

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

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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 2015/2016 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 unscathed 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 956.81.³⁶

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

³⁷Section 26 provides that the unfair terms regime does not apply to ‘a term of a consumer contact 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?bId=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.