safety harness, under supervision? Further, can a cruise operator can exclude liability for all the recreational activities on board in its passage contract, or can the ‘exclusion’ take the form of a waiver signed whilst on board? There are interesting questions of application here.¹⁷

These issues evaporate under the *Athens Convention* because no such exclusion is permitted. As regards hotel type claims, if the claimant can prove that the carrier was negligent and that the injury resulted from that negligence, the carrier will be liable.¹⁸ However, any damages may be reduced by the contributory negligence of the claimant.¹⁹

The second two issues relate to the interaction between the *Australian Consumer Law* and the civil liability regimes.

2.1.2 The Interaction Between the ACL and the State Based Civil Liability Regimes

The Civil Liability Acts

The objective of the Commonwealth *Competition and Consumer Act 2010* (CCA), which contains the ACL, is at loggerheads with that of the CLAs, at least insofar as the statutes have overlapping application. The objective of the CCA is to ‘enhance the welfare of Australians through the ... provision for consumer protection.’²⁰ The ACL is also enacted as mirroring legislation in each of the States and territories.

On the other hand, the policy behind the Civil Liability Acts is to rein in the law of negligence and reintroduce personal responsibility.²¹ The CLAs also extend to similar claims arising from breach of contract or statutory duty, which were treated as if they were claims in negligence so as to prevent these becoming a ‘backdoor’ route to recovery.²² In essence (and at the risk of oversimplifying) the *Civil Liability Acts* rein in the common law of negligence in two main ways. First, they rewrite and narrow the elements of the cause of action that must be proven to establish negligence. They lift the bar required for proof; in some cases they extinguish liability and in others they reverse the onus of proof. Put simply, the CLA laws make it harder to establish that a defendant is liable. The Civil Liability Acts also have special rules applicable to recreational activities, defined more broadly than the CCA. The CLAs permit the use of waivers, risk warnings and disclaimers in relation to recreational services and have special rules for dangerous recreational activities.

Secondly, the *Civil Liability Acts* seek to minimise the quantum of claims awarded in the event that the Defendant is found liable. In most States, plaintiff’s damages are subject both to a threshold (to cut out small claims) and a cap for pecuniary and non-pecuniary losses. However, there is huge variability in what constitutes a threshold as between the various states. The ACT and Queensland have no threshold at all, for example. South Australia has a relatively low threshold; requiring that the plaintiff has significant impairment of the ability to lead a normal life for at least two weeks and incurred medical expenses in the order of about \$3000.²³ In Victoria, the plaintiff must sustain a significant injury causing impairment of more than 5%.²⁴ New South Wales sits at the other end of the spectrum. A personal injury must be more than 15% of the ‘most extreme case’ in order to receive compensation under the CLA (NSW). Further, an award for non-pecuniary losses is discounted if it falls between 15% and 29%

¹⁷ It is difficult to reconcile this exception with the protection of consumer’s rights. The ACL is more protective of a consumer’s right to return a malfunctioning toaster, or to recover their loss if the toaster burns down the house, than it is of consumers who entrust their wellbeing to a service provider.

¹⁸ *Athens 2002*, Article 3r2. Subject to the quantum limits set out in the Convention.

¹⁹ *Athens 1974/2002*, Article 6.

²⁰ CCA, s2.

²¹ *Ipp Report*, 1.24.

²² Notably, the Ipp Report, insofar as it dealt with the TPA, did not even list the implied warranties as being a concern insofar as personal injury claims.²² Section 74 TPA was discussed only in the context of recreational activities, not generally.²²

²³ CLA 1936 (SA) s3, 52(1).

²⁴ Or 10% for psychiatric injury: *Wrongs Act 1958* (Vic) s28LB, s28 LF, s28LG.

of the most extreme case.²⁵ These thresholds mean that a claim for a passing illness such as gastro would arguably not be compensable in certain jurisdictions.²⁶

The CCA restricts personal injury damages along the same lines as the CLA (NSW).²⁷ However, the CCA provisions in Part VIB do not extend to personal injury damages awarded for a breach of the consumer guarantees.²⁸ This is perhaps a mixed blessing. It is desirable to have a uniform regime of assessment of damages in place under the Federal Act. For uniformity, if remedies for personal injury claims arising from a breach of the ACL are to be constrained in accordance with ACL principles, it is preferable for them to be assessed according to a scheme set out in the ACL itself. However, ironically, most consumers would be worse off if that were the case: because the ACL quantum limitations are harsher than most if not all State based CLAs.²⁹ In any event, it will be discussed shortly, it appears to be accepted that the quantum restrictions on damages contained in the State CLAs apply to personal injury claims brought under the ACL consumer guarantees.

In short, in Australia we now have eight different systems of tort law and damages assessment.³⁰ Each State has a slightly different CLA. Victoria is possibly the least harsh and NSW probably the most harsh.³¹ The recreational activity provisions, ability to contract out and the quantum provisions vary significantly. There is a published, refereed article in a law journal consisting simply of comparative tables.³² The dizzying variations make it very difficult for a lawyer to advise clients on where to sue, particularly personal injury lawyers who are often not familiar with maritime law. The variations probably do not matter much for a single plaintiff who is injured in the same state as he or she lives. But if there is an incident involving multiple plaintiffs from multiple states, it creates issues of forum shopping due to the disparate regimes. This is ironic, given one of the stated objectives of the liability reforms was to reduce intrastate forum shopping.

'Uplift' of State Laws that Limit or Preclude Liability into the ACL

Given that well advised cruise passengers will sue for any personal injury based on the federal statutory guarantee, one might wonder why the state laws relating to negligence would be relevant. They are relevant because state law 'fills the gaps' in Federal law. Broadly, this might happen in one of two ways:

- First, there is an explicit uplift provision within the *Australian Consumer Law* that 'picks up and applies'³³ State laws that 'limit or preclude liability for the failure, and recovery of that liability'... 'as surrogate federal law'.³⁴ Formerly s74(2A) of the TPA, it is now found in s 275 ACL.
- Secondly, s80 of the *Judiciary Act 1903* permits a court to apply State law where necessary (and where not inconsistent).³⁵

Does s 275 pick up and apply the CLA provisions? The High Court have only considered the issue once, in *Insight Vacations v Young*.³⁶ In *Insight Vacations* the High Court held that s 275 was intended to uplift and apply certain state laws, but would not pick up and apply s5N CLA, a provision that permitted the service provider to exclude liability via a contractual provision.³⁷ The judgment concerned the former *Trade Practices Act* provisions.

²⁵ CLA 2002 (NSW), s16(1).

²⁶ Although if it occurred on a cruise ship outside the State, there would be an argument that it was not caught by the CLA: *Moore v Scenic Tours*, discussed below.

²⁷ Part VIB.

²⁸ S 87E of the CCA sets out the divisions to which Part VIB applies. It does not mention Part 3-2 of the ACL (containing the guarantees) nor Division 1 of Part 5-4 (containing the remedies for breach of guarantees.)

²⁹ Generally the CCA provisions follow the NSW CLA, which is in turn the harshest of the State regimes. However the CCA caps damages for lost earning capacity at twice the average weekly earnings (s87U); lower than all the state jurisdictions. The policy of consumer protection would be better served by the adoption, within the CCA, of the most generous CLA regime found in State iterations.

³⁰ *Ibid.*

³¹ Martin Davies & Ian Malkin *Focus: Torts* (LexisNexis Butterworths, 7ed. 2015), 35.

³² Des Butler "A comparison of the adoption of the lpp report recommendations and other personal injuries liability reforms" (2005) *Torts Law Journal* 203.

³³ The shorthand expression used by the NSW Court of Appeal in *Insight Vacations v Young* [2010] NSWCA 137 (11 June 2010).

³⁴ *Insight Vacations v Young* (2011) 243 CLR 149, 155 [12]. See the discussion at (2015) 29 ANZ Mar LJ 93, 106.

³⁵ Section 80 *Judiciary Act 1903* (Cth) is set out in an appendix to this paper.

³⁶ (2011) 243 CLR 149

³⁷ *Ibid.*, [21] – [26]. The Court also relied on the fact that the State provisions were inconsistent with the purpose and tenor of s68B, which restricts the circumstances in which exclusions of liability can be effective.

The High Court has not yet considered whether and what other CLA provisions might be ‘uplifted and applied’. However the NSW Courts have considered the point in the context of the former TPA provisions in several cases.³⁸ More recently those courts have applied the same reasoning to the new *Australian Consumer Law* provisions.³⁹ These NSW cases have been discussed at length elsewhere.⁴⁰ Broadly speaking, those cases have held that as regards a claim for personal injury resulting from the implied warranty of due care and skill under the TPA:

- The state quantum limits from the CLA will be ‘uplifted and applied’;
- That the modification of tests of negligence for liability in the CLA may well be uplifted, but not those provisions that fly in the face of the implied warranty such as a section negating the existence of a duty, such as s 5M of the CLA (NSW).⁴¹

In contrast, it is arguable that the CLAs do not apply to injuries sustained in breach of the fitness for purpose guarantee.⁴²

We await the imprimatur of the High Court as to the NSW approach, and there is every reason to suggest that the point will be hard fought.⁴³

Critically, one expects an argument as to whether there should be a distinction between the treatment of implied warranties under the former TPA, and statutory guarantees as introduced by the ACL in 2011. For example, perhaps it would be inconsistent with the nature of a ‘guarantee’ to allow the tests for the breach of it to be watered down?

The point of overlap and interplay between these two statutes is a matter which would benefit from legislative amendment. Unfortunately a recent Government Review of the Consumer Guarantees focussed on the guarantees relating to provision of goods rather than services. It did not touch on personal injury claims or s275.⁴⁴

2.1.3 Will CLAs Apply to ‘Damage’ Sustained Outside the Jurisdiction?

Another issue with the ACL/CLAs that has a direct impact on cruise ship passenger claims relates to the fact that passengers are often injured on ships beyond Australian waters. Would these CLA limitations apply to events that have occurred outside Australia? Some CLAs are silent as to extra territorial application. In *Insight Vacations*,⁴⁵ the High Court said that even if the CLA provision permitting contractual exclusions had been picked up and applied as surrogate federal law, it would not have been engaged on the facts of that case: the definition of recreational activity⁴⁶ was restricted to activities taking place in NSW.⁴⁷ There was no indication of an intent to apply that provision beyond NSW so they had to be read as limited to NSW territory.⁴⁸ The decision of the High Court related only to the geographical limitations found within the definition of ‘recreational activity’. In *Moore v Scenic Tours Ltd* the trial judge extended it by analogy, finding that the CLA (NSW) does not necessarily apply to losses sustained overseas,⁴⁹ but this finding was recently overturned on appeal.⁵⁰ Both parties have sought special leave to appeal to the High Court. *Moore v Scenic Tours Ltd* is discussed further below.

³⁸ *Insight Vacations v Young* [2010] NSWCA 137 (NSWCA); *Motorcycling Events Group v Kelly* (2013) 303 ALR 583.

³⁹ *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219.

⁴⁰ see 2016 articles in ANZ Mar LJ: fn 2 above.

⁴¹ *Motorcycling Events Group v Kelly* [2013] NSWCA 361; *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219, [63].

⁴² Because a breach of the guarantee does not hinge on negligence: see *Gharibian v Propix Pty Ltd t/a Jamberoo Recreational Park* [2007] NSWCA 151.

⁴³ Notably, the NSWCA was overturned in *Insight Vacations v Young* (2011) 243 CLR 149. There was an application for special leave to appeal to the High Court in *Perisher Blue*, but on the causation issue only: [2015] HCATrans 269.

⁴⁴ <http://consumerlaw.gov.au/consultations-and-reviews/review-of-the-australian-consumer-law/final-report/>

⁴⁵ (2011) 243 CLR 149.

⁴⁶ S5K CLA (NSW).

⁴⁷ The provision refers to parks, beaches and public open space.

⁴⁸ [9]; [35] - [36]. See *Moore v Scenic Tours* [2017] NSWSC 1555, discussed below.

⁴⁹ See *Moore v Scenic*, *ibid*.

⁵⁰ *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238.

Looking Ahead

Under Australian law, the legal position of passengers is unnecessarily complex and there are many issues that remain unresolved.

In the context of any potential implementation of the *Athens Convention* by Australia, the interaction with both the ACL and the CLAs must be carefully thought through so as not to add an extra layer of complexity to such claims. The aim must be to substitute clarity and uniformity for the layers of complexity and uncertainty that are hallmarks of the current position.

Australia would be best served by one uniform system of jurisdiction, liability and quantum for passenger personal injuries and death claims. There should be no more than one limitation regime operational at any one time. The Athens Convention would provide that regime; however it leaves the assessment of damages to the forum court to determine. Therefore, and critically, any enacting legislation would need to be explicit about whether personal injury damages awarded under any Athens regime will be assessed at common law; or according to CLA, or according to CCA Part VIB. As already outlined, the latter two impose quantum restrictions on claims: as does the Athens Convention (albeit operating as an overall cap).

Elsewhere I have argued that the quantum of damages under Athens, if they are to be capped under the Athens regime itself,⁵¹ should not also be subject to the constrictions of the CLA quantum limits.⁵² Otherwise, a single passenger claim would be subject to the various caps and limits for different heads of damage under the CLA, then have applied a further overall cap of 400,000 SDRs. If the event causing the injury was such to trigger the carrier's right to general limitation under the *Limitation of Liability for Maritime Claims Act 1989* (Cth), that would constitute a third limit on the passenger claim. Multiple applicable limits would be unjust.

Inevitably, the boundary of the domestic scheme will need to butt up against the boundary of the Athens regime as regards personal injury, death and damage claims. Claims would fall either side of the boundary. The scope of operation of the *Athens Convention* will be contested, but one can draw on international caselaw in that regard. In contrast, because the Athens Convention is silent on matters concerning pure consumer claims, passengers must retain the right to complain about the quality of services provided by the carrier pursuant to the consumer guarantees under the Australian Consumer Law. In other words, where the passenger asserts a claim other than personal injury or property damage, that claim should still be able to be brought under the ACL.

3 Part two: New Answers

3.1 The 'Long Arm' Reach of the Australian Consumer Guarantees is Longer than We Thought (and s 67 is Not the Determinant)

ACCC v Valve Corporation (No 3) (Valve) ⁵³

Do the consumer guarantees of the *Australian Consumer Law* apply to a transaction where the supplier is based overseas and the law of the contract is a place other than Australia? This question was the subject of a recent decision by Justice Edelman just prior to his elevation to the High Court.

The defendant in this case asserted that the application of the ACL was decided by looking for the proper law of the contract, given s 67.⁵⁴ Surprisingly there had been little discussion about this aspect of s 67 in previous caselaw.

⁵¹ Note that the Athens Convention 2002 allows a signatory state to impose higher limits, or indeed no limits at all, on the 'per passenger' personal injury/death claims. Likewise, signatories can opt out of global limits for passenger claims under the *Convention on the Limitation of Liability for Maritime Claims 1976*. For more on this see the Discussion Paper, and the submissions of Professor Gaskell, as well as my own, available at the Department website.

⁵² 'Cruise Ship Operators, their Passengers, *Australian Consumer Law* and *State Civil Liability Acts – Part 2*' (2016) 30 *ANZ Maritime Law Journal* 12, 26.

⁵³ [2016] FCA 196, (2016) 337 ALR 647 (Edelman J).

⁵⁴ The number has not changed in the transfer of provisions from TPA to ACL.

The *Valve* decision established that s 67 does not determine the application of the consumer guarantees under the ACL.

Section 67 ACL says:

Section 67 Conflict of laws

If:

- (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
- (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:

- (i) the provisions of the law of a country other than Australia;
- (ii) the provisions of the law of a State or a Territory;

the provisions of this Division⁵⁵ apply in relation to the supply under the contract despite that term.

ACCC v Valve Corporation was an enforcement action by the ACCC against an overseas supplier of streamed internet video games. Valve had a ‘no refunds’ policy that contravened the *Australian Consumer Law*. The main issue for our purposes was whether the ACL could apply to Valve’s dealings with Australian subscribers. Valve was incorporated and operated in Washington State, USA. Its standard agreement with subscribers nominated the laws of Washington State. Valve had subscribers and proxy servers all around the world, including Australia. Subscribers had to give their address when they joined, and ‘chats’ were had between Australian subscribers and Valve. Valve maintained that it did not carry on business in Australia,⁵⁶ nor was there any ‘conduct’ in Australia.⁵⁷ In a nutshell, Edelman found that the representations made on Valve’s website, and its chat logs with consumers, constituted representations taken to be made in Australia.⁵⁸ Further, Valve had carried on business in Australia: despite having no corporate presence or managers, employees or agents resident in Australia.⁵⁹

Valve argued that the consumer law guarantees did not apply because the proper law of the contract was not Australian law. Valve argued that the implication to be drawn from s67 was that the consumer law would not apply if the proper law of the contract was the law of some place other than Australia.⁶⁰

Justice Edelman held that s67 does not have that effect. His Honour said that the provision will operate where a party seeks to substitute a different law for the provisions of the ACL. However, it does not mean that the ACL can only apply if the proper law of the contract is Australian.⁶¹ Reading down the provision in this way was, his Honour found, contrary to the history, purpose, context and policy of the provision.⁶² In particular, the history of the enactment of the ACL was to simplify and clarify consumer rights, and unhook them from any underlying contract.⁶³

I do not accept Valve’s submission that s 67 has no effect unless it is construed as limited in the operation of Division 1. Rather, the section does exactly what it says. It ensures there can be no possibility of varying the operation of the Division by contractual terms.⁶⁴

⁵⁵ Being Part 3-2, Division 1 - Consumer Guarantees.

⁵⁶ Which would trigger the application of the ACL, because the company would be caught by s5 of the *Competition and Consumer Act*.

⁵⁷ [4]. Engaging in conduct includes making of representations.

⁵⁸ FCFCA [85]; first instance judgment [180].

⁵⁹ Edelman J, [199] – [204]. His Honour relied upon the following as supporting the conclusion that it was carrying on business in Australia: it had many customers in Australia (2.2m accounts) from whom it earned significant revenue; its ‘content’ was deposited on servers within Australia and accessed by customers; it had property and servers located in Australia; it incurred significant expenses in Australia for rack space and power, for which it paid an Australian company; it relied on relationships with third party members of content delivery providers in Australia; and it entered into contracts with third party service providers who provided content around the world, including to Australian customers, and Valve knew this was more efficient.

⁶⁰ [5].

⁶¹ Discussed in *ACCC v Valve* (No 3) (2016) 337 ALR 647, [90] – [125].

⁶² [90]. Notably, s67 could be contrasted with the provisions in the *Insurance Contracts Act 1984* (Cth) (ICA) which restricted the operation of the Act to those contracts the proper law of which is (or would be, but for a contractual provision) the law of a State or Territory in Australia. See s 8(1) ICA, discussed at [92]. Also discussed at 109 – [115], the *Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (no 2) 2010* (Cth)

⁶³ Simply put, the guarantees apply where a supplier supplies goods or services. See [111], [[115].

⁶⁴ [119].

His Honour went on to explain how the policy of the ACL would be undone by accepting Valve's construction of s67.⁶⁵ In this regard, the Full Court on appeal, added:

given the move away from contractual implication to direct guarantees, it would make little sense if the guarantees applied (at least as regards contracts) only where the proper law of any contract of supply was that of Australia or a part of Australia.⁶⁶

Therefore, we now know that the application of the statutory guarantees in the *Australian Consumer Law* does not depend on the proper law of that contract being Australian law. Rather, the guarantees will apply where the supplier engaged in conduct in Australia, or the supplier carried on business in Australia.⁶⁷ (The judge found that the proper law of the contract was that of Washington State.⁶⁸)

There are strong parallels between the *Valve* scenario and international cruise ship companies selling their cruises into the Australian consumer market – particularly those corporations that are not registered in Australia. Like Valve, these corporations have customers from all around the world and they provide services touching almost every country. They involve local entities to facilitate their business, not the least of which is marketing. Their contracts are often entered online and they attempt to create business efficiency by nominating the applicable law of the contract, and a place for disputes.

However, in relation to consumers at least, those corporations trading internationally must take the laws of the jurisdiction as it finds them. This has been mentioned in a few consumer cases now, and was reiterated again by Edelman J who quoted Buchanan JA in *The Society of Lloyd's v White*:⁶⁹

When it entered a foreign jurisdiction Lloyd's was required to deal with the legal system it found. It is one thing to require claims to be determined by the courts of one country; it is another to require all claims to be determined by the same laws whether or not they are the appropriate laws to govern the transaction giving rise to the claim.⁷⁰

In 2017, Justice Edelman's judgment was affirmed by the Full Court.⁷¹ In 2018, the High Court dismissed Valve's application for special leave to appeal, stating that there was no reason to disagree with the decisions of the lower courts.⁷²

The decision in *Valve* is important for all consumer contracts involving foreign corporations. It shines a light on the reach of the service guarantees under the ACL, and is of great relevance to passenger contracts in Australia. It articulates the significance of the change from implied warranties to consumer guarantees. It establishes that s67 does not determine the application of the ACL. Rather we have to look elsewhere in the Consumer Law – namely, whether the supplier 'engaged in conduct' in Australia, or whether the supplier was 'carrying on business' in Australia. Either of these two triggers will ensure the application of the ACL. This gives the ACL a 'long arm' to reach beyond Australia.

In the context of passengers, certainly, it seems that if a passenger in Australia:

- Embarks/disembarks a cruise in an Australian port;
 - Is physically in Australia when finalising the contract or when the ticket is issued;
 - Is accessing an Australian webpage of a cruise provider to book a cruise;
 - Has viewed advertisements in Australian press or obtained brochures in Australia; or
 - Whilst in Australia, communicates with the carrier or carrier's agent about the cruise:
- then, according to *Valve*, that would satisfy either or both of the criteria 'engaging in conduct' or 'carrying on business' in Australia.

⁶⁵ [116]–[124].

⁶⁶ [2017] FCAFC 224, (2017) 351 ALR 584, [111].

⁶⁷ As the Full Court pointed out [116], even if the supply of goods had taken place outside Australia, by virtue of s5(1), the ACL also applied to conduct outside Australia by bodies corporate carrying on business within Australia.

⁶⁸ *Valve*, [84].

⁶⁹ [2004] VSCA 101 [19].

⁷⁰ Quoted at *Valve*, [125].

⁷¹ [2017] FCAFC 224.

⁷² [2018] HCASL 99.

What of an Australian who is overseas and whilst overseas, arranges a last minute cruise with a foreign cruise operator that does not start or finish in an Australian port? That would not be caught by the ACL.

In submissions to DOTI concerning the implementation of Athens Convention, Professor Gaskell and I have proposed that this broader definition of ‘engaged in conduct’ might be harnessed to provide a clearer reach for Article 2.1(b) and Article 17.⁷³ Helpfully, this would also align the application of Athens with the reach of the ACL.

3.2 Clarifying the Operation of ACL Guarantees to Non-Personal Injury Claims by Passengers: Fitness for Purpose, Due Care and Skill, and Damages for Disappointment and Distress (DDD)

Aside from personal injury and damage claims, a passenger may also wish to dispute the quality of service delivered under the contract of carriage. The holiday may not have lived up to expectations. In England, passengers will have rights under the *Consumer Rights Act 2015* (UK); the *Package Travel, Package Holidays and Package Tours Regulations 1992*; and/or *EU Regulation concerning the rights of passengers when travelling by sea and inland waterways 1177/2010*. In Australia, rights will ensue under the ACL.

Under the ACL, a passenger would be likely to rely upon service guarantees such as the due care and skill guarantee (s60), and particularly the fitness for purpose guarantee (s61): or even s18 (misleading and deceptive conduct.) These provisions have certain advantages over common law claims based in contract. Generally speaking, these cannot be excluded and they apply automatically. For the fitness for purpose guarantee, the consumer need not prove negligence: non-compliance is compensable.⁷⁴

Generally, common law precludes the recovery of damages for disappointment and distress (DDD) in breach of contract cases, but holiday cases are an exception to that rule as accepted in *Jarvis v Swan Tours*.⁷⁵ In the famous passenger case of *Baltic Shipping v Dillon*,⁷⁶ the High Court held that the general rule and exceptions developed in English law should be recognised in Australia. In that case the plaintiff was awarded DDD when the ship sank off the coast of New Zealand 9 days into a 14 day cruise.⁷⁷ The experience was terrifying for the recently widowed plaintiff, who escaped the ship only 10 minutes before it sank. The trial judge awarded an amount twice the value of the cruise holiday for DDD. The courts on appeal had reservations about the quantum awarded, but not enough to disturb it.

That was the state of the law until the Civil Liability Acts were introduced in the early 2000s.

In a series of cases the NSW Court of Appeal has held that:

- Disappointment and distress is mental harm, therefore a ‘personal injury’;
- As such, it is caught by the CLA;
- According to the CLA, mental harm can only be recovered if it is a recognised psychiatric illness or psychological harm accompanying compensable physical injury.⁷⁸

This is a conclusion with which I respectfully disagree.⁷⁹ The history of the CLA changes do not support the view that they were intended to capture contractual damages for disappointment and distress. Nor do the plain words of the CLA provision. Significantly, the Ipp Report did not mention DDD at all. It is therefore arguable that such damages were never intended to be caught by the CLA. I think the damage that is being compensated is not a ‘personal injury’ by way of ‘mental harm’, but could also be characterised as the failure to deliver the expected

⁷³ See submissions at https://infrastructure.gov.au/maritime/business/liability/damage_luggage.aspx

⁷⁴ *Gharibian v Propix Pty Ltd t/a Jamberoo Recreational Park Ghariban* (unreported, New South Wales Court of Appeal, 22 June 2007), [62] (Ipp JA)

⁷⁵ [1973] QB 233.

⁷⁶ (1993) 176 CLR 344.

⁷⁷ The ship sank due to the negligence of the pilot.

⁷⁸ NSWCA in *Insight Vacations v Young*, applied in *Flight Centre v Louw* [2011] NSWSC 132).

⁷⁹ See S. Walker & K. Lewins ‘Dashed expectations? The impact of civil liability legislation on contractual damages for disappointment and distress’ (2014) 42 *Australian Business Law Review* 465; Lewins *International Carriage of Passengers by Sea* (Sweet & Maxwell 2016), 4-129 onwards.

benefit of the contract, namely relaxation and entertainment. It is true that it is a non-pecuniary loss, and in that sense bears some similarity to a head of damage in tort,⁸⁰ but it is not a tortious claim. The unfortunately emotive language – ‘disappointment’ and ‘distress’ – has perhaps obfuscated the nature of the claim: but this language was a feature of these contract cases well before *Donoghue v Stevenson*.

As a minor head of damage only recoverable in a narrow range of breach of contract cases, usually concerning holidays and therefore concerning very low quantum, it is strongly arguable that DDD does not represent the mischief that the Ipp Report was looking to address. Further, it sits ill with the objective of the ACL to allow the neutralising of the plain right to damages it offers on the basis of interpreting obscure provisions against a consumer in only a particular type of case – especially as it will not apply to consumers litigating in all States. A recent case in NSW has considered damages for disappointment and distress in the context of passengers. It also touches on the geographical ambit of the *Civil Liability Act* (NSW).

Moore v Scenic Tours Pty Ltd⁸¹

The case was a class action against a NSW company well known for running European river cruises. Scenic Tours Pty Ltd (Scenic) had promoted its cruises as a once in a lifetime experience, where passengers would be immersed in luxury, travelling from place to place on their ship. However, the floods that hit in 2013 badly affected these cruises. Many other operators cancelled their cruises but Scenic persevered. Australian passengers were not told of the issues until 48 hours before boarding and were not given the option to cancel (unlike European passengers, buffered by the EU holiday package laws, who mostly decided to cancel and claim a refund). The passengers were shuffled around Europe on various buses and different cruises, with limited time on the water. It was not the luxury and relaxing experience they expected. Thirteen different cruises were affected.

The passengers claimed Scenic had breached the ACL statutory guarantees that:

- services supplied must be reasonably fit for the purpose made known to the supplier (particular purpose guarantee – s 61(1));ⁱ
- services should be reasonably expected to achieve the result made known to the supplier (result guarantee – s 61(2));ⁱⁱ and
- services are to be rendered with due care and skill (due care and skill guarantee – s 60).

Notably, the passengers did not rely upon any contractual cause of action.

Scenic denied liability. It said the ‘services’ it contracted to provide were merely the right to go on a tour. It based that on its own terms and conditions permitted it to substitute and vary the tour as necessary so long as it was to the ‘nearest possible standard’. Further, it argued that the cause of the plaintiff’s damage was the unseasonal weather and flooding.

In a very lengthy judgment, the trial judge found that Scenic had breached at least one of the guarantees in relation to 12 of the 13 cruises in question.

On the question of liability, the findings with important implications for all cruise ship operators include:

- The contracted service commenced at the time of booking and continued until after disembarkation. Therefore, there was an obligation to provide information and management of the booking – which extended to information about likely disruption and offering an opportunity to cancel where feasible.⁸²
- The ‘service’ provided is not to be read down or qualified by the contractual terms and conditions.
- The ‘reasonableness’ requirement in the guarantees meant that not every small lapse would constitute a breach of the guarantee. Reasonableness also imposed a qualitative assessment. The court must make an overall evaluation of the services and their fitness for purpose.

⁸⁰ See *Milner v Carnival PLC* [2011] 1 Lloyd’s Law Reports 374 (EWCA) where the Court of Appeal had to assess what DDD to award the Milners as a result of their ruined holiday. In assessing an appropriate amount, the Court considered damages awarded in ‘other fields’ such as ‘general damages in personal injury cases when psychiatric injury has been suffered’ [38].

⁸¹ [2017] NSWSC 1555. See casenote (2017) 31 *Australian & New Zealand Maritime Law Journal* 47; see also (with Ashwin Nair) *International Recent Developments: Australia* [2018] *Tulane Maritime Law Journal* 533, 546.

⁸² [810].

A failure to comply with guarantees leads to a right to compensation under the ACL, such as a return of the purchase price. The judge awarded the Moores a full refund on the basis that they would not have acquired the services if they had known what they were getting.

The ACL also permits the recovery of damages for a breach of the statutory guarantee: s267(4). In this case, the plaintiffs also sought damages: which, as the judge noted, was essentially a claim for disappointment and distress. Scenic argued that such damages were not available. There had been no physical injury, nor psychiatric illness, and therefore such damages were not recoverable under the *Civil Liability Act 2002 (NSW)*. Scenic said that s 275 'picked up and applied' the CLA, and this included the restrictions on recoverability for mental harm under the CLA. The plaintiffs said the cause of action was not based on a breach of contract, but on s267. In any event, even if the CLA was picked up and applied, the damages regime under the CLA has a geographical limitation where damages occurred beyond the territorial jurisdiction of Europe.

The judge held he was bound by authority to conclude that damages for distress and inconvenience not consequent on physical injury or a discrete psychiatric condition will constitute personal injury damages as that phrase is used in the CLA (NSW).⁸³ Therefore it is caught by Part 2, and because the extent of disappointment and distress would not reach the minimum threshold of the CLA,⁸⁴ there would be no damages payable. However, that was subject to the issue of whether the CLA could extend to 'personal injury' beyond the borders of NSW (the geographical limitation point).

Relying on High Court authority, the judge said that as the claim for damages was for 'personal injury' and therefore a tort claim, the place of the tort was where the accident or harm happened.⁸⁵ The parties in this case had not proceeded on the basis of a contractual claim, nor did Scenic dispute that the *Australian Consumer Law* applied. As the judge said:

Neither party referred the Court to any authority dealing with the question of how one might decide which law applies to a statutory cause of action (s 267(4)) arising because of a breach in an overseas country of a consumer guarantee imposed on a supplier of services based in Australia. The question is, from the perspective of legal authority, at large.⁸⁶

A significant factor had to be that legislation is presumed not to have extraterritorial effect,⁸⁷ although a state parliament can displace the presumption with clear words or unavoidable implication.⁸⁸

The judge in *Moore v Scenic* considered the High Court case, *Insight Vacations v Young*. In that case, the High Court had to decide whether the *Trade Practices Act* warranty of due care and skill would be modified to allow reliance on an exemption permitted under s5N of the CLA (NSW). The exemption related to recreational activity, which is defined as including any pursuit or activity 'engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure'.⁸⁹ The High Court considered whether the CLA was to apply to all actions brought in NSW, or just applied to events occurring in NSW but said that in this case, the question would be resolved by looking at the words of the provision. The High Court held that the exemption of liability for recreational activity in s5N only applied if that recreational activity occurred in New South Wales. As described by His Honour in *Moore v Scenic*, s5N was a provision hinged on the place of performance of the relevant contract, and that gives best effect to the purpose and text of the provision.

The broader question – whether there is a general geographical limitation on the operation of the CLA (NSW) – was left at large by the High Court. So in *Moore v Scenic*, the judge reviewed the CLA and decided that the CLA (NSW) was not intended to have extraterritorial effect: a result 'not inconsistent' with the High Court decision in

⁸³ [854].

⁸⁴ Set by s16.

⁸⁵ At [881].

⁸⁶ [887].

⁸⁷ [888].

⁸⁸ [891].

⁸⁹ s5E *Civil Liability Act 2002*.

Insight Vacations.⁹⁰ As such, the CLA did not apply to the claim, which meant there was no minimum threshold of harm, which meant damages were recoverable.

Scenic appealed. The judgment of the NSW Court of Appeal was handed down in October 2018.⁹¹

Scenic Tours Pty Ltd v Moore (NSWCA)

In broad terms, Scenic:

1. alleged the trial judge erred in not considering the ‘services’ the subject of the guarantees to be confined by the contractual Terms and Conditions;
2. challenged the trial judge’s findings that Scenic failed to comply with the three guarantees;
3. challenged the trial judge’s assessment of compensation for non-compliance;
4. challenged the trial judge’s finding that damages of disappointment and distress could be awarded at all, arguing they were precluded by *CLA(NSW)* s16.

Scenic was unsuccessful in its appeal on the first ground. The second ground was partly successful. The Court of Appeal upheld the trial judge’s findings on contravention of the guarantees except in one respect. The court overturned the finding that Scenic had contravened the care and skill guarantee owed to Moore in relation to pre-embarkation services. Delivering the leading judgment, Sackville AJA set aside the trial judge’s finding as to what information ought to have been provided prior to embarkation. His Honour adopted a narrower view of the pre-embarkation services obliged to be provided, and on that view, was satisfied that Scenic had met the care guarantee in that respect.

The Court of Appeal also allowed the appeal on the question of assessment of compensation, saying the judge had assessed damages on subjective not objective considerations. It was ordered that the case be remitted back to the trial judge to determine compensation.⁹²

Critically for our purposes, the Court overturned the trial judge’s finding that Moore was entitled to DDD. The court held that the CLA (NSW) provisions did apply regardless of the fact that the contravention of the guarantee occurred outside Australia. The court distinguished the High Court judgment in *Insight Vacations v Young*, as being heavily influenced by the definition of ‘recreational activity’ contained in s5N CLA.⁹³ That definition was not in play in this case; s 16 was the relevant provision requiring interpretation. The court held there was sufficient geographic connection with New South Wales because s16 is directed to a court of NSW, directing such a court not to award damages contrary to the CLA.⁹⁴

Therefore, because the extent of Moore’s disappointment and distress would not reach the minimum threshold of the CLA for damages to be payable, s16 CLA precluded the court from awarding damages for the distress and disappointment occasioned by Scenic’s breach of the consumer guarantees.⁹⁵ That portion of the award was set aside.

Application for special leave to appeal to the High Court

Both parties have sought special leave to appeal to the High Court. Notably, Moore has appealed from the Court of Appeal decision regarding recounting of the award of DDD.

If the High Court grants leave, it will create be an opportunity to answer some of the questions posed in this paper. In particular, it could determine whether the High Court agrees with the NSW Court of Appeal that damages for disappointment and distress are in effect, damages for personal injury such that they are caught by the CLA; and in NSW, whether s16 CLA (NSW) precludes recovery. It would also determine whether there is a general geographical limitation applicable to the CLA (NSW).

⁹⁰ [908].

⁹¹ After the presentation of the conference paper upon which this article is based.

⁹² [331], [335].

⁹³ [385].

⁹⁴ [387] - [388].

⁹⁵ [390].

4 Conclusion

Although recent cases have clarified certain aspects, Australian law as it currently applies to cruise ship passengers is not clear or certain. The laws governing personal injury are no longer consistent between the States of Australia. Where that personal injury occurs during the course of delivery of services caught by the *Australian Consumer Law*, questions of liability and quantum are made unnecessarily complicated by the uplift of the state Civil Liability regimes into the *Australian Consumer Law*. There is also the prospect that the quantum of damages awarded for injuries may be assessed using different rules in different states of Australia. For example, if the High Court were to uphold the interpretation of s16 CLA (NSW) by the Court of Appeal in *Scenic v Moore*, DDD may still be recoverable in other states which do not share that provision.

Passenger claims are inherently complicated to begin with. Usually the accident has occurred overseas, and the provider of services may well be a foreign operator; and the ship a foreign ship. This international element also creates extra barriers not fully explored here – the possible need to serve out of the jurisdiction; to deal with a foreign exclusive jurisdiction clause and the application of Australian law to an accident that occurred beyond its shores, to name but a few.

Introducing the *Athens Convention* would go a fair way towards clarifying and standardising passenger claims in Australia. It would give the plaintiffs a certain choice of venues for their litigation, hold the carrier strictly liable for injuries or deaths arising from shipping incidents,⁹⁶ provide the assurance of insurance in the event of catastrophes and allow Australian courts to rely upon caselaw from other jurisdictions. However, if Australia is to implement the *Athens Convention*, its relationship with the state based CLAs must be clear.

Other papers at this Forum have discussed *Athens 2002* in depth. Suffice to say that the *Athens Convention*, carefully implemented, could resolve most of these issues, providing a more certain, clearer framework for passengers and carriers alike.

⁹⁶ Subject to the quantum limits in *Athens Convention 2002*: as to which see the DOTI Discussion Paper, fn 1.

Excerpts of key provisions⁹⁷

Australian Consumer Law (2010)

s60 Guarantee as to due care and skill

If a person supplies, in trade or commerce, services⁹⁸ to a consumer,⁹⁹ there is a guarantee that the services will be rendered with due care and skill.

s61 Guarantee as to fitness for a particular purpose etc

(1)[goods reasonably fit for purpose] If:

- (a) a person (the supplier) supplies, in trade or commerce, services to a consumer, and
- (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

(2) If:

- (a) a person (the supplier) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer makes known, expressly or by implication, to:
 - (i) the supplier; or
 - (ii) the person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, State or condition, that they might reasonably be expected to achieve that result.

(3) [exception to guarantee of fitness for particular purpose where consumer did not rely or was unreasonably to rely on skill or judgment of supplier]

... (4) ...

S 64 Guarantees not to be excluded etc. by contract

(1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the provisions of this Division; or
- (b) the exercise of a right conferred by such a provision; or
- (c) any liability of a person for a failure to comply with a guarantee that applies under this

Division to a supply of goods or services.

(2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with the provision.

ACL 67 Conflict of laws

If:

- (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
- (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:

- (i) the provisions of the law of a country other than Australia;
- (ii) the provisions of the law of a State or a Territory;

the provisions of this Division apply in relation to the supply under the contract despite that term.

⁹⁷ For the purposes of this article only.

⁹⁸ The definition of services is found in s3 *Consumer Law*:

Section 3

'services' includes

a) any rights benefits privileges or facilities to be provided, granted or conferred in trade or commerce...

b) or conferred under

(i) a contract for or in relation to the performance of work... whether with or without the supply of goods; or

(ii) a contract for or in relation to the provision of or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction...

⁹⁹ The definition of consumer also remains the same, although now contained in s3 *Consumer Law*.

CCA, s139A Terms excluding consumer guarantees from supplies of recreational services

(1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64 of the *Australian Consumer Law* only because the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:

(a) the application of all or any of the provisions of Subdivision B of Division 1 of Part 3-2 of the *Australian Consumer Law*; or

(b) the exercise of a right conferred by such a provision; or

(c) any liability of the person for a failure to comply with a guarantee that applies under that Subdivision to the supply.

(2) Recreational services are services that consist of participation in:

(a) a sporting activity or a similar leisure time pursuit; or

(b) any other activity that:

(i) involves a significant degree of physical exertion or physical risk; and

(ii) is undertaken for the purposes of recreation, enjoyment or leisure.

(3) This section does not apply unless the exclusion, restriction or modification is limited to liability for:

(a) death; or

(b) a physical or mental injury of an individual (including the aggravation, acceleration or recurrence of such an injury of the individual); or

(c) the contraction, aggravation or acceleration of a disease of an individual; or

(d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or State of affairs in relation to an individual:

(i) that is or may be harmful or disadvantageous to the individual or community; or

(ii) that may result in harm or disadvantage to the individual or community.

(4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.

(5) The supplier's conduct is reckless conduct if the supplier:

(a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and

(b) engages in the conduct despite the risk and without adequate justification.

Competition and Consumer Act 2010, Schedule 2, Australian Consumer Law

275 Limitation of liability etc

If:

(a) there is a failure to comply with a guarantee that applies to a supply of services under subdivision B of Division 1 of Part 3-2; and

(b) the law of a State or Territory is the proper law of the contract;

that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.

Judiciary Act 1903

79 State or Territory laws to govern where applicable

(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

...

80 Common law to govern

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies of punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the

laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

ⁱ ACL, s 61(1).

ⁱⁱ ACL, s 61(2).