

**What's the TPA got to
do with it?
Safety, quality and
towage contracts**

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Introduction

- The Trade Practices Act 1974 (Cth) aims to set standards of obligation between consumers and their suppliers.
- Extends well into commercial and maritime industries.
- S 74 seeks to impose a duty to render services with due care and skill.

Towage contracts

- Caught by consumer provisions - how come?
- Towage contracts vulnerable due to heavy use of standard conditions with exclusions and limitations.

s74 TPA

Warranties in relation to the supply of services

(1) In every contract ...of services to a consumer there is an implied warranty that the services *will be rendered with due care and skill....*

(2)

S74 (2) Where a corporation supplies services to a consumer in the course of a business and the consumer... *makes known to the corporation any particular purpose ...* there is an implied warranty that the services supplied ...will be *reasonably fit for that purpose...*

But does s74 apply at all?

S74 (3)

A reference in this section to services does not include a reference to services that are...provided, granted or conferred under:

- (a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored...

(“goods includes: Ships, aircraft and other vehicles...” – s4)

S74 (3) cont.

Will Queensland case will answer our questions?

Assuming s74 does apply to towage contracts....

PNSL Berhad v Deutsche Morgan Grenfell Leasing (ACT) Pty Ltd (formerly known as Bain Leasing Pty Ltd)

Threshold issue...

- s74 will be implied where a contract exists.
- Claim by or against a non- party will not attract s74.
- Parties to whom contractual reach is extended?

What effect does s74 have on:

Exclusion clauses?

Void – s 68

Effect on UK Standard Conditions

TRADE PRACTICES ACT 1974

- SECT 68

Application of provisions not to be excluded or modified

(1)

Any 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) that 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;
- (b) the exercise of a right conferred by such a provision;
- (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
- (d) the application of section 75A;

is void.

(2)

A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

Limitation clauses?

- Void unless comply with s68A.
- (pure form of UK Standard Conditions will not so comply.)
- s68A –can limit liability to cost of the service.
- Will still be void if the consumer can prove that it is not 'fair or reasonable' for the towage operator to rely on such a clause.



SECT 68A

Limitation of liability for breach of certain conditions or warranties

(1)

Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by section 69) to:

- (a) in the case of goods, any one or more of the following:
 - (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of the goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;
 - (iv) the payment of the cost of having the goods repaired; or
- (b) in the case of services:
 - (i) the supplying of the services again; or
 - (ii) the payment of the cost of having the services supplied again.

(2)

Subsection (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.

(3)

In determining for the purposes of subsection (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters:

- (a) the strength of the bargaining positions of the corporation and the person to whom the goods or services were supplied (in this subsection referred to as *the buyer*) relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;
- (b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;
- (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and
- (d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

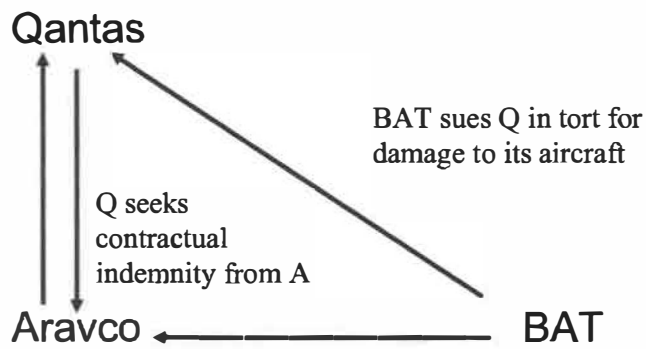
Indemnity clauses and s74

Indemnity clauses have the effect of transferring the cost (if not fact) of liability to other party.

Qantas Airways Ltd v Aravco Ltd (1996)

Qantas v Aravco (1996) 185 CLR 43, (1996) 136 ALR 510

Qantas v Aravco



Claims for personal injury and s74?

Limited circumstances.

Note UK Standard Conditions (1986) do not
exclude liability personal injury claims.

Recognising effect of UK Unfair Contract Terms
Act 1977 (UK).

Should s 74 apply to towage contracts?

interference happens elsewhere: UK, US

Is maritime that different from other commercial industries? – eg Aviation

Industry 'breakout' from s74 - options

- Seek clearer redraft of ss3 re marine services
- Get state legislature to intercede (possible because of s74 (2A))
- Adapt use of UK Standard Conditions to better fit the TPA (especially to take advantage of s68A)

Conclusion

**Is s74 TPA just a distraction from issues of
safety and quality?**