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THE OWNER'S VULNERABILITY TO THE LIABILITIES OF THE DEMISE CHARTERER

Angus Stewart*

1 Introduction

Demise charters differ from other forms of charterparty in that they involve the charterer having possession and control of the owner's vessel. The leading statement on the nature of a demise charter is that of Lord Justice Evans in *The Guiseppe di Vittorio*:¹

What then is the demise charter? Its hallmark ... is that the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting – a lease, or demise, in real property terms – of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a 'bareboat' lease or hire arrangement.

That statement was with reference to the meaning of the phrase 'charter by demise' in s 21(4) of the *Supreme Court Act 1981* (England and Wales) enacting Article 3(4) of the *1952 Arrest Convention*.² It was adopted by the Full Court of the Federal Court of Australia in *The Hako Endeavour*.³ Rares J also recognised that a demise charterer has often been described as 'the owner *pro hac vice* or the temporary owner because of the extent of his possession and control'.⁴

Because the charterer has possession and control of the vessel, peculiar issues arise with regard to the vulnerability of the owner through the possible arrest of the ship for the debts and liabilities of the demise charterer. The charterer may through the use of the owner's vessel incur tortious liability, or it may contract for its own purposes and interests and thereby place the vessel at risk for contractual debts.

These issues will be analysed in two categories, namely liabilities that give rise to maritime liens and those that are enforceable by statutory lien (i.e. by the arrest of a vessel on a general maritime claim in *in rem* proceedings). In each case, the circumstances can be further categorised into those cases in which the claim arose before termination of the charterparty and those in which the claim arose after termination of the charterparty.

2 Maritime liens

Since the master and crew are not employed by the owner, the owner will not be liable for the acts and omissions of the master and crew on the basis of vicarious liability. However, the ship itself will be susceptible to arrest and ultimately judicial sale – and the owner's asset will be imperilled and the owner will in that sense be liable – where the acts and omissions of the master and crew give rise to a maritime lien. Similarly, although the owner will not in the ordinary course be liable for the contractual debts of the charterer, where those debts give rise to a maritime lien the owner will be vulnerable to the debts through the enforcement of the lien against the ship.

A maritime lien is a privilege or security interest 'which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged'.⁵ It is enforceable against the ship even if at the time of enforcement the ship is no longer owned by the person who owned it when the events that gave rise to the lien occurred.⁶

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¹ [1998] 1 Lloyd's Rep 136 at p 156 2nd col. Curiously the reports of this and other judgments published in Lloyd's Reports concerning the same dispute spell the name of the ship as reflected here (i.e. Guiseppe) although the ship was presumably named after the Italian post-war trade-union and communist leader Giuseppe di Vittorio.

² *International Convention Relating to the Arrest of Sea-going Ships* (Arrest Convention), 1952, 439 UNTS 6330.

³ (2013) 211 FCR 369, 386 [54] (Rares J), 372 [1] (Siopis J), 404 [138] (Buchanan J).

⁴ Ibid 386 [55], citing *inter alia*, *The Andrea Ursula* [1973] QB 265, 269H (Brandon J).

⁵ *The Two Ellens* (1872) LR 4 PC 161, 169.

⁶ *The Bold Buccleugh* (1861) 7 Moo PC 267.

In England and the jurisdictions which have adopted the English admiralty law, there are generally five recognised maritime liens although their categorisation may vary.

First, there is the lien for collision damage (i.e. damage done by a ship). The liability for negligence giving rise to collision damage will attach to the ship herself.⁷ In *The Father Thames*⁸ the ship was under bareboat charter and it was the negligence of the charterer's employees that resulted in the collision, but the lien still attached, i.e. the owner became vulnerable to the *in personam* liability of the bareboat charterer through the mechanism of the lien. The lien does not arise if the fault is not attributable to the owner or demise charterer as owner *pro hac vice*.⁹

Second, there is the maritime lien for salvage. Under the terms of the charter, the bareboat charterer will typically be liable to the owner to repair any damage to the vessel as well as to take out hull and machinery insurance, but the claim for salvage attaches to the vessel itself. In other words, even though the successful salvage effort will save the charterer and/or the charterer's insurer the expense of repairs, the owner will through the salvage lien be vulnerable to the salvage reward. The salvage lien is not dependent on the personal liability of the owner or demise charterer.¹⁰

Third, there is the maritime lien for the master's and the seamen's wages. That is to say, even though the wage debt is incurred by the bareboat charterer and for its benefit and interests, the owner will through the lien be vulnerable to that debt. As a matter of public policy, the wages lien does not depend upon the personal liability of the owner or demise charterer.¹¹

The same is true for the *fourth* maritime lien, namely bottomry – that is where the keel or bottom of the ship is pledged as security for the payment of necessities that are contracted for by, and for the benefit of, the bareboat charterer or other person in possession. It is the credit of the ship itself that is pledged, not the credit of the owner.¹²

Finally, there is a lien for master's disbursements, i.e. the master has a lien for disbursements made by him for the employment and operation of the vessel. This lien does not arise if the master is employed by the demise charterer unless the master has authority to incur expenses for the owners.¹³

3 Statutory liens

Article 3(4) of the 1952 *Arrest Convention*¹⁴ allows for the arrest of a ship under 'a charter by demise' when the charterer is liable in respect of a maritime claim relating to that ship. Article 3(1)(b) of the 1999 *Arrest Convention*¹⁵ is to similar effect. These provisions, and in particular the statutory provisions which give effect to them, raise the question of whether a ship is under a charter by demise at a particular time. Controversy has arisen in connection with the period after the owner has purported to exercise a right of termination of the bareboat charterparty but the vessel is still in the possession of the charterer.

3.1 Charter Terminated Prior To The Claim Arising But Before Redelivery

If the charterparty is held to have terminated when the proceedings were commenced then the statutory lien will not be available even if the charterer still had possession. Claimants have, however, on occasion sought to justify proceedings against the vessel on the basis of the owner's *in personam* liability, or otherwise sought to hold the owner personally liable, in such circumstances on the basis of ostensible authority, i.e. that by allowing the erstwhile charterer to be in possession of the vessel and operating it as if it was the owner, the owner represented that the charterer had the authority of the owner to incur debts on its behalf.

An example of such a case is *The Guiseppe di Vittorio*,¹⁶ referred to above. The vessel was owned by the Republic of Ukraine and operated by Black Sea Shipping Co, known as Blasco, under a statutory scheme.

⁷ *The Dictator* [1892] P 304; *The Father Thames* [1979] 2 Lloyd's Rep 364.

⁸ [1979] 2 Lloyd's Rep 364.

⁹ *The Castlegate* [1893] AC 48, 52 (Lord Watson).

¹⁰ DR Thomas, *Maritime Liens* (Stevens & Sons, 1980) [274].

¹¹ *The Castlegate* [1893] AC 48.

¹² *The Ripon City* [1897] P 226, 245-6 (Gorell Barnes J).

¹³ *The Castlegate* [1893] AC 48, 51-3 (Lord Watson).

¹⁴ 439 UNTS 195.

¹⁵ International Convention on the Arrest of Ships (Arrest Convention), 1999, 2797 UNTS 49196.

¹⁶ [1998] 1 Lloyd's Rep 136.

When the vessel was arrested pursuant to a statutory lien for the supply of bunkers, the Republic argued that Blasco was the debtor *in personam* and there was no demise charter in place. The plaintiffs argued that if there was no demise charter, then the debtor *in personam* was the Republic on the basis that Blasco had contracted for the Republic.

As is customary, the contract for the supply of bunkers was stated to be for and on behalf of '[the vessel], her Master, owners and operators'. At first instance, Clarke J held that the Republic had permitted Blasco to represent to the world, including to the plaintiffs, that Blasco was the owner and thus that it could contract (as it were) on behalf of the vessel and that it could commit the vessel as security for any claim.¹⁷ Applying the principles of ostensible authority, or authority by estoppel, expounded in *Freeman & Lockyer v Buckhurst Park Properties*,¹⁸ the Republic was estopped from denying that it was liable on the contract, at least to the extent necessary to bind the ship.¹⁹

On appeal, the Court of Appeal analysed the factual circumstances of the relationship between the Republic and Blasco and concluded that there was a charter by demise within the meaning of the relevant statutory provision.²⁰ This was consistent with the finding of Clarke J at first instance. However, on the question of Blasco's authority to contract on behalf of the Republic, Evans LJ (Aldous and Waller LJ agreeing) held that the very factors which meant that Blasco was the demise charterer led to the conclusion that it, and not the Republic, was liable *in personam* on the plaintiffs' claim, and that even if there was no demise charter the facts would be the same which would lead to the same result.²¹

When there is a demise charter, it is not relevant that a third party dealing with the vessel may or may not have known what the terms of the charter were, or even whether a charter existed or not. The demise charterer is bound because the third party believes that he is dealing with him, or with his representatives, even if he also knows that another person is the registered or 'actual' owner of the vessel.

The reliance on the ostensible authority of the person in possession of the vessel accordingly failed. The reasoning was substantially based on the authority of the House of Lords decision in *Baumwoll Manufactur von Carl Scheibler v Furness*,²² which held that a master employed by a demise charterer has no apparent authority to bind the owner in signing bills of lading.

In *The Socofl Stream*,²³ counsel for the plaintiff sought to distinguish *Baumwoll v Furness* on the basis that unlike in that case the vessel was not still under demise charter; the charter had been terminated but the owner had done nothing to retake possession. It was contended that in those circumstances bills of lading signed by the master bound the owner. Moore J (in the Federal Court of Australia), in a jurisdictional challenge, held that the plaintiff's contentions were not untenable and therefore allowed them to proceed to trial.

In an appeal from the judgment following the trial in which the issue had been fully tried out, *The Socofl Stream (No 2)*,²⁴ the Full Court of the Federal Court in *The Socofl Stream (No 3)*²⁵ held that the plaintiff was entitled to assume that when the master received cargo on board the vessel he did so for the owner or the disponent owner for the time being,²⁶ the implication being that if there was no demise charter in place then the master could be taken to have signed for the owner. The other elements of estoppel having been made out, the owner was not able to deny the ostensible authority of the master to sign bills of lading binding the owner.

The High Court of Singapore (Steven Chong J) in *The Chem Orchid*²⁷ applied the reasoning of the Full Court in *The Socofl Stream (No. 3)*. On the assumption that the demise charter had been terminated (the Court having found that it had not been terminated making the findings on this point purely *obiter*), the vessel nevertheless remained in the possession and control of the erstwhile demise charterer when bills of lading were issued. His Honour held that the case based on the ostensible authority of the master to bind the owner rather than its erstwhile demise charterer was stronger than in *The Socofl Stream*; the owner knew that the vessel was

¹⁷ Ibid 149, 1st col.

¹⁸ [1964] 2 QB 480.

¹⁹ [1998] 1 Lloyd's Rep 136, 149 1st col.

²⁰ Ibid 159, 2nd col.

²¹ Ibid.

²² [1893] AC 8.

²³ (1999) 95 FCR 403.

²⁴ [2000] FCA 1681.

²⁵ [2001] FCA 961 (Ryan, Tamberlin and Conti JJ).

²⁶ Ibid [22]-[26], [37].

²⁷ [2015] SGHC 50 (18 February 2015) [122]-[129]; the judgment is on an appeal from a decision of the Assistant Registrar reported at [2014] SGHCR 1; [2014] 1 Lloyd's Rep 520.

continuing to trade and could have taken the simple step of contacting the shippers and informing them of the termination of the charter and the absence of authority to trade the vessel. Its failure to take overt steps to prevent the erstwhile charterer from loading the vessel was a representation (by silence) to third parties that the master had authority to bind the owner.

3.2 Is The Charter Terminated Even Though There Is No Redelivery?

The cases that deal with the situation where the claim arose prior to termination but the proceedings are brought against the ship still in the possession of the erstwhile demise charterer after the charter is terminated or purportedly terminated can be divided into three categories. *First*, there are cases where the demise charterer repudiated the charterparty and the owner accepted the repudiation. As will be seen, in each case the court has accepted that the charterparty was terminated and that the vessel was not susceptible to proceedings on the erstwhile charterer's liabilities. *Second*, there are cases in which notice of termination by the owner to the charterer following the charterer's breach alone has been sufficient to bring the charter to an end with the result that proceedings against the vessel on the charterer's liabilities are not competent. *Third*, there are cases in which it has been held that in addition to notice of termination, the retaking by the owner of possession of the ship, either actually or symbolically, is required in order to bring the charter to an end and thereby protect the vessel from proceedings on the charterer's liabilities.

3.2.1 Repudiation

In *The Munster*,²⁸ the claim was for payment for bunkers supplied to the ship in August 1982 under a writ issued in September 1982. The issue was whether the ship was under demise charter at the later time. On 6 April 1982 (only a few weeks after the commencement of the charter) the charterers had sent a telex to the owners saying that they could not continue with the charter as they had lost their entire capital. There was an immediate reply from the owners saying that the telex was treated as a repudiation and the claim in damages was being formulated.

There was therefore a repudiation of the charter which was accepted and the charter was held by the Court of Appeal (Ackner LJ, Waller and Purchas LJJ agreeing) to have come to an end. This was notwithstanding that the repudiation letter recorded that the vessel was abroad and could not be returned to the owners because the charterers were without means.

In *The Rangitata*,²⁹ an argument was advanced in the Federal Court of Australia that the sub-demise charter in question had been repudiated by the sub-charterer by non-payment of hire, the repudiation had been accepted by the intermediate charterer and the sub-charter had consequently come to an end prior to the commencement of proceedings to enforce the claim against the sub-charterer. The argument failed on the facts because the intermediate charterer had allowed non-payment of hire to persist for lengthy periods without insisting on compliance. The original 'time shall be of the essence' requirement had accordingly been waived and there was no repudiation.

In *The Mahakam*,³⁰ Eder J in the High Court of Justice of England and Wales held that the charter's non-payment of hire in the context of a 'time shall be of the essence' provision amounted to a repudiation that the owner had accepted thereby bringing the charter to an end.

3.2.2 Notice of Termination Only Required

In *The Sea Empire*³¹ in the Supreme Court of Hong Kong, Court of First Instance, prior to writs against the two vessels concerned having been issued, the owner had issued notices of withdrawal of the vessels to the demise charterer. The issue was whether those notices had terminated the charterparties. The plaintiffs referred to terms of the charterparties that provided for the payment of hire between withdrawal and redelivery and for redelivery in specified areas to argue that the charters did not terminate until redelivery. Barnett J rejected this argument and held that:³²

²⁸ [1983] 1 Lloyd's Rep 370.

²⁹ [1998] FCA 885 (15 July 1998).

³⁰ [2012] 1 Lloyd's Rep 87.

³¹ [1992] HKCFI 48 (9 March 1992); [1992] HKCFI 273 (9 March 1992).

³² Ibid [20].

... a demise charterparty is terminated when, in accordance with the provisions of the charterparty, an owner acquires a right to withdraw the vessel and asserts that right. Such assertion could, as in the present cases, be no more than a formal notice to the charterers. If the vessel is conveniently located the right might be asserted by the owner taking actual possession. The recovery of possession from the charterer is not, however, crucial to the termination of the charterparty. The charterparty terminates, I am satisfied, upon the owner asserting his right to withdraw the vessel from the charterer.

The circumstances of the termination of bailment were referred to as authority for this conclusion. The reasoning is that a contract of bailment can be terminated with immediate effect even though the bailee may continue to have possession of the *res* with the bailee's liability for the goods, and obligation to care for the goods, continuing even after termination.

In *The Socofl Stream*,³³ Moore J in the Federal Court of Australia held that it is necessary to ascertain from the terms of the charterparty whether continuing physical possession of a vessel by the charterer (pending taking of possession by the owner by redelivery or some other means) is coextensive with continuing possession and absolute control of the vessel of the type characteristic of a demise charter.³⁴ His Honour reasoned that the case before him was different from *The Turakina*³⁵ (discussed in the following section below) because there was in the case before him a clear contractual right to terminate by giving notice and it was exercised.³⁶ He said that it is difficult to avoid a conclusion that if a charterparty expressly provided for its termination and the power to terminate was exercised then the charterer ceased to be a demise charterer from the time of termination.³⁷

The issue arose again in the context of a charterparty with similar terms (being in that case a charter on the Barecon 2001 form) in *Re Pan Australia Shipping Pty Ltd (under administration): ASP Holdings Ltd v Pan Australia Shipping Pty Ltd (The Boomerang I)*.³⁸ Clause 28 provided for the owner to 'withdraw the vessel from the service of the charterers and terminate the charter with immediate effect by a written notice to the charterers' in the event of non-payment of hire'. Clause 29 dealt with repossession: 'the owners shall have the right to repossess the vessel from the charterers at the current or next port of call' and that 'pending physical repossession of the vessel ... the charterers shall hold the vessel as gratuitous bailee only to the owners'.

Finkelstein J felt compelled to follow the precedent of Moore J in *The Socofl Stream* but expressed some disquiet about it:³⁹

If I may say so, this is a troubling conclusion. It is troubling because until the owner actually withdraws the vessel not only does the charterer retain possession it still mans and supplies her. The problem becomes acute if the notice of termination is served while the vessel is at sea. Applying *The Socofl Stream*, she is not under demise while returning to port. If that be true it may surprise the owner to learn that the master now has ostensible authority to bind it. ...

I prefer the view that it is not until the vessel has been withdrawn that the demise comes to an end for it is only then that the charterer has lost exclusive possession of the vessel. That the charterparty describes the charterer's possession before delivery as that of 'gratuitous bailment' is not to the point. The real relation between the charterer and the vessel cannot be disguised by the use of an inapposite label or description.

Most recently, also in the context of the Barecon 2001 form, the issue was dealt with in *The Hako Endeavour*.⁴⁰ In the Full Court of the Federal Court of Australia, Rares J reasoned as follows:⁴¹

... The charterer becomes entitled to possession of the ship under and by virtue of the contractual rights that the owners confer on it by the terms of the demise. But that right to possession and control can be affected by another of the terms of the Barecon 2001 form. Thus, cl 29 provides that upon withdrawal of the ship and termination of the charter, the nature of the charterer's possession changes from possession for the charterer's use and benefit to possession as a gratuitous bailee for the owners. Possession of the latter kind is substantively different in character to the plenary right to possession and use of the ship formerly enjoyed by the charterer while the charter remained on foot.

³³ (1999) 95 FCR 403.

³⁴ Ibid 419 [28].

³⁵ (1998) 154 ALR 666.

³⁶ *The Socofl Stream* (1999) 95 FCR 403, 419-20 [29].

³⁷ Ibid 420 [30].

³⁸ (2006) 235 ALR 554.

³⁹ Ibid 558 [14]-[15].

⁴⁰ (2013) 211 FCR 369.

⁴¹ Ibid 389 [63]-[64].

When the charterer is in possession as a gratuitous bailee under cl 29, he holds the ship for the sole use and benefit of the owners. When, however, he is in possession because of the demise of the ship to him, the charterer holds her for his own use and benefit. The effect of withdrawal and termination of the charter under cl 29 is the same as a physical redelivery to the owners because the charterer has lost his contractual authority and right to use and employ the ship as he pleases.

The notice of withdrawal and termination thus amounted to symbolic conferral of possession of the ship in the owner even though physical possession remained with the former demise charterer.

Buchanan J reasoned similarly,⁴² and Siopis J agreed with Rares and Buchanan JJ.⁴³

In *The Chem Orchid*,⁴⁴ the Court disagreed with the reasoning in *The Hako Endeavour*.⁴⁵ Steven Chong J held that there is a general rule of the common law that physical redelivery of the vessel is necessary for a bareboat charter to be validly terminated,⁴⁶ and that it is not possible to contract out of that general rule.⁴⁷

While others might have been of a different view from Finklestein J [in *Boomerang I* quoted above], his concerns certainly resonated with me. I do not see how the parties' attempt at constituting the charterer as a "gratuitous bailee" can be effective in transferring possession and thereby bring about an end to the charter. ... The question of repossession goes right to the heart of whether the bareboat charter remains in force and, that being the case, I do not consider it to be within the parties' private sphere to stipulate when or how this may occur short of what the general law requires. As I have stressed in this judgment, a bareboat charter is only at an end in law if the two ingredients of control and possession in fact revest in the owner – parties cannot, through the use of an inapposite label, declare this to be the case when that is not reflected in the reality of their situation.

It was also held that constructive redelivery is not part of the law of Singapore, actual physical redelivery being required.⁴⁸ *The Chem Orchid*, although obiter on these points, marks a clear departure from the position in Australia.

3.2.3 Notice of Termination Plus Some Act of Repossession Required

Perhaps the most influential judgment in this category is that of Tamberlin J in the Federal Court of Australia in *The Turakina*.⁴⁹ The charterparty in question was on the Barecon 89 form which in clause 10(a) contemplates the continued payment of hire under the charter until the day and hour of redelivery of possession to the owner. Clause 10(e) provides for the right to withdraw the vessel from the service of the charterer for non-payment of hire. Unlike clause 28(1) of the Barecon 2001 form, it does not expressly provide for termination of the charter with immediate effect.

In response to the owner's argument that the notice of withdrawal had the effect that the charterer lost complete possession and control (which is the distinguishing hallmark of the demise charter) with an obligation to give back possession of the vessel at the direction of the owner, so the demise came to an end,⁵⁰ his Honour referred to the obligation to continue to pay hire until redelivery.⁵¹

Whilst holding that there had been no redelivery in this case and that the charter had accordingly not come to an end when the proceedings were commenced, his Honour allowed for the possibility that redelivery of possession could be achieved by symbolic delivery or attornment.⁵²

The notion of redelivery of possession of the vessel suggests some step or acknowledgment by the charterer to give effect to the redelivery and not merely a notice by or on behalf of the owner that redelivery is required. No such step was taken nor was any acknowledgment made in the few hours between withdrawal and commencement of proceedings. In the light of these considerations there is no substance in the

⁴² Ibid 408 [159];

⁴³ Ibid 372 [1].

⁴⁴ [2015] SGHC 50 (18 February 2015).

⁴⁵ (2013) 211 FCR 369.

⁴⁶ *The Chem Orchid* [2015] SGHC (18 February 2015) [72].

⁴⁷ Ibid [91].

⁴⁸ Ibid [104]–[105].

⁴⁹ (1998) 154 ALR 666.

⁵⁰ Ibid 675.

⁵¹ Ibid 676.

⁵² Ibid.

suggestion that constructive delivery was made simply by issuing and serving the notice of withdrawal of the vessel.⁵³

The New Zealand High Court came to consider the same factual situation of withdrawal or termination but in relation to different vessels chartered out under the same charterparty in *The Rangiora, Ranginui and Takitimu*.⁵⁴ After analysing the judgment in *The Turakina*, Giles J came to the same conclusion that since there had been no act of actual or symbolic redelivery of possession the charter had not terminated:

... a demise charter is effectively brought to an end when the right of possession and control is withdrawn (notice of termination) and redelivery is achieved. Neither act need be consensual. ... Provided the default relied on gives a right to termination (which it does) then cancellation is effective by giving notice ... but the owner must nevertheless recover possession, actual, symbolic or constructive.⁵⁵

4 Conclusion

How are the different decisions to be reconciled, and where they cannot be reconciled, which approach is correct?

It is important to recognise that the termination of demise charters is under consideration here in the context of the exercise of the statutory lien by the arrest of a 'demise chartered' ship. As between owner and charterer different considerations may apply as to whether the charter has been terminated, but as between the third party plaintiff and the owner who asserts that by the time the proceedings were commenced the vessel was no longer subject to 'a charter by demise' (Article 3(4) of the *1952 Arrest Convention*,⁵⁶ or similar phraseology in its statutory analogues) the question has to be answered with reference to the statutory language and purpose: is the possessor of the ship at the time that proceedings are commenced in such a relationship with the ship and its owner that it is 'a charterer by demise'? It was established in *The Guiseppe di Vittorio* that it is not necessary that that relationship be one governed by written contract. In that case it was governed by statutory provisions of the Republic of the Ukraine. But it can presumably equally be governed by the rules of the common law such as those that apply to a relationship of bailment.

When the owner has served a notice of termination and has actively asserted its right to take possession of the vessel, the situation may be clear enough. But where the owner has been content merely to serve notice and do nothing further to retake possession, the former charterer continues to enjoy the possession and operation of the vessel for its own purpose, including employing the master and crew, with the effective consent of the owner. It may be that the contract that originally governed their relationship has terminated, but there is an argument to be made that the new relationship of consensual gratuitous bailment (or some other relationship that gives possession to the 'charterer', cf. *The Sydney Sunset*⁵⁷) ought to still amount to 'a charter by demise' for the purposes of the exercise of the statutory lien.

The argument is that if whether or not the vessel is demise chartered for these purposes is to turn on the right of the owner to retake possession rather than on the retaking of possession, as suggested by the repudiation cases and the cases which say that notice of termination only is enough, then the statutory purpose is easily avoided. The vessel can trade indefinitely under the owner's immediately exercisable (but not yet exercised) right to retake possession. The charterer can gather debts and liabilities as it trades and these will not be able to be pursued against the vessel as Article 3(4) of the *1952 Arrest Convention*⁵⁸ and its statutory analogues envisage.

But the answer is that when notice of termination has been given and no steps to retake possession have been taken then the vessel is either still under demise charter or it is being operated with the consent of the owner. In other words, if it is under demise charter the debts and liabilities incurred in its operation will be the demise charterer's debts and liabilities and they will be able to be pursued against the vessel, but if the charter has terminated and possession remains with the former charterer then the debts and liabilities may be the owner's debts and liabilities which will then also be able to be pursued against the vessel. The latter position is established by the ostensible authority cases and assumes that the other elements of ostensible authority have been established.

⁵³ Ibid 677.

⁵⁴ [2000] 1 Lloyd's Rep 36.

⁵⁵ Ibid 55, 1st col.

⁵⁶ 439 UNTS 195.

⁵⁷ [2001] FCA 210 (9 March 2001).

⁵⁸ 439 UNTS 195.

Only two windows of avoidance for the vessel remain. One is where the charter is regarded as terminated by notice and the owner actively sought to retake possession but has failed because the former charterer has not cooperated (i.e. where it cannot be said that the former charterer holds possession with the consent of the owner). Only maritime liens arising from the actions or omissions of the former charterer in this period will be able to be pursued against the vessel. The other window is in respect of (non- maritime lien) debts arising prior to termination but in respect of which proceedings were not commenced prior to termination. The risk that a creditor will not be able to pursue the demise chartered vessel for payment is a risk that is always present and it is not made worse by the possibility of the charter being terminated but the vessel remaining in the former charterer's possession through the owner's inaction.

It follows that the cases are ultimately to be reconciled on the basis, *first*, that the terms of the charter in question are all important when determining whether it has been terminated in a given factual situation and, *second*, that notice of termination and retaking of possession are required, but it may be that in a particular case (because of the terms of the charter and possibly the terms of the notice, but not in Singapore following *The Chem Orchid*⁵⁹) the notice of termination itself amounts to the constructive taking of possession.

⁵⁹ [2015] SGHC (18 February 2015).

CRUISE SHIP OPERATORS, THEIR PASSENGERS, AUSTRALIAN CONSUMER LAW AND STATE CIVIL LIABILITY ACTS – PART 1

Kate Lewins*

Australians are besotted by cruising. The number of Australians embarking on a cruise has risen by an average 20% per year over the period 2002 – 2013. A record one million Australians embarked on a cruise in 2014.¹ Over the 2014/2015 summer 38 cruise ships are scheduled to visit Australian ports, and they will make more than 800 port visits. In that time there will be 330 roundtrip cruises from Australian ports. That number does not include Australia's own specialist cruise operators, nor does it take into account those Australians who fly overseas to join a cruise elsewhere in the world. The most popular fly-cruise option for Australians is Europe. In 2013, 77,000 Australians took a cruise in Europe, an increase of 34% over 2012 and a tripling over the previous 4 years.² Clearly, the cruise business is booming, and Australians have enthusiastically embraced this form of leisure travel.

An Australian who decides to book a cruise holiday will not have in the forefront of his or her mind the prospect that the holiday may be spoilt by personal injury. Of course, the vast majority of passengers will enjoy their cruise unsullied by such an event. But where an Australian is injured during the course of the holiday, both the passenger and the cruise operator will look to establish the legal position. The lawyers for both parties will be confronted with a perplexing and tangled set of State and federal statutes applicable to claims for breach of contract resulting in personal injury. These statutes are awkward companions. One set aims to 'protect' consumers, while the other seeks to retract common law rules of liability for claims arising from negligence. Both classes of statutes purport to deal with liability for recreational services, but with conflicting effect. The fact that the State based statutes are not uniform across Australia and their application to events and places outside Australia is uncertain adds yet another layer of complexity.

This paper canvasses these two sets of statutes in the context of a passenger claim brought in Australia against a cruise ship operator as a result of personal injuries sustained during the voyage.³ It seeks to outline how the federal and State statutes⁴ operate in the context of such a claim. The paper does not seek to explain or outline the common law of contract or torts, nor the specific principles governing the determination and assessment of personal injury claims on a State by State basis. There are many books available on those topics. Nor does it attempt to deal with the problems posed by conflicts of law, or managing multiple passenger claims arising out of large scale disasters.⁵

The paper is in two parts. Part One contains a general overview of the common law and the relevant statutory interventions at federal and State levels. It will then concentrate on the statutory guarantee imposed on service providers to render contracted services with due care and skill under the Australian Consumer Law. That statutory guarantee is the favoured basis for claimants to bring their claims. Part Two will consider how the consumer protection and civil liability laws interact. It considers the messy 'recreational services' provisions and explains the lessons to be learnt from recent case law about the effectiveness of waivers and exclusion clauses seeking to restrict liability for injuries sustained during the contractual provision of recreational services. It reveals the considerable lack of clarity and uncertainty involved in determining a passenger claim for personal injuries in Australian courts. It also outlines other difficulties that compound the complexity further but fall outside the ambit of the two papers. They are further illustration of the labyrinthine laws applicable to what may well be a simple accident. The conclusion suggests that the Athens Convention 2002 would represent an advance on the current state of the law, both for passengers and ship operators.

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¹ Cruise Lines International Association, 'State of the Cruise Industry Outlook' (Media Release, 2 December 2015) <<http://www.cruising.org.au/filelibrary/files/CLIA%20Global%202016%20forecast.pdf>>. Worldwide, 22 million people took a cruise in 2014.

² Ibid.

³ An assumption is made that the law of a state or territory in Australia is applicable to that claim, either because the parties have expressly or impliedly chosen that law, or that a court would find it applicable. If, on careful consideration, a lawyer forms the view that it is possible to argue that the carriage is caught by another system of law (particularly if the *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 2002 (Athens 2002)* would be recognised as applicable in that place) then it is imperative to weigh up the advantages and disadvantages of pursuing the claim in another jurisdiction.

⁴ The expression 'Australian law', although problematic, is used here as a shorthand for the mix of statute law (both federal and State) and common law that applies in any particular state in Australia.

⁵ Which would include matters such as class actions, shipowner's limitation of liability, and the varying entitlements of passengers on board to different damages awards, particularly for those passengers who may have booked an Australian cruise in Europe such that the 2002 *Athens Convention* applied.

These papers have been written with claims against cruise ships in mind. However much of what is set out will also apply to injuries sustained on other passenger ships that do not provide accommodation services, such as ferries.

1 Duty to take reasonable care for passenger safety at common law

At common law a carrier will be liable for a breach of contract should the passenger be injured or killed as a result of ‘fault or neglect’ on the part of the carrier, its servants or agents acting within the scope of their employment.⁶ This can also be described as a contractual duty to take reasonable care for the passenger’s safety.⁷ Clearly the duty requires competency in the many aspects of the navigational endeavour but the duty also extends to non-maritime aspects of the service provided. Therefore the ambit of that duty will reflect the services offered by the carrier. For a cruise ship operator, this includes the so called ‘hotel risks’. For example, the duty may manifest as a duty to take reasonable care to provide food free from contamination; to take reasonable care to implement an outbreak response plan for contagious disease⁸ to ensure a swimming pool has been properly chlorinated; to install and maintain a water system that prevents or minimises Legionnaire’s disease;⁹ and to ensure maintenance is carried out to minimise trip hazards. It is important to stress that liability is not strict. The carrier can repel claims by bringing evidence that establishes it took reasonable care to prevent the accident.

Where a breach of a contractual duty results in injury, damages will be assessed applying much the same principles as the equivalent claim in tort.¹⁰ At common law the plaintiff may also bring a separate claim for contractual damages for disappointment and distress if the contract of carriage was intended to provide relaxation and pleasure and yet failed to do so.¹¹ There may be a claim for the return of part of the fare on the basis that the contracted benefit was not forthcoming (In *Baltic Shipping v Dillon* the High Court held that a passenger cannot claim damages whilst also recovering the full fare for failure of consideration¹²).

Where a passenger has been injured during the course of performance of a contract, the paramount remedy is usually that based in contract but it is not unusual for a tortious remedy to be pursued in the alternative. Leaving aside the effect of contractual limitations or exclusions,¹³ at common law the assessment of what constitutes a breach of the duty to take care, and how damages are assessed for the injury, would be much the same whether pursued in tort or contract.¹⁴

The tort claim by a passenger may take on more significance where the injury was suffered in another jurisdiction and it is perceived that that the law in that place would be more favourable to the passenger. However an assertion before an Australian court that foreign law applies to the claim in tort will complicate matters in at least two respects; first as to whether an Australian court can justify claiming jurisdiction over that claim, and secondly as regards establishing that the foreign law did apply and what its effect would be.¹⁵ This

⁶ Richard Shaw, ‘Carriage of Passengers’ in *Southampton on Shipping* (Informa, 2008) 148.

⁷ See Mayo J in *Wong Mee Wan v Kwan Kin Travel Services Ltd*, (Unreported, High Court, Hong Kong, 25 October 1993), cited in Privy [1995] 4 All ER 745 (PC). In this regard, the *Athens Convention* Article 3 is said to reflect the common law position.

⁸ See *Nolan v Tui UK Ltd* (Unreported, County Court, October 2015) [October 2015] in which the court found that the carrier had an adequate outbreak plan in place and had deployed it correctly. The carrier was therefore not liable for the outbreak virus.

⁹ See *Myhra v Royal Caribbean Cruises Ltd* (2012) AMC 2678 (US).

¹⁰ N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract 1* (LexisNexis, 10th Aust Ed, 2012) [10.53].

¹¹ For England, see *Jarvis v Swan Tours Ltd* [1973] 1 QB 233; *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92; *Watts v Morrow* [1991] 1 WLR 1421; for Australia, see *Baltic Shipping Company v Dillon* (1993) 176 CLR 344. The effect of the CLA reform on claims for damages for disappointment and distress is still controversial: see Sonia Walker and Kate Lewins, ‘Dashed Expectations? The impact of Civil Liability Legislation on contractual damages for disappointment and distress’ (2014) *Australian Business Law Review* 465.

¹² (1993) 111 ALR 289 (*Baltic*).

¹³ As well as the question as to their effective incorporation.

¹⁴ Where the passenger is on board the vessel gratis, or it is a casual outing on a pleasurecraft, the tort claim may take on more significance because there would be no basis to sue in contract.

¹⁵ For a recent example of an assessment of court jurisdiction over such matters see *Thompson v Royal Caribbean Cruises* [2013] FCA 1427 (6 December 2013) (Rares J). The plaintiffs applied for leave to serve out of the jurisdiction in relation to an injury sustained on a cruise. They had boarded the ship in Venice and Mrs Thompson sustained an injury whilst disembarking in Croatia. While claiming under the contract, the plaintiffs also sued in tort alleging the law of Croatia applied. Justice Rares considered the Federal Court had jurisdiction in relation to the tort claim because part of the damage sustained had been suffered in Australia (at [11]). This was only an ex parte interlocutory decision regarding an application for leave to serve out of the jurisdiction, and was still susceptible to a *forum non conveniens* claim, but it is an example of the ‘homeward’ trend. The judge also ruled that the court had jurisdiction because the claim was a maritime claim under the *Admiralty Act 1988* (at [13]) and therefore the action could be pursued *in personam* (note that at the time of the cruise Italy had not acceded to the *Athens Convention, 1974*, 1463 UNTS 19; however a few months later, in December 2012, the *Athens Convention 2002* came into force by way of an EU Regulation).

paper assumes that the law applicable to the contract or tort claim is the law of one of the states of Australia unless otherwise stated.

At common law, the fact that there is an obvious risk of injury arising from recreational activities does not exculpate the provider from a duty to exercise reasonable care in controlling the activity.¹⁶ This is so even if the participants are adults taking part for enjoyment.¹⁷

In Australia assessment of liability for personal injuries, whether brought in tort and contract, has changed due to the State based CLA reforms, as has the assessment of the quantum of a claim. While the intent may have been for the CLA reforms to operate uniformly, as we shall see the reality is something quite different. These reforms apply to virtually all types of personal injury claims.¹⁸ What is not clear, however, is the extent to which the State based CLA reforms may modify the formulation of liability of a ship operator under the Commonwealth consumer protection provisions.

The CLA reforms are now introduced.

1.1 Civil Liability reforms relating to recovery of damages for personal injuries

A clutch of laws with significance for passenger contracts are the various reforms passed by all Australian States and territories in 2002/2003 (collectively called *Civil Liability Acts* (CLAs)), passed to give effect to the Ipp Report.¹⁹

The reform of laws relating to personal injury was mooted in the late 1990s. Concern over burgeoning litigation arising from tort claims and the supposedly consequent increase of public liability premiums²⁰ led to claims that there was a ‘public liability insurance crisis’. An inquiry was instigated, chaired by Justice David Ipp, and tasked with recommending reforms to reduce the quantum and number of claims.²¹ The Ipp Report led to all States and the Commonwealth enacting legislation with the aim of limiting recovery for personal injury, both in terms of liability and quantum. The changes include altering the tests for duty of care, causation and contributory negligence; provisions concerning proportionate liability and restricting liability for mental harm, reforming the law relating to liability for injuries sustained during recreational activity; as well as imposing thresholds and caps on the quantum of claims for non-economic loss. The effect of the reforms include the virtual extinguishment of smaller claims and a significant reduction in general damages, no matter how deserving the plaintiff. However, the reforms enacted by each State were not entirely uniform as we shall see.²²

1.1.1 Effect of CLA reforms on tort and contract claims for personal injury at common law

The CLAs are designed to deal with ‘harm caused by the fault of a person’.²³ They will apply to any claim for damages resulting from such harm, whether the damages are sought in an action based in negligence, contract or any other action. The Acts are not limited to liability for personal injury, but are said to extend to liability for other harm including property damage and economic loss.²⁴ All claims that fall within its terms are to be treated as if they are claims in the tort of negligence²⁵ (there is a query as to whether the CLA framework of liability also applies to property and consequential claims; the CLAs are drafted broadly enough to apply to all types of

¹⁶ *Action Paintball v Clarke* [2005] NSWCA 170 (25 May 2005) [28] (Basten J, with whom Handley and Tobias JJ agreed) (*‘Action Paintball’*).

¹⁷ *Ibid.*

¹⁸ Again, the scope of application of the CLA reforms varies from State to State.

¹⁹ The reforms were enacted either by a standalone Act or by amendments to statutes already in place: see *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).

²⁰ On the other hand, some considered the ‘concerns’ were not justified and therefore neither are the reforms: see Justice John Goldring, ‘The *Civil Liability Act 2002* (NSW) (2003) 6 *The Judicial Review* 274, 278; Anna Katzmann, ‘Restricting Access to Justice. Changes to Personal Injury Laws: the New South Wales Experience’ (2005-6) *Bar News* 5.

²¹ The terms of reference Stated:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and the quantum of damages from personal injury and death.

²² See, for example, the treatment of injuries during recreational services, and circumstances in which the parties can agree that the CLA will not apply, discussed further below.

²³ See Heading – Part 1A, *CLA 2002* (WA).

²⁴ See, eg. *CLA (2002)* WA s 3.

²⁵ *Insight Vacations v Young* (2011) 243 CLR 149, 155 [14] (*‘Insight Vacations’*).

damage arising from careless conduct but it is at least arguable that the CLAs may not extend to claims that involve either no personal injury at all, or those that do not involve careless conduct.²⁶) In some states parties can contract out of the operation of certain aspects of CLA.²⁷

It is important to note that the provisions enacted in each State roughly approximate one another but the wordings of each section are not identical. This creates both disparity and uncertainty of outcome,²⁸ both of which inhibit predictability. It makes it difficult for parties to determine with any certainty what a court is likely to conclude in a given case, which in turn acts as a barrier to the early settlement of claims. Further, Victoria and South Australia have chosen not to enact the tranche of Ipp recommendations as regards injuries arising from recreational activities.

A discussion of the full extent of the reforms (and the variation in the laws between States) can be found in specialised texts and journal articles;²⁹ readers should refer to them in order to grasp the full extent of the reforms and the differences between jurisdictions. Aside from the very brief summary provided under this heading, this paper will focus on the aspects of the CLA reforms that pose particular challenges in a claim for injuries sustained while a passenger is on board a ship.

For our purposes, the sweeping reforms enacted by the *Civil Liability Acts* in 2002/2003 fall into three broad categories:

Restrictions on calculation of damages

First, the reforms impose limitations on the amount of damages that can be recovered if the defendant is found liable. Of great significance is the extinguishment of non-economic loss for claims of personal injury that do not meet a minimum threshold³⁰ and the discounting of those claims that only just fall over the threshold.³¹ The desired purpose of removing all small personal injury claims is thus achieved: no matter how worthy of compensation those cases may be.

The aim of the reforms is to control the quantum of larger claims where the plaintiff has suffered horrendous or catastrophic injury as a result of the negligence of another. The CLA reforms in some States (but not all)³² contain caps on the total amount of damages recoverable.³³

A striking illustration of the effect of these changes on the quantum of damages awarded is provided by the case of *Nair-Smith v Perisher Blue*.³⁴ The plaintiff was injured when a ski chairlift safety bar hit her as she waited to sit on the chairlift. The court found that defendant breached its duty of due care and skill because the operator failed to observe the bar was in the wrong position and act in good time to correct it, thereby avoiding the injury.³⁵ The parties disputed whether the CLA reforms applied to the case due to the date of the injury, so the judge assessed damages under both the common law and CLA. At common law the plaintiff's damages were assessed at AUD1 192 597.50. The judge found that under the CLA (NSW) the same injuries would have entitled the Plaintiff to damages assessed at AUD411 95681.³⁶

²⁶ The *CLA (2002) NSW* long title reads 'an Act to make provision in relation to the recovery of damages for death or personal injury caused by the fault of a person; to amend the Legal Profession Act 1987... and for other purposes.' (emphasis added)

²⁷ See, eg. *CLA (2002) (WA)* s 4A which expressly provides for contracting out of certain provisions of the *CLA*, requiring a written and signed agreement between the parties. The *Wrongs Act 1958 (Vic)* s 46 is worded more generally, stating that the parties are not prevented from making express provisions for their rights obligations and liabilities under the contract (see also s 70.) The *CLA 2002 (NSW)* s 3A is worded similarly to the Victorian provision. The *CLA 2003 (Qld)* s 7(3) contains a variation of the wording in the Victorian Act.

²⁸ Most telling is the diagram that features in the paper by Joachim Deitrich, 'Liability for personal injuries arising from recreational services: the interdiction of contract, tort, State legislation and the Trade Practices Act and the resultant mess' (2003) 11 *Torts Law Journal* 1, 17.

²⁹ See, eg. Dominic Villa, *Annotated Civil Liability Act (NSW)* (Lawbook Co, 2nd ed, 2013); see also Australian tort texts such as *Fleming's Law of Torts*; RP Balkin and JLR Davis *Law of Torts* (LexisNexis, 5th ed, 2013) and the journal articles referred to in fn 16 and 58.

³⁰ In NSW, there will be no recovery for non-economic loss ('general damages') where the severity of injuries is assessed as being less than 15% of the 'most extreme' case: *CLA (NSW)* s 16. The damages payable for the 'most extreme' case of severity is capped at an amount that is set by regulation each year: at the time of writing, in NSW, the figure is AUD 572,200: *Civil Liability (Non-economic Loss) Order 2010 (NSW)*.

³¹ In NSW, for example, for any injuries that are assessed as between 15% - 32% of the most extreme case there is a 'writedown' formula for calculating the damages. Under that formula, an injury that is assessed at 16% of the most extreme case will be awarded not 16% but 1% of that figure.

³² WA, for example, has no ceiling on non-economic loss.

³³ For example, in NSW, at the time of writing, that amount is AUD 572,200.00.

³⁴ [2013] NSWSC 727 (7 June 2013) (*Perisher Blue*), which is discussed further in Part 2. See also *Nair-Smith v Perisher Blue Pty Ltd (No 2)* [2013] NSWSC 1463 (4 October 2013) (*Perisher Blue (No 2)*).

³⁵ *Ibid* [197].

³⁶ *Perisher Blue (No 2)* [2013] NSWSC 1463 (4 October 2013) [57].

However the thresholds and caps are different as between the States. For example, WA has no cap on the quantum of award for non-economic loss, but does have a threshold below which claims cannot be brought.

Alteration of common law tests of liability

Secondly, the reforms seek to rewrite the common law tests and principles relating to liability; in particular the principles for establishing duty of care; causation; contributory negligence and assumption of risk. Amongst other things, and pertinently to passenger claims, the reforms:

- introduce the presumption of contributory negligence where a claimant is intoxicated;
- introduce proportionate liability for concurrent wrongdoers;
- stipulate that there is no duty to warn where the risk of harm is obvious;
- extinguish liability for inherent risks; and
- limit the right to recover for mental harm.

Specific reforms relating to liability arising out of recreational activities

Thirdly, the reforms stipulated changes to specific spheres that were seen to be problematic. One of those spheres was injuries arising out of recreational activities. The reforms extinguish a duty of care towards a person engaging in a recreational activity if a risk warning that meets the requirements of the Act has been given. Further, the reforms permit a provider of recreational services to rely upon a contractual waiver of liability. Waivers that comply cannot be reviewed for unfairness under the unfair terms regime under the *Consumer Law*.³⁷ Two things to note about this: first, a reminder that Victoria and South Australia have chosen not to include the recreational activities reforms in their CLA package and in fact have brought in limitations on the use of waivers in their State based consumer protection.³⁸ Secondly, in *Insight Vacations* the High Court has ruled that the NSW CLA provisions concerning recreational activities supplied in NSW do not apply extraterritorially to activities outside NSW.³⁹

These CLA reforms raise lots of questions that the courts are only beginning to answer. How do these state based reforms of the law of negligence interact with the Commonwealth consumer protection laws? Will warnings, contractual waivers and exclusions permitted by the state CLAs be valid if the Commonwealth consumer protection laws are engaged? Outside of recreational services, do the other CLA reforms apply to the assessment of liability and damages for accidents caught by the Commonwealth consumer laws, particularly if the injury occurs outside Australia?⁴⁰ These issues are discussed further below, and in Part II of this paper.

The Commonwealth consumer protection provisions are now introduced.

2 Consumer protection legislation – Trade Practices Act/Australian Consumer Law

Since 1975, consumer protection has been the subject of legislation instigated at federal level and replicated to a degree in state laws. When the federal Parliament enacted the ground-breaking *Trade Practices Act 1974 (Cth)* (TPA)⁴¹ it was an ambitious reform. Its ambit was constrained by constitutional limits, such that it in the main it applied to conduct by corporations. To overcome those limitations, state parliaments enacted roughly equivalent

³⁷ Section 26 provides that the unfair terms regime does not apply to ‘a term of a consumer contract to the extent, but only to the extent, that the term... (c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.’

³⁸ See fn 58.

³⁹ (2011) 243 CLR 149, 161-2, [35]. The NSW Act did not explicitly provide for extraterritorial application (*Insight Vacations* (2011) 243 CLR 149, 156[16]). Note that there is yet more variation between the states here. The *Civil Liability Act* (WA) appears to mirror the NSW position. But the *Civil Liability Act* (SA) 1936, for example, provides it is to apply to ‘harm arising from an accident occurring in this State’ (s 4).

⁴⁰ As stated, for the purposes of this article we are assuming that a court in Australia has jurisdiction.

⁴¹ Various judicial decisions about the TPA proved controversial and broadened its scope considerably outside the pure consumer protection field. This is not relevant to passenger contracts as they would clearly be classed as consumer contracts in nature and therefore within the natural ambit of the TPA.

legislation which applied to conduct in trade and commerce regardless of corporate status.⁴² All of these laws are subject to certain territorial restrictions.⁴³

Most relevantly, the consumer protection provisions of the TPA included:

- prohibiting a corporation from engaging in conduct in trade or commerce that would mislead or deceive, or which was likely to mislead or deceive (s 52).⁴⁴
- prohibiting particular specified types of false or misleading representations in connection with the supply or possible supply of goods or services (s 53).
- statutory implied terms that goods supplied to consumers would be of merchantable quality, fit for purpose, meet their description and correspond to sample (s 69 – s 72).⁴⁵
- a statutory implied term that services supplied to a consumer would be rendered with due care and skill and that any goods supplied under that contract are fit for purpose (s 74).

Those provisions were supported by facilitative sections elsewhere in the TPA that reflected a broad approach to matters such as agency, promises as to the future and extended liability for others ‘involved’ in the contravention, and a hostility towards the exclusion of TPA liability using contractual terms. In relation to consumer contracts at least, the TPA was a mandatory statute that could not be avoided by the parties in the usual exercise of party autonomy: in other words, if triggered, Australian courts would be obliged to apply it regardless of a choice of law clause nominating the law of another country.⁴⁶

In 2002 provisions were added to the TPA prohibiting unconscionable conduct by a corporation in the supply of goods or services.⁴⁷ Also in 2002, a new s 68B permitted clauses excluding or limiting liability under s 74 for personal injuries arising from the provision of recreational services.⁴⁸ These sections were significant for passenger claims under Australian law.⁴⁹

Until 2004, relying upon the TPA provisions to recover for personal injury claims was possible⁵⁰ but not common.⁵¹ However the potential for the TPA provisions to be used to support a claim for damages for personal injuries led to the TPA being caught up in the civil liability reforms of 2002-2004. The resulting changes to the TPA⁵² roughly, but not entirely, approximated civil liability reforms enacted in the various states as a result of the *Ipp Report*.⁵³ For claims based on misleading or deceptive conduct, the ability to seek damages for personal injury was eliminated altogether so as to avoid s 52 becoming a ‘backdoor’ method for obtaining damages for personal injuries.⁵⁴ It remained possible to obtain damages for personal injury under the TPA where the injuries arose in the context of a *contract* for goods or services, but the claim was constrained in line with the civil liability reforms⁵⁵ of the state in which the services were supplied.⁵⁶ This will be discussed further under the next heading.

⁴² *Fair Trading Act 1987* (NSW); *Fair Trading Act 1999* (Vic); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1987* (WA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1992* (ACT); *Consumer Affairs and Fair Trading Act 1990* (NT). Unfortunately, but predictably, these state regimes are not entirely uniform.

⁴³ See Kate Lewins, ‘Cruise Ship Industry – liabilities to passengers for breach of s 52 and s 74 *Trade Practices Act 1974* (Cth)’ (2004) 18 *MLAANZ Journal* 30, 32-5. For claims alleging a breach of the warranty of due care and skill, the warranty will apply where the proper law of the contract (absent any choice of law clause) would be an Australian state or territory: s 67 TPA and s 67 *Consumer Law*. For s 52 claims the situation is more complicated, however, s 52 is no longer able to support a claim for personal injuries in any event: see below.

⁴⁴ If damages are sought under the *Consumer Law*, and the plaintiff relies upon conduct outside of Australia, the plaintiff must obtain ministerial consent before a hearing: CCA s5.

⁴⁵ These provisions represent improved versions of terms implied in contracts under the state Sale of Goods Acts. Importantly, under the TPA they were not able to be excluded if they were goods ordinarily acquired for personal domestic or household use: s 68 TPA.

⁴⁶ S 67 TPA, now s 67 *Consumer Law*. See discussion of mandatory laws of the forum in Martin Davies, Andrew S Bell and Paul Le Gay Brereton, *Nygh’s Conflict of Laws* (LexisNexis Butterworths, 9th ed, 2014) [19.39].

⁴⁷ Part IVA added by Act 222 of 1992, s 9. There have been various additions and amendments to that part since: see Ray Steinwall *Annotated Trade Practices Act 1974* (LexisNexis Butterworths, 2009) [10,850.5]. Those provisions were said to be inspired by the *Contracts Review Act 1980* (NSW).

⁴⁸ Inserted by Act 146 of 2002.

⁴⁹ This is discussed further under the next heading.

⁵⁰ From the outset of the TPA, ‘loss or damage’ was defined to include injury, thus making it possible to sue for damages: *Trade Practices Act 1974* (Cth), s 4K.

⁵¹ *Law of Negligence Review* (2002) (*Ipp Report*) [5.11].

⁵² See, eg. Act 113 of 2004, which inserted Part VIB ‘Claims for Damages or compensation for death or personal injury’.

⁵³ See, eg. *Ipp Report*.

⁵⁴ See the terms of reference for the *Ipp Report* which required the development of ‘amendments to the TPA to prevent individuals commencing actions in reliance on the TPA, including misleading and deceptive conduct, to recover compensation for personal injury and death’: Treasury, *Review of the Law of Negligence Terms of Reference 4* (2002) <<http://revofneg.treasury.gov.au/content/review2.asp>> x.

⁵⁵ TPA s 74(2A), now *Consumer Law* s 275.

⁵⁶ Joachim Dietrich, ‘Service guarantees and consequential loss under the *Australian Consumer Law*: the illusion of uniformity’ (2012) 20 *Competition & Consumer Law Journal* 43, 44.

Some states had also introduced additional protection for consumers. In New South Wales the *Contracts Review Act 1980* (NSW) contained provisions allowing the court to intercede where a provision in the contract was unjust in the circumstances. The Victorian *Fair Trading Act 1999* is said to have taken inspiration from the *Unfair Terms in Consumer Contracts Regulations 1999* (UK).⁵⁷ Eventually unfair terms reforms were included in the federal scheme but in different terms to the UK regime.⁵⁸

The patchwork of national/state consumer protection laws was overhauled as a result of the Intergovernmental Agreement 2009. The states and Commonwealth agreed to adopt a uniform scheme termed the *Australian Consumer Law*. The TPA was replaced with the *Competition and Consumer Act 2010* (Cth) (CCA); the *Australian Consumer Law* (*Consumer Law*) forms a schedule to the CCA. The *Consumer Law* came into effect on 1 January 2011.⁵⁹ Each of the states and territories⁶⁰ has enacted the *Consumer Law* as part of its own law.⁶¹ The State versions of the *Consumer Law* will apply to natural persons and others not otherwise caught by the Commonwealth *Consumer Law*. Notably, the state iterations deviate from the Commonwealth version and from each other's, particularly around exclusions of liability for recreational services where some states have enhanced, and others have diminished, consumer protection for consumers of recreational services.⁶² The disparity is highly undesirable although perhaps of minimal impact for ship operators that will invariably be incorporated bodies caught by the Commonwealth *Competition and Consumer Act/Consumer Law*.⁶³

Much of the *Consumer Law* contains rebadged TPA provisions. Therefore we can draw upon a corpus of TPA caselaw and commentary in that regard. However there are several new features. Relevantly:

- The *Consumer Law* contains a new national 'unfair terms' code,⁶⁴ and
- statutory implied warranties have been converted to 'statutory guarantees' with express remedies provided in the Act.

The new 'uniform' consumer protection scheme has not been free from criticism.⁶⁵

The laudable aspiration of federal/state uniformity has been achieved in many areas of consumer protection under the *Consumer Law*. Lamentably it does not extend to contracts for provision of services, in particular in relation to personal injuries sustained in breach of the obligation to supply services with due care and skill.

⁵⁷ See the differences highlighted, and a criticism of the unfair terms regime in the *Consumer Law*, by JW Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) *Journal of Contract Law* 221, 238 – 241.

⁵⁸ The *Contracts Review Act 1980* (NSW) deals with notions of unconscionability, now also included in Part IVA of the TPA. Provisions dealing with unfair contract terms have been added to the new *Consumer Law*, enacted in 2010. Notably, under the UK Act, terms excluding liability for personal injury and death are the subject of a blanket prohibition.

⁵⁹ Be it the TPA or the later *Consumer Law*. For a summary of the provisions in the TPA relevant to cruise ships in Australia as at 2004, see Lewins, above n 43.

⁶⁰ By virtue of the Intergovernmental Agreement for the Australian Consumer Law made on 2 July 2009 between the Commonwealth, the state of New South Wales, the state of Victoria, the state of Queensland, the state of Western Australia, the state of South Australia, the state of Tasmania, the Australian Capital Territory and the Northern Territory of Australia. ('Intergovernmental Agreement 2009'). The Intergovernmental Agreement 2009 provides that Australian Consumer Law, in each state, may be referred to as, eg., *Australian Consumer Law* (ACT).

⁶¹ *Fair Trading Act 1987* (NSW); *Australian Consumer Law and Fair Trading Act 2012* (Vic); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 2010* (WA); *Australian Consumer Law (Tasmania) Act 2010* (Tas); *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Consumer Affairs and Fair Trading Act 1990* (NT).

⁶² Victoria, South Australia and the Northern Territory have imposed restrictions on the use of contractual waivers by recreational service providers: *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 22; *Fair Trading Act 1987* (SA) s 42; *Consumer Affairs and Fair Trading Act 1990* (NT) s 48 (see the discussion concerning the Victorian Legislation: Dietrich, above n 56, 53). By contrast, New South Wales has sought to expand the permissible operation of contractual waivers for recreational services providers caught by their legislation: *Fair Trading Act 1987* (NSW) s 88A. The NSW provision does so by specifically making s 64 of its *Consumer Law* subject to *Civil Liability Act 2002* (NSW) s 5N. It could be argued that this provision is not in accord with the spirit of the Intergovernmental Agreement 2009 as regards modifications. For more on the inconsistency between states, see, Dietrich, above n 56.

⁶³ CCA s 131: 'Schedule 2 applies as a law of the Commonwealth to the conduct of corporations....' The state variations to consumer law provisions are not covered in this paper.

⁶⁴ *Consumer Law* Pt 2-3. A term that is expressly permitted under Commonwealth, state or territory laws cannot be an unfair term under the code: s26(1)(c) *Consumer Law*.

⁶⁵ For criticisms of the *Consumer Law* as genuine reform, see Carter, above n 57; 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; Sirko Harder, 'Problems in interpreting the unfair contract terms provisions of the Australian Consumer Law' (2011) 34 *Australian Bar Review* 306; Dietrich, above n 56.

3 Statutory guarantee to render services with due care and skill (s74 TPA/60 Consumer Law)

3.1 History - Trade Practices Act 1974

In Australia the implied contractual obligation to take reasonable care for a passenger's safety has been eclipsed by its statutory relative first incarnated in s 74 TPA. It was part of a suite of implied warranties protecting consumers, and the only one relating to supply of services as opposed to goods.⁶⁶ Since 1977 the provision has appeared in the following form:⁶⁷

(1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

(2) Where a corporation supplies services ... to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation a particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied in connexion with those services might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.

Until 1986 the reach of s 74 was constrained by a narrow definition of 'services' to which it applied, such that it did not provide a cause of action for personal injuries consequent on the breach of warranty.⁶⁸ Amendments to s 74 in 1986 expanded its reach to contracts 'for or in relation to ...the provision of or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction'.⁶⁹ From that point, a cruise ship contract clearly fell within the parameters of s 74 and as a result, a claim for personal injuries could be made. In the seminal case of *Dillon v Baltic Shipping Company (The Mikhail Lermontov)*⁷⁰ the trial judge held that the pre-1986 provision imposed upon the cruise ship operator a duty to exercise due care and skill in the navigation of the vessel carrying the plaintiff's luggage, but the original provision did not extend to impose the duty in relation to the carriage of the plaintiff herself.⁷¹ The 1986 amendment came too late for Mrs Dillon.

Between 1986 and 2002, s 74 was particularly effective because it extended to personal injury claims arising from a failure to exercise due care and skill in the performance of the contract for services, and could not be excluded where the services were of a personal domestic or household nature.⁷² It clearly caught contracts for carriage of passengers. Further, the provision applied where the objective proper law was that of an Australian state, which meant that a choice of law provision in a contract was to be ignored.⁷³

In 2002, s 68B⁷⁴ was inserted. Section 68B permitted corporations, by means of an effective and incorporated exclusion clause, to exclude liability for injury⁷⁵ caused by the consumer undertaking 'recreational services'. Initially the proposal was only to excise liability for 'inherently risky' activities⁷⁶ but the amending provision contained a broader definition of 'recreational services' which appeared to increase the ambit of effective exclusion clauses considerably.⁷⁷

⁶⁶ The TPA included many warranties based on implied conditions for the sale of goods such as fitness for purpose. Section 74, a warranty for services, was an attempt to create similar protection for consumers purchasing services as existed for consumers purchasing goods.

⁶⁷ *Trade Practices Act 1974* (Cth).

⁶⁸ *Trade Practices Act 1974* (Cth) s 74 as originally enacted defined services as follows:

- (3) In this section, 'services' means services by way of-
- (a) the construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or of fixtures on land;
 - (b) the alteration of the physical state of land;
 - (c) the distribution of goods; or
 - (d) the transportation of goods.

⁶⁹ Act 17 of 1986.

⁷⁰ (1989) 21 NSWLR 614.

⁷¹ While doubted on appeal it was not expressly overturned (see Lewins, above n 43, fn 83); nor did it receive attention in the High Court.

⁷² Section 68 allowed businesses to limit liability, but only if the contract was not one for personal domestic or household use or consumption. The equivalent provision in the *Consumer Law* is s 64. A contract for a holiday is almost invariably of a 'personal domestic or household' nature.

⁷³ TPA s 67.

⁷⁴ *Trade Practices Amendment (Liability for Recreational Services) Act 2002* (Cth) (no 146 of 2002), which received Royal Assent and commenced on 19 December 2002.

⁷⁵ Defined as physical or mental injury: s 68B(2).

⁷⁶ See Lewins, above n 43, fn 93.

⁷⁷ Section 68B.

Section 68B read:

68B Limitation of liability in relation to supply of recreational services

(1) A term of a contract for the supply by a corporation of recreational services is not void under section 68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:

- (a) the application of section 74 to the supply of the recreational services under the contract; or
- (b) the exercise of a right conferred by section 74 in relation to the supply of the recreational services under the contract; or
- (c) any liability of the corporation for a breach of a warranty implied by section 74 in relation to the supply of the recreational services under the contract; so long as:
 - (d) the exclusion, restriction or modification is limited to liability for death or personal injury; and
 - (e) the contract was entered into after the commencement of this section.

(2) In this section:

disease includes any physical or mental ailment, disorder, defect or morbid condition, whether of sudden onset or gradual development and whether of genetic or other origin.

injury means any physical or mental injury.

personal injury means:

- (a) an injury of an individual (including the aggravation, acceleration or recurrence of an injury of the individual); or
- (b) the contraction, aggravation, acceleration, or recurrence of a disease of an individual; or
- (c) 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 that is or may be harmful or disadvantageous to, or result in harm or disadvantage to:
 - (i) the individual; or
 - (ii) the community.

Then in 2004 a new s 74(2A) was introduced, circumscribing claims according to limitations contained in state laws.⁷⁸

74(2A) If:

- (a) There is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and
 - (b) the law of a State or Territory is the proper law of the contract;
- the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any) in the same way as it applies to limit or preclude liability, and recovery of liability, for breach of another term of the contract.

It was contained in a Bill that had the purpose of supporting state Professional Standards laws to ensure that s 74 and s 68 TPA did not unwittingly undermine them.⁷⁹ Section 74(2A) was not originally part of the Bill, but was included by the Government whilst the Bill was before the House, and a supplementary explanatory memorandum was provided.⁸⁰

After 2004, a claim based on s 74 could still support a claim for damages for personal injury or death in some instances; such as where the injuries are sustained in a contract for the supply of services that were something other than ‘recreational services’ within the TPA definition. For example, it would apply to a contract with a taxicab to carry the passenger, or a mechanic to repair the car. But more broadly the ambit of s 68B and s 74 (2A) were relatively untested, at least until 2010 when they were the focus of the *Insight Vacations* case discussed below.

⁷⁸ Inserted by the *Treasury Legislation Amendment (Professional Standards) Act 2004* (Cth), which commenced operation on 13 July 2004. The ambit of this provision was discussed by the High Court in *Insight Vacations* (2011) 243 CLR 149, 154-5 [10]-[13]. This is discussed further below, eg. at fn 113. In short, the provision will import state laws that, of themselves, operate to limit or preclude liability for breach and recovery of that liability. Unfortunately the High Court did not explicitly outline which other parts of the CLA would satisfy s 74(2A), other than that it did not pick up s 5N.

⁷⁹ The history of the bill and the various explanatory memoranda for *Treasury Legislation Amendment (Professional Standards) Bill 2003* and Second Reading Speech all available at Australian Parliament House, *Treasury Legislation Amendment (Professional Standards) Bill 2003* (2004) <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r1957>

⁸⁰ See Spigelman CJ's judgment in *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137 (11 June 2010) [43]-[46] where his Honour lays out the legislative history of that amendment.

The TPA provisions were transferred into the new CCA in 2010.

3.2 From TPA to the Australian Consumer Law

The TPA consumer provisions, including s 74, were subsumed into the *Competition and Consumer Act 2010* and its schedule *Australian Consumer Law (Consumer Law)*.

On a practical level, provisions that were formerly grouped in a discrete part of the TPA (ss 68 – 74) have been ‘redistributed’ in a manner that makes analysis difficult. The following table shows where each of the provisions discussed above can now be found:

Then - TPA provision	Now - CCA/Consumer law provision
s 74(1): services rendered with due care and skill	s 60 <i>Consumer Law</i>
s 74(1): services fit for purpose	s 61 <i>Consumer Law</i>
s 68: warranties not to be excluded by contract	s 64 <i>Consumer Law</i> (see also s 276)
s 68A: can limit liability if not personal domestic or household use	s 64A <i>Consumer Law</i>
s 68B: can exclude s 74(1) for death injury resulting from recreational services	s 139A <i>CCA</i> (NOT part of <i>Consumer law</i>)
s 74(2A): State limitation of liability applies	s 275 <i>Consumer Law</i>
Remedies for breach - silent	s 267 – 270 <i>Consumer Law</i> (new)
s 67: conflict of laws – objective proper law of contract applies	s 67 <i>Consumer Law</i>

Although the obligations once outlined in s 74 have been reshaped into several sections, the contents of these provisions are very similar in form (albeit not identical) to their corresponding provisions in the repealed TPA. There are, however, some important differences. The implied warranties are now termed statutory guarantees and explicit remedies for their breach are contained in the statute.

AUSTRALIAN CONSUMER LAW (COMPETITION AND CONSUMER ACT 2010) (CTH) SUBDIVISION B – GUARANTEES RELATING TO THE SUPPLY OF SERVICES

60 guarantee as to due care and skill

If a person supplies, in trade or commerce, services⁸¹ to a consumer,⁸² there is a guarantee that the services will be rendered with due care and skill.

61 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) ...

⁸¹ The definition of services is found in *Consumer Law* s 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...

⁸² The definition of consumer also remains the same, although is now contained in *Consumer Law* s 3.

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.

In the CCA, we find the former s68B, slightly reworded:

139A 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.

The significance of s 139A, and its relationship with provisions in state CLAs concerning recreational activity, is discussed below.

3.3 Nature of obligation under statutory guarantees relating to providing a service

3.3.1 Render services with due care and skill – s 60

The obligation to perform services with due care and skill has been said to equate with tortious duty to take care at common law.⁸³ The test of whether a provider failed to render services with due care and skill has been described as one of 'reasonableness'.⁸⁴

⁸³ *Motorcycling Events Group Australia Pty Ltd v Kelly* (2013) 303 ALR 583, 613 [159] (Gleeson JA) ('*Motorcycling*'). See also Russell Miller, *Miller's Australian Competition and Consumer Law*, (Thomson Reuters 33rd ed, 2011) [1.S2.60.10].

⁸⁴ *Motorcycling* (2013) 303 ALR 583, 613 [161] (Gleeson JA). Although his Honour had decided the CLA provisions amending the duty of care in s 5B applied to s 74 claims (at [150]), his Honour considered, in the alternative, what the s 74 duty would entail if s 5B did not apply.

Difficult questions arise concerning the extent to which the s 60 statutory guarantee is subject to the state CLA recalibration of tests to establish negligence, causation and the like. The state based CLA reforms seek to apply to all claims for damages for death or personal injury, whether grounded in tort, contract or a statutory claim, but they can only do so where not inconsistent with a federal law. The provision in s 275 CCA will shield state laws from s 109 of the Constitution and render them as ‘surrogate federal law’,⁸⁵ but the scope of that provision has proved problematic. The words of s 275 CCA⁸⁶ are cast narrowly and recent cases show such that not every aspect of the CLA reforms will be treated as ‘surrogate federal law.’ The legal position is still unclear but what the cases tell us thus far is that where a breach of s 60 results in personal injury, it is not a simple case of importing the framework for liability of the applicable state CLA in its entirety.⁸⁷ This is discussed further in Part 2 of this paper.

3.3.2 Fitness for purpose – s61

Section 74 TPA contained two elements of fitness for purpose. These are continued in s 61 *Consumer Law*:

- (1) materials supplied in the course of the contract for services had to be reasonably fit for the purpose.⁸⁸ This obligation could be breached, for example, where food on board a ship is contaminated with salmonella causing illness to passengers, or where leisure equipment is faulty causing injury;⁸⁹ and
- (2) a more general obligation that, as well as rendering the services with due care and skill, the services themselves be fit for purpose, where the customer has made known the purpose or the results the customer desires to achieve.

The requirement that goods supplied be ‘reasonably’ fit imports a degree of relativity, but if the goods are not so fit then liability will follow. Cases that considered the s 74 warranty of fitness for purpose have decided that the warranty might be breached even if the supplier has taken reasonable steps to avoid a foreseeable risk of injury.⁹⁰ This should be of keen concern to cruise ship operators.

In *Gharibian v Propix Pty Ltd t/a Jamberoo Recreational Park*, the appellant was injured during the course of a toboggan ride when rain fell, making the track slippery and the brakes ineffective. The supplier had taken many steps to protect users from using the track during rain. However the court held that these measures were necessary because ‘the toboggans were not fit for their purpose when rain caused the tracks to become wet’.⁹¹ The toboggans needed to be reasonably safe when operated by any person who had entered into a contract for their use; their safety should not depend upon the ability of members of the public to react quickly and without panic.⁹² Further, as the goods were not reasonably fit for the purpose for which they were to be used, the fact that the respondent acted with due care and skill and was not negligent in failing to spot the imminence of rain, was irrelevant to liability.⁹³ The court dismissed claims based on negligence and the contractual warranty of due care and skill.

This case shows that it is possible for a supplier to be liable for breach of the guarantee of fitness for purpose even if it has taken reasonable care and not been negligent.⁹⁴ The fact that it is a judgment of the NSW Court of

⁸⁵ A term used by the High Court in *Insight Vacations* (2011) 243 CLR 149, 153 [3].

⁸⁶ *Consumer Law* s 275 (formerly s74(2A)) inserted by Act no 118 of 2004 (Cth), operational from 13 July 2004.

⁸⁷ See *Motorcycling* (2013) 303 ALR 583.

⁸⁸ TPA s 74(2); now *Consumer Law* s 61. See also *Action Paintball* [2005] NSWCA 170 (25 May 2005) [31]. In that case the appellant had been injured during a game of paintball in the rain, during which his goggles fogged up. His claim that the goggles were not fit for purpose in breach of s 74 was dismissed because his evidence did not contend that he was looking at the ground therefore he could not establish the requisite causal link (A different conclusion may have been reached had he had specifically given evidence on this point).

⁸⁹ For an example of s 74 in action see *Gharibian v Propix Pty Ltd t/a Jamberoo Recreational Park* (unreported, New South Wales Court of Appeal, 22 June 2007) (*Gharibian*). In that case a family paid to enter a fun park and in the course of activities, rode on a toboggan ride. The brakes on the toboggans would not work if wet, and therefore the ride had to be shut during rain. The plaintiff was injured when rain started as she was part way through the ride, causing the brakes to fail. The question was whether the materials supplied in connection with the supply of services (namely the toboggans) were reasonably fit for the purpose for which they were supplied under s 74(2). Ipp J, with whom the other judges agreed on this point, said at [42]-[48] there were 3 questions to be determined in considering the s 74 cause of action. First, was there a contract between the parties where the defendant undertook to provide the plaintiff (a consumer) with services. The second is whether materials were supplied in connection with those services. If they were, then the defendant impliedly warranted that the materials supplied would be reasonably fit for the purpose for which they were supplied.

⁹⁰ *Gharibian* (unreported, New South Wales Court of Appeal, 22 June 2007) [62] (Ipp JA), relying on English authorities to do with implied warranty into contracts for the sale of goods.

⁹¹ *Ibid* [54] (Ipp JA), with whom the rest of the court agreed on this point.

⁹² *Ibid* [57].

⁹³ *Ibid* [63].

⁹⁴ Mason P and Tobias JA agreed with Ipp JA that a breach of s 74(2) had been established. Ipp JA and Mason P concluded that there was insufficient evidence that the trial judge had erred in finding that the claim of negligence had not been made out. As the negligence claim failed, so too did the contract claim. Tobias JA, agreed with Ipp JA on the issue of s 74 and final orders, but concluded that in fact the

Appeal, and the judgment was delivered by Justice Ipp, the architect of the Ipp Report, makes it all the more significant.

3.4 Nature of remedies for breach of statutory duty /guarantee

3.4.1 Under TPA

Originally the statutory duty to render services to a consumer with due care and skill was a warranty implied by the TPA. The TPA did not provide an explicit remedy for its breach.⁹⁵ Instead, a breach of the provision was treated as a breach of warranty to which common law remedies could be ascribed.⁹⁶ Toohey and Gaudron JJ, in *Wallis v Downard Pickford (North Queensland) Pty Ltd*⁹⁷ stated ‘...the warranty created by s 74 carries with it full contractual liability for breach’.⁹⁸

In *Dillon v Baltic Shipping Company (The Mikhail Lermontov)*⁹⁹ the defendant conceded during trial that it had failed to exercise due care and skill in caring for the plaintiff and her possessions in that the services of navigation of the vessel were not rendered with due care and skill.¹⁰⁰ The trial judge accepted that the cruise ship operator had breached the s 74 warranty in relation to the care of the luggage.¹⁰¹ Even if the carrier’s exclusion clauses were incorporated in the contract, they would have been void by reason of s 68.¹⁰² The plaintiff was granted damages for her lost possessions.¹⁰³ On appeal, neither the parameters nor content of the duty imposed by s 74’s application to cruise ship contracts was discussed.¹⁰⁴

3.4.2 Consumer Law

Remedies are no longer left to common law contractual principles but are now found within the *Consumer Law* itself.¹⁰⁵ The *Consumer Law* now provides specific remedies for a breach of the statutory guarantees in the provision of services in s 267. If the failure is a minor one, the consumer can require it to be remedied. If the failure is major, or cannot be remedied, the consumer may terminate the contract or recover compensation for any reduction in the value of services below the price paid or payable by the consumer for the services.¹⁰⁶ For a cruise passenger, termination will not generally be viable once the passenger has embarked, so the option of recovering compensation is more attractive. Compensation may be appropriate, for example, if the passenger is

supplier had been negligent also, by failing to stop the ride when rainclouds were in the area ([89]). This would appear to be an unusual case. First, one would expect that where a court finds there to be no negligence, there will usually be no breach of fitness for purpose either; indeed courts can on occasion treat the two causes of action with disturbing similarity (see for example the Federal Court in *Ruaro v Holcomm Marine Pty Ltd* [2008] FCAFC 174 (31 October 2008) where the majority judgment concluded that ‘the... factual finding that there was no negligence is an answer to the alternative limb of the claim under s 74(2).’ ([83]).) Secondly, the manner in which the appeal unfolded meant that issues of ss 68 and 68B were not canvassed on appeal: [58]-[59].

⁹⁵ TPA s 87E did apply to claims under s 74 for personal injury. By its terms, TPA s 87E applied to ‘part VIA, to Division 1A or 2A of Part V or to Part VA’: s 74, being found in Part V Division 2, was not caught.

⁹⁶ *Malo v South Sydney District Junior Rugby Football League* [2008] NSWSC 552 (14 February 2008) [22] (Hoeben J), citing *Arturi v Zupps Motors Pty Ltd* (1980) 33 ALR 243, 245-6 in which Brennan J said that the implied terms imposed by TPA operate as a legal fiction namely that the obligation has been included in the contract and therefore the breach of the obligation is not a breach of the Act but a breach of the obligation imposed by the contract.

⁹⁷ (1994) 179 CLR 388.

⁹⁸ *Ibid* 397.

⁹⁹ (1989) 21 NSWLR 614. At the time, the warranty did not extend to the carriage of the plaintiff personally, but from 1986 it did.

¹⁰⁰ The vessel grounded and sank a short time after the final passengers aboard had abandoned ship. The grounding was found to have been caused by negligent pilotage, for which the ship operator was legally liable. The concession by the defendant meant that the court did not have to rule on the exact content and reach of the duty in the context of navigational services.

¹⁰¹ See above fn 95.

¹⁰² *Dillon v Charter Travel Co Ltd & Ors* (1989) 92 ALR 331, 355.

¹⁰³ At that time the section’s definition of ‘services’ was such that her personal injuries were not compensable under the section.

¹⁰⁴ Although the Court of Appeal was not convinced by the trial judge’s device of cleaving the contract into one for luggage (to which s 74 applied) and one relating to carriage of the person (to which, at that time, it did not).

¹⁰⁵ See Jeannie Paterson ‘The new consumer guarantee law and the reasons for replacing the regime of statutory implied terms in consumer transactions’ (2011) 35 *Melbourne University Law Review* 252, 254.

¹⁰⁶ *Consumer Law* s 267(2). These prescriptive remedies do not sit comfortably with claims by passengers for injuries sustained during their carriage. Terminating a cruise is an unlikely prospect when you are out at sea, nor once disembarked having completed the contract. The expression ‘compensation for the reduction of services below the price paid’ implies that the price paid for the contract is a cap on any claim. A passenger on a cruise ship stricken with engine problems such that there is no electricity, the ship is unsanitary and food is scarce is unlikely to be properly compensated by an amount something less than what was paid for the cruise. See, eg., the *Carnival Triumph* incident of February 2013, where a 4 day cruise ended up taking 7 days after a fire in the engine room caused the vessel to lose power. Passengers slept on deck, food was limited, and there were reports of the floor being slippery with waste from overflowing toilets. The ship was eventually towed to Alabama where the distressed passengers were able to disembark.

sick for several days of a cruise due to food poisoning and it is proven to be caused by a breach of the statutory guarantee.¹⁰⁷

Pursuant to s 267(4) *Consumer Law*, the consumer may also seek damages for any loss or damage they suffer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.¹⁰⁸ Therefore, where a passenger has sustained an injury caused by a failure to comply with a statutory guarantee, the entitlement to damages is found in s 267(4). \

If the *Consumer Law* applies to the contract then these provisions cannot be excluded by a term of the contract, except as permitted under the terms of the *Consumer Law* itself.

3.4.3 State Civil Liability Acts as surrogate Federal Law: Calculating damages for personal injury claims brought for breach of the statutory guarantees: what is the effect of s275 Consumer Law?

As has already been mentioned, the TPA was swept up in the drive to reform civil liability laws so as to restrict the success and quantum of claims for personal injuries. The reform, across both federal and state laws, saw the then TPA amended to excise personal injury claims altogether in some cases and to restrict them in others, along the lines of the reforms enacted in state laws. The TPA amendment incorporating state laws into an assessment of personal injury damages for breach of s 74 warranty was effective only from 13 July 2004.¹⁰⁹ This was a year or more after reforms had been enacted by the states. The *Perisher Blue* case determined that any personal injuries sustained in consequence of a breach of s 74 prior to 13 July 2004 fell to have damages assessed at common law, unconstrained by the CLA reforms.¹¹⁰

The CCA maintains the system put in place in 2004 for the *Trade Practices Act*.¹¹¹ Personal injury damages remain recoverable for a breach of the statutory guarantees: s 267 *Consumer Law*. Part VIB of the CCA contains a regime for assessing personal injuries claimed under the *Consumer Law*, but a claim is for breach of statutory guarantees is an omission from that Part.¹¹² Therefore the damages would apparently fall to be determined in accordance with the state CLAs by dint of s 275 of the *Consumer Law* (formerly s 74(2A) TPA). That provision ‘picks up and applies’¹¹³ the State laws that ‘limit or preclude liability for the failure, and recovery of that liability’... ‘as surrogate federal law’.¹¹⁴

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;

¹⁰⁷ Indeed, such a remedy is usually offered by the larger cruise companies in those circumstances.

¹⁰⁸ s 267(4).

¹⁰⁹ Upon assent being given to the *Treasury Legislation Amendment (Professional Standards) Act 2004* (Cth) which inserted, inter alia, s 74(2A).

¹¹⁰ *Perisher Blue (No 2)* [2013] NSWSC 1463 (4 October 2013) (Beech-Jones J). The Judge had assessed damages under the CLA in an earlier judgment but not entered a verdict until issues regarding the commencement of s 74(2A) and the effect on the claimant’s case were heard: [2013] NSWSC 727 (7 June 2013) [119], [123], [356]-[357]. In the later judgment it was determined that common law damages should be awarded. There were stark differences between the two forms of assessment for the plaintiff’s injuries:

Assessment of award to Dr Nair Smith	Civil Liability Act (AUD)	Common Law (AUD)
General damages	34 775	135 000
Past economic loss	61 701.62	314 458.18
Future economic loss	nil	325 000
...
Total	411 956.81	1 192 597.50

¹¹¹ TPA s 87E was the operative provision of Part VIB, and has been transferred to the CCA as Part VIB. Section 87E also did not catch claims under s 74 for personal injury. By its terms, TPA s 87E applied to ‘part VIA, to Division 1A or 2A of Part V or to Part VA’... s 74, being found in Part V Division 2, was not caught. This remains the case under the CCA. An action for personal injury damages for breach of the statutory guarantees in part 3-2 of the *Consumer Law* is not expressly required to be brought in accordance with part VIB (see C&D s 137, which do not apply to proceedings taken under 3 -2 of the *Consumer Law*).

¹¹² See s 87E, which does not mention part 3-2 of the *Consumer Law*, where the statutory guarantees can be found.

¹¹³ The shorthand expression used by the NSW Court of Appeal in *Insight Vacations* [2010] NSWCA 137 (11 June 2010). The unreported judgment contains the discussion as to s 74(2A) which is unfortunately missing from the authorized NSWLR.

¹¹⁴ *Insight Vacations* (2011) 243 CLR 149, 155 [12].

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.

These provisions were intended to pick up, amongst other things, State laws that limited liability contrary to the statutory warranty/guarantee.¹¹⁵

Is the entire package of State based CLA reform picked up and applied to the *Consumer Law* by dint of s 275? Two extremes are clear:

- It does appear clear, at least, that the aspects of the CLA dealing with assessment of damages are picked up by s 275. As we have already seen, these CLAs (like the federal version in part VIB of the CCA) contain significant constraints on quantum of damages that can be awarded by the courts, particularly for non-economic loss.
- It has been authoritatively established that s 275 does not pick up and apply the state CLA provisions that permit a company to exclude liability for personal injury in its contractual terms. In *Insight Vacations v Young* the High Court ruled, in a joint judgment, that s74(2A) only operated to pick up limitations contained in the state Acts themselves, not those provisions that simply permitted suppliers to include contractual limitations in their contracts.¹¹⁶ In this regard the High Court affirmed the majority finding of the NSW Court of Appeal as to the effect of s 74(2A).¹¹⁷ As s 275 is in the same terms as the new s 275, *Insight* remains good law.

But in the middle is a significant grey area: namely, do the other CLA provisions that alter the tests of liability and even remove liability altogether also get ‘picked up and applied’ to claims for damages for personal injury caused by a breach of the statutory guarantee? This will be discussed further in part 2 of this paper.

3.4.4 Does the *Judiciary Act 1903* fill the gaps?

Section 275 expressly allows State laws that may otherwise be seen as inconsistent with the protection of the statutory guarantee. Where other State laws do not fall within s 275 but are not directly inconsistent with the statutory guarantees, the *Judiciary Act 1903* (Cth) ss 79 and 80 may be of assistance. Those provisions require courts exercising Federal jurisdiction (such as under the CCA) to apply the laws of the state to the matters before them, to the extent it is not dealt with by Commonwealth law. In other words, state law, and the common law, will ‘fill the gaps’ where the Commonwealth law is silent.

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.

However, the *Judiciary Act* will only assist where the state law is not inconsistent. Any inconsistencies between Commonwealth laws and otherwise applicable state laws will be dealt with pursuant to s 109 Constitution.

¹¹⁵ Which, given the state by state variation explained above, is problematic. The initial purpose of the provision was to preserve state laws that regulated certain professions and allowed for caps on liability and the original explanatory materials for s74(2A) make no mention of the desire to modify the test for liability under s 74: However, the government of the day amended the Bill prior to the Bill being passed, and the supplementary explanatory memorandum made it clear that the amendments were ‘to ensure state reforms of the law of contract were not undermined’: APH, above n 79. See 2010] NSWCA 137 (11 June 2010) [45] (Spigelman CJ).

¹¹⁶ (2011) 243 CLR 149.

¹¹⁷ (2010) 78 NSWLR 641.

In summary, damages for personal injury resulting from a failure to comply with the guarantee of due care and skill remain recoverable under s 267 *Consumer Law*. It is clear that the damages will be restricted by state laws to the extent those laws satisfy s 275 *Consumer Law*¹¹⁸ or are otherwise not inconsistent with the Commonwealth provisions.¹¹⁹ *Insight* makes it clear that state laws permitting the exclusion or limitation of liability for injuries arising from recreational services will not satisfy s 275 and therefore will breach s 68 TPA. The extent to which the other aspects of the CLA, or indeed other statutes, that seek to modify liability or prevent it from arising can be uplifted using s 275 is still a matter of some conjecture. This is discussed further in Part II of this paper.

3.5 Extraterritorial application of the statutory guarantee

By their very nature, cruise passage contracts will often involve a cruise to be wholly or partly performed outside Australia, and possibly by a cruise line with no presence in Australia. We have already seen that the State based Civil Liability Acts are generally silent on the question of extraterritorial application, and the High Court has ruled that the CLA (NSW) provisions concerning recreational activity only apply to activities within the geographical boundaries of New South Wales.¹²⁰ However will Australian laws relating to consumer protection apply to events occurring outside Australian territory?

The principle at general law is that the laws of a place will only apply to its own territory. The words of the statute should evince the intent of parliament to apply its laws beyond its physical territory. As the statutory guarantee is found in both Commonwealth and state statutes enacting the *Consumer Law*, the test for extraterritorial application of the *Consumer Law* is different for the Commonwealth iteration as opposed to the states/territories.

3.5.1 Commonwealth

Most commonly a contract for supply of services to consumers will be caught by the Commonwealth *Consumer Law* because a corporation is providing the service: s 131 CCA. If the Commonwealth iteration applies, a contract to be performed outside Australia will be caught by the *Consumer Law*, so long as the contract in question has, as its objective proper law, the law of a state or territory of Australia.¹²¹ In that sense it does not require that an Australian corporation provide the service, nor does it require the contract to be partly or wholly performed in Australia. In determining the proper law, choice of law clauses in the contract are to be ignored.¹²²

In addition, s 5 of the CCA expressly extends the operation of the *Consumer Law* to conduct outside Australia by either an Australian corporation or one that does business in Australia, a citizen or permanent resident of Australia. Entering a contract is engaging in conduct and therefore the operation of the statutory guarantees in the Commonwealth *Consumer Law* will apply to conduct outside Australia.

The CCA, like the TPA before it, contains ‘general avoiding provisions’¹²³ which render void a contractual term that attempts to negate the benefits of the statutory guarantees imposed by the *Consumer Law* - s64.¹²⁴

3.5.2 States and Territories: Consumer Law

Although s 5 of the Commonwealth iteration of the *Consumer Law* is likely to catch certain conduct outside Australia, there is also the possibility that the contract may be caught by the relevant state version of the *Consumer Law*. Although the state Acts seek to enact the uniform *Consumer Law*, once again the state Acts are consistently individualistic. The proper law of the contract is not generally the chosen trigger in those Acts. By way of example, consider the provisions in Victoria and New South Wales.

¹¹⁸ However, *Consumer Law* s 275 will not adopt as surrogate federal law a State CLA provision that permits contracting out of liability for injuries sustained during recreational services. This is the result of the High Court decision in the *Insight Vacations* case. That case concerned NSW laws and therefore there is always the prospect the outcome would be different for another State. However the impact of the decision relates to the notion of permitting contractual waivers and those are found in each State and Territory version of the CLA.

¹¹⁹ *SJudiciary Act 1903* (Cth) ss 79, 80. See *Motorcycling* (2013) 303 ALR 583, 612 [149]; *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* [2014] NSWSC 1280 (19 September 2014) [186].

¹²⁰ See text accompanying fn 35 above.

¹²¹ TPA s 67; *Consumer Law* s 67.

¹²² TPA s 67; *Consumer Law* s 67.

¹²³ *Insight Vacations* (2011) 243 CLR 149, 158 [24].

¹²⁴ Quoted at 3.2 above.

In Victoria, the extraterritorial application of the *Consumer Law and Fair Trading Act 2012* is set out in section 5:

5 Extraterritorial application of this Act

- (1) This Act applies within and outside Victoria.
- (2) This Act applies outside Victoria to the full extent of the extra-territorial legislative power of the Parliament.
- (3) Without limiting subsection (1) or (2), this Act applies to—
 - (a) the engaging in conduct in Victoria by persons outside Victoria;
 - (b) the engaging in conduct outside Victoria by persons in Victoria;
 - (c) a supply of goods or services in Victoria where the contract for the supply of goods or services is made in Victoria;
 - (d) in a case where a contract for the supply of goods or services is made outside Victoria, to the supply of those goods or services to—
 - (i) a person normally resident in Victoria;
 - (ii) a body corporate whose principal place of business is in Victoria.

And in s 12:

12 Application of Australian Consumer Law

- (1) The Australian Consumer Law (Victoria) applies to and in relation to—
 - (a) persons carrying on business within this jurisdiction; or
 - (b) bodies corporate incorporated or registered under the law of this jurisdiction; or
 - (c) persons ordinarily resident in this jurisdiction; or
 - (d) persons otherwise connected with this jurisdiction.
- (2) Subject to subsection (1), the Australian Consumer Law (Victoria) extends to conduct, and other acts, matters or things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).

New South Wales, in its *Fair Trading Act 1987* expresses a similar sentiment, more succinctly:

5A Extraterritorial application

- (1) This Act is intended to have extraterritorial application in so far as the legislative powers of the State permit.
- (2) Without limiting subsection (1), this Act extends to conduct either in or outside the State that:
 - (a) is in connection with goods or services supplied in the State, or
 - (b) affects a person in the State, or
 - (c) results in loss or damage in the State.

32 Application of Australian Consumer Law

- (1) The Australian Consumer Law (NSW) applies to and in relation to:
 - (a) persons carrying on business within this jurisdiction, or
 - (b) bodies corporate incorporated or registered under the law of this jurisdiction, or
 - (c) persons ordinarily resident in this jurisdiction, or
 - (d) persons otherwise connected with this jurisdiction.
- (2) Subject to subsection (1), the Australian Consumer Law (NSW) extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).

If a cruise ship passenger is ordinarily resident in the state, but the Commonwealth provision does not otherwise apply (because the objective proper law of the contract is not that of an Australian State), then that state's iteration of the *Consumer Law* (including the guarantee to render services with due care and skill) will apply. It is at least arguable that the provisions may therefore apply when the proper law of the contract is not Australian law, but the claim otherwise engages the state legislation.¹²⁵

As the state Acts apply to 'persons' they will also apply to corporations to the extent it is not inconsistent with the Commonwealth law. It is likely that if it suits their case, either party may choose to rely upon the state

¹²⁵ It is submitted that if the proper law of the contract is another country, and the plaintiff litigates in that other country, then that country will not apply the *Consumer Law* regardless of the intended application of the legislature in Australia. A party wishing to rely on the *Consumer Law* would need to bring the claim in Australia to ensure that statute was applied. See Kate Lewins, 'Maritime Law and the TPA as a "mandatory statute" in Australia and England: Confusion and consternation?' (2008) 36(2) *Australian Business Law Review* 78; Martin Davies, 'Forum Selection, choice of law and mandatory rules' (2011) *Lloyd's Maritime and Commercial Law Quarterly* 237.

extraterritoriality provision to extend the *Consumer Law* to contracts that fit within the state trigger provision, even if the proper law of the contract is not Australian.

If the state *Consumer Law* guarantee rather than Federal *Consumer Law* guarantee applies in a given case, close attention needs to be paid to the particular provisions of the state *Consumer Law*. State *Consumer Laws* may treat waivers for injuries sustained during recreational activities differently, for example.¹²⁶ Again, this demonstrates the unnecessary complexity involved in determining the applicable legal framework for a passenger claim.

3.6 Summary

To sum up; the imposition of the statutory duty to render services with due care and skill is not that it is more onerous than the similar obligation in contract at common law. It is not. But when Commonwealth version of the statutory guarantee applies, it dictates that:

- Overall, the remedies will be found in the *Consumer Law*;¹²⁷
- The ability to exclude liability for personal injuries is constrained by s 139A;
- The regime applicable to assessment of quantum for personal injury claims is the relevant state CLA due to s 275 *Consumer Law* (but as to the extent to which the provisions regarding assessment of liability apply, see Part II of this paper)¹²⁸
- Even if a State law is applicable by reason of s 275, or the *Judiciary Act* provisions, provisions of a state CLA that envisage providing recreational services will not apply if the contract was for the provision of services wholly outside that state unless the state Act explicitly envisages extraterritorial application, by reason of the High Court decision in *Insight Vacations*.¹²⁹
- However if the objective proper law of the contract of carriage is not Australian, then the Commonwealth version of statutory guarantee may not be triggered, but the state consumer equivalents may be. The burning question will be whether the full suite of reforms found in the state Civil Liability reforms will then apply.

Part Two of this paper aims to digest and explain the consequences of this tangle of legislation by reference to a series of questions that a passenger or a passenger ship operator, will need to consider in relation to a claim for personal injury allegedly resulting from a breach of the statutory guarantee. In particular, it will consider whether the quantum limits and tests of liability found in the CLA reforms will apply to statutory guarantee claims under the Australian Consumer Law by considering recent case law. Passenger ship operators are keen to invoke risk warnings displayed in their common areas and exclusions contained in their passage contracts. Recent cases provide good guidance as to what will be required for such provisions to be effective under the Australian Consumer Law. These matters will also be considered in Part Two.¹³⁰

¹²⁶ See a discussion of this in the context of the NSW version of the *Consumer Law*, *Fair Trading Act 1987* s 88A at fn 58 above.

¹²⁷ Formerly, under the TPA, the remedies were those available for breach of contract at common law.

¹²⁸ See *Insight Vacations* (2011) 243 CLR 149, 156 [18]. However, also decided by the Court that the waiver provisions in the CLA cannot be relied upon to excuse a breach of the Consumer law guarantees in the Commonwealth Act.

¹²⁹ It has yet to be determined whether it would apply to services partly provided in the state if the injury was sustained outside the state, and the possible effect that a choice of law provision may have.

¹³⁰ Part 2 shall be published in the first issue of the journal in 2016.

CAN YOU ARREST BUNKERS IN AUSTRALIA?

Quintin A. Rares*

Background

'Bunkers' tends to refer to the fuel inside a ship, though it can also refer to the tank those bunkers are stored in, or the process of filling those tanks with fuel. In essence one can bunker their bunkers with bunkers. Inside the ship might be many tanks in which fuel of varying specifications are stored.

Commonly, shipowners will charter their vessels on a time charter. The time charterer will most often buy the fuel already in the tank when they sign their contract with the shipowner, and will thus own the fuel in the tanks and will own additional fuel that they buy and fill the tanks with. At the expiry of their charter, the time charterer will generally sell the remaining bunkers to the shipowner, who will be compelled to buy them at the local market price, under the standard contractual provision/s governing these transactions.

However, a problem arises during the arrest of ships. In Admiralty courts, or courts otherwise vested with Admiralty jurisdiction, a judge can order a ship be arrested, and if need be, sold after a maritime claim has been brought against the ship itself; an action *in rem*.

The problem is that at the time of arrest, the ship will have a lot of items on her, which cannot be sold for the shipowner's dues, as the shipowner does not own them. Cargo is a good example of this and so are bunkers. The difficulty posed by bunkers is that they are said to be practically difficult to separate from the ship (though no case cited in this paper appears to have heard evidence to this effect). Because of this, courts generally sell the bunkers with the ship and remit the proceeds of the bunker sale to the bunker's true owner, generally the charterers.

However, what happens when there is a claim against the bunkers themselves for the evils of the charterers, but not against the ship or its owners? Can you apply the same logic and sell the ship and the bunkers and remit the cost of the ship back to the shipowners? Can you arrest the bunkers and hold them until one's claim is paid, bail is posted or a court releases the ship because the claim did not succeed or was dropped? The answers to these legal questions will form the topic of this paper.

The British Position: What Did You Say, Your Lordship?

Most of the Australian case law in this area is derivative of the judgments of Sheen J.¹ The problem is that there are differing views as to what his Lordship said over the many cases he decided regarding bunkers.

The first relevant case in this regard is *The Saint Anna*.² Here the contract was governed by the standard *Shelltime 3* clauses,³ set out below:

14. Charterers shall accept and pay for all bunker oil and boiler water on board the vessel at the time of delivery, and Owners shall, on the expiry of this charter pay for all bunker oil and boiler water then remaining on board . . . Owners shall give charterers the use and benefit of any fuel contracts they may have in force, at home and/or abroad, if so required by Charterers, provided suppliers agree.
22. . . . If Owners require the vessel to proceed to any special port for periodical docking purposes no hire shall be payable for time lost in proceeding to whilst at and after leaving such special port . . . all fuel

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¹ Sir Barry Sheen (1918 - 2005) was a British judge who served as Admiralty Judge of the High Court (Queen's Bench Division) from 1978 to 1993.

² [1980] 1 Lloyd's Rep 180.

³ Note the *Shelltime 4* clauses (Dec 2003) are slightly, but for the purposes of this paper not materially, different: '15. Charterers shall accept and pay for all bunkers on board at the time of delivery, and Owners shall on redelivery (whether it occurs at the end of the charter or on the earlier termination of this charter) accept and pay for all bunkers remaining on board, at the price actually paid, on a "first-in-first-out" basis. . . . Notwithstanding anything contained in this charter all bunkers on board the vessel shall, throughout the duration of this charter, remain the property of Charterers and can only be purchased on the terms specified in the charter at the end of the charter period or, if earlier, at the termination of the charter'.

Can You Arrest Bunkers in Australia?

consumed . . . in the course thereof shall be paid for by the Owners, Charterers crediting Owners with any benefit they may gain in purchasing fuel at the special port aforesaid . . .

In this case, the ship was arrested for debts owed by the shipowner. No one contested the right of the Court to sell the ship and the fuel in one sale; the contention was as to who owned the fuel. Sheen J looked to the charterparty agreement to find the answer to these questions. The above quoted provisions could not be more clear about where the fuel's ownership was vested; it was with the charterers. His Lordship therefore said:⁴

It seems to me that if the charterers purchase fuel, that fuel is their property unless the parties clearly and unequivocally agree that the property shall vest in the owners.

This was made even more obvious by the fact that owners needed to buy back the bunkers on redelivery. Why would they need to buy back their own bunkers? They would not. Therefore the bunkers were clearly the property of the charterers until the owners bought the bunkers back.

The next case decided by Sheen J on this topic was *The Silia*.⁵ Importantly in this case *the shipowners owned the bunkers, not the charterers*.

In the case, it was contended by the plaintiff charterers that the Court could not sell bunkers that were owned by the shipowner due to the owner being in arrears. Why did the charterers not want the bunkers to be sold and put into one fund with the ship? Because, if the bunkers were sold with the ship, the proceeds would be shared between all creditors *pari passu*, however if they were separate the charterers hoped that they would have the only claim over that separate fund. His Lordship stated that:⁶

It has hitherto been the practice of this Court to treat the proceeds of sale of a ship, and her bunkers and lubricants (unless they are the property of charterers) as one fund.

It does not always follow that that one fund (consisting of the proceeds of the vessel and her bunkers *et cetera*) can be drawn from by all creditors *pari passu* unless, of course, the bunkers are owned by the shipowner, in which case that is exactly what happens. This is because where property on board a ship does not belong to the shipowner, it must be set aside and sold for the benefit of only its true owner:⁷

I have no doubt that in the context of an action *in rem* the word 'ship' includes all property aboard the ship other than that which is owned by someone **other than the owner of the ship**.

Variants of the above paragraph (at least seven by my count) with the caveat 'other than the owner' are repeated throughout the four-and-a-half page judgment, including once in the headnote. The caveat means that where the property aboard the ship in question is owned by the shipowner, even though it is not a necessary part of the ship, then that property forms security from which creditors can claim. This includes the bunkers. To recap, whether something forms part of the 'ship' for the purposes of an action *in rem* depends on the ownership of that, or those, things. Also, whether the oil was sold with the ship was dependant on its manner of storage; at his Lordship says 'unbroached drums of oil are usually sold separately. But the oil in the ship's tanks must, for practical reasons, be sold with the ship'.⁸ He then listed reasons, from a technical perspective that made the removal of bunkers in the UK in 1979 difficult, though none of these appear to have been based on evidence. He then offered an additional reason under UK tax law. Whether those presumably guesstimated technical issues, if they ever existed, exist 35 or more years later or if such tax issues, if they ever existed in Australia, exist today in Australia has not been the subject of subsequent discussion on the basis of evidence in the Australian case law surveyed for this paper. I note that there is no legal reason his Lordship gave for not disgorging bunkers not owned by the shipowner (and it is doubtful if there is one given the treatment of oil drums quoted above). As this was never an issue of law but only of practicality, it should be revisited (with evidence) as times change.

In 1984 the House of Lords, in *The Span Terza*,⁹ approved of Sheen J's earlier *ratio decidendi* in *The Saint Anna*. In the former case the *Span Terza* was arrested and the charterers soon after cancelled their charter with the owners. She was then sold by the Court and the question before the Court was as to whether the bunkers were the property of the charterers or the owner's creditors.

⁴ [1980] 1 Lloyd's Rep 180, 182.

⁵ [1981] 2 Lloyd's Rep 534.

⁶ Ibid 536.

⁷ Ibid 537 (emphasis added).

⁸ Ibid 535.

⁹ [1984] 1 Lloyd's Rep 119.

Clearly, if the charterers had property in the bunkers then any proceeds from their sale would go to them, in line with Sheen J's earlier judgments (as discussed above). Contradistinctly, if property was with the owners, then on sale of the ship, the bunker's worth would be distributed to the creditor's of the ship. At the time of arrest and cancellation, all fuel had been paid for by the subcharterers. Lord Diplock stated:¹⁰

[i]n cl. 2 the words: '*provide . . . and pay for*'; in cl. 3 the words; '*take over and pay for*' and the references to '*price*', seem to me to be wholly inconsistent with the property in the bunkers being vested in anyone other than the charterers. The words I have italicized would otherwise be meaningless.

In essence, what was created was a case of common law bailment, whereby once property in the bunkers passed to the charterers on the start of the time charter, the shipowner was bailee of the fuel aboard their ship. Lord Diplock stated in relation to this:¹¹

[u]nder the terms of the charter-party the bunkers while aboard *Span Terza* were at all material times the property of the charterers; the shipowners had possession of them as bailees of the charterers. So long as the contract contained in the charter-party continued, the shipowners had the right and duty to use and consume the bunkers of which they were bailees for the purpose of carrying out such instructions to the master about the employment of the vessel as the charter-party granted them authority to give.

Once that bailment was revoked, the shipowners no longer had a right to possess and consume the fuel in their bunkers and were compelled to pay for them by virtue of the contract. Importantly, the right to the bunkers was not merely contractual; it was a property right. If it were only a right in contract then all that could be claimed is damages, which would probably have put the charterers into the position of unsecured creditors.

In 1992, Sheen J was then faced with a novel question. In *The Pan Oak*,¹² the fuel oil was transferred from the ownership of the charterers to the shipowners after arrest. Here the issue was whether a creditor that had secured their mortgage over the 'ship' had in fact secured their claim over the bunkers as well. Sheen J said:¹³

the property mortgaged to the plaintiff was - ... the ship, her boats, guns, ammunition, small arms and appurtenances. Giving those words their ordinary and natural meaning they do not include the bunker oil.

Since none of the words used (including the word 'ship') appeared to secure the bunkers, Sheen J stated that the security over which the mortgage was made did not include the bunkers.¹⁴ Importantly, this also shows the separate nature of the bunkers from being included in the 'ship'.

The next case worthy of discussion is *The Saetta*,¹⁵ where Clarke J was called to decide whether fuel belonged to shipowners, fuel sellers or charterers in circumstances where the charterers had not paid for the fuel which by contract was to be paid by the charterers. Here his Lordship went to the contract of fuel sale to determine each of the parties' relationship with the bunkers. His Lordship found that since a Romalpa (retention of title until payment) Clause was present in the contract, the fuel needed to be paid for by the shipowners.

Generally, no person can give, let alone sell, what they do not own.¹⁶ Here there may also have been some influence upon the Bench from the fact that the shipowners clearly knew that the charterers had not paid for the fuel and the shipowners admitted as much. All they did not know of was the Romalpa clause. In essence:¹⁷

when the charter-party came to an end on Jan. 11 the property in all the bunkers on board passed from the charterers (in so far as they had property in them) to the owners. I also hold that any right to possession of

¹⁰ Ibid 122 (emphasis in original).

¹¹ Ibid 122-3.

¹² [1992] 1 Lloyd's Rep 36.

¹³ Ibid 38 (emphasis added)

¹⁴ It is important to remember in this situation that Sheen J looked at Bahamian law, which was the law of the contract, and found no indication that bunkers under that law were part of the 'ship', he then went through the *Silia* case and made no attempt to qualify it on the grounds that the ordinary and natural meaning did not apply. In a later case, *The Eurostar* [1993] 1 Lloyd's Rep 106, 113, his Lordship explained the logic behind this was that 'in the absence of satisfactory evidence of Bahamian law the Court will apply English law'. Why would his Lordship apply legal definitions of ship in the first place if the contract is to be settled on the ordinary and natural words as (presumably) an insurance broker would understand them? It is clear he would not, and that the mentioned qualifier is a turn of phrase rather than anything truly meaningful. In any event, the discussion of Bahamian law is a distraction insofar as the bunkers are concerned, as no evidence was before Sheen J to say that mortgaged property included bunkers under Bahamian law (see [1993] 1 Lloyd's Rep 106, 109).

¹⁵ [1993] 2 Lloyd's Rep 268.

¹⁶ This rule is commonly referred to as the '*nemo dat* rule', or in full form the '*nemo dat qui non habet* rule'.

¹⁷ [1993] 2 Lloyd's Rep 268, 273.

Can You Arrest Bunkers in Australia?

the bunkers which was vested in the charterers passed to the owners. At the same time the owners became under an obligation owed to the charterers to pay for the bunkers

This makes sense, in line with previous decisions, because the shipowner's creditors could not have property in the bunkers passed from the shipowner to its creditors if the shipowner had no property in them to begin with. This is exactly the same principle as applied in the aforementioned cases, but applied between fuel sellers and the shipowner.

In the last British case I will refer to, *The Eurostar*,¹⁸ Sheen J looked at whether the right to claim the value of the bunkers at the end of a charterparty was one in property or if it was merely contractual. If it was contractual and the shipowners could not pay, then the right against the shipowners would be in damages, which is of limited help if they have no money. If the right is in property, then the owners are mere bailees and at the end of the bailment the charterers have the right to the property, which they can sell or use in normal cases. However, even though the law in admiralty restricts use and sale for practical reasons, the charterers can still sell it.

In this case, the charterers knew the shipowners were low on cash because they could not pay for repairs when the ship was docked; a pretty good indication. Therefore they wanted to ensure that they got the value of the bunkers. Sheen J stated:¹⁹

When the period of hire expired by effluxion of time the shipowners' right to use and consume the bunkers then remaining in *Eurostar* terminated. The shipowners remained bailees of the charterers' property. As there was no sale of the bunkers to the shipowners thereafter the bunkers remained the property of the charterers until they were sold by the Admiralty Marshall.

Of course when they were sold by the Marshal, as was the usual practice, the ship and bunkers were sold together and the charterers had a certain claim in property over an amount equivalent to the local market price of the bunkers.

On 21 March 2012, Justice Buchanan gave a speech at the Federal Court on bunkers. His Honour offered five general principles on the English law (citing: *The Saint Anna*, *The Silia*, *The Pan Oak* and *The Eurostar*) which are summarised as:

1. The terms of the agreement between the shipowners and charterers are determinative (generally) of who owns the bunkers.
2. Similarly for point one, for security, with agreements between banks and bunker owners.
3. For the purpose of a sale of a ship *in rem*, bunkers of a ship are not separate from the ship. But this is not the same as saying legal title of the bunkers and ship are one.
4. If bunkers belong to the charterers then they cannot be distributed to creditors claiming out of the arrest and sale fund.
5. If bunkers are owned by the owner then they can be sold and put in the same fund as the claim *in rem*.

Now that the British cases have been summarised, it is important to ascertain the Australian position.

The Australian Position

In *The Billie Fay*,²⁰ Sheppard J of the Federal Court issued an arrest warrant for the bunkers of the *Billie Fay ex parte*. The plaintiff was the supplier of the bunkers and the claim was in relation to the same bunkers that were arrested pursuant to this warrant²¹. Security was later put up and the matter did not progress further. These appear to be the first recorded orders where bunkers were arrested pursuant to the *Admiralty Act 1988* (Cth).

¹⁸ [1993] 1 Lloyd's Rep 106.

¹⁹ Ibid 110-1.

²⁰ *Bridgewater Marine Pty Ltd v The Owners of the Bunkers supplied to the Vessel 'Billie Fay' by the Plaintiff on or about 24 April 1992* (Unreported, Federal Court of Australia, Sheppard J, 15 May 1992).

²¹ D James, *Arrest of Time Charterer's Bunkers in Australia* (1992) 22 *International Banking Law* 365.

In *The Skulptor Vuchetich*,²² Sheppard J was asked to decide whether movable equipment (importantly) owned by the shipowner and aboard a ship formed part of the 'ship' for the purposes of arrest and sale. He answered in the affirmative, stating:²³

In all the circumstances I think that Sheen J's statements should be adopted and applied. The equipment in question was equipment which was used by the vessel in the course of its operations. It may be, as Mr Wood said, that it was not essential for the ship to have the equipment on board although I would have thought that a vessel such as this might well have benefited from the presence of such equipment from the point of view of its safety because of the need perhaps to move cargo in an emergency in order to retrim the vessel or to carry out some other operation when it would not have been possible to engage stevedores.

Though this statement is important regarding bunkers, and Sheppard J draws the link between them, citing the ALRC's interpretation of Sheen J's judicial statements, it is not as solid as it may seem. Sheen J himself said, in *The Eurostar*, 'there is, however, a fundamental difference between the equipment of a ship and her fuel.'²⁴

Four years later, the Full Court of Federal Court was asked to decide, in *The Skulptor Konenkov*,²⁵ whether containers were sufficiently a part of the ship to be saleable when the ship was arrested and sold in an action *in rem*. They answered in the negative, especially if the containers were not loaded on the ship. Black CJ, Cooper and Finkelstein JJ stated:²⁶

[135] There must be some sufficient connection between the property and the ship to justify the former being treated as an integral part of the latter.... [138] A container of itself is not a ship... [143] In any event, even if it were correct to hold that a container is part of a ship when it is placed on board a ship, especially a ship designed for carrying cargo packed in containers, we would not conclude that a container that is stored onshore is a part of a ship, at least when it has not been acquired as equipment for a particular ship. This is important, for here the evidence shows that the services in respect of which the claim was made were rendered when the containers were onshore. Further, there is no evidence that the containers ever had any character as equipment acquired for a particular ship and thus no evidence that they retained any such character at the relevant time. Accordingly, even on this narrow ground, Opal [*the Skulptor Konenkov*] must fail.

The significance of this should not be understated. The idea behind arresting a ship and everything on it that belongs to the shipowners, is that you cannot get security over the rest of the shipowner's belongings. This is why you arrest the ship *in rem*. If the shipowner turned up you could sue her, him or it personally. In this case, there were extra assets of the shipowner accessible i.e. the containers, yet their Honours limited the value of the attainable security to what was directly on the ship and integral to it. They stated 'a container of itself is not a ship';²⁷ Sheen J said the same of bunker oil in *The Pan Oak*. However, insofar as the container was the property of the shipowner and was aboard the ship, Sheen J would likely have found the container a part of the ship as 'the word 'ship' includes all property aboard'²⁸ so long as that property is owned by the shipowner.

The remaining cases look at bunkers alone, to ascertain the Australian position on whether you can arrest them, noting of course *The Billy Fay* where bunkers were arrested by the Federal Court.

First is that of *The Genko Leader and Tolmi*.²⁹ The Full Court of the Federal Court here was asked to decide what 'property' and 'other property' meant under *Admiralty Act 1988* (Cth) s 17:

Where, in relation to a general maritime claim concerning a ship or other property, a relevant person:

- (a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and
- (b) is, when the proceeding is commenced, the owner of the ship or property;
a proceeding on the claim may be commenced as an action *in rem* against the ship or property

²² *Morlines Maritime Agency v The Ship "Skulptor Vuchetich"* (1996) 62 FCR 602.

²³ Ibid 605-6.

²⁴ [1993] 1 Lloyd's Rep 106, 112.

²⁵ *Opal Maritime Agencies Pty Ltd v The Ship "Skulptor Konenkov"* (2000) 98 FCR 519.

²⁶ Ibid 556-8.

²⁷ Ibid 557 [138].

²⁸ *The Silia* [1981] 2 Lloyd's Rep 534, 537.

²⁹ *Metall Und Rohstoff Shipping & Holdings BV v Owners of Bunkers on Board ship MV Genco Leader* (2005) 145 FCR 145.

Or, abbreviated to remove the 'or' statements in order to relate it to a claim on charterer's bunkers:

Where, in relation to a general maritime claim concerning other property, a relevant person: (a) was, when the cause of action arose, the charterer of, or in possession or control of, the property; and (b) is, when the proceeding is commenced, the owner of the property; a proceeding on the claim may be commenced as an action *in rem* against the property.

In this case, the *Tolmi* and *Genko Leader*'s time charterers were involved in a London maritime arbitration. Those seeking an award against the time charterers spotted the *Genko Leader* off the coast of Australia and arrested the bunkers in that ship as security for the London arbitration which related to only the *Tolmi*. It is important to note that the property arrested had no connexion with either the charterparty of *Tolmi* or the bunkers of *Tolmi*. The owners of the *Tolmi* and *Genko Leader* are also different; the dispute was purely with regards to the time charterers.

Therefore the question was whether the property spoken of in *Admiralty Act 1988* (Cth) s 17 could include property that does not have a connexion with the general maritime claim. The Court said it could not.

Allsop J (as his Honour then was), who wrote the leading judgment, stated that the words 'or property' and 'or other property' are absent definite articles, which are required to be read into the legislation. His Honour states, therefore that s 17(a) should read 'the owner or [the] charter of, or in possession or control of, the ship or [the] property'. His Honour stated that no matter how you read it, the interpolation of words is necessary. His Honour stated the other reading of s17(a) is 'the owner or charter of, or in possession or control of, the ship or [any] property'. Allsop J stated that this was due to the drafter valuing an economy of words more than anything else.

Importantly Allsop J (with whom Lee and Tamberlin JJ agreed) left open the question of whether bunkers can be arrested. His Honour stated:³⁰

[20] It is unnecessary to decide whether 'property' includes bunkers. For my part, I see no reason to limit the word "property" to particular types of property that would exclude bunkers. The relevant limitation is, as I have said, found in the words 'general maritime claim concerning' in the first part of s 17. (See generally ALRC Report [107]-[110].)

One year later, a differently constituted Full Court of the Federal Court (comprising Ryan, Tamberlin and Kiefel JJ), was called to specifically decide whether bunkers always form part of the ship in *The Taruman*.³¹ The Full Court answered in the affirmative. However, their answer was more than affirmative; they said that the bunkers were inseparable from the 'ship'. However, their answer was *obiter dicta*.³²

On the 12 September 2005, in Hobart, the Australian Fisheries Management Authority served a notice of seizure on the ship, the *Taruman*.³³ Three days later the plaintiff began *in rem* proceedings against the bunkers, which contained 220 000L of fuel. In answering who had a right to the bunkers, all three judges agreed that (1) bunkers were a part of the ship under both the fisheries legislation and the *Admiralty Act 1988* (Cth), (2) therefore when the ship was seized, title passed to the Commonwealth, and (3) fuel bunkers cannot be property separate to the ship, therefore an action could not be brought in relation to the bunkers.

Kiefel J went through much of the above case law. Her Honour concluded that Sheen J came to the conclusion that the 'ship' always necessarily includes its 'bunkers' and therefore 'bunkers' cannot be 'other property' under the above quoted *Admiralty Act 1988* (Cth) s 17. Her Honour stated:³⁴

[81] If regard is had to s 17 it seems to me that there is no answer to the proposition that the bunkers cannot be regarded as 'property' if they are to be taken as part of the property which is the 'ship'. The 'property' referred to in the section is that which is not the 'ship', whatever else it may mean. The plaintiff offered no basis for the submission that the bunkers could be both part of the ship or property, given the reference to 'or' in a ship or other 'property' and the 'ship or property'. The reference to 'other property' in the opening part of s 17 in particular conveys that what is part of a ship cannot also be property.

³⁰ Ibid 148.

³¹ (2006) 151 FCR 126.

³² Justice James Allsop, 'Admiralty Jurisdiction - Some Basic Considerations and Some Recent Australian Cases' [2007] *Federal Judicial Scholarship* 5.

³³ There are a number of relevant facts that are difficult to ascertain from the judgment regarding property ownership and the contractual relationships between parties, though the claim that was brought against the bunkers appeared to involve a contract dispute and a damages dispute ([29]).

³⁴ (2006) 151 FCR 126, 147 [81], 150 [99].

[99] I conclude that the plaintiff does not have a right to proceed against the bunkers. There is authority which holds that the term 'ship' in the *Admiralty Act* includes the bunkers...[A]s a matter of the construction of s 17 of that Act, that whatever is included as the property which is the 'ship' is not 'other property'.

At first blush these are attractive propositions. However, reflecting on the authorities summarised above it can be noted that not one decided (or at a minimum implied) that the ship and her bunkers were inseparable legal property.

Her Honour concludes that 'bunkers' come under the word 'ship'. Before her Honour's statement, the strongest statement of inseparability was that it was impractical to separate the bunkers and the ship physically at the time of sale, thus although a ship would be sold together with her bunkers, the proceeds of the sale of the bunkers owned by the charterers would go to the charterers, in circumstances where the charterers owned the bunkers; see the *Silia*.

I set out below some points that support a different conclusion to that reached by her Honour.

First, the relevant British case law has concluded that the shipowner is bailee of the charterer's bunkers where the charterer owns the bunkers (see especially, *The Span Terza* and *The Eurostar*). If the bunkers are inseparable from the ship, then the owners are both shipowner and bailee of the 'ship', and the charterers are both owners and bailee of that same 'ship'. This would mean that shipowners could not sell a ship without permission of their co-owner. This would also mean that charterers would need to register as part owners of the ship, in many jurisdictions. It would also raise a question as to why a separate fund would need to be made for owners and charterers from the sale of the ship (as was (and is) the long time practice in Britain which was referenced in many of the cases her Honour cited), if both own and are thus responsible for the 'ship' and general maritime claims against the ship under *Admiralty Act 1988* (Cth) s 17.³⁵

Second, if title is merged, which it must be for the bunkers to not be considered as 'other property' and thus may only be considered as the 'same property', then why would it only be as a matter of practicality that bunkers are not sold with the ship? It would be a legal certainty – putting aside any national tax regimes or general fuel sale regulations – that the bunkers would be sold with the ship in an arrest and sale if they were the same piece of property. No practical considerations, which Sheen J was at pains to explain, would be necessary or logically useful.

Third, the view that a ship is inseparable from her bunkers does not appear to accord with commercial practice. Mariners, in standard agreements such as *Shelltimes*, treat bunkers as separate property, capable of bailment, sale and resale. There is no conception that they are selling an equity stake in a larger whole of property or subdividing a greater property or anything else which would indicate a commercial understanding of inseparability.

Fourth, all judicial references are to 'property in the bunkers' not to 'property in the ship equivalent to the market worth of the bunkers'. For example, in *Daebo v Go Star*, at first instance³⁶ 'property in the bunkers' was mentioned 19 times, and on appeal³⁷ 5 times, according to a simple text search. The manner of reference, in no instance I have seen in the present context, connotes that 'ship' and 'bunkers' are one and the same in circumstances where the bunkers are owned by the charterers.

Fifth, Sheen J said that both the natural and ordinary meaning of 'ship' did not include 'bunkers', nor did English law (see *The Pan Oak* and *The Eurostar*). Her Honour's implication that the words 'bunkers' in *The Silia* was used in an unnatural or extraordinary manner is an alternative view to that expressed by Sheen J. Ultimately, a distinction must be drawn between where bunkers are part of a ship for the purposes of sale or are part of the ship for the purposes of differentiating the ship and other property. Whether bunkers are considered part of the *res* for the purposes of a sale fund or not is dependant entirely on whether they are owned by the shipowners or another party, under the English law cited above.

Sixth, how could the Romalpa Clause in *The Saetta* work if title merged with the ship the second the ship took on the fuel?

³⁵ Note that part ownership of a ship is not recognised under *Admiralty Act 1988* (Cth) s 19 in Australia as a result of the *The Ship "Gem of Safaga" v Euroceanica (UK) Ltd* (2010) 182 FCR 27, 42-6 [73]-[87].

³⁶ (2010) 182 FCR 27.

³⁷ (2012) 207 FCR 220.

Seventh, Allsop J, with whom Lee and Tamberlin JJ agreed, said in a prior Full Court of the Federal Court decision that his Honour could see no reason at all why bunkers should not be a type of 'other' property under s 17. Furthermore, bunkers have been arrested pursuant to the *Admiralty Act 1988* (Cth) in the past in *The Billie Fay*.

Eighth, her Honour's conclusion that '[h]is Lordship concluded that the proceeds of the sale of the oil are part of the *res* and, as such, are available to judgment creditors *in rem*'³⁸ does not accord with the *ratio decidendi* in *The Silia*, which was that 'the ship includes all property aboard the ship *other than that which is owned by someone other than the owner of the ship*'.³⁹ The emphasised words are the vitally important qualification. It is not that his Lordship was saying that the shipowner's possessions somehow became a ship or part thereof; he was merely making the observation that it would all be sold by the Marshal into a single fund. However, in circumstances where any of that other property is not owned by the shipowner, it would be sold by the Marshal, if it could not be easily separated from the ship, but if that sale occurred then the proceeds would be given back to the other property's true owner. This is the reason that time-after-time Sheen J put the sale proceeds of bunkers into a separate fund from the ship.

Ninth, on one view, the *Admiralty Act 1988* (Cth) would need to be expressed in no uncertain terms to be read in such a way as would deprive an innocent property owner (i.e. not the shipowner) of having his property taken from him by (in this case) the Government, or (in another case) any other party, without adequate compensation. There may even be a Constitutional issue in circumstances where the Australian Government takes without adequate compensation to the charterers.⁴⁰

Tenth, reading *Admiralty Act 1988* (Cth) ss 4(3) and 17 very narrowly appears to be contrary to the reasoning of the High Court in the *Shin Kobe Maru*.⁴¹ On one view, her Honour's reading of s 17 may be so narrow as to denude the words 'other property' of any real meaning. It is true that s 4(3) does not create a new maritime lien or charge or other cause of action, but, for example, s 4(3)(d)(i) states '[a] reference in this Act to a general maritime claim is a reference to a claim (including a claim for loss of life or personal injury) arising out of an act or omission of the ... charterer of a ship' and s 17 states (in the form summarised above) a right to proceed *in rem* '[where], in relation to a general maritime claim concerning other property, a relevant person: (a) was, when the cause of action arose, the charterer of, or in possession or control of, the property; and (b) is, when the proceeding is commenced, the owner of the property; a proceeding on the claim may be commenced as an action *in rem* against the property.' It is clear, at least from the words of the sections quoted above, that the drafters of the legislation intended that general maritime claims could be brought against charterers and against property other than the ship.

Ryan J, who wrote the other substantial judgment in *The Taruman*, said:⁴²

It is significant, however, that his Lordship [Sheen J, in the *Saint Anna*,] did not regard the bunkers as something separate from the ship so as to be immune from the sale in consequence of an arrest instigated by the plaintiff mortgagee *in rem*.

In addition to his Honour's inseparability argument, Ryan J added a practical reason why the bunkers should not be capable of being arrested themselves:⁴³

To admit of the possibility of its separate arrest as 'property' would compel its disgorgement from the ship, upon or before arrest, or the provision by the owners of security in respect of an item of property in which *ex hypothesi* they have no interest.

Again, I set out below some points that support a different conclusion to that reached by his Honour.

First, with regards to the second argument, one must ask why, when the ship is under arrest for the evils of the shipowners, the charterers (or cargo owners etcetera) must post security or have the cargo they are bound to carry, their fuel and other property detained in respect of a claim and a piece of property that they have no

³⁸ *The Taruman* (2006) 151 FCR 126, 145 [69] (emphasis added).

³⁹ [1981] 2 Lloyd's Rep 534, 537.

⁴⁰ Note that, as a general rule of statutory interpretation, where there is a construction of a statute that is open that allows the statute to be read consistently with the Constitution, it will be read in that consistent manner: *Acts Interpretation Act 1901* (Cth) s 15A.

⁴¹ (1994) 181 CLR 404, 422.

⁴² (2006) 151 FCR 126, 129 [7].

⁴³ *Ibid* 133 [20].

interest in. Why is it that only charterers must suffer and shipowners are the only party that must repay their marine debts under threat of arrest and sale?⁴⁴ It seems particularly odd in situations where the fuel in a ship is worth more than the ship itself, which can occur with poor quality ships in market downturns. If the issue were the relative value of the ship, cargo and bunkers, there would be nothing to stop a judicial assessment weighing the proportional worth of the property, the ability to obtain security for costs and whether there is an undertaking for damages and the extent of that undertaking.

Second, the shipowners are liable for the charterer's actions every day. For example, under clause 16 of *Shelltimes 4*, charterers may employ and pay for stevedores and pilots, but this in no way lessens the liability of the owners for:

all issues, claims, responsibilities and liabilities arising in any way whatsoever from [the charterer's] employment of pilots, tugboats or stevedores, who although employed by the charterers shall be deemed to be the servants of and in the service of owners.

Accordingly, if the charterer's pilot collides the shipowner's ship with another ship, a claim will often be brought against the *res* (being the property of the shipowner). There is little to support, in the reports, why this liability should have an artificial line drawn at bunker arrest, which could cost shipowners in having their ship detained, but not any more than if a charterer's pilot crashes the shipowner's ship into another ship and a claim is brought against the *res*, *in rem*, or the owner, *in personam*.

Third, the solution used when there are claims (of any size) against the shipowners and the *res* is arrested, and the owners do not show to defend their ship, is the ship is sold by the Marshal under the orders of the Court. If the same were applied to claims against the charterer, then the charterer's bunkers would be arrested and the vessel along with her bunkers sold with the shipowner obtaining the market value of their ship. This being in place, would almost certainly result in new insurance being offered by the market to protect shipowners from this eventuality (assuming the owner was not indifferent between his ship and the market value of his ship). Lloyds is particularly famous for offering insurance for unusual or nascent risks.

Fourth, and related to the third point, shipowners are perfectly capable of protecting themselves. In *The Pacific Chukotka*, a US appellate court stated:⁴⁵

It should be noted that Green Pacific [owner of the *Pacific Chukotka*] could have taken any number of steps, including requiring the charterer to post a bond, demanding a letter of credit or even possibly procuring some sort of insurance, in order to protect its interest in the Vessel from the effects of a maritime lien, but no such actions were apparently taken in this case..

Fifth, with countries like South Africa allowing bunker arrest in some circumstances (beyond the scope of this paper), it makes Australia a less attractive arrest jurisdiction. It also makes Australia uncompetitive with countries with regimes that are similar in effect to bunker arrest. In America, ship arrest is permitted in circumstances where the charterers purchase necessities (for example, bunkers) and the fuel suppliers are unpaid.⁴⁶

Sixth, disgorgement costs, though widely cited by Sheen J in the cases set-out above and raised in Australian authority, appear to be based entirely on judicial notice; there does not appear to be any evidence cited in support of these unstated costs. Such a highly technical topic as disgorgement of bunkers from ships does not seem an apt topic to take as a matter of judicial notice. Nor should it be assumed that in Australia in 2015 the practical hurdles referred to by Sheen J in the late 1970s and 1980s in the UK are relevant. Moreover, there are enormous costs holding a ship under arrest for any period of time and evidence may show it is cheaper to disgorge the fuel (though the fuel will generally lose value on disgorgement, the plaintiff takes that risk by seeking that order).

Seventh, it makes charterers a law unto themselves, if they do not need to satisfy their debts, unlike owners. Essentially, unless charterers are a large, easily findable company in a jurisdiction with a reliable judiciary, there are few ways to enforce debts against them.

⁴⁴ Note, however, charterers often work out their differences with the owners later in an arbitration (usually in London under English law), as per their charterparty agreement.

⁴⁵ 575 F 3d 409 (4th Cir, 2009) fn 4.

⁴⁶ See, eg. *The Pacific Chukotka* 575 F 3d 409 (4th Cir, 2009); *The Trogir* 602 Fed Appx 673 (9th Cir, 2015).

Eighth, Ryan J cited the ALRC's relevant musings as to what actions *in rem* may be against. The Commission concluded that 'there could also be difficulties with property owned by a person who is not the shipowner, but who may be liable in respect of the claim. On balance it is undesirable to spell out what would be a complex definition... Accordingly it should be sufficient to refer to a right to proceed *in rem* against the ship or other property'.⁴⁷ His Honour concludes that that discussion coupled with the decision in *The Silia* 'precludes, I consider, an argument that bunkers are 'property' so as to be the subject, separate from the ship, of an action *in rem*'.⁴⁸ In saying this, his Honour appears to interpret the decision in *The Silia* and the view of the ALRC as standing for the proposition that bunkers cannot be property separate to the ship, and accordingly cannot be a type of 'other property' within the s 17 definition. However, respectfully, in my view the decision in *The Silia* found that the bunkers and the ship were separate property, though found, as a matter of practicality, when the ship was arrested and judicially sold, the bunkers should be sold together with the ship, with the market value of the bunkers being put into a separate fund if, and only if, those bunkers were owned by someone other than the shipowner. The fact that property not owned by the shipowner could be the subject of a general maritime claim seems to be precisely what the ALRC was providing for in its deliberate choice of words. Ryan J's interpretation contrarily would leave the words 'other property' with little, if any, work to do and would render the ALRC's conclusion (that his Honour quoted) nugatory. The entire purpose of the maritime regime is that the coffers of shipowners and charterers are often not obtainable, so creditors of these seafarers take as security the ship or other property which they know they can arrest and have sold to satisfy their debt, at least in part. A broader reading, would, in my view better fulfil the public policy underlying maritime arrest as it would provide creditors of charterers (at least in some circumstances) reliable security.

Ninth, in South Africa, which does allow the arrest of bunkers, bunkers are almost never disgorged as commercial realities generally result in security being put up (as occurs in similar circumstances in America, for example, in *The Trogir*). Disgorgement costs, if seen as a practical impediment to arrest, should be understood in light of that practical reality i.e. they are practically almost never actually disgorged as the threat of disgorgement is generally sufficient.

Therefore it is not clear if these arguments, raised by the Full Court of the Federal Court, necessitate that bunkers cannot be arrested.

Generally, if the bunkers do merge with the ship so as to become 'part of the ship' this would mean that the owners of the bunkers take an ownership stake in the ship. This being so, one must query whether one can have a ship arrested for maritime claims against the charterers given their partial-stake in the ship. Indeed, in *Daebo v Go Star*,⁴⁹ the Full Court of the Federal Court appear to confirm that where the contract provides for it, there remains a transfer in the ownership of the bunkers on delivery, though they simultaneously confirm that the bunkers are an inseparable 'part of the ship'. In that case Keane CJ, Rares and Besanko JJ said '[t]aking over the bunkers is an inevitable consequence of delivery of the ship for the bunkers are regarded as part of the ship'. However, a claim of such partial ownership may be inconsistent with the decision in *The Ship "Gem of Safaga" v Euroceanica (UK) Ltd*.⁵⁰

Conclusion and Further Questions

It is unclear in Australia if bunkers can be arrested. If bunkers cannot be arrested, there are still a number of questions. For example, what, if any, effect will the *Personal Property Securities Act 2009* (Cth) have on bunkers? Second, what, if any, effect will *Admiralty Act 1988* (Cth) s 15, which allows arrests with regards to maritime liens have, especially where the liens were created in another jurisdiction?⁵¹ Third, will Australia's judiciary change its mind about allowing Mareva injunctions over bunkers? All of these questions easily deserve their own paper and are beyond this paper's scope of investigating *Admiralty Act 1988* (Cth) s 17 and the powers to arrest bunkers under that.

Also important to confront will be the so-called 'practical issues', however as it has been possible to arrest bunkers in, for example, South Africa for such a long time there is a good body of law which Australian judges would no doubt be able to adapt and apply in our jurisdiction. For example, where bunkers are mixed Nicholson

⁴⁷ Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33 (1986) [110].

⁴⁸ (2006) 151 FCR 126, 133 [19].

⁴⁹ (2012) 207 FCR 220, 235 [61], citing *The Taruman* (2006) 151 FCR 126.

⁵⁰ (2010) 182 FCR 27, 29 [1] (Ryan J), 46 [87] (Besanko J), 51 [115] (Jagot J).

⁵¹ See, for example the issues raised in *Reiter Petroleum Inc v The Ship "Sam Hawk"* [2015] FCA 1005 (11 September 2015) (at the time of publication this case was on appeal to a five-judge bench).

J said in *The Wisdom (No 2)*⁵² that the security claimed on the arrest should only be for as much as the tortfeasor charterer's bunkers were worth, not the entire value of the bunkers on the ship.

In sum, it is possible that the current law in Australia is that bunkers cannot be arrested. However, the Full Court of the Federal Court's support of bunker arrest in *The Genko Leader and Tolmi* and the Full Court of the Federal Court's reasoning against bunker arrest in *The Taruman* were both *obiter dicta*. Sheppard J's orders in *The Billy Fay* suggest that at least in the past bunker arrest was possible. Bunkers were also arrested in *The Genko Leader and Tolmi* though the warrants there were set aside for reasons other than the legality of s 17 bunker arrest. There do not appear to be any cases where a superior court in Australia has decided that bunkers cannot ever be arrested in *ratio decidendi*. Accordingly, whether bunkers can be arrested in Australia is still a live issue.

⁵² (2003) SCOSA B 201 (D).

BOOK REVIEW

**Michael White, *Australian Maritime Law*. Federation Press, Sydney (3rd ed, 2014). 700 pp.
ISBN: 9781862879508**

Yvonne Baatz*

Over seventeen chapters this book covers a wide range of maritime issues. It has been 14 years since the previous edition, which was written by a number of authors, and the fact that this edition has now been written by one author (albeit with some assistance which is generously acknowledged) is an impressive feat. For one author to have the expertise to deal with all the areas covered in this book is rare. Equivalent books on English law, such as *Maritime Law* edited by this author and published by Informa Law from Routledge (now in its third edition) are written by numerous authors each specialising in their own particular areas of research. This gives the advantage that new editions can be written relatively quickly if one author is only doing one or two chapters and therefore the authors do not have to contend with too much change while the writing process is going on. Whereas Michael White has no doubt had to face the problem that over the period of writing there have been numerous changes and, therefore, there is a constantly shifting seascape which all has to be crystallised at one moment in time. It does, however give the great advantages that the style throughout the book is consistent and it is easier for the author to cross-reference throughout the book, both of which have been achieved here.

The author modestly states that ‘the purpose of the book is to set out for legal practitioners, academics, regulators and for the maritime industry a short summary of the Australian current law on maritime matters and to guide the reader as to where to look for more detailed information.’ This, the author undoubtedly delivers. It is not easy to provide a good summary of complex material, but the author does this and more. Each chapter seeks to provide a good understanding of the development of the law. Indeed the whole of Chapter 1 on Admiralty Jurisdiction and the Australian Constitutional Background does so culminating in the *Admiralty Act 1988* (Cth). Chapter 2 considers Admiralty Jurisdiction; Admiralty Act 1988; Actions in Rem; Arrest of Ships; Maritime Liens; and Priorities.

Chapters 3 and 4 discuss charterparties and carriage of goods. The case law, both English and Australian, is discussed to illustrate key points. As the author says a whole book could have been written on each chapter. Throughout the book the reader is referred to the leading works and journal articles which may assist them. For example the chapter on charterparties refers to John Wilson’s excellent book on *Carriage of Goods by Sea*,¹ and S. Girvin, *Carriage of Good by Sea*.² New books have been published since such as Paul Todd’s *Principles of the Carriage of Goods by Sea*³ and the latest edition of *Scrutton on Charterparties* is expected shortly.⁴

The text, which is well written and easy to read, is enlivened by some colourful examples. This is certainly the case in the fifth chapter on carriage of passengers which gives some good illustrations of problems which have occurred in the cruise ship business, such as the *Costa Concordia*, and which could occur in the future. The chapter is international in its scope but also relates specifically to Australia and the type of business found there together with some useful statistics and references to websites.

Chapter 6 covers marine insurance and refers to the reform of marine insurance in England (the *Insurance Act 2015* (UK) comes into force in April 2016). It is explained that, as a result of the reform of English marine insurance, further reform may be seen in Australia. Australia did not previously want to make changes which were too radical to their marine insurance in case it affected the ability to obtain reinsurance in the London market.

Ownership; Registration; Securities is the title of Chapter 7 which is followed by Navigation; Shipping; Safety in Chapter 8. Chapter 9 covers Marine Labour Law and Chapter 10 Marine Collisions and Groundings; Marine Inquiries. Chapter 11 discusses Salvage; Wreck; Underwater Cultural Heritage. Chapters 12 and 13 are relatively short chapters on Towage and Pilotage. The chapter on pilotage addresses the requirements for

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¹ (Longman, 7th ed, 2010).

² (OUP, 2nd ed, 2011).

³ (Routledge, 2015).

⁴ Sir Bernard Eder, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 23rd edition, forthcoming).

pilotage in the Great Barrier Reef and the Torres Strait and the Australian cases on a pilot's liability for negligence. Limitation of Liability has a chapter to itself in Chapter 14.

Chapter 15 deals with Marine Pollution: Ships and Offshore Platforms. It ends with the *Montara Platform* blowout in 2009, the Commission of Inquiry and Report which followed and the consequential legislative changes. It draws parallels with the *Deepwater Horizon* oilspill in the United States and concludes with the possibility of international regulation of the offshore oil industry.

Further evidence of the wide coverage of this book is that Chapter 16 deals with Criminal Jurisdiction; Piracy and finally Chapter 17 deals with Prize; Prize Salvage; Bounty and Ransom. Despite this, it might be argued that the book could also have included shipbuilding, ship sale and finance and maritime competition. There is some discussion of conflict of laws.

This book is at very least a good starting point for a reader who wishes to familiarise themselves with Australian law on an area of maritime law. It is eminently readable and interesting and will no doubt inspire the reader to enquire further. However, it is also a good source for maritime lawyers from all over the world to see the Australian approach to maritime issues and, in particular, the international conventions on these issues, which confront us all.

BOOK REVIEW

Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective*. Hart Publishing, Portland (2014). 274 pp. ISBN: 9781849465472

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The South China Sea is a highly contested and complex geographical area, semi enclosed by seven nations (Brunei, Indonesia, Malaysia, China, the Philippines, Taiwan and Vietnam), and scattered with an array of islands and other features including reefs, shoals, cays and rocks, many of which are claimed by multiple States.

China claims and occupies a number of islands and other smaller landforms in the region, and is creating new islets with ports, military barracks and airstrips by pumping millions of tonnes of sand onto reefs, including on the appropriately named Mischief and Fiery Cross Reefs in the Spratlys. These works are building what the US Commander of the US Pacific Command, Admiral Harris, has called China's 'great wall of sand'.¹ Other States in the region are also undertaking similar works, although not on the same scale.

In addition to claims to particular features, China also makes a deliberately unspecific claim to an arc of influence marked out by a series of dashes on its map of the region. This is the so-called nine dash line that has appeared on Chinese maps since the 1940s, and which encircles virtually the entire South China Sea.

There are two interconnected bodies of international law of relevance to the ambitions and activities of China and other States in the South China Sea.² The first is the law concerning sovereignty over territory. The second is the law of the sea as set out in the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS),³ to which all States in the region are parties.

The law of the sea borrows the Roman law notion *dominium maris* and so most maritime zone issues flow from the prior question of which State has sovereignty over contested territory. Nonetheless, there are some law of the sea issues separable from sovereignty disputes, including the legal status of the hundreds of islands, rocks, low-tide elevations and reefs. How these are categorised under UNCLOS has major implications for what maritime zones can emanate from them, regardless of who actually owns them. For instance, artificial islands can possess no territorial sea, and uninhabitable rocks cannot have an exclusive economic zone or continental shelf.⁴

Given that South China Sea States are parties to UNCLOS the possibility of turning to UNCLOS's sophisticated dispute settlement system has always seemed a possibility. There was considerable anticipation, therefore, when in January 2013 the Philippines initiated arbitral proceedings against China under UNCLOS.

The Philippines argues that China cannot claim the waters within the nine dash line, as there is clearly no basis for such a claim under UNCLOS, and the area is far and beyond any claim that China would legitimately have even were it sovereign over all the territories it claims. The Philippines also contends that China is unlawfully asserting maritime entitlements from rocks, submerged banks, reefs and low tide elevations that do not qualify as islands under UNCLOS.

China has objected to the case from the outset and taken no part in the proceedings. But outside the courtroom China has given several reasons for rejecting the arbitration, including that the dispute really relates to territorial sovereignty and also concerns maritime boundaries, a matter that China has lawfully excluded from UNCLOS

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¹ Clive Schofield, 'Why the World is Wary of China's "Great Wall of Sand" in the Sea', *The Conversation*, 8 May 2015, <<https://theconversation.com/why-the-world-is-wary-of-chinas-great-wall-of-sand-in-the-sea-40070>>.

² See Chris Ward SC, 'The South China Sea: An Introduction to the Disputes and the Role of International Law' (2014 Justice Richard Cooper Memorial Lecture, Sydney, 17 November 2014).

³ 1833 UNTS 3.

⁴ UNCLOS, art 121(3). For discussion see Robert C Beckman and Clive H Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29 *International Journal of Marine and Coastal Law* 193. See generally Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing/Bloomsbury, 2nd ed, 2016).

dispute settlement. While refusing to enter the international courtroom, China nonetheless went to significant lengths to explain aspects of its position in legal terms in a detailed position paper released in late 2014.⁵

The South China Sea dispute has given rise to a large volume of literature that has examined various dimensions of the controversy. And, very prominent among this body of work is *South China Sea Arbitration: A Chinese Perspective*, edited by Stefan Talmon and Bing Bing Jia. The editors of the volume are well known and regarded international law scholars, and they have assembled an impressive list of co-contributors, most of whom are from mainland China. Nonetheless this book is very unusual, for several reasons.

There are relatively few books devoted to a single case in an international court or tribunal.⁶ And there are none, to my knowledge, written in advance of the actual proceedings. As the editors themselves note in the Preface, '[b]ooks on important international law cases are normally written only after the parties have submitted their memorials and presented their oral arguments, and the court or tribunal has finally rendered its judgment.'⁷

The book is rendered even more curious by the approach that it takes to the subject matter. It does not seek to offer an independent assessment of the *South China Sea Arbitration*, as most scholarly contributions would normally aspire to. Instead it is designed 'to offer a specifically Chinese perspective on some of the legal issues before the Arbitral Tribunal.'⁸ And it deliberately steers clear of the merits of the case and focuses on the questions of jurisdiction, admissibility and other objections, which the Arbitral Tribunal will have to decide as a preliminary matter.⁹ As such, the authors state that it is designed to be something akin to an *amicus curiae* brief,¹⁰ but one which presents an avowedly Chinese view on the case in the absence of China's participation in the proceedings.

While this book offers an exceptionally detailed and rigorous analysis of the jurisdictional issues, it might legitimately be asked what purpose it serves. China is more than capable of safeguarding its international legal interests. China's calculated non-appearance in the proceedings, coupled with its detailed position paper in late 2014, illustrate that China has ample capacity to advance its position without the type of gratuitous assistance that this book seeks to provide. In any event the book does not appear to have influenced the tribunal's deliberations, nor its award on jurisdiction and admissibility. The work was not cited in the award issued in October 2015, nor in oral argument before the tribunal.

And, most critically, the arbitral tribunal took opposite conclusions to the book on all of the main issues of jurisdiction, concluding that Philippines has presented a case worthy of consideration on its merits.¹¹ Crucially, the tribunal noted that the Philippines had not asked the tribunal to determine contested issues of sovereignty, but rather only to address discrete law of the sea questions that are justiciable, or which may well be so on closer inspection at the merits stage.¹²

While the tribunal accepted it cannot rule on sovereignty, it insisted that it can rule on the law of the sea implications of sovereignty. It can rule on whether an outcrop of land in the South China Sea is an island, rock, low-tide elevation, or submerged feature, from which then flow legal consequences for maritime entitlements. And it can also rule on whether China's land reclamation activities are unlawful because they are damaging the marine environment.

And, so the scene is set for the possible (perhaps now likely) conclusion by the tribunal that there are minimal or no maritime entitlements extending from the reefs and shoals claimed by China. As James Kraska has observed, this would inevitably undermine China's position on the nine dash line, leaving it with perhaps nothing more than small patches of territorial sea.¹³

⁵ Ministry of Foreign Affairs of the People's Republic of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 December 2014) <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

⁶ See, for instance, Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999).

⁷ Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing, 2014) v.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.* vi.

¹¹ *Republic of the Philippines v People's Republic of China (Award on Jurisdiction and Admissibility)*, (Permanent Court of Arbitration, 29 October 2015).

¹² *Ibid.*, [153].

¹³ J Kraska, 'A Legal Analysis of the Philippine-China Arbitration', *The Diplomat*, 2 November 2015 <<http://thediplomat.com/2015/11/a-legal-analysis-of-the-philippine-china-arbitration-ruling/>>.

Given that the arbitral tribunal did find that it could proceed to the merits, the *South China Sea Arbitration: A Chinese Perspective* has to a large extent outlived its usefulness as it was aimed specifically at anticipating jurisdictional and admissibility issues. However, the book does have a number of features of enduring value that merit acknowledgment.

The introduction by Bing Bing Jia and Stefan Talmon provides helpful background to the dispute by explaining the geographical context and the timeline for the proceedings (albeit in terms sympathetic to the Chinese view as to its claims in the region). Stefan Talmon's chapter on jurisdiction and the consequences of default of appearance is exceptionally closely argued, and draws upon a wide array of practice, case law and scholarship. Notwithstanding the tribunal's decision there are aspects of this chapter which will continue to have importance for understanding the operation of the UNCLOS dispute settlement system.

The contributions that follow, by Michael Sheng-ti Gau, Bing Bing Jia and Haiwen Zhang and Chenxi Mi do involve a certain degree of repetition of points advanced by Talmon, although there are some additional details added to the mix, particularly in relation to specific areas and maritime features at issue in the arbitration. This analysis, mainly found in the chapter by Michael Sheng-ti Gau will continue to be useful as the parties enter the merits stage. Finally, the book contains three Annexes which reproduce select documents of relevance in the case, including in Annex I the Philippines Notification and Statement of Claim. Annex II contains a select bibliography on the dispute, and Annex III a glossary of place names for all of the islands, islets, rocks and other features to which references is made throughout the book.

In sum, this book provides a thought-provoking contribution to a highly contested dispute that has importance not only for the States in the South China Sea region but for all governments with an interest in the law of the sea and the integrity of the UNCLOS dispute settlement system.