The Trade Practices Act (Cth) 1974 and its Impact on 
Maritime Law in Australia

Kate Lewins 
B.Juris; LLB (UWA) LLM (S'ton)

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School of Law 
Murdoch University 
Western Australia

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as required!
Declaration

This thesis contains no material which has been accepted for the award of any other degree or
diploma in any other University and, to the best of my knowledge or belief, contains no material
previously published or written by another person, except when due reference is made in the text.

________________________________

Katherine Beatrice Lewins
Preface

The majority of the work for this thesis was completed as a series of stand alone articles published (or in one case, accepted for publication) in journals with a double blind peer review system. There is also one case note that has been published unrefereed. The fact that much of the thesis has already been published has certain ramifications for the thesis, relating to both content and style. Of necessity each published article introduces the topic, and the workings of the Trade Practices Act 1974 (Cth) (TPA), afresh. Similarly, each article explores, to varying degrees, the possibility of reform in that particular area. Although each is tailored to the particular subtopic in question, a degree of overlap and repetition is unavoidable.

I have decided to set out the published articles in the format in which they have been published. This lends authenticity to the work, and makes it clear where the published work begins and ends. However, it does mean that each section which is a published work will be presented in the house style of the particular journal in which it has appeared, complete with its own footnoting.

Aside from the introduction, each article forms the main bulk of one chapter. All chapters will conclude with an outline of any significant developments which may have arisen since the publication of the article, so as to bring the article ‘up to date’. The abbreviations adopted in each article are continued throughout the balance of that chapter.

The interest in the topic of TPA and maritime law, along with the growing body of cases, makes it clear that the impact of the TPA on maritime law is a real and significant issue to the maritime industry and maritime law community in Australia. Outside the author’s work, there has been little analysis published in Australia or elsewhere.
Abstract

The trade of shipping is necessarily international in nature. Courts and international bodies often express the need to ensure international consistency in matters of maritime law. However, it has been an extremely difficult goal to achieve. Many countries have refused to be party to international conventions that seek to ensure comity. Some have enacted laws that reflect part but not all of those conventions, or seek to improve the protection offered by the conventions. The domestic law of each country also adds its own flavour to shipping law as recognised and applied by the courts in that jurisdiction.

In 1974 Australia enacted the Trade Practices Act 1974 (Cth) (TPA), heralding a new era in corporate and commercial law. However, its impact on maritime law on Australia has only been felt over the last 10 – 15 years. It is potentially relevant to many areas of maritime law, including carriage of goods by sea, cruise ships, and towage. This thesis explores the encroachment of the TPA on a number of different areas of shipping law, using the few case examples on offer and extrapolating the impact that the TPA may have. It also considers the extent to which the TPA is stymied by simple contractual agreements to litigate or arbitrate in a non Australian forum, despite the TPA’s status as a mandatory statute within Australia.

Raised at various points in the thesis is the possibility of law reform, which is a complex compendium of issues overlaid with a moral dimension – does shipping, as an industry, deserve to be exempted from the operation of the Act which sets a high standard of corporate behaviour? If so, how could that reform be shaped? In the meantime, what steps can the shipping industry take to work within the legal framework of the TPA?
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Chapter One

The Trade Practices Act and Shipping Law in Australia – 
An Introduction
It is no surprise that the Australian economy is heavily dependent on international shipping. Australia is an island nation. It produces and exports minerals and primary produce, which by their nature require transportation by sea. Australia also has a significant demand for imports. The vast majority of our exports and imports are carried by sea. Their transportation is the result of private contracts between those who own or manage the vessels, and those with an interest in the cargo. While the act of taking a finite shipment of goods and delivering it elsewhere in the world may appear to be a simple physical act, the process is rendered complex by the number of different parties involved, the various responsibilities they assume and the terms and conditions on which they are prepared to accept those responsibilities. As between the various parties, tasks are assigned, risks are adjudged and insurances arranged accordingly. When a ship is carrying many consignments for different parties, that complexity is multiplied accordingly.

Those parties involved in the transportation of goods (and related maritime arrangements) would undoubtedly regard them as commercial arrangements first and foremost, rather than legal ones. But the legal framework is critically important. The wheels of international commerce work best when ‘greased’ by a receptive legal framework. Those regularly involved in maritime commerce will attempt to frame their own practices around laws in a manner that ensures the outcome of any particular dispute is as certain as possible, leading to the lowest overheads or transaction costs. This striving

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1 For example, in 2004–05, the maritime transport sector’s share of Australia’s international trade was 680.5 million tonnes valued at $215.2 billion. In Australia’s total trade this represented 75.4 per cent by value, and 99.9 per cent by weight and tonne kilometres: Department of Infrastructure, Transport, Regional Development and Local Government, Bureau of Infrastructure, Transport and Regional Economics [BITRE] 2007 ‘Australian Maritime Trade: 2000–01 to 2004–05’ (Working Paper 69, BITRE, Canberra, ACT), ix.


3 Above n 1.

4 Either as buyer or seller.

5 Something that is usually achieved by choosing the law applicable to the contract and the forum for any disputes: Michael Whincop & Mary Keyes Policy and Pragmatism in the Conflict of Laws (2001) (Whincop & Keyes) 29. Chapter 5 of this thesis deals with the extent to which such selections can override the operation of the TPA.
for certainty of outcome is all the more challenging when the legal frameworks of various countries are relevant to performance.

As a result, it is to be expected that the laws relating to maritime and trade have developed with an international focus. This can be traced back through history to ancient times, and in more modern times has come about through various measures aiming to standardise international maritime and trade law. Manifestations of this include the many international Conventions concerning the commercial aspects of shipping, such as carriage of goods and passengers, limitation conventions, and those in related fields such as arbitration. International bodies such as UNIDROIT, UNCITRAL and CMI have developed model laws and principles that different countries - or even parties - can adopt, leading to enhanced uniformity. In the face of ambiguity,

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11 International Institute for the Unification of Private Law (Institut International Pour L’unification du Droit Prive).


13 Comite Maritime International.

courts will seek a solution that promotes uniformity rather than detracts from it.\textsuperscript{15} As such, it is clear that individual countries recognise the importance of a degree of ‘commonality’\textsuperscript{16} between the laws of different countries in matters of international trade – and that significant deviation from commonality of laws is undesirable.

\textit{International commercial law is a species of private law that is supranational or transnational.} \textsuperscript{17}

It is, of course, impossible to create total uniformity in the laws of different countries. Nevertheless, through a combination of the standardisation of contractual terms agreed by the parties, and legislative and judicial attempts to align legal regimes between countries, a ‘fuzzy’ alignment of applicable principles can be achieved. This gives transnational operators a degree of comfort that basic familiar concepts, and even those more complex concepts, are likely to be recognised in different legal jurisdictions.\textsuperscript{18}

However, unavoidably, the application of commercial maritime law in any particular instance\textsuperscript{19} involves the application of municipal (domestic) law to the dispute in question.\textsuperscript{20} The particular court or panel seized of any dispute must apply the municipal law of that country, including any

\textsuperscript{15} As regards admiralty matters, see \textit{The Tolten} [1946] P 135,142; (1946) L L Rep 349, 352 as cited in Sarah Derrington & James Turner \textit{The Law and Practice of Admiralty Matters} (2007) [1.17]; and as regards interpretation of international carriage Conventions see \textit{Shipping Corp. of India Ltd v. Gamlen Chemical Co (A/Asia) Pty Ltd} (1980) 147 CLR 142, 159 (Mason & Wilson JJ).
\textsuperscript{16} Justice Allsop, above n 6, 2.
\textsuperscript{17} Ibid.
\textsuperscript{18} Of course, the plethora of different international conventions (such as the \textit{Hague, Hague Visby and Hamburg Rules}) is also in and of itself, a challenge to the aim of international uniformity – but in this thesis, the emphasis is on the effect of municipal laws on international uniformity.
\textsuperscript{19} At least in the context of commercial law.
International Conventions which that country has ratified.\textsuperscript{21} The need to maintain comity with other nations is recognised by courts,\textsuperscript{22} but must always give way to the will of municipal Parliament, which grants the courts their jurisdiction and to which the courts are bound.\textsuperscript{23} A particular municipal law may be of great significance to that country, and it may not be willing to compromise on its application.\textsuperscript{24} This thesis is concerned with one such municipal law and its effects on commercial maritime law in Australia.

In Australia, one of the most powerful municipal laws relating to commerce is the \textit{Trade Practices Act} 1974 (Cth) (TPA). It has many important parts, but for this thesis, the critical parts are those containing Sections 52 and 74. Those sections were primarily designed to protect consumers but their scope was not so limited.\textsuperscript{25} Section 52,\textsuperscript{26} in particular, is an extremely powerful provision which seeks to impose a standard of conduct on those participating in trade and commerce in Australia:

\begin{quote}
\textit{(The TPA) is a statute of the highest importance in connection with commercial activity and behaviour in Australia and in the promotion of the welfare of Australians. The norms of conduct laid down in Pt V, including in particular s 52 dealing with misleading or deceptive conduct, and the ample and flexible relief made available in Pt VI, in particular the powers in s 87, illustrate the central importance of the Trade Practices Act to the regulation of commercial life and commerce in Australia.}\textsuperscript{27}
\end{quote}


\textsuperscript{22} \textit{Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia)Pty Ltd} (1980) 147 CLR 142; \textit{Federal Commerce and Navigation Co Ltd v Tradax Export SA (the Maratha Envoy)} [1978] AC 1 at 8 (Lord Diplock).

\textsuperscript{23} Above n 20.

\textsuperscript{24} This is explored further in Chapter 5 below.

\textsuperscript{25} In the second reading speech for the \textit{Trade Practices Bill} 1973 the Attorney General, the Honourable Senator Murphy said “The consumer protection provisions are to be found for the most part in Part V. Some of these provisions are expressly limited to transactions involving consumers.” Commonwealth Hansard, Senate Vol 57 p.1012. Second Reading 27 September 1973.(emphasis added).

\textsuperscript{26} Which is discussed at length and quoted in the introductory sections to each chapter of this thesis.

\textsuperscript{27} \textit{Comandate Marine Corp v Pan Australia Shipping Pty Ltd} (2006) 238 ALR 457 at 504, [195] (Allsop J).
The TPA has now been part of the municipal law of Australia for more than 30 years. It has taken some time for the courts to explore and exploit the scope of the provisions, particularly s52. Through this development, it has gradually become apparent that the sphere of influence of the TPA can and does extend to disputes involving matters of maritime law.\textsuperscript{28} It is probably fair to say that the expanding influence of the TPA has caught some in the maritime industry by surprise. To the extent that it constitutes a significant deviation from international comity, it is viewed as undesirable – particularly because it has the potential to cut across usual and accepted forms of liability in maritime law. The reality is, however, that the TPA is the cornerstone of Australian commercial law;\textsuperscript{29} as such, parties operating in this region ignore it at their peril.

This thesis explores the uneasy relationship between the TPA and maritime law in Australia.

Despite its origins in consumer protection, it is now clear that the all-pervasive nature of the TPA means it can and will apply to maritime disputes caught within its purview. This thesis argues that its application is appropriate for certain aspects of maritime law - such as cruise ship passengers and services provided wholly within Australia. However, in relation to certain other international commercial maritime contracts, the application of the TPA can create discord; it results in Australia’s laws being out of step with that of our trading partners thus threatening international comity. Furthermore, it gives false hope to Plaintiffs based in Australia who might relish adding the TPA cause of action to their weaponry\textsuperscript{30} but find themselves grasping for shadows should they be forced to litigate or arbitrate elsewhere. The thesis explains why, as a result, Plaintiffs must engage in an

\textsuperscript{28} The first reported cases in which s52 was alleged in a maritime matter were \textit{Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd (Oceanic Trader)} (1993) 113 ALR 677 and \textit{Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd} (1993) 117 ALR 507, both judgements of the Federal Court of Australia.

\textsuperscript{29} Above n 27.

\textsuperscript{30} Based on my view that the TPA cause of action can lead to liability that might otherwise not exist, I believe that there are substantive reasons why a plaintiff might seek to rely on the TPA; this does not entirely accord with the suggestion of Mary Keyes that ‘the use of TPA claims in foreign jurisdiction cases may be for strategic purposes.’ Mary Keyes \textit{Jurisdiction in International Litigation} Federation Press (2005) 154.
expensive and uncertain battle over jurisdiction in order to determine whether the TPA cause of action may be brought at all. This thesis outlines where the law lacks clarity as to the application of the TPA, questions whether the TPA ought to apply to all commercial maritime matters and gives some suggestions for reform.

This thesis unfolds as follows. The second chapter examines the effect of the TPA on contracts for the carriage of goods by sea. It outlines s52 and its related provisions and charts their evolution from consumer protection to a weapon wielded within private commercial transactions. It then considers the territorial and extraterritorial reach of the TPA and why (and in what circumstances) overseas carriers might find themselves exposed to a TPA cause of action. It examines a number of maritime cases that have already been decided in Australia based on the TPA, and discusses the interface between TPA claims and the cargo liability regimes. In particular it highlights the uncertainty about the carriers’ ability to limit liability for claims in the manner in which shipowners have become accustomed. It points out that s52 is a weapon for both parties; a theme which is further developed in chapter 4. It concludes by posing the (partly) rhetorical question – whether s52 ought to have a place in maritime contracts enforced in Australia.

Chapter 3 considers the TPA in the context of the law relating to carriage of passengers by sea. It explains that cruise ship operators operating from Australia or advertising in Australia are uniquely exposed to claims for breach of the TPA because they carry, in essence, an entire cargo of ‘consumers’. Such claims could relate to simple misrepresentations in advertising about what the cruise might be like; or the claims might be for personal injury or death sustained on board. As regards the latter form of claim, the chapter notes that, ironically, recent amendments to the TPA

31 Given the origins of the TPA as a consumer protection statute.
as a result of the so called ‘public liability crisis’ have watered down and in some cases excised the ability of individuals to rely on the TPA in seeking damages. Those amendments, and what they might mean for cruise ship operators, are discussed and critiqued; before concluding that there remains plenty of scope for a passenger to use the TPA to bring a claim against a cruise ship operator. The article also examines the interplay between the TPA, contractual attempts to exclude liability, and international conventions limiting passengers’ claims and examines the current passenger liability regime in Australia in that regard. It concludes that cruise ship operators must navigate a murky seascape of liability under the TPA and would be well advised to carefully consider their obligations under the TPA.

It is important to remember that shipowners are not only the provider of services but also the consumer of services. Every vessel visiting port requires certain services at each port; such as pilotage, towage, stevedoring, shiprepairs and providoring. Chapter 4 deals with the application of the TPA where a maritime service is undertaken in Australia, using the example of towage contracts. In this context the emphasis is on s74 (3) TPA, which imposes an obligation to exercise due care and skill in a contract for the provision of services. This chapter shows that the TPA can also be used by shipowners – not just against them. (Australian parties, while usually happy to rely on the TPA to support any claims of their own, might find that the boot is on the other foot in this regard.) This chapter anticipates then develops recent case law which has given guidance on the meaning of the s74(3) exception. The chapter argues that the providers of maritime services in Australia ought to make relatively modest changes to their terms and conditions to allow them to legitimately limit their overall liability. However, it may be that until the High Court rules on the matter, the industries will maintain their ostrich-like stance.

32 Using s68A.
Legal disputes arising in Australia involving the TPA and maritime law create headaches for parties, lawyers and courts alike; particularly where the parties had agreed to resolve their disputes somewhere other than Australia. Almost invariably, resolving these disputes involves teams of lawyers; and increasingly (and regrettably) will also involve pre-emptive strikes by one or both parties to secure a ‘beneficial’ jurisdiction to hear the claim. Chapter 5 looks at the theoretical issues and very practical problems resulting from a party wishing to rely on the TPA when there has been an agreement to litigate or arbitrate elsewhere than Australia. The attitude of the English courts is critical to this chapter, given the dominance of England as a centre for resolution of maritime law matters, with either its courts, or its law, applying in many cases as a result of contractual agreement. Chapter 5 outlines how the English legal system stoically defends the principle of party autonomy. It explores how the English and Australian courts are on a collision course as regards the status of the TPA. This is particularly problematic for maritime law disputes as the underlying contracts often contain a contractual provision which, if allowed to operate, would render the application of the TPA unlikely. It explains why Australian parties might be ‘shell shocked’ by the lack of recognition given to foreign ‘mandatory’ statutes in England, but points out that it is a result of the primacy of the principle of autonomy of contract – a principle which the English are not prepared to compromise. The chapter compares the experience of some other foreign ‘mandatory’ statutes before the English courts, as well as considering the fate of international attempts to allow recognition of such statutes, before drawing some lessons from that for Australia. It notes that there are signs that the judiciary, both in Australia and abroad, are taking creative approaches to the problem. It concludes, nonetheless, that currently the application of TPA to maritime law in Australia, and the English dismissal of the importance of the TPA once the parties have chosen an English forum, means that

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33 As at 13 May 2008, PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v The Owners of the Ship ‘Koumala’ awaiting a hearing date for an application for special leave to appeal to the High Court.
an Australian plaintiff wishing to rely upon TPA in those circumstances must undertake an
undignified scramble for the courthouse in the hope of securing their preferred forum. Ultimately, the
high stakes mean that the scramble must take place without sufficient time for due consideration of
the strength of the TPA cause of action.

This thesis argues that it is clear that the TPA does apply to maritime law in Australia, but the knitting
together of maritime and TPA law in Australia is far from seamless. Bearing in mind the uppermost
importance of certainty of legal outcomes in international maritime commerce, the best way to
achieve clarity in the law is not to allow it to continue to develop in an *ad hoc* manner, tinkering with
amendments or waiting for caselaw to develop incrementally. Rather it is time for policymakers and
legislators to take a considered and principled approach to the application of the TPA to maritime
law.
Chapter Two

Carriage of Goods by Sea and the TPA
2.1 Article: ‘Corporate Morality and Commercial Maritime Contracts:
Considering the impact of the Trade Practices Act 1974 (Australia) s52 on
197 – 218.
Corporate Morality and Commercial Maritime Contracts: Considering the impact of the Trade Practices Act 1974 (Australia), s 52 on carriage of goods by sea

Kate Lewins*

The Trade Practices Act 1974 (Australia), s 52 prohibits a corporation from engaging in misleading or deceptive conduct. Its reach has extended beyond consumer transactions, to commercial and even, in some circumstances, international transactions. After providing an outline of s 52, this article looks at the circumstances in which the Trade Practices Act can apply to a contract of carriage that has a nexus with Australia, even if one or both parties are not based in Australia. The article reviews the potential impact of the Trade Practices Act on carriage contracts generally and the Hague/Hague-Visby limitations in particular.

1. INTRODUCTION

Certainty is of great importance in carriage of goods by sea and other commercial maritime contracts. A complex web of interlinking contracts, Conventions and legal fictions underpin the relationships and liabilities of the various parties involved. It is a stated aim of the courts to interpret and enforce contracts and international Conventions in a manner that provides certainty in commercial circles. So it may come as a surprise that commercial contracts such as these, built on principles of lassiez faire and interpreted by courts seeking to deliver commercial certainty, may be neutralized by an Australian statute whose aim is (in part) to encourage fair trade and develop corporate morality.

Corporate morality and commercial maritime contracts are two expressions which are not often uttered in the same breath. And yet there is, or should be, a growing realization that s 52 of the Trade Practices Act 1974 (Cth) (“TPA”) does have an impact on

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* Senior Lecturer in Law, Murdoch University, Perth, Australia.

1. Eg, “It has been recognised that a national court, in the interests of uniformity, should construe rules formulated by an international convention, especially rules formulated for the purpose of governing international transactions such as carriage of goods by sea in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law or by English legal precedent, but on broad principles of general acceptation”: Shipping Corp. of India Ltd v. Gamlen Chemical Co (A/Asia) Pty Ltd (1980) 147 CLR 142, 159 (Mason & Wilson JJ).

2. See eg Federal Commerce and Navigation Co Ltd v. Tradax Export SA (The Maratha Envoy) [1978] AC 1, 8, per Lord Diplock.
commercial maritime law in Australia. Its involvement may well be controversial, but there is no doubt now that, in determining the liabilities of parties in a maritime dispute that has some nexus with Australia, this statute, about controlling corporate behaviour towards others, needs to be considered alongside cargo liability regimes, terms of sea carriage documents or charterparties and the common law of contract.

The potential application of s 52 in a maritime context is evident from the following example. A time-chartered vessel is due to discharge an Australian consignee’s cargo in Australia pursuant to a contract of affreightment with the consignor. The consignee enquires as to the likely arrival of the vessel so as to make arrangements for stevedoring services. Misleading information about the ETA of the vessel is faxed to the consignee in Australia by the charterer. The consignee books stevedores accordingly and is out of pocket when the vessel does not arrive as planned. The expenses caused by the reliance on the misleading information would be recoverable by the consignee from the charterer under the TPA. The time charterer would be liable regardless of the fact that the bill of lading seeks to exclude any claim of that nature, and that the applicable cargo carriage regime is silent on its recovery—even if it was not the contractual carrier and despite any circular indemnity clauses or other attempts to channel legal action towards one agreed defendant.

The primary provision of the TPA, for the purposes of this article, is s 52. Section 52(1) states: “A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.” The application of s 52 is broad and it has transformed Australian civil litigation. But, like all other causes of action, the TPA has advantages and pitfalls. The aim of this article is to outline both of these, concentrating on the implications for those corporations involved in maritime contracts and relationships with Australian corporations.

While a broad exposition of s 52 is best left to dedicated texts, this article seeks to outline the elements and importance of s 52 in the Australian maritime commercial landscape, and focuses on the particular ramifications for carriage contracts.

2. AN OUTLINE OF TPA, s 52

Section 52 is a revolutionary provision that has cut across all other forms of relief for civil disputes in Australia. It is: “a comprehensive provision of wide impact, which does not adopt the language of any common law cause of action. It does not purport to create a

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3. Other sections of the TPA may also be relevant: see s 53, which deals with representations in specific instances; s 51AA–AC, on corporate unconscionability; and s 74, which imposes warranties of due skill in the provision of services. The latter does not apply to contracts for the carriage of goods for business purposes (s 74(3)) but could apply to maritime contracts that are not carriage per se—such as towage or salvage. However, this paper is limited in scope to s 52. For a copy of the TPA see: [http://scaleplus.law.gov.au/html/pasteact/0/115/top.htm](http://scaleplus.law.gov.au/html/pasteact/0/115/top.htm).


liability at all; rather it establishes a norm of conduct... It has been referred to by some as the “new corporate morality”. Initially, the Australian courts were conservative in its application. But over time its reach has extended from the realm of consumer protection into that of private contracts; even a breach of contractual warranties may constitute misleading or deceptive conduct. It has virtually replaced the law relating to misrepresentation in Australia. However, it is by no means limited to situations where the parties are in a contractual relationship. In Australia, it has been applied to areas as diverse as advertising, newspaper articles, property transactions, sale of goods, the professions, holidays and takeover bids, to name but a few.

Section 52 prohibits a corporation from “engaging in conduct” that is misleading or deceptive or likely to mislead and deceive. The Act defines “engaging in conduct” broadly, as:

doing or refusing to do any act, including the making of or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant.

As for the words “mislead or deceive”, the courts have tended to stick closely to the dictionary definitions such as:
deceive: . . . “to cause to believe what is false, to mislead as to a matter of fact, to lead into error, to impose upon, delude, take in.”
mislead: . . . “to lead astray in action or in conduct, to lead into error, to cause to err.”

Section 52 can be breached unwittingly, without either intent or negligence, and may even be breached by silence, where there is a duty to reveal relevant facts. The section can be breached if no person has actually been misled (although any person alleging a breach of s 52 needs to show reliance on the conduct and damage resulting from that reliance in order to receive relief). It can also be breached by statements that are literally true but, once assessed in the light of the overall effect and context, are found to contain a false representation.

Section 52 is designed to ensure that “trading must not only be honest but must not even unintentionally be unfair”. This gives the section a far wider ambit than most common

8. The threshold requirement for a corporation acting in trade or commerce will not be discussed here, as in a commercial maritime context they will usually be satisfied easily.
9. TPA, s 4(2).
11. Though intent can be relevant, because if there were intent then conduct would be deceptive rather than merely misleading.
12. The question is whether, in all of the circumstances there has been conduct likely to mislead or deceive: Demagogue Pty Ltd v. Ramensky (1992) 110 ALR 608 (Full Fed Ct).
13. TPA, ss 82, 87. A requirement of reliance also curtails claims where the plaintiff knew the representation was not true or had ceased to regard that representation as influential. However, the Australian Consumer and Competition Commission (ACCC) (being the body charged with enforcement of the TPA) may bring an action for breach of s 52 without the need to show that anyone has been misled.
15. Ibid., per Stephen J.
law causes of action that generally require some degree of fault, intent, or failure to take reasonable care. As such, it is an attractive cause of action for a litigant and a threatening one for defendants.

The power of s 52 is not only due to the simplicity of the section itself, but also those facilitative sections elsewhere in the TPA that reinforce it. Briefly:

(i) The remedies section allows the recovery of damages for those who have sustained loss as a result of the conduct.\textsuperscript{16} There is no requirement equivalent to duty of care or privity of contract; rather, the notion is reliance on the conduct in question leading to loss. The pool of potential plaintiffs is increased as a result.

(ii) As well as an award of damages, the TPA allows the court to make any orders it thinks fit including selecting from an extensive suite of remedies in order to compensate the plaintiff in whole or in part for the loss or damage, or to prevent or reduce the loss or damage.\textsuperscript{17}

(iii) Those liable for the breach of s 52 include not only the main perpetrator but also any party “involved” in the contravention.\textsuperscript{18}

(iv) The statutory definition of agency adopted in the TPA (s. 84) is broader than at common law.\textsuperscript{19}

(v) S 52 also applies to representations about a future matter by virtue of s 51A. The TPA deems representations as to future conduct as having been misleading or deceptive unless the representor can show that there were reasonable grounds for making the representation.\textsuperscript{20}

The final contributor to the considerable scope of s 52 is the attitude of Australian courts in interpreting it. Courts have been strident in their development of s 52 and the protection of the principles of fair trading that it exemplifies. For instance (and particularly relevant in a maritime context), the courts virtually ignore contractual clauses seeking to exclude or somehow offload liability that may accrue under s 52. Such clauses are generally regarded as attempting to undo the effect of the provision and will not be applied.\textsuperscript{21}

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\textsuperscript{16} S 82 states: “(1) A person who suffers loss or damage by conduct of another person that was done in contravention of . . . [amongst others, s 52] . . . may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.”

\textsuperscript{17} See ss 80, 87. Some remedies include an injunction (s 80), declaration, rendering an agreement void, varying the contract, refusing to enforce the contract, requiring the refund of money or property, varying the contract or covenant in such a manner as the court considers just and equitable (s 87).

\textsuperscript{18} S 75B (1) reads: “A reference in this Part to a person involved in a contravention of a provision of [amongst others, s 52] shall be read as a reference to a person who:
(a) has aided, abetted, counselled or procured the contravention;
(b) has induced, whether by threats or promises or otherwise, the contravention;
(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
(d) has conspired with others to effect the contravention.”

However, the extraterritorial application of Act set out in s 5 does not apply to s 75B: see s 5(1).

\textsuperscript{19} For instance, a person with apparent authority can give authority to another person: TPA, s 84(2).

\textsuperscript{20} S 51A(1)&(2). See discussion of this section in articles referred to at fn 7.

\textsuperscript{21} A disclaimer clause can only be effective if it has the effect of actually erasing that which is misleading in the conduct because it then modifies the conduct: \textit{Benlist Pty Ltd v. Olivetti Australia Pty Ltd} (1990) ATPR 41–043, cited in Miller, § 1.52.75, p 431. This is unlikely to apply in a maritime contract, though see the text accompanying fn 76 infra for one possible application. For a maritime example of ignoring of exclusion clauses once s 52 has been held to apply, see the Mogal case, infra In 52.
Another example is that currently there seems to be no concept akin to contributory negligence leading to a reduction of the measure of damages. Once the violator’s conduct is found to breach s 52, they will be liable for the whole of the loss (even if the complainant itself made decisions or omissions that led to the loss).

All these features mean that s 52 is a formidable opponent of the complex principles of liability that have been developed for breach of maritime contracts, particularly carriage contracts. The ability to cut across well-established rules of privity, its relative immunity to exclusion and limitation clauses, and the six-year time limit for a claim for damages are particularly significant. That significance will be discussed further in Part 4 of this paper.

3. THE ORDINARY AND EXTRATERRITORIAL APPLICATION OF THE TRADE PRACTICES ACT

One would be forgiven for assuming that the impact of the TPA is limited to Australian territory and those corporations registered in Australia. However, the Trade Practices Act seeks to impose its provisions on those doing business within Australia (even if they are not registered in Australia) and also extends its reach to conduct outside Australia in certain circumstances. Significantly for the maritime industry, the application of the Act cannot be thwarted by choice of law clauses. Nor can an arbitration clause exclude the application of the TPA, or deprive the parties of remedies that a court may grant under the Act.

a. Conduct within Australia

Much of the TPA seeks to moderate a corporation’s conduct within Australia. The TPA has been framed on the assumption that it catches conduct within Australia. Therefore, it can catch the conduct of

(i) Australian corporations, or foreign corporations registered in Australia; and

(ii) foreign corporations not registered in Australia but who have “engaged in conduct” in Australia.

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22. As a result of Henville v. Walker [2001] HCA 52. This decision has the dubious distinction of being named by a leading Australian commentator, Professor W. Pengilley in “The Ten Most Disastrous Decisions made Relating to the Trade Practices Act” (2002) 30 ABLR 331. The writer understands that the Australian Government (Department of Treasury) is considering proposing amendments to allow for contribution to the loss to be taken into account in the assessment of damages.


24. S 82(2).


26. Emmett J in Hi-Fert Pty Ltd v. Kiuikang Maritime Carriers Inc [1998] 1485 FCA 21 (Fed Ct) as cited by B. McCabe, “Compulsory Arbitration Clauses and Claims under the Trade Practices Act” (1999) 7 TPLJ 41, 43. It is still possible for both parties to agree to arbitration of a dispute that arises under the TPA but parties cannot be held to that agreement if the effect is to thwart the TPA: see Emmett J, at 26. See also M. Davies “A chink (or two) in the Bill of Lading Plaintiff’s Jurisdictional Armour? Good news for Australian Maritime Arbitration?” (1998) 26 ABLR 70, 74.

27. For example, unconscionable conduct (Div IVA); misleading or deceptive conduct (s 52).

What does “engaging in conduct within Australia” mean? First, it is important to note that the term “conduct” relates to the specific conduct that allegedly breaches the TPA—for instance, the misleading representation. Therefore, the mere fact that a foreign corporation has some sort of trade relationship with Australia is not sufficient. It is the specific conduct complained of by the plaintiff that must have occurred in Australia. In a maritime context, this means that a corporation will not necessarily be caught by the TPA just because vessels owned by it visit Australian ports.

In the recent case of Bray v. F. Hoffman-La Roche Ltd it was held that “engaging in conduct” included conduct initiated by an overseas corporation outside Australia but expected to be received in Australia (such as the content of emails, facsimiles, telexes and telephone conversations to and with parties in Australia). Therefore, those engaged in the maritime industry who are based out of Australia, not carrying on business in Australia but dealing with trading partners in Australia by way of faxes, phone calls, letters and emails, will find those aspects of their business caught by the provisions of the TPA.

The interpretation of the phrase “engaging in conduct within Australia” seems, therefore, to represent a physical or territorial aspect to the operation of the Act. Therefore, the issuing of bills of lading in Australian ports will render the conduct of the carrier (for instance, regarding representations made in that bill) subject to the TPA. Similarly, the negotiation of a carriage contract between an Australian corporation and a foreign corporation for delivery of goods to Australia will bring the conduct of both negotiating parties within the TPA. On the other hand, it would seem that conduct between a foreign corporation and an overseas agent of an Australian company that did not take place in Australia would not be deemed as “engaging in conduct within Australia”.

What about bills issued outside of Australia for cargoes to be delivered in Australia? Are representations in those bills taken to be “engaging in conduct” in Australia? In Hunter Grain Pty Ltd v. Hyundai Merchant Marine Co., Sheppard J. concluded that Hyundai as contractual carrier had engaged in misleading or deceptive conduct by issuing a clean bill instead of a claused bill to an American consignor. However, the action by the indorsee based on s 52 failed, as Hyundai was not incorporated nor carrying on business in Australia, and the conduct in question—the issuing of the bill—had not occurred in Australia.

29. For the definition of “conduct”, see text accompanying fn 9.
31. Decided in the context of s 45 (anti competitive conduct).
32. The Australian corporation will be caught by virtue of being registered in Australia and because the conduct occurred in Australia. The foreign corporation’s conduct will only be governed by the TPA to the extent that there was “conduct” in Australia, as envisaged by Bray v. Hoffman La Roche [2002] FCA 243, where the conduct complained of was contained in negotiations and communications by the foreign corporation or its agent directed to and received in Australia.
33. Though the conduct of the Australian agent might be caught by the extraterritorial operation of the Act (see infra text accompanying fn 42) the conduct of the foreign corporation will not be caught and will not be subject to the TPA.
34. (1993) 117 ALR 507 (Fed Ct).
35. Ibid., 520. This would have been relevant to the extraterritorial provisions to be discussed in the next section.
The finding that Hyundai had not “engaged in conduct” in Australia was made despite the fact that there was an appreciation by those parties that the bill was to be negotiated and the goods delivered to a consignee or indorsee in Australia. Nor could the claim against Hyundai be sustained under the extraterritorial provisions of the TPA discussed under the next heading.

However, the recent case of Bray v. Hoffman-LaRoche provides cargo interests with a useful springboard to argue that this aspect of the Hyundai decision should not be followed. Now that the Bray case has accepted that conduct can originate overseas so long as it is received and intended to be received in Australia, the Hyundai case then could be seen as taking an unnecessarily narrow view of what constitutes “engaging in conduct” in Australia. After all, the very nature of bills of lading and sea carriage documents is that not only the consignor is interested in what the bill says. The consignee/indorsee of the document will rely on representations on its face; and that those representations will commonly be received, and be relied upon, in the country where the cargo is to be discharged. In that sense, the issuing of a bill of lading is less like a personal representation made by the carrier only to the consignor (as it seemed to be viewed in Hyundai) and more like a public representation made to class of persons interested in the cargo and, as a result, the veracity of the bill.

If the Hyundai case survives a challenge on those grounds, then Australian importers who wish to improve their chances of their carriage arrangement being caught by the TPA could buy goods FOB and arrange their own carriage contracts; or choose carriers who are Australian-registered foreign corporations.

b. Conduct outside Australia—extraterritorial operation

The reach of the TPA extends beyond conduct in Australia to conduct outside Australia in certain limited circumstances. Specifically, TPA, s 5 provides that s 52 also applies to the engaging of conduct outside of Australia by: Australian corporations or those carrying on business in Australia; or Australian residents or persons ordinarily resident

36. However Hyundai were found liable in fraud. See ibid., 524.
37. [2002] FCA 243 (Fed Ct)
38. Although Bray v. Hoffman concerned the anticompetitive provisions of the TPA, it is clear that the comments made about the reach of the TPA can apply to s 52. For instance, in its decision (at paras 145–146) the court relied upon a High Court relating to the tort of negligent misstatement (Voth v. Manildra Flour Mills Pty Ltd (1990) 171 CLR 538) which had been applied to conduct found to contravene TPA, Pt V in No. 1 Raberem Pty Ltd v. Monroe Schneider Associates Inc (8 February 1991). Unreported (FCA: van Doussa J).
39. The notion of representations being made to and affecting a class of persons is one that is common in TPA actions, applying as it often does in an advertising context.
40. Satisfaction of s 5 is not a condition precedent to jurisdiction of a duly authorized court to proceed to hear a matter under TPA, s 86—though it will be a critical element of the cause of action against foreign respondents: see Bray v. Hoffman La Roche, para 191. The procedural requirements for service outside the jurisdiction means that the issue of applicability of the TPA/extraterritoriality of the TPA are brought forward and argued immediately after issuing (in Federal Court) or even before issuing (in Supreme Courts). This falls outside the ambit of this paper but, for more, see P. Nygh & M. Davies, Conflict of laws in Australia, 7th edn (Butterworths, 2002) (hereafter, Nygh & Davies), chs 4 and 22.
41. S 52 is contained within TPA, Part V.
in Australia. As a result, offending conduct outside of Australia will be caught if it is by a corporation incorporated in Australia or that “carries on business” in Australia.

A corporation that is incorporated in Australia will be a clear-cut case. However, what of a corporation “carrying on business”? This phrase has been a vexed one in the conflict of laws. Recently, the Federal Court rejected a narrow interpretation of the phrase that would have limited it to situations where a foreign corporation had a place of business in Australia. In an earlier case, Mason J (as he then was) of the High Court said that: “‘business’ denotes activities undertaken as a commercial enterprise in the nature of a going concern; that is activities engaged in for the purpose of profit on a continuous and repetitive basis.” If the foreign corporation has an office or an agent in Australia undertaking its business then it will quite likely be carrying on business here, and thereby caught by the TPA provisions. The liner trade, with regular visits to Australia and agents in each port, would seem to be caught by that definition of the “carrying on business”. However, those who are not in the liner trade but merely own or control vessels and charter them to load or discharge cargo in Australia from time to time (for example, bulk carriers) would, without more, be unlikely to be caught by that definition.

A case in point is Hunter Grain Pty Ltd v. Hyundai Merchant Marine Co discussed already in the context of the ordinary jurisdiction of the TPA. Sheppard J held that, not only was Hyundai not caught by that ordinary jurisdiction, nor was it caught by the extraterritorial application of the Act, because it was not “carrying on business” in Australia. Perhaps the judge saw the benefit of circumscribing the impact of s 52 on maritime cases, but again there seems to be room for an argument to be mounted that carriers making regular visits to Australia are indeed “carrying on business” here. In any event, it is not hard to imagine how a slight change in facts might have led to a different result. For instance, had the vessel been on voyage charter to an Australian company, or the consignor been Australian, then the court may well have found that the representation had been intended to be received in Australia and thereby qualifying under the ordinary operation of the Act.

For now at least, the Hyundai case is persuasive authority for the proposition that carriers who are chartered by overseas interests to deliver goods in Australia do not fall

42. A plaintiff who seeks to use TPA, s 5 to rely on conduct outside of Australia to show a breach of the Act entitling it to damages or seeking an injunction must seek ministerial consent to do so: s 5(3)-(5). S 5(5) provides that consent shall be granted unless, in the opinion of the minister, the law of the country in which the conduct occurred required or specifically authorized that conduct and it is not in the national interest for consent to be given. There has been at least one case where the failure to seek ministerial consent is noted, although it was not decisive of the case, as the judge held that the defendant was not “carrying on business in Australia” within the terms of TPA, s 5(1): Hyundai (1993) 117 ALR 507, 518, 520. Nygh & Davies (supra, fn 40) note (para 22.13) that for a claim of damages, consent need not be obtained before instituting proceedings (Natureland Parks Pty Ltd v My-life Corp Pty Ltd (1996) 67 FCR 237 (Fed Ct), though it does need to be obtained before a hearing. On the other hand, leave needs to be obtained before instituting in the event of a claim under s 87—see s 5(4) and Yamaji v Westpac Banking Corp (No. 2) (1993) 42 FCR 436 (Fed Ct). In any event, it is wise to seek ministerial consent as early as possible.

43. See Bray v. Hoffman La Roche [2002] FCA 243, para 63. While this case concerned the anti-competition provisions of the TPA, the courts would be likely to apply the same definition in a fair trading context.


45. This will require an analysis of the relationship between the principal and agent, and in particular whether the agent is in truth carrying out the principal’s business: see Commonwealth Bank of Australia v. White [1999] 2 VR 681 at 691; Bray v. Hoffman La Roche, supra, fn 37 at para 63-64.

within the requirement of “carrying on business” within Australia, even if the carrier has agents in Australian ports and issue bills that are ultimately intended to fall into the hands of Australian indorsees. Their conduct will only be caught, under the ordinary application of the TPA, if it can be said that they have engaged in conduct that takes place in Australia (including that sent from overseas but received in Australia).

Finally, in many parts of the TPA there is an overall requirement that the conduct in question be “in trade or commerce”. In fact, the definition within the TPA circumscribes the extraterritorial application of the TPA even further, requiring the underlying transaction to have some nexus with Australia. “Trade and commerce” is defined as “trade or commerce within Australia or between Australia and places outside Australia”.

Trade and commerce is defined as “trade or commerce within Australia or between Australia and places outside Australia. Therefore, dealings by an officer of a foreign company who is negotiating deals between two foreign states with no Australian link will not be in trade and commerce and will not be caught by the TPA even if part of the deal is settled in Australian territory.

By way of summary, the provisions of the TPA discussed in this paper are likely to apply to corporations that:

(i) are registered in Australia and dealing with foreign corporations regarding maritime matters—such as an Australian corporation that charters vessels to ship consignments to or from Australia;

(ii) are foreign corporations not registered in Australia but entering into contracts within Australia (their conduct by sending emails/faxes and the like to be received in Australia, will be subject to the TPA); eg, a foreign corporation that enters into a contract by fax with an Australian company to provide shipping services under a contract of affreightment;

(iii) are foreign corporations who are “carrying on business” in Australia; a clear cut example is having an office/agent here with regular visits by vessels, such as corporations in the liner trade; perhaps even those overseas carriers committed to a long term contract of affreightment to or from Australia might qualify; but simply controlling various vessels that may or may not call in Australia from time to time is unlikely to be sufficient.

Finally, relying on the Bray case, it is at least arguable that the issuing of bills by foreign corporations, in foreign ports for delivery of goods to Australia and to Australian consignees or indorsees may well be “engaging in conduct” within Australia. This is because, as the carrier has to expect that the bill will be sent to Australia, so would the representations made in the bill be received and relied upon in Australia.

The reach of the TPA is therefore quite significant. In no circumstances should the TPA be dismissed as a potential cause of action simply because one party is registered elsewhere than Australia. However, the nature of maritime business as it is, usually involving overseas companies, means that the extraterritoriality of the TPA needs to be given close consideration given the particular facts of the case. Importantly, the territory in which the particular “conduct” took place will be significant. Arbitration clauses in

47. TPA, s 4.
charterparties can be effective but only if worded widely enough to incorporate a statutory, non-contractual cause of action. 49

4. IMPACT OF THE TPA ON CARRIAGE CONTRACTS

Once the jurisdictional issues are satisfied, there is no question that TPA, s 52 applies to carriage contracts as it does to every commercial contract in Australia. Representations as to a certain state of affairs and promises as to performance of the contract are an integral part of the law of international carriage of goods by sea and indeed the law of international sale. This is because invariably most of the relevant parties are physically remote from the performance of the transaction and must rely on the truthfulness and completeness of those statements in order to conduct business. Some examples are representations as to the qualities of a ship being chartered or a cargo to be loaded, how a cargo will be cared for, when a ship is to arrive and, in particular, the representations contained on the face of a bill of lading concerning the quantity and condition of the cargo on loading. Both the law relating to carriage and the TPA envisage that these representations can be acted upon by a person other than the consignor, and that that person, when sustaining loss, should be entitled to recover. 50

In many situations an action under s 52 will provide relief that would be available at common law in any event. However, the s 52 action can be more effective than the common law; it is almost impervious to contractual exclusion clauses, has a six-year time bar, an extensive list of remedies and those not strictly parties to the contract of carriage can still receive relief. 51 So, this begs the question: to what extent can the TPA affect, even upset, the carefully developed allocation of liability and contractual responsibilities that exist in shipping?

To date, there have been only a handful of Australian maritime cases citing s 52 but they give an indication of its potential. Cases have concerned the following.

(i) Representations by freight forwarder in Australia as to past experience and competency in packing containers with aluminium coils, when in fact there was no suitable system of care and no general competency. The freight forwarder was liable under s 52 for misleading or deceptive conduct, despite an exclusion clause in the bill of lading that excluded liability for damage occurring before shipment. 52

49. See Hi Fert Pty Ltd v Kiukiang Maritime Carriers Inc [1998] FCA 1485 (Full Fed Ct). However, under COGSA, an arbitration clause in a sea carriage document cannot exclude the jurisdiction of Australian courts in any event: COGSA 1992 (Aus), s 11(2). See also Davies (1998) 26 ABLR 70.

50. In carriage law, the legislation relating to bills of lading is the primary recognition of this: see in Australia the Sea Carriage Documents Acts in each State, eg, Sea Carriage Documents Act 1997 (WA).

51. In some cases, a s 52 claim may be a simpler route to relief: eg, The owners of the cargo lately laden on board the ship David Agmashenebeli v. The owners of the ship David Agmashenebeli [2003] 1 Lloyd’s Rep 92, analysed by B. Parker, “Liability for incorrectly claused bills of lading” [2003] LMCLQ 200. In that case the master incorrectly claused a bill which, it was claimed, ought to have been clean. If the TPA applied to this scenario, then it would seem to be a relatively straightforward claim that the master, and therefore the carrier, engaged in misleading conduct.

52. Comalco v Mogal Freight Services (Oceania Trader) (1993) 113 ALR 677 (Fed Ct). The carrier’s appeal to the Full Federal Court was dismissed.
(ii) Representations made to Australian charterer/importer under a contract of affreightment. The carrier had made representations and contractual promises to the charterer that cleanliness survey to “grain cleanliness standard” would be carried out before each of the cargoes the subject of the contract of affreightment were loaded. When a consignment was loaded pursuant to the contract of affreightment several years later, that particular standard of survey was not carried out, strict standards of inspection and cleaning had not been performed and the consignment was contaminated with a disease causing the consignment to be rejected on its arrival in Australia.53

(iii) Representations on the bill that cargo was clean on board when in fact the bill ought to have been clauscd to reflect the fact that part of the cargo had been contaminated upon loading.54

(iv) A letter of indemnity issued by a charterer to the vessel against which the cargo was delivered without production of the bills of lading. Pursuant to a letter of credit, a bank held the bills and by virtue of that delivery the bills were valueless as security in the bank’s hands. It was alleged that the letter of indemnity provided by the charterer to the ship constituted a misleading representation concerning the charterer’s right to the cargo or to deal with the goods.55

(v) Representations contained in a notice of impending arrival of goods that a carrier was required by Australian Customs to issue to the importer of the goods. The notice was required to give relevant details identifying the contents of the container. The carrier gave that notice, but mistakenly misdescribed the cargo as general purpose, not reefer. The importer did have other means to check the description, but relied wholly on the carrier’s notice. The importer collected the cargo from the stevedore and, in reliance on the notice, failed to realize that the container required power. As a result, the contents spoiled.56

Only the first and final of these cases succeeded on the TPA point. In the second, whilst the court found there had been misleading or deceptive conduct, the plaintiff was unable to recover damages, as it failed to show there was continued reliance on the conduct in question. It had known that a less strict survey was being performed than contractually required. The third case—the Hyundai case discussed earlier57—failed because the conduct in question occurred overseas and was conduct by a foreign corporation, with the result that the TPA did not apply. In the fourth case, the court held that the letter of indemnity in question was properly characterized as a mere promise to indemnify. It did

53. Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc [2000] FCA 660 (Fed Ct). Although the representations were found to be misleading, ultimately the action failed as the plaintiff was unable to prove it had relied upon the representations. It had known that a lesser standard of survey had been used by the defendants for at least six months prior to the shipment in question. See ibid., paras 87–96.
54. Hunter Grain Pty Ltd v. Hyundai Merchant Marine Co Ltd (1993) 117 ALR 507 (Fed Ct). Ultimately the action against Hyundai based on s 52 failed because the representation had been made outside Australia and Hyundai was not a corporation carrying on business in Australia. Hyundai was found liable in fraud. See supra, text accompanying fn 34.
56. Woolworths Ltd v. APL Co Pte Ltd [2001] NSWSC 662 (NSW SC). The court held that the importer knew that this container was a reefer and required refrigeration (at para 52); not the least because it was a consignment which the importer had shipped but then recalled. The claim in tort was reduced by 30%, but the plaintiff recovered full damages under s 52.
not assert a right to deal with the cargo and therefore there was no misleading or deceptive conduct.\footnote{Ibid., para 74.}

Representations and other misleading conduct can occur in all manner of scenarios in the carriage of goods. For the purposes of this article, we will divide up the types of carriage contract into two broad types: those subject to a cargo liability regime,\footnote{Such as the Hague Rules, the Hague-Visby Rules, the Hamburg Rules.} being sea carriage document contracts; and those subject entirely to free market forces and common law principles, being charterparties. In the context of cargo liability regimes, this article looks primarily to the Australian Carriage of Goods by Sea Act 1991 (Cth) (COGSA), an Act that enacted the Hague-Visby Rules,\footnote{The International Convention for the Unification of Certain Rules relating to Bills of Lading 1924 (Hague Rules) as modified by the Visby Protocol to the Brussels Convention (1968) and the SDR Protocol amending the Brussels Convention as amended by the Visby Protocol (1979).} since amended\footnote{Though none that specifically affects the monetary or time limitations discussed in this section. For the text of the Act see: http://scaletext.law.gov.au/html/pasteact/2/1046/top.htm} to include some modifications. Although the TPA can affect a transaction where a different cargo regime is at work,\footnote{Because the port of loading usually determines the cargo regime applicable, and damage is often litigated in the port of discharge, so carriage cases that find themselves before Australian courts are more likely than not to be governed by the cargo liability regime of a different country. Those regimes are more likely to have a narrower application that the Australian COGSA—which means that the opportunity for a clash with s 52 is less likely, and the sphere of influence of s 52 is expanded.} examining the impact of TPA, s 52 upon the Australian COGSA gives an opportunity to see how the Australian legislature contemplated that the TPA will interact with cargo liability regimes.

\section*{a. TPA, s 52 and carriage under sea carriage documents covered by a cargo liability regime such as Australian COGSA}

The interface between a cargo claim based on a cargo liability regime and a related claim based on TPA is a curious one. On the one hand, there are various cargo regimes, all born of negotiation between cargo and carrier for the apportionment of responsibility for loss or damage to cargo whilst on board a ship. The regimes contain a web of exceptions and counter exceptions, and limitations on who can claim,\footnote{Though these are also the subject of the Sea Carriage Document Acts in each State of Australia.} on the time to claim and a cap on the ultimate recovery amount. On the other hand, there is the TPA, with the lofty ideals of enforcing a corporate morality, which eschews exclusions of liability and was designed to show little respect for the inherent restrictions of traditional grounds of liability. So, which of the two will prevail?

\subsection*{i. Does s 52 or the cargo liability regime have precedence?}

The drafters of COGSA did foresee a clash with the TPA and introduced s 18:

\begin{quote}
18 \textit{Act prevails over certain provisions of the Trade Practices Act 1974}
\end{quote}

The provisions of this Act prevail over the provisions of Division 2 of Part V of the \textit{Trade Practices Act 1974} to the extent of any inconsistency.

\footnote{Ibid., para 74.}
\footnote{Such as the Hague Rules, the Hague-Visby Rules, the Hamburg Rules.}
\footnote{The International Convention for the Unification of Certain Rules relating to Bills of Lading 1924 (Hague Rules) as modified by the Visby Protocol to the Brussels Convention (1968) and the SDR Protocol amending the Brussels Convention as amended by the Visby Protocol (1979).}
\footnote{Though none that specifically affects the monetary or time limitations discussed in this section. For the text of the Act see: http://scaletext.law.gov.au/html/pasteact/2/1046/top.htm}
\footnote{Because the port of loading usually determines the cargo regime applicable, and damage is often litigated in the port of discharge, so carriage cases that find themselves before Australian courts are more likely than not to be governed by the cargo liability regime of a different country. Those regimes are more likely to have a narrower application that the Australian COGSA—which means that the opportunity for a clash with s 52 is less likely, and the sphere of influence of s 52 is expanded.}
\footnote{Though these are also the subject of the Sea Carriage Document Acts in each State of Australia.}
This gets around some parts of the TPA;64 but s 52 is in Division 1 of Part V.65 One cannot therefore assume that COGSA prevails over s 52.66 Instead, the effect of s 52 and COGSA has been described as “overlapping”.67

As has already been stated, in many cases s 52 would simply render a plaintiff entitled to claim against a carrier68 to a similar result by a different route, in much the same way as alternate claims in contract, tort and bailment are already pleaded in carriage contacts. Indeed, not every breach of contract or breach of duty will support an action for damages arising from misleading or deceptive conduct.69 The Hi-fert case70 is a good example of this. The s 52 action failed, but the carrier was found to be liable under the cargo liability regime in any event for breaching Art 3, r 1(a) and (c). The carrier had failed properly to clean the holds of the ship. Had the plaintiff been able to complete the s 52 claim, it would have been an additional ground of recovery only.71

The fact that the TPA usually offers much the same cause of action as that in contract or tort under COGSA may lead one to question why TPA claims are even pursued. Quite simply, the main (though not only) drawcard for cargo interests is the possibility that a s 52 claim will not be subject to the monetary limitations imposed by the cargo regimes.72 As Professor Martin Davies points out,73 if s 52 is not subject to the monetary limitation in COGSA, then there is an obvious advantage in suing under s 52—unlimited liability.

Many standard cargo claims to which a cargo liability regime applies and which involve wrongdoing by the carrier will see no significant benefit in adding a s 52 claim, particularly if the claim is under or near the limitation amount.74 Cases of fraud, also, are severely punished at common law, and a claim under s 52, whilst viable and easier to prove, would most likely add little.75 Even carriers’ representations on the bill of lading, if inserted because of a genuine inability to determine or check the veracity of statements

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64. In particular s 74, which implies a warranty of due diligence in the provision of services to a consumer, but by its terms does not apply to contracts of carriage of goods for business purposes.
66. Or indeed the specific prohibited false or misleading representations set out in s 53. The new unconscionable conduct provisions are also not mentioned in COGSA.
68. By virtue of the applicable Bills of Lading or Sea Carriage Documents Act, combined with the applicable cargo liability regime.
71. This result was ironic, as the plaintiff had fought long and hard to have the dispute heard in Australia, relying inter alia on the TPA claim to dispute the defendants’ argument that it was governed by the arbitration clause and ought to be heard in England.
72. Although the question of monetary limitation was not canvassed in Hi Fert v. Kiukiang (supra, fn 70); one presumes the claim was less than the limitation amount.
73. Davies, (1993) 21 ABLR 377, 382
74. Even if the claim sought damages in excess of the limitation amount, commercial considerations would dictate that it would be better to accept the limitation amount rather than litigate over a small amount outside of limitation.
75. As occurred in the Hyundai case, where the s 52 action failed but the plaintiff succeeded on the basis of fraud: supra, text accompanying fn 54.
on the bill, might still provide protection if the representation is later established to be false.\(^76\)

However, assuming that the facts fit within a TPA claim,\(^77\) there are at least five situations\(^78\) where a plaintiff who has suffered loss as a result of misleading or deceptive conduct should consider seeking a remedy under s 52:

(i) where the plaintiff would ordinarily be barred from a claim because of a lack of privity or other lack of standing, or because the Sea Carriage Documents Act does not apply in its specific situation;

(ii) where the plaintiff’s claim is against a party who is not the contractual carrier;\(^79\)

(iii) where cargo liability regime is not decisive of the claim and the carrier seeks to rely on an exclusion or limitation clause in the bill of lading (particularly an unusual one or one that the plaintiff did not know about);

(iv) where the defendant asserts contributory negligence on the part of the plaintiff;

(v) if the amount claimed is more than the limitation amount and it seeks to allege that the dollar limit does not apply to a TPA claim;

(vi) where the plaintiff is outside the one-year time bar and wishes to take advantage of the six-year time bar\(^80\) in the TPA.

In the first three situations, there seems little doubt that the remedy offered by s 52 will be superior to that offered by the relevant cargo liability regime. In the latter two, the remedy may be superior—it depends on whether a claim under s 52 is subject to the time and monetary limitations imposed by the cargo regimes; an issue to which we now turn.

ii. Does the limitation period and monetary limitation stipulated in COGSA apply to the TPA aspect of the claim?

The provision of Art 4bis of Australian COGSA (not relevantly different from the Hague-Visby Rules) reads:\(^81\)

\textit{Article 4bis}

\begin{enumerate}
\item The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage \textit{whether the action be founded in contract or in tort}.\(^76\)
\end{enumerate}

76. By analogy with the occasional successful use of disclaimers in TPA cases, where the carrier might argue that the clauising on the bill effectively undoes the mischief of the misrepresentation by showing that the representation cannot be relied upon. This highlights the continuing importance of shippers exercising their rights under Art 3 to obtain a bill with unclauised representations to the extent possible. If, however, the carrier has used the clause merely to disguise its own failure, eg, accurately to describe the goods (particularly the condition of the goods), then the court could regard it as an attempt to limit its liability for misleading or deceptive conduct. The particular facts of the case will be crucial.

77. Misleading or deceptive conduct, reliance by party in question, caught by territorial law of Australia.

78. Undoubtedly there are more. Another might be due to a purely evidentiary advantage, for instance where the plaintiff might be better served by the deeming provisions of s 51A.

79. And often, therefore protected by operation of circular indemnity clauses or similar contractual devices aimed at channelling liability to a single entity which then seeks to limit its liability.

80. The limitation period for claims for damages under the TPA was recently increased from three years to six years, effective 8 January 2003—see s 82 and Trade Practices Amendment Act (No. 1) 2002 (No. 128 of 2002).

81. Emphasis added.
2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 4bis, r 1 is fairly straightforward. It mentions contract and tort. The same limits also seem to apply to actions in bailment, although it is not mentioned in Art 4bis, r 1. Perhaps that means other types of action, such as s 52, can be “shoehorned” in as well?

It is certainly arguable that Art 4bis, r 1 should not be read to include a purely statutory cause of action such as s 52. The Australian regime was updated in 199882 and at that time several cases had dealt with the possibility of s 52 applying in a carriage setting. It would have been possible to mention other potential causes of action in Art 4bis, r 1, or to make the words inclusive of all potential causes of action. Furthermore, COGSA, s 18 expressly takes precedence over some aspects of the TPA, but remains silent about the division containing s 52. As a matter of construction, there is at least a reasonably good argument that the defences and limits in COGSA ought not to apply to a TPA claim.

However, the arguments against that hypothesis are also strong. The wording of the section seems to mean to catch all grounds of action—“shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage”—but then goes on to mention only contract and tort. Should the second phrase limit the breadth of the first? There are good commercial grounds to say that it should—the need for clear and certain limits of liability and upsetting the delicate balance of liability and compensation established by COGSA and its predecessors; and the need for Australia’s laws to remain in step with the international maritime community. It would only take a small change to Art 4bis, r 1 to include all causes of action howsoever based. This would, however, be giving COGSA precedence over s 52—something which the legislators seemed content not to do.

We turn now to the exact wordings of each limitation:

The monetary limit

Australian COGSA, Art 4, r 5 states83:

(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the sea carriage document, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding


83. Emphasis added.
666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher...

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

Professor Davies has eloquently argued that loss sustained by a plaintiff who sued under s 52 could be regarded as “loss . . . in connection with the goods” within the scope of Art 4, r 5 such that the limitation amount could be applicable to s 52 actions. However, perhaps there is an opposite argument. First, is the loss “in connection with” the goods or better characterized as loss “in connection with” the misleading or deceptive conduct of the defendant? Secondly, TPA, s 82 states that: “A person who suffers loss or damage by conduct of another person that was done in contravention of . . . (amongst others, s 52) may recover the amount of the loss or damage by action against that other person . . .” This section gives a statutory right to damages for loss or damage resulting from a breach of s 52. It seems unlikely that a court will allow this to be read down, particularly when this section is not one over which COGSA expressly takes precedence pursuant to COGSA, s 18.

Thirdly, the carrier’s right to limit damages in accordance with the COGSA formula has never been intended to be iron clad. It could be argued that misleading or deceptive conduct is akin to the power to “break” limitation provided by COGSA, Art 4bis, r 4 and therefore represents an additional, Australian, ground to obtain full damages from a carrier who has breached s 52. Carriers would be on notice that, were they to act in a manner that was either: intended to cause damage;86 reckless and with knowledge that damage would probably result; or misleading or deceptive in a manner caught by the TPA, then the limitation amount might be broken or (in the case of liability under the TPA) inapplicable.

The time limit

The Hague-Visby Rules, Art III, r 6 contains the one-year time limit: “. . . the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.”88 Similar issues are raised here as are discussed in the context of the monetary limit. The fact that COGSA, s 18 failed to mention TPA, s 52 weakens any argument that the time limit should apply to TPA claims, despite the seemingly clear language “all liability whatsoever”. Furthermore, would a TPA claim be loss “in respect of the goods”, or “loss in respect of” the misleading or deceptive conduct?

85. See supra, text accompanying fn 66.
86. Art 4bis, r 4.
87. Ibid.
88. Emphasis added.
Monetary and time limitations—conclusion

At the outset, it was noted that the burden of the TPA on maritime law is somewhat incongruous. Perhaps, though, the cargo liability regimes and the TPA are not so incongruous after all. They actually have quite a lot in common. They were both a reaction to the behaviour of big business; they sought to regulate liability and prevent the more powerful players from excluding all possible liability. They are two different ways of levelling the playing field.

It is at first ironic but on closer analysis it is understandable that the TPA arguably has the lesser role to play in claims that involve wrongdoing on the part of the carrier, and therefore fall directly into a cargo liability regime such as COGSA. There will be occasions, when the facts support it, where it might be useful, even critical to plead s 52; but in the main it will be yet another cause of action to bolster those framed in contract, tort and bailment. The interesting point yet to be clarified in these “garden variety” claims is whether the COGSA limitations (both time and monetary) will cross-pollinate into TPA-based claims for damage to goods carried by sea. The writer believes that there is a real argument that the limits will not apply to the TPA.

If this is not what the legislature intended or wants, it would be necessary to amend both TPA and COGSA in order to make it clear that the limitations in COGSA apply to all claims, even those arising under the TPA. Unless and until that is done, there is likely to be a great deal of time and money spent by the various proponents seeking to establish a judicial precedent one way or another. In the process there is likely to be a “shoehorning” of facts into an ill-fitting s 52 in the hope of a result that, in these types of contracts, would represent a relative windfall by receiving uncapped compensation.

b. Carriage that falls outside COGSA

The TPA is particularly useful for those situations where the facts of the case have not covered the relevant cargo regime. One scenario is where the loss or damage occurred outside the period of responsibility dictated by the regime. The Hague and Hague-Visby Rules both incorporate a “tackle to tackle” period of responsibility. The Australian COGSA has modified the Hague-Visby period of responsibility to something similar to the Hamburg Rules so as to extend it to the period while the carrier is in charge of the goods within the limits of the port. In any event, it is not uncommon for the carrier still to be in charge of the goods outside the period of responsibility under the applicable cargo regime.

There are also instances when no cargo liability regime may be applicable compulsorily, depending on the law applicable at the port of shipment or the nature of the cargo. Finally, there may be aspects of the carriage upon which the cargo regime applicable is silent—such as the route to be taken between loading and discharge, or responsibility for the condition of containers.

89. See supra, text accompanying fn 78.
91. COGSA, Art 1.3.
93. Under the Hague and Hague-Visby, the regimes do not apply automatically to certain cargo such as carriage of livestock, deck cargo in certain circumstances. See the definition of goods in Art 1(c)
In these situations the carrier will often seek to outline the liabilities of the parties through a series of clauses on the bill of lading. Such clauses commonly include, for instance, a prohibition on claims for consequential loss, clauses placing the responsibility for inspecting containers at the foot of cargo interests, and a clause granting the carrier the liberty of proceeding on the voyage to designated ports in whatever order it sees fit. The less scrupulous carriers include a monetary limitation far less than that to which a cargo regime would entitle cargo, and an imposition of a time bar shorter than 12 months.

Again, this is an example of the types of clauses that the courts enforcing the TPA treat with suspicion. The courts will not enforce clauses that appear to be attempts to avoid liability that would otherwise arise under the TPA. Contractual attempts to limit liability in a monetary sense can expect to suffer the same fate. Thus, if a consignee had sought and received an assurance by the carrier that it had a system to ensure that the refrigerated goods would be put on power on arrival into the carrier’s care at the port of loading, then a contractual condition excluding liability for loss arising in the breach of such an undertaking will not be valid.

In the parts of the carriage contract to which the compulsory regimes do not apply and where the facts otherwise fit within s 52, that section is potentially of great benefit to cargo interests. If there has been conduct that offends s 52, then these contractual devices will more than likely have no effect, and the carrier will be liable.

c. Charterparties

Charterparties with Australian companies involved in the export or import of goods are commonplace. Given the extent of Australia’s bulk commodity exports, that is no surprise. Charterparties negotiated between overseas carriers and Australian companies will more than likely fall within the scope of the TPA, as will the representations surrounding the negotiations.

Charterparties are the epitome of a free market. There is virtually no external regulation and the parties are free to contract on whatever basis they choose. Many charterparties are concluded on standard forms, which often limit the circumstances and extent to which the carrier can be held liable for loss or damage; for instance, to circumstances where the loss was caused by the personal want of due diligence on the part of the owner or manager. Such clauses set a very high bar for the cargo interests to leap, effectively transferring the risk of damage during transit onto cargo interests and their insurers in all but the most unusual of circumstances.

In negotiating a charterparty, there is plenty of scope for the parties to engage in conduct that is misleading or deceptive. Examples of representations and contractual

94. See supra, text accompanying fn 21.
95. Though it does depend on the facts. For instance, if an Australian representative overseas negotiated the charterparty with a foreign corporation, then the TPA would not govern the conduct of that foreign corporation.
96. Eg, Gencon Charter (1994, BIMCO) cl 2 reads: “the owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss damage or delay has been caused by personal want of due diligence on the part of the owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied, or by the personal act or default of the Owners or their Manager. And the Owners are not responsible for loss damage or delay arising from any other cause whatsoever, even from the neglect or default of the master or crew . . . or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.”
promises are those concerning matters such as vessel capacity and speed, cleanliness of holds, previous cargoes, suitability of ship and crew, likely arrival dates, methods of unloading or stowing. Should such a representation be wrong, or misleading in any way, then a party who has relied on it and suffered loss or damage may well be able to recover, regardless of privity (or lack of it) or any contractual attempt to limit or offload liability. Again, the common law may well give a similar result in some cases, but it is the fact that exclusion clauses and privity count for little in the TPA claim that make the TPA action so powerful. Carriers should be aware of the particular danger involved in engaging in misleading or deceptive conduct towards or intended to be received in Australia by, for instance, an Australian charterer or another interested party.

d. Strangers to the contract—suing and being sued

It is trite to say that in shipping there are many different entities that have some contact with a particular cargo. Apart from the contractual carrier, there may be other companies involved in the actual transportation—such as charterers or owners of vessels, or the land based transport companies who are subcontracted to complete a combined carriage contract. There are also companies such as stevedores handling the cargo, and parties not actually involved in the handling of the goods but somehow concerned with the wellbeing and cargoworthiness of the ship—such as surveyors and classification societies.

There are so many potential defendants should a cargo be damaged. As a result much effort has been devoted to ensuring that one known party sues one known defendant. Often a cargo claimant will sue more than one defendant, attempting recovery in tort or bailment against those not the contractual carrier. However, such actions are themselves ordinarily subject to the terms and conditions of the contract, via agency, circular indemnity and Himalaya clauses. In a recovery action relying on traditional causes of action, the cargo claimant may find themselves battling another defendant other than the carrier but, at best, subject to all the same restrictions of remedy as against the carrier.

On the cargo side, there are also, commonly, several different potential plaintiffs who may have suffered a loss—the consignor, consignee or indorsee, and holder of the bill or the ultimate purchaser of the goods at their destination. Again, the standard sea carriage document seeks to bind all these parties to its terms and limitations.

There is no sign, however, that the TPA will respect this pragmatic commercial construct. If a party has sustained damage from reliance on the misleading or deceptive conduct of another, then a remedy follows. Contractual attempts to protect the wrongdoer will be given limited, if any, effect. Therefore parties outside of the contract are also exposed if they engaged in, or were involved in, conduct that was misleading or deceptive. And a potential plaintiff who is outside the contract of carriage may still have a right to claim under the TPA, ignoring the limitations in the contract.

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97. If it is a representation as to a future matter, the carrier may be able to prove it had reasonable grounds for making the representation (TPA, s 51A) or, in the case of representations about competence, that it was generally competent and merely negligent on this one occasion, in which case its representations would not have been misleading: see discussion in Mogal (1993) 113 ALR 677, 693.

98. Parties “involved in” a contravention cannot be made subject to the TPA by extraterritorial applications: supra, fn 18.
e. Section 52—a double edged sword

Thus far, the discussion has been based on the premise that cargo interests will be the ones most likely to allege a breach of s 52. Of course, s 52 is not limited only to the conduct of the carriers. It is just as applicable to the conduct of cargo interests (though the opportunities for the breach of it are less common). Again, in many instances it will only replicate a cause of action which the carrier has against the cargo interests at common law or under a cargo regime—for instance, where a shipper represents a dangerous cargo as safe; or a voyage charterer represents that it has a certain volume of cargo to load. But in certain instances the facilitative sections may be useful, as may the breadth of remedies available. As such, in the event of a dispute, carriers should also consider the conduct of their Australian trading partners in the light of s 52.

5. APPLICATION OUTSIDE CARRIAGE CONTRACTS

Whilst this article has concentrated on the application of the TPA to carriage contracts, the broader maritime industry is also subject to s 52; for example, those who have dealings with Australian shipbuilders.99 Shipbuilders in Australia are bound to ensure that their conduct complies with s 52, and the conduct of the overseas customers contained in communications received in Australia will also be subject to s 52. The same applies for Australian shiprepairers, providores, stevedores, tug and salvage operators; and the conduct contained in communications sent to Australia by those who are based overseas. Shipowners who seek concessions from port operators from standard pilot or tug arrangements based on the experience of the master or the particular attributes of the vessel could also be liable should those representations be misleading or deceptive.

6. RIGHTS IN ADMIRALTY AND S 52

It appears that the prospect of a TPA claim being brought in Admiralty was not raised before the Australian Law Reform Commission when it rewrote Australian admiralty jurisdiction in the 1980s.100 Nevertheless, it seems clear that a s 52 claim could ground an action in Admiralty in Australia so long as the essence of the dispute fits within the definitions of the various maritime claims,101 which are framed in a generic way. So, depending on the facts, a claim for misleading or deceptive conduct concerning ownership, possession or mortgage of a ship could be a proprietary maritime claim.102 Claims for misleading or deceptive conduct concerning an act or omission in the navigation or management of the ship in connection with loading or unloading of goods,

99. Australia has a burgeoning industry in the construction of aluminium ferry, military and leisure craft.
100. There is no mention of the TPA as a cause of action in an admiralty matter in the Australian Law Reform Commission’s report Civil Admiralty Jurisdiction: Report No. 33. Given that the TPA was relatively new, and in particular, s 52 was in its infancy at that time, it is not surprising.
102. Ibid., s 4(2).
or carriage of goods or persons, will also be accommodated.\textsuperscript{103} So too could a claim based on s 52 in respect of the construction, repair, equipping or provisioning of a ship.\textsuperscript{104}

Like any claim where the plaintiff seeks to arrest the vessel in Australia, the defendant must be\textsuperscript{105} the owner or demise charterer of the vessel.

7. SHOULD s 52 BE INVOLVED IN MARITIME CONTRACTS?

There is much to be said for the view that maritime contracts are complex arrangements that have been developed over centuries to create a liability regime which, even if always complex and not always fair, is at least certain. The courts of all countries have always held consistency of decisions led to commercial certainty, and this was, and is, of great importance. The importance of certainty is not just to the parties, but also to the various industries that are intertwined with the maritime one, such as finance and insurance. The judges may minimize the conflict between international maritime law and s 52 by narrowly construing the territorial requirement. However, the threat of s 52 will still loom for many overseas corporations seen to have “engaged” in conduct by communicating with Australia.

On the other hand, great store has been placed in the TPA by Australia. Section 52 is the single most important legislative constraint on commercial practice. No other commercial area has been exempt from its reach. It would seem impertinent to suggest that conduct otherwise unacceptable in Australia should be acceptable in a maritime context—that those in maritime trade should be “allowed” to mislead and deceive. Indeed, it could be said that the Australian COGSA recognizes as much when it does not specifically make COGSA overrule s 52, but only other parts of COGSA. As we have seen, in many cases s 52 replicates a right to recover that already exists; it is the fact that limitations, exemptions and the defendants’ liability are not so readily controlled that make it so powerful. Whilst there could be complaints that s 52 unfairly unravels the commercial arrangements set up by carriers to manage risk allocation when a loss has occurred, the TPA requires something more—a management of behaviour preceding the loss. Though it is idealistic to seek to uphold the ideal of corporate morality, if it does make parties reflective about how they conduct business, perhaps it is no bad thing.

Finally, while s 52 is by far the most significant of the fair trading provisions in the TPA, there are others that also have the ability to impact on maritime contracts. Section 74, whilst expressly inapplicable to carriage contracts for business, will apply to impose a duty to exercise due skill in other related contracts. It has been cited in cases concerning aircraft handling agreements\textsuperscript{106} and in towage contract disputes. Another significant aspect of the TPA is the provisions in Part IVA,\textsuperscript{107} which seek to limit unconscionable conduct between trading partners. In a decision with significant implications for letters of

\textsuperscript{103} Ibid., s 4(3)(d).
\textsuperscript{104} Ibid., s 4(3)(m)–(o).
\textsuperscript{105} And have been at the time: see ibid., ss 17–19.
\textsuperscript{106} Qantas Airways Ltd v. Aravco Ltd (1996) 185 CLR 43.
\textsuperscript{107} Ss 51AA, 51AB and 51AC.
credit and performance bonds, those provisions have already been applied to prevent the beneficiary of unconditional performance guarantees from calling on those guarantees when to do so was deemed unconscionable by the court. However, consideration of the implications of these sections of the TPA for international trade will need to wait for another day.

108. In the somewhat startling case of Olex Focas Pty Ltd v. Skodaexport Co Ltd [1998] 3 VR 380 (Vic SC) this Part of the TPA has been used to prevent a head contractor drawing upon unconditional bank guarantees, which had been designed to secure mobilization and procurement advances it had made to a subcontractor. At the time of the demand upon the guarantee, the advances had been almost repaid. The judge held that the head contractor had acted unconscionably and in contravention of TPA s 51AA by making a demand under the guarantees, because it had insisted on strict legal rights in circumstances which made that harsh or oppressive or caused hardship. Of the TPA cause of action, Batt J said: “The effect of the statute, applying as it does to international trade and commerce, is to work a substantial inroad into the well established common law autonomy of letters of credit and performance bonds and other bank guarantees” (at p 404).
2.2 Significant Developments

2.2.1 Amendments to the TPA

Some relevant changes to the TPA have taken place since the publication of this article in 2004.

Changes to allow proportionality and contribution of damage awards in relation to claims under s52, as foreshadowed in the article, have been enacted. Part VIA now allows the Court to give judgment against the defendant for not more than the amount reflecting the proportion of the damage that the Court considers just given the defendant’s responsibility for the damage or loss. The court

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34 At text accompanying fn 22 of the article in 2.1.
35 Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) No 103 of 2004
36 87CD (1) In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant’s responsibility for the damage or loss; and

(b) the court may give judgment against the defendant for not more than that amount…’

See also s82 (1B):

82 (1B) Despite subsection (1), if:

(a) a person (the claimant) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the defendant) that was done in contravention of section 52; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant’s failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant’s share in the responsibility for the loss or damage.
may take into account wrongdoers not party to the proceedings, as well as the contributory negligence of the plaintiff under any relevant law.\textsuperscript{37}

The court may only apply apportionment in the case of what is termed an ‘apportionable claim’ which is defined as a claim for economic loss or damage to property. The vast majority of maritime claims under s52 would constitute apportionable claims. As such:

- if a defendant can prove that the plaintiff did itself contribute to its own loss, and that the defendant did not intend to cause the loss nor do so fraudulently,\textsuperscript{38} or

- if another concurrent wrongdoer exists, whether or not a party to the proceedings,\textsuperscript{39}

then the defendant can seek to reduce the amount of damages it pays based on the proportion of damage or loss that the court considers just.\textsuperscript{40} However, the Part is not to affect normal rules of vicarious liability, or several liability imposed by statute.\textsuperscript{41}

While the precise workings of s82(1B) are beyond the scope of this thesis, it is worth noting the criticism that the section introduces common law notions into the remedies for s52, which has erstwhile been a provision sitting entirely separate from common law.\textsuperscript{42}

\begin{flushright}
\textsuperscript{37} Section 87CD (2). This model was criticised by Nicholas Bender in ‘Multiple Wrongdoers: One for the Money – Or Something Different?’ (2004) 12 Trade Practices Law Journal 66 at 75 – 77. In particular, he criticises the move from joint and several liability to proportionate liability, which was a recommendation of the Final Report of the Review of the Law of Negligence (Ipp Report). Bender claims that it leaves the prospect that the plaintiff may be undercompensated if one of the persons liable to it is impecunious or cannot be found.

\textsuperscript{38} Section 82(1B).

\textsuperscript{39} Section 87CD.

\textsuperscript{40} Section 87CD.

\textsuperscript{41} Section 87CI.

\end{flushright}
It will be some time before a sufficient body of caselaw develops in relation to this new provision. Nonetheless, for all Australian plaintiffs including those in maritime law cases, it represents a watering down of the impact of s52. No longer will a plaintiff be entitled to claim the full amount of their loss from the party who has engaged in misleading or deceptive conduct where other parties were also involved in the contravention. This is of particular significance in carriage of goods by sea, where the cause of any particular loss of or damage to cargo may be a result of errors by various parties involved with that cargo. For instance, in the *Woolworths Ltd v APL Co Pte Ltd*\(^{43}\) the plaintiff’s claim in tort was reduced by 30% for contributory negligence, but recovered damages in full for the breach of s52. Such a discrepancy will no longer occur with the new s82(1B).

Other legislative changes to the TPA, dealing specifically with personal injury and death claims, are more relevant to the next chapter and will be covered there.\(^{44}\)

### 2.2.2 New Cases

Of the many cases reported on TPA since the article was published, there are several cases worth noting. The 2004 decision of *Butcher & Anor v Lachlan Elder Realty Pty Ltd*\(^{45}\) (*Butcher*) is relevant to the point made in the article about disclaimers\(^{46}\) as well as the attitude of the highest court in Australia to s52 generally. The High Court held in *Butcher* that a disclaimer was effective to negate the misleading nature of a representation made by an agent on behalf of its principal. In fact the misleading information had been obtained from the principal and passed on by the agent – with a

\(^{43}\) [2001] NSWSC 662.

\(^{44}\) See 3.2.2 below.


\(^{46}\) See fn 21 of the article in 2.1.
disclaimer that the agent could not ‘guarantee its accuracy’ and urging interested parties to make their own enquiries. This has been termed the ‘conduit’ defence.\(^{47}\)

In one sense, the case did not develop any new principles. As McHugh J noted,\(^{48}\) the law already recognised three scenarios where a corporation would not infringe s 52 by passing on erroneous information:

- Where the circumstances make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity and is merely passing on the information for what it is worth;\(^{49}\)
- Where the corporation, while believing the information, expressly or impliedly disclaims personal responsibility for what it conveys, for example, by disclaiming personal knowledge;\(^{50}\)
- Where the corporation, while believing the information, ensures that its name is not used in association with the information.\(^{51}\)

What is notable about the Butcher decision is that the majority and minority ‘applied the same principles but showed a fundamentally different philosophical approach’.\(^{52}\) The majority, comprising Gleeson CJ, Hayne and Heydon JJ, found that the disclaimer was readable and effective. The majority considered as a matter of principle that a real estate agent was not an expert in matters of


\(^{49}\) Citing Yorke v Lucas (1985) 158 CLR 661.

\(^{50}\) Citing Saints Gallery Pty Ltd v Plummer (1988) 80 ALR 525.

\(^{51}\) Citing Amadio Pty Ltd v Henderson (1988) 81 FCR 149.

land title and it would be too radical a proposition to find that a real estate agent producing a brochure offering land for sale is representing that the vendor has good title. On the other hand, McHugh J and Kirby J each considered its print to be small and that the agent had adopted the representation; it had incorporated the incorrect information in its brochure and conducted itself as if the information was correct. Both the Judges in the minority considered that the agent had engaged in misleading and deceptive conduct and that the disclaimer did not obliterate the effect of the conduct of the agent.

What does this case mean for an allegation based on s52 in a maritime context? As in the Butcher case itself, much will depend on the context of the contravening ‘conduct’, and the circumstances surrounding the disclaimer. As such, sweeping generalisations are unhelpful. Nevertheless, for instance, Butcher will be helpful for a carrier defending its failure to clause a bill of lading because it was unaware of its damaged or incomplete status. More broadly, what the case does exhibit is a willingness, at least by the majority of the High Court, to read the provisions of the TPA in a less

54 Ibid, 371. Kirby J rebuked the majority in his reasons (at 404) saying that the question was whether there was misleading and deceptive conduct in the brochure as concerned the location of the relevant boundary line. The question was not whether real estate agent pamphlets would be considered to be making representations as to vendor’s good title over land. ‘This court’s function is to resolve questions before it. We are deflected when we needlessly resort to hypotheticals not relevant to the question in issue.’
56 Ibid. McHugh J at 391.
57 Ibid. McHugh J at 397; Kirby J at 406 – 407.
58 Russell Miller claims that the ‘more dogmatic’ judgements of the past relating to the effect of exclusion clauses must now be considered to be overruled or as turning on their own facts: Russell Miller Miller’s Annotated Trade Practices Act (29th ed,2008) (Miller) [1.52.77] However, the author’s view is that the Butcher decision is better confined to third party agents acting to pass on information, and that exclusion clauses by those who make a representation and who are in a position to know otherwise will be viewed sceptically by the courts.
59 Which would mean that the result is the same under the TPA as it is under the Hague Visby Rules – that the carrier will not be liable for goods shipped damaged if it had no means of ascertaining the state of the goods and had made no unqualified representations that the goods were in sound condition (Article 3 r 3).
60 As then constituted.
expansive fashion than perhaps has been the case in recent times. Sam Appleton and Bernard McCabe have commented that the Butcher decision may be:

...a subtle but important shift in the attitudes of the courts towards the liability of agents and other third parties in claims for misleading and deceptive conduct.

In any event, we have yet to see what effect is wrought to this attitude by recent changes to the constitution of the High Court bench.

A second case of relevance is the case of Braverus Maritime Inc v Port Kembla Coal Terminal Ltd v Anor (Braverus). This case is discussed in chapter 4, insofar as it deals with the interpretation of s74(3) of the TPA. However, it also had something important to say about s52.

In Braverus, a pilot appointed by the Port Kembla Port Corporation was qualified but, due to an administrative error, unlicensed. The pilot was negligent in berthing Braverus' vessel, causing damage to the berth and the vessel. The effect of s410B of the Navigation Act 1912 (Cth) is to render the shipowner liable for the negligence of the pilot. Much of the case is concerned with the consequences of the pilot's unlicensed status. However, Braverus also alleged that the pilot had breached s52:

Braverus contended that... by his navigational commands, inaction and failure properly to inform and interact with the master in the conduct of the vessel, he [the pilot] engaged in conduct likely to mislead the master.

61 This is raised in Part 2 of the article in 2.1 above at p200.
62 Sam Appleton & Bernard McCabe 'In the wake of Butcher: decisions affecting the liability of agents and third parties in proceedings for misleading or deceptive conduct' (2006) 14 Trade Practices Law Journal 46 at 52.
63 (2005) 148 FCR 68.
64 See Chapter 4.3 below.
The Full Court of Appeal, overruling the trial judge, found that a Port Authority exercising its statutory responsibilities is nonetheless acting 'in trade and commerce' when it provides pilotage services.\(^6\)\(^6\) This is significant, because such a finding clears one of the thresholds for the operation of s52 against Port Authorities, which could now be said to be subject to the provisions of s52, even if exercising statutory responsibilities.

The second significant outcome of this case was the question of whether s52 liability could be sheeted to the shipowner pursuant to the operation of *Navigation Act 1912* (Cth) s410B. On the facts of the case the courts were not obliged to rule on the point. That is because both the trial judge and the Full Court of Appeal found that the Master’s delay in overriding the pilot’s order was not due to reliance on the conduct of the pilot at the critical point, but rather the Master’s own negligence in failing to countermand the pilot’s orders at the point when he had exercised his own judgment about the possibility of a collision.\(^6\)\(^7\) The Full Court agreed with the trial judge that the requisite causal nexus between the conduct and the loss had not been established on the facts. However, the Full Court also commented that the effect of s410B was to render the ship vicariously liable for the pilot. As such, any misleading and deceptive conduct is sheeted back to the ship, not the Defendant.\(^6\)\(^8\)

Although only dictum, this must be considered highly persuasive, being an appellate judgment delivered by an experienced maritime judge. Nevertheless, the interplay between s52 of the TPA and s410B of the *Navigation Act 1912* (Cth) will require either another case, or legislation, to

\(^{65}\) (2005) 148 FCR 68, [136].  
\(^{66}\) (2005) 148 FCR 68, [145] – [146], following *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 210 ALR 312 (High Court) which had been decided since the trial judge had handed down judgment in *Braverus*.  
\(^{67}\) (2005) 148 FCR 68, [171].  
\(^{68}\) As to the possible impact of s74 see ibid [174] – [192] as discussed further below at 4.3.
unequivocally confirm the views of the Full Court. Again, this exemplifies the need for reform to better
knit together the fabric of Australian maritime legislation with that of the TPA.

2.2.3 A New Carriage Convention? Draft Convention on Contracts for the International
Carriage of Goods Wholly or Partly by Sea

In its 21st session, UNCITRAL’s working group approved the text of the Draft Convention on
Contracts for the International Carriage of Goods Wholly or Partly by Sea (Draft Convention). The
Draft Convention will be considered by the UNCITRAL Commission in June 2008 where it is
anticipated that the Commission will adopt the text and transmit it to the General Assembly for formal
approval. It will then be open for signature. It requires the ratification of 20 States before it will
come into effect.

A general discussion of the scope of the Draft Convention is beyond the parameters of this paper.
However, assuming the Draft Convention does one day come into force and is accepted by Australia,
there are several matters worth noting. First, the Draft Convention would negate several of the
advantages of a TPA action mentioned at p210 of the article. The Draft Convention seeks to deal
with standing to sue, and gives a right to sue performing carriers, as well as contracting carriers.
It also extends the period of responsibility of the carrier beyond ‘tackle to tackle’; the Draft

69 UNICTRAL website <http://daccessdds.un.org/doc/UNDOC/GEN/V08/507/44/PDF/V0850744.pdf?OpenElement> at 1
April 2008.
70 Letter from Susan Downing Senior Legal Officer Office of International Law Attorney-General’s Department, to
members of the Maritime Law Association of Australia and New Zealand, titled ‘Summary of Draft Convention on
Contracts for the International Carriage of Goods Wholly or Partly by Sea for Australian Industry’ by email dated 12
March 2008. A copy is held by the author.
71 One year after the deposit of the 20th ratification – Draft Convention, Article 96(1).
72 Ibid, Articles 59 and 60.
73 Ibid, Article 20.
74 Which was the period of responsibility in the Hague and Hague Visby Rules: see Article 1(e).
*Convention* will apply from the time the goods are received to the time they are delivered.\(^{75}\) In addition, Article 4 states:

4.1 Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in tort, contract or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this convention… (emphasis added)

The addition of the words ‘or otherwise’ represents a recognition that other causes of action might be used, and that the *Draft Convention* will regulate the liability of the parties regardless.\(^ {76}\)

Should Australia decide to ratify and enact the *Draft Convention* into domestic law, it would be wise to take that opportunity to clarify the position as regards the TPA. The enacting statute could expressly state that the TPA does not apply to matters governed by the *Draft Convention*. Alternatively, it could allow TPA claims to be brought but make them subject to the same limitations as contained in the *Draft Convention*. The latter approach would see the time and monetary limits for the TPA and the more traditional causes of action become consistent. In that case, one would think that there would be less incentive to rely on the TPA in carriage of goods matters governed by the *Draft Convention* unless the TPA truly did offer an enhanced prospect of recovery. Either way, if Australia enacts the *Draft Convention*, and the *Draft Convention* is accepted by our trading partners, some of the advantages of alleging the TPA should fall away for Plaintiffs seeking to sue on contracts of carriage caught by its provisions.\(^ {77}\) However, as we shall see in Chapter 5, the *Draft Convention*.

\(^{75}\) *Draft Convention*, Article 12(1).

\(^{76}\) Contrast the words in Hague-Visby Rules Article 4bis: ‘whether the action be founded in contract or in tort’. See discussion of those words at page 210 of the article in Chapter 2.1.

\(^{77}\) Particularly when taken in concert with the introduction of proportionality and contributory negligence provisions as raised in 2.2.1 above.
Convention does not do much to assist an Australian plaintiff seeking to litigate in Australia but facing an exclusive jurisdiction clause nominating courts elsewhere.

The Draft Convention does not cover charterparties. As such, unless substantial amendments excise maritime contracts of carriage from the TPA, the TPA will remain relevant in that context. The next chapter deals with the applicability of the TPA to contracts for the carriage of passengers by sea; and the unique exposure of the cruise ship operator to the TPA provisions.

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78 See recommendations in Chapter 5.1 below, Part III.
79 See p 213 of the article in Chapter 2.1 above, but subject to the limitations noted in Chapter 5.
Chapter Three:

Cruise Ship Operators and TPA
The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 Trade Practices Act 1974 (Cth)

Kate Lewins *

Senior Lecturer in Law, Murdoch University

Cruise ship operators that are subject to Australian laws find that their passengers have important rights under the Trade Practices Act 1974 (Cth) ("TPA"), particularly sections 52 and 74. However recent changes to the law have reduced the scope of these claims and given some ground back to the cruise ship operators. Additional proposed amendments, still before parliament, will alter the scenario again. The overall result is a further muddying of the waters for passenger claims where Australian law applies. This paper considers the circumstances in which a cruise ship operator will be bound by the provisions of the TPA, explores the impact of the TPA on cruise ship passenger liability, reflects on the recent and proposed changes to the TPA as regards liability for personal injury and looks at the consequences for the cruise ship operator who wishes to invoke a Convention limiting passenger liability.

Introduction
Maritime law contracts are intensely commercial in nature. A complex web of interlinking contracts, conventions and legal fictions underpin the relationships and liabilities of the various parties involved. It is a stated aim of the courts to interpret and enforce contracts and relevant international conventions¹ in a manner that provides certainty in commercial circles.² However, the Australian Trade Practices Act (TPA) can apply to maritime law contracts - and when it does, the TPA can cut through traditional contractual arrangements. Particularly vulnerable to the TPA are contracts entered into by cruise ship operators with passengers for a cruise.

This paper will focus on two sections of the TPA - section 52, which prohibits a corporation engaging in misleading or deceptive conduct and section 74 which imposes a statutory term in a contract for services supplied to a consumer, that those services

¹Eg ‘It has been recognised that a national court, in the interests of uniformity, should construe rules formulated by an international convention, especially rules formulated for the purpose of governing international transactions such as carriage of goods by sea ‘in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law or by English legal precedent, but on broad principles of general acceptance.’ Shipping Corporation of India Ltd v Gamlen Chemical Co (Asia) Pty Ltd (1980) 147 CLR 142, 159 (Mason & Wilson JJ)
The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 Trade Practices Act 1974 (Cth) will be rendered with due care and skill. Section 74 operates in a more traditional fashion because it attaches to contracts rather than conduct.

The vulnerability of passenger cruise ship contracts to the TPA arises because one of the aims of the TPA is to control the conduct of corporations towards consumers. The nature of cruising as a holiday taken by individuals means that all passengers aboard a cruise ship will be consumers under the TPA. All of those passengers will have, at some earlier point, received representations about the type of experience they can expect. All those passengers are captive in an environment created and maintained by the cruise ship operator for the passengers’ safe enjoyment and pleasure, for periods varying from a day or two, to weeks or even months. If the representations prove to have been less than accurate, the passenger is injured or (for some other reason attributable to the operator) does not enjoy their cruise experience; the passenger may look to recover from the cruise ship operator. Assuming the necessary jurisdictional nexus can be satisfied, it is likely that an injured or disgruntled passenger will have a remedy under the TPA. Therefore, this Australian Act needs to be considered as part of the legislative landscape that can affect a cruise ship operator who conducts business or advertises for business in Australia.

Of course, cruise ship operators, like all those in the maritime field, are used to the intrusion of local law on their business arrangements, at least to some degree. Most operators, if not all, would manage that intrusion by seeking to control and limit their potential liability. Usually an operator would rely on specific International Conventions limiting liability for the carriage of passengers (specifically, the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea and its various amending protocols) along with the judicious use of contractual terms and conditions. Many countries have adopted these Conventions. However, Australia, like the United States of America, has not ratified the Athens Convention or any of its protocols. Therefore, for reasons the paper will explore, it is feasible in many instances for passengers in Australia to rely on their statutory rights under the TPA in an action against the cruise ship operators. Significantly, the TPA has traditionally been hostile to attempts to exclude liability that would otherwise accrue as a result of a breach of its provisions.

However, recent amendments and proposed amendments to the TPA have the potential to dramatically alter – and arguably, skew – the remedies available to a

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1 Passengers are taken to have acquired particular services as a consumer if the price of the services did not exceed the prescribed amount – currently $40,000 – or were of a kind ordinarily acquired for personal domestic or household use: Section 4B (1) (b) TPA. Passengers can also be consumers if the cost of the services was greater than $40,000 so long as the services were of a kind ordinarily acquired for personal domestic or household use or consumption. One would expect a cruise ship holiday would so qualify, even in the less likely event that it was a business function, because a cruise ship is ‘ordinarily acquired for personal use’ as required by section 4B (1) (b). Nor does the consumer need to be an Australian or based in Australia – see Wells v John B Lewis (Int) P/L (1975) 25 FLR 194, 208.

2 As described in the next section.

5 Although the recent reforms and those proposed will make personal injury claims under the TPA less likely. See discussion accompanying fn 66 (s52) and 93 (s74) below.

6 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 (known as the Athens Convention). There have been protocols to the Athens Convention made in 1976, 1990 and 2002. Thus far only the 1976 Protocol has come into force. See text accompanying fn 127 below.

7 See below at text accompanying fns 44 and 78.
passenger under the *TPA*.8 The result of these amendments will be that cruise ship operators will need to navigate through a more complicated legal landscape to determine their potential liability to passengers under the *TPA*. In order to do so, the jurisdictional reach of the *TPA* will need to be considered, as well as the type of damage and the manner in which it was sustained.

With the increase in popularity of cruising, both in Australian waters and overseas,9 it is important for cruise ship operators and their advisers to be aware of obligations imposed upon them by the *TPA*. This paper explores the likely application and effect of the *TPA* on contracts between cruise ship operators and their passengers. First it outlines the nexus to Australia that is required before the Act can apply. It considers the two most likely sections that a disgruntled or injured passenger would be likely to use and outlines recent and proposed changes. Finally, it looks at the implications of a *TPA* action on the cruise ship operator’s right to limit liability under the Athens Convention and the *Limitation of Liability for Maritime Claims Act 1989* (Cth).

**In what circumstances will a cruise ship operator be caught by the provisions of the *TPA*?**

One would be forgiven for assuming that the impact of the *TPA* is limited to Australian territory and those corporations registered in Australia. However the *TPA* seeks to impose its provisions on those doing business within Australia (even if they have no corporate presence in Australia) and also extends its reach to conduct outside Australia in certain circumstances. Significantly for cruise ship operators, the application of the Act cannot be thwarted by choice of law clauses.10 Nor will an arbitration clause be allowed to operate in a manner that excludes the application of the *TPA*, or deprive the parties of remedies that a court may grant under the Act.11

As we shall see, different considerations seem to apply in determining when s52 or s74 will apply to a given set of facts with an overseas element.

**Territorial and Extraterritorial application of s52.**

*Territorial application: Where conduct takes place in (or is received in) Australia it will be caught by the *TPA*.*

For a claim based on s52, the misleading or deceptive conduct relied upon must have either occurred within Australia or, if it originated overseas, the corporation in question

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8 Amendments are part of the suite of reforms that have occurred or are occurring in the area of personal injury and negligence, for instance, those suggested by the Ipp report: see below at text accompanying fns 66 (s52) and 94 (s74).

9 Paper given by Richard Hein (Chairman, P&O Cruises) to MLAANZ National Conference held in Brisbane on 2 October 2003 where it was revealed that there had been an average 9% compound growth in cruising over the decade to 2002. The slides that accompanied Mr Hein’s paper are available on the MLAANZ website <http://www.mlaanz.org/2003%20Conference/Richard%20Hein.ppt> at 29 June 2004.

10 *Francis Travel Marketing Pty Limited v Virgin Atlantic Airways Limited* (1996) 39 NSWLR 160 (NSW Supreme Court). See also s67, which is relevant to s74 and is discussed below at text accompanying fns 25 and 26.

11 Emmett J in *Hi-Fert Pty Ltd & Anor v Kiukiang Maritime Carriers Inc & Anor* (1998) 90 FCR 1 as cited by B McCabe in ‘Compulsory Arbitration Clauses and Claims under the Trade Practices Act’ (1999) 7 TPLJ 41 at 43. It is still possible for both parties to agree to arbitration of a dispute that arises under the *TPA* but parties cannot be held to that agreement if the effect is to thwart the *TPA*; see Emmett J, at 26. See also M. Davies ‘A chink (or two) in the Bill of Lading Plaintiff’s Jurisdictional Armour? Good news for Australian Maritime Arbitration?’ (1998) 26 ABLR 70, 74.
must have expected it to be received in Australia. For instance, the development or circulation of brochures for overseas cruises sent to Australians from overseas would bring representations made within those brochures into the net of the TPA. Another example is where representations are made during contractual negotiations with an interested customer who is based in Australia. To the extent they were received and intended to be received in Australia, these representations will be caught by the TPA and subject to s52.

Extraterritorial application: Conduct by an Australian registered corporation or one carrying on business in Australia will be caught, regardless of where conduct took place.

If the conduct in question occurred entirely overseas, section 5 provides that the TPA will apply to that conduct only if it were by a company registered or carrying on business in Australia. This is the only means by which the TPA, and therefore s52, can extend to conduct that occurs overseas. The TPA will apply to the conduct, here or overseas, of an Australian cruise ship operator – that is, where the corporation (not necessarily the ship) is registered in Australia or is carrying on business in Australia. It is easy to establish if a corporation is registered in Australia. What is more difficult is to establish whether a corporation not registered in Australia is nevertheless ‘carrying on business’ in Australia. The interpretation of the phrase ‘carrying on business’ has been a vexed issue in conflict of laws. Recently, the Federal Court rejected a narrow interpretation of the phrase that would have limited it to situations where a foreign corporation had a place of business in Australia. In an earlier case, Justice Mason (as he then was) of the High Court said that

‘business’ denotes activities undertaken as a commercial enterprise in the nature of a going concern; that is activities engaged in for the purpose of profit on a continuous and repetitive basis.

If the foreign corporation has an office or agents in Australia undertaking its business then it will quite likely be carrying on business here. If it is, then both its conduct in Australia and its conduct outside Australia will be caught by the TPA provisions.

12 Communications initiated outside Australia but directed to, and expected to be received by, persons in Australia was held to amount to conduct taking place in Australia by Merkel J in Bray v Hoffman La Roche Ltd (2002) 118 FCR 1, [147]. The same approach was adopted by Drummond J in a fair trading context in Howard & Ors v National Bank of New Zealand & Ors (2002) 121 FCR 366, [42].

13 Note the requirement that written ministerial consent is required before a party is entitled to seek a remedy under s82 or s87: Trade Practices Act 1974 (Cth), s5(3).

14 The TPA relies primarily upon the corporations power for its constitutional validity, but does also rely, in the alternative, upon the trade and commerce power – see s6. The High Court has recently had cause to consider the trade and commerce power: Re the Maritime Union of Australia & Ors; ex parte CSL Pacific Shipping Inc (2003) 200 ALR 39 in which the court said at [36] that ‘it is well settled that, in the exercise of the trade and commerce power, the Parliament can validly regulate the conduct of persons employed in those activities which form part of trade and commerce with other countries and among the States. A ship journeying for reward is in commerce…’.

15 See Bray v Hoffman La Roche (2002) 118 FCR 1, [63].

16 Hope v Bathurst City Council (1980) 144 CLR 1, 8–9. Gibbs, Stephen and Aickin JJ concurred.

17 This will require an analysis of the relationship between the principal and agent, and in particular whether the agent is in truth carrying out the principal’s business: see Commonwealth Bank of Australia v White [1999] 2 VR 681, 691; Bray v Hoffman La Roche (2002) 118 FCR 1, [63-64].

18 Subject to the need for a nexus with Australian trade and commerce. See text accompanying fn 19.
There also needs to be some connection with trade or commerce with or in Australia for the TPA to apply. For instance, representations made by an Australian company to overseas consumers while promoting its Australian cruises at an overseas travel fair will be caught by s52. The requirement for the representation to be made in the context of trade or commerce with Australia means s52 would probably not apply to a company carrying on business in Australia promoting only its overseas cruises at the same travel fair.

Can the TPA apply where there is:

Conduct whilst on the high seas – ‘yes madam, the gym exercise equipment is checked every day’.

Or in a foreign port – ‘our onshore tours are conducted with your safety and pleasure in mind’.

Most representations that would be caught by the TPA would happen before or at the time of contracting, or perhaps as the passenger settles themselves in the cabin whilst still in an Australian port. But what about those representations which occur outside Australia – perhaps during the cruise, outside Australian waters or in the waters of another country? If the representation is made on behalf of an Australian company or one carrying on business in Australia, then the TPA will apply by virtue of its extraterritorial provisions. The representation will be subject to s52. However if the representation is made on behalf of a cruise ship operator who does not carry on business in Australia then the TPA will not apply once the ship is out of Australia or if the cruise is wholly outside Australia. So, for example, the TPA will not apply to representations made to an Australian whilst on a Mediterranean cruise booked from Australia and operated by a company who is neither registered nor carrying on business in Australia.

In summary, in each instance it is a case of establishing whether the TPA applies to a given fact scenario. If the conduct occurred in Australia or was intentionally directed to Australia it does not matter if the cruise ship operator is not registered or carrying on business here. The TPA will apply. If the conduct was misleading or deceptive then the cruise ship operator will be liable. The issuing of brochures in Australia, or even posting them to an interested customer in Australia, will render the representations in the brochure subject to s52. This will be the case, even if Australia is not the port of embarkation. The TPA will catch conduct occurring overseas, if the perpetrator is registered or carrying on business in Australia. The exact interpretation of ‘carrying on business’ remains a hot topic for litigation.

19 Due to the constitutional limitations of the TPA. That requirement would be satisfied by, for instance, an Australian cruise company or one trading here, who was operating cruises outside Australia. It would not be satisfied if, for instance, an Australian consumer in the UK booked an English Channel ferry crossing with a company neither registered nor carrying on business in Australia.

20 Wells v John R Lewis (Int) P/L (1975) 25 FLR 194 established that the TPA was not solely concerned with Australian consumers.

21 It is at least arguable that here there is an insufficient connection with trade or commerce in Australia.

22 Trade Practices Act 1974 (Cth), s5.

23 But if those representations had been made to the Australian whilst he or she was still in Australia – for example, in a confirming fax or letter, then the representations would be caught as conduct taking place in Australia.
Extraterritorial application of s74

What about the application of s74? When does that implied warranty apply to transactions partly based, or performed, overseas? Section 5 outlined above24 purports to grant extraterritorial jurisdiction over all of Part 5 of the TPA, including Division 2 which contains s74. However the language contained in s5, of corporations ‘engaging in conduct’, does not make much sense in the context of statutory warranties imposed in contracts. Of greater assistance is s67 coupled with general conflict of law principles.

Section 67 states that so long as the proper law of the contract is that of Australia25 then any attempt to substitute the law of another country for the consumer protection provisions of the TPA will be ineffective.26 The determining factor is therefore whether the law of the contract is Australian. If it is, then s74 applies, regardless of whether it is breached overseas, because it is still a breach of the contract to which Australian law applies. If an Australian enters a contract in Australia for a Mediterranean cruise with an overseas cruise ship operator, and if the facts were such that the proper law of the contract was Australian law,27 it is submitted that failure to exercise due diligence in the provision of the services on that Mediterranean cruise would result in TPA liability.28

Relevant provisions of the TPA – an outline

The main provisions that are most likely to be used in a claim against a cruise ship operator are s52 and s74. For brevity’s sake this paper will mainly confine itself to these two sections, but other sections that are potentially relevant will be mentioned at the end of this section.

Section 52 – prohibition against misleading or deceptive conduct

Section 52 reads:

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) …

Section 52 is a revolutionary provision that has cut across all other forms of relief for civil disputes in Australia. It is:

a comprehensive provision of wide impact, which does not adopt the language of any common law cause of action. It does not purport to create a liability at all; rather it establishes a norm of conduct,.29

24 At text accompanying fn 13.
25 Or some State or Territory of Australia.
27 Oceanic Sun Line Special Shipping Company Inc. v. Fay (1988) 165 CLR 197 provides a useful fact scenario, although the case itself concerned a challenge to Australian jurisdiction and the place of contract, rather than a decision of the law applicable to the contract. In that case the plaintiff arranged a Mediterranean cruise via a travel agent in Sydney. The plaintiff was given an exchange voucher by the travel agent to exchange for the passage tickets in Greece just prior to boarding the ship. The plaintiff was injured in a trap shooting activity on board. The court found that the contract was entered in Australia rather than when the voucher was exchanged in Greece. If such a scenario had occurred after 1986 (see fn s 84 and 85) and a court found that the proper law was that of Australia, then it would certainly be arguable that s74 would have applied to the cruise contract.
28 There are complicated issues involved in determining the governing law of the contract, particularly as regards contracts made on the Internet. Such matters are outside the bounds of this paper. For a discussion of the relevant principles, see texts on conflicts of laws such as Peter Nygh and Martin Davies Conflict of Laws in Australia (LexisNexis Butterworths, 2002, 7th edition), in particular chapter 19.
It has been referred to by some as the ‘new corporate morality’. Initially, the Australian courts’ interpretation of s52 was conservative. But, over time, its reach has extended from the realm of consumer protection into that of commercial contracts; even a breach of contractual warranties may constitute misleading or deceptive conduct.\(^{30}\) It has virtually replaced the law relating to misrepresentation in Australia and in so doing has simplified it. Although in this context we are largely interested in its effect on contracts, it is by no means limited to situations where the parties are in a contractual relationship. In Australia, it has been applied to areas as diverse as advertising, newspaper articles, property transactions, sale of goods, the professions, takeover bids and, relevantly, holidays - to name but a few.\(^{31}\)

Section 52 prohibits a corporation from ‘engaging in conduct’ that is misleading or deceptive or likely to mislead and deceive.\(^{32}\) The Act defines ‘engaging in conduct’ broadly, as:

- doing or refusing to do any act, including the making of or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant.\(^{33}\)

As for the words ‘mislead or deceive’, the courts have tended to avoid the mere substitution of alternate words, adhering closely to the dictionary definitions such as:

- deceive: ‘…to cause to believe what is false, to mislead as to a matter of fact, to lead into error, to impose upon, delude, take in
- mislead: to lead astray in action or in conduct, to lead into error, to cause to err.\(^{34}\)

Section 52 can be breached unwittingly, without either intent\(^{35}\) or negligence, and may even be breached by silence where there is a duty to reveal relevant facts.\(^{36}\) The section can be breached if no person has actually been misled (although any person alleging a breach of s52 needs to show reliance on the conduct and damage resulting from that reliance in order to receive relief.\(^{37}\)) It can also be breached by statements that are literally true but, once assessed in the light of the overall effect and context, are found to contain a false representation.\(^{38}\)


\(^{31}\) See Russell V Miller, Miller’s Annotated Trade Practices Act (LBC, 2003, 24th edition) (‘Miller’) paragraphs 1.52.170 – 1.52.280 for examples of the various situations in which s52 has been held to apply.

\(^{32}\) The threshold requirement for a corporation acting in trade or commerce will not be discussed here as in the context of a cruise ship operator offering its services, this will be easily satisfied.

\(^{33}\) Trade Practices Act 1974 (Cth), s4(2).

\(^{34}\) Weitmann v Katies (1977) 29 FLR 339, 343 (Franki J) quoting the Oxford Dictionary.

\(^{35}\) Though intent is not necessary it can be relevant, because if there were intent then conduct would be deceptive rather than merely misleading.

\(^{36}\) An example of this may be the failure to withdraw outdated brochures containing incorrect information. The question is whether, in all of the circumstances there has been conduct likely to mislead or deceive: Demagogues Pty Ltd v Ramensky (1992) 39 FCR 31.

\(^{37}\) Trade Practices Act 1974 (Cth), s82 and s87. A requirement of reliance also curtails claims where the Plaintiff knew the representation was not true or had ceased to regard that representation as influential. However, the Australian Consumer and Competition Commission (ACCC) (being the body charged with enforcement of the TPA) may bring an action for breach of s52 without the need to show that anyone has been misled.

\(^{38}\) See Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd (1978) 140 CLR 216, 228 where Stephen J relied on passing off actions by way of analogy.
Section 52 is designed to ensure that ‘trading must not only be honest but must not even, unintentionally, be unfair.’ This gives the section a far wider ambit than most common law causes of action that generally require some degree of fault, intent, or failure to take reasonable care. As such, it is an attractive cause of action for a litigant and a threatening one for defendants. There is no requirement equivalent to duty of care or privity of contract; rather, the notion is reliance on the conduct in question leading to loss. The pool of potential plaintiffs – and defendants - is increased as a result.

The power of s52 is not only due to the simplicity of the section itself, but also those facilitative sections elsewhere in the TPA that reinforce it. For instance, the remedies’ section allows the recovery of damages for those who have sustained loss as a result of the conduct. As well as an award of damages, the TPA allows the court to make any orders it thinks fit including selecting from an extensive suite of remedies in order to compensate the plaintiff in whole or in part for the loss or damage, or to prevent or reduce the loss or damage.

Other examples of facilitative sections include

- S75B – which provides that those liable for the breach of s52 include not only the main perpetrator but also any party ‘involved’ in the contravention.
- S84 - which sets out a statutory definition of agency that is broader than common law.
- S51A - which provides that the onus of proving that a prediction about the future was reasonably made lies on the maker of the statement.
- S82 – a six year time limit for claiming loss or damage by conduct in contravention of the TPA.

The final contributor to the considerable scope of s52 is the attitude of Australian courts in interpreting it. Courts have been strident in their development of s52 and the protection of the principles of fair trading that it exemplifies. For instance (and particularly relevant in the context of liability for cruise ship passengers) the courts virtually ignore contractual clauses seeking to exclude or limit liability that may accrue under s52. Such clauses are generally regarded as attempting to undo the effect of s52 and will not be applied. Another example is that currently there seems to be no...
concept akin to contributory negligence leading to a reduction of the measure of damages. Once the violator’s conduct is found to breach s 52 then it will be liable for the whole of the loss (even if the complainant itself made decisions or omissions46 that led to the loss.) Finally, in deciding whether conduct was misleading, deceptive or likely to mislead or deceive, the test is not what a reasonable person would think. Courts will look at the class of people likely to be affected by the conduct – including the gullible, not so intelligent and poorly educated.47

All these features mean that section 52 is a formidable opponent of the complex principles of liability that have been developed for common law causes of action and particularly those that have been traditionally well protected from claims through the use of contractual terms limiting or excluding liability. The ability to cut across well-established rules of privity, its relative immunity to exclusion and limitation clauses, and the six-year time limit for a claim for damages48 are particularly significant.

Why might cruise passengers be interested in a s52 action?49

Where a cruise ship operator or its agent50 gives a prospective passenger the wrong impression about some aspect of the holiday, then this will most likely constitute misleading or deceptive conduct.51 Cases from the USA provide useful fact examples.52 For example, a brochure that represents cabins to be ‘special, luxurious and beautiful’ when the reality turns out to be anything but53 will constitute misleading or deceptive conduct under s52. Other examples might be a deceptive explanation of port or other charges,54 or the order of ports or length of time to be spent at each,55 or the

it has the effect of actually erasing that which is misleading in the conduct because it then modifies the conduct: Benlist Pty Ltd v Olivetti Australia Pty Ltd (1990) ATPR 41-043, as cited in Miller, at 1.52.75.  
45 As a result of Henville v Walker (2001] 206 CLR 459. This decision has the dubious distinction of being named by a leading Australian commentator, Professor Warren Pengilly in his article: ‘The Ten Most Disastrous Decisions made Relating to the Trade Practices Act’ (2002) 30 Australian Business Law Review 331. Nevertheless, it has been followed in several judgments already (see for example I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109.) The writer understands that the Australian Government (Department of Treasury) is considering proposing amendments to allow for contribution to the loss to be taken into account in the assessment of damages.

46 Argy v Blunts and Lane Cove Real Estate Pty Ltd (1990) 26 FCR 112; 94 ALR 719, 744 –745. See also the recent case of Woolworths Ltd v APL Co Pte Ltd [2001] NSWSC 662. (Supreme Court of New South Wales) In the Woolworths case, representations were contained in a notice of impending arrival of goods given to customs but also provided to the importer. The carrier mistakenly misdescribed the cargo as general purpose, not reefer (refrigerated) cargo. The importer did have other means to check the description, but relied wholly on the carrier’s notice. The importer collected the cargo from the stevedore and in reliance on the notice, failed to realise that the container required power. As a result, the contents spoiled. The court held that the importer knew this container was a reefer and required refrigeration (at [52]); not the least because it was a consignment the importer had shipped but then recalled. The claim in tort was reduced by 30%, but the plaintiff recovered full damages under the alternative claim based on s52.

47 Puxa Pty Ltd v Parkdale Custom Built Furniture Pty Ltd (1980) 31 ALR 73, 93 (Lockhart J.) However, the courts have adopted the notion of puffery, where representations could not be intended to be taken literally: see Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd (1981) 53 FLR 307, 311 (Lockhart J.). 

48 Trade Practices Act 1974 (Cth), s82(2).  
49 At this stage we are assuming that the TPA applies to the conduct in question.  
50 ‘Agent’ is broadly defined for the purposes of the TPA – see s84.  


54 Ibid, at text accompanying fn 138.
recommendation of the quality of shore based excursions operated by third parties but sanctioned and promoted by the cruise ship operator. Representations that turn out to be misleading, and have been relied upon by a passenger who has sustained loss or damage as a result, will sound in damages. Even conduct post performance can be caught by s52, such as in the course of negotiating a settlement of a claim by a passenger against a cruise ship operator.

Using s52 to pursue a personal injury claim is, at present, possible but not common. An example of such a claim might be if a querulous elderly passenger was coaxed up a gangway after being told it was perfectly safe and had just been checked by engineers. In fact there was no proof that any checks had taken place and during her embarkation the gangway gave way injuring her. Another example would be a representation in a brochure assuring passengers that the vessel had every last safety feature and that all crew were trained in responding to calamities; when the reality revealed only rudimentary training and only basic safety features. Indeed, had the TPA been applicable, White Star Line could well have been held liable for personal injuries caused by a reliance on the representation that the “Titanic” was unsinkable.

Of course, many of these types of claims could be brought equally well in negligence or breach of contract. However, framed in tort or contract they would be susceptible to properly incorporated exclusion clauses and contractual limits of liability, including monetary and time limits. From a passenger’s point of view, the beauty of the s52 action is that such exclusion and limitation clauses are virtually ignored. Only if a disclaimer can be said to have erased the misleading effect of the conduct will the exclusion clause be valid. If the passenger has relied on the misleading or deceptive conduct, and sustained a loss or injury, then the exclusion clause will rarely be effective to block recovery. Neither will the fact that the passenger contributed to the accident or the injury alter the liability of the cruise operator, which would remain 100%.

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55 By analogy to Dawson v World Travel Headquarters Pty Ltd [1980] FLR 455, where the change in a tour itinerary meant that there was the loss of a ‘day’ in Singapore when compared with the representations made in the tour itinerary.
56 Insofar as representations as to future matters are concerned, the representor will be deemed to have been misleading if the representor did not have reasonable grounds for making the representation: Trade Practices Act 1974 (Cth), s51A(1). The representor is deemed not to have had reasonable grounds for making the representation as to the future matter unless it proves otherwise: Trade Practices Act 1974 (Cth), s51A(2).
57 As stipulated in s82, the section that gives a right to claim damages for loss or damage suffered by conduct of another person that was done in contravention of a provisions including s52.
58 See Dillon v Baltic Shipping Company (Mikhail Lermontov) (1989) 21 NSWLR 614 where the trial judge held that the conduct of the defendant in the settlement of the plaintiff’s claim had been misleading: see at page 650. The Court of Appeal doubted the finding by the trial judge that the defendant had engaged in misleading and deceptive conduct in the settlement of the claim but upheld the plaintiff’s claim on this ground based on the Contracts Review Act 1980 (NSW): see Baltic Shipping Company (Mikhail Lermontov) v Dillon (1991) 22 NSWLR 1 per Gleeson CJ at 9, Kirby P at 22 and Mahoney JA at 51. The Dillon case is discussed further in relation to s74 in the text accompanying fn 81.
59 Loss or damage is defined to include injury, thus making it possible to sue for damages: Trade Practices Act 1974 (Cth), s4K.
60 Law of Negligence Review September 2002 paragraph 5.11.
61 For instance, in Dillon v Baltic Shipping Company (Mikhail Lermontov) (1989) 21 NSWLR 614 the plaintiff recovered damages for breach of contract for disappointment and distress at the loss of the balance of her holiday, following the UK case of Jarvis v Swan Tours Ltd [1973] QB 233. That aspect of the decision was upheld on appeal to the High Court (1993) 176 CLR 344.
62 An example of this would be a disclaimer about the quality or skills of third party operators. If such a disclaimer was contained on any brochure recommending a certain operator, and it was sufficiently obvious, then this may well be effective.
the cause of action under s52 is easier to establish than a common law cause of action.\textsuperscript{64} For these reasons, the \textit{TPA} has traditionally been a potentially powerful weapon against cruise ship operators.\textsuperscript{65}

**Proposed amendments to TPA affecting claims under s52 for personal injury or death.**

The ramparts of s52 are under attack, at least as regards claims for personal injury. In the insurance and legal landscape that occurred post September 11 2001, the Federal Government commissioned the Review of the Law of Negligence (known as the Ipp Report).\textsuperscript{66} Relevantly, the terms of reference 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.\textsuperscript{67}

The panel was concerned that changes wrought to the law of negligence by its recommendations might be undermined if the \textit{TPA} continued to provide a ‘back door route’ to claims for personal injury.\textsuperscript{68} Amongst other reforms,\textsuperscript{69} the Ipp Report recommended that the TPA be amended to prohibit the award of damages for injury or death as a result of a breach of s52 or the related provisions in Division 5 Part 1 \textit{TPA}.\textsuperscript{70}

The Bill giving effect to that recommendation, the \textit{Trade Practices Amendment (Personal Injuries and Death) Bill 2003} (the Bill) would extinguish personal injury claims based on s52. However the Bill has reached an impasse because the Senate insisted on amendments unacceptable to the Government.\textsuperscript{71}

The ACCC is vehemently opposed to the excising of personal injury and death claims from s52 and related provisions of the TPA:

\footnotesize{\textsuperscript{64} For the reasons discussed above, at text accompanying fns 35 to 47. 
\textsuperscript{65} Although the number of cases brought against cruise ship operators in Australia is relatively low, there have been only a handful of cases that have alleged a breach of s52, and at least one that could have but didn’t; namely \textit{Gill v Charter Travel Co Unreported, Qld Sup Ct (De Jersey J), 16 February 1996, Butterworths Unreported Judgements BC 9600812}. Further discussion of this case is contained in the text accompanying fn 92.
\textsuperscript{67} Ibid, Terms of Reference no 4 at page x.
\textsuperscript{68} Ibid, paragraph 5.12.
\textsuperscript{69} The Report suggests a wide range of reforms over personal injury negligence law. In particular, it has suggested that the Commonwealth and the States enact an Act giving effect to the recommendations, to apply to any claim for personal injury or death arising out of negligence whether framed in contract, tort or for breach of statute: Recommendation 2. The report recommends sweeping changes to, amongst other things, contributory negligence, assumption of risk, limitation of actions, the tests for foreseeability, standard of care causation and remoteness of damage, proportionate liability and damages payable, as well as specifically considering the liability of public authorities, recreational service providers and not for profit organisations. Some States have already enacted these reforms. However the detail of these suggested changes is beyond the ambit of this paper.
\textsuperscript{70} The recommendation was hardly surprising, given that the terms of reference directed the Review to find some mode of preventing such claims. However this proposed prohibition on damages for personal injury claims brought under Division 5 Part 1 TPA does not apply to s74, which is found in Division 5 part 2. The operation of s74 is also a focus of the Ipp Report in a different context. See below at text accompanying fn 98.
\textsuperscript{71} Bill No. 72 of 2003. The Senate passed the Bill with amendments on 1 December 2003; the Bill returned to the House of Representatives on 2 December 2003 where the amendments were rejected and the Bill returned to the Senate in its original form; the Senate again insisted on its amendments on 11 December 2004.
There is a real risk that some of the far reaching changes to the law now being considered may be rushed through as quick fix re-active measures with inadequate attention being paid to their long term effects. ... The Commission can conceive of no circumstances in which it is or should be acceptable for a supplier to mislead or deceive a consumer...72

If the Bill were to pass, cruise ship operators would then only face the prospect of s52 claims if the claim does not involve injury or death. It seems ironic that damages under s52 will flow for a misleading representation about a brochure, a cabin, or facilities on a cruise or on shore activities, but will not apply if the misleading representation happens to have a more serious outcome - personal injury or death. Those same reservations are held by the ACCC.73 It is also ironic that whilst one hand of Australian government appears reluctant to sign off on any of the Athens Conventions, the other hand of government is, through domestic legislation, creating a regime for personal injury compensation that makes the Athens Convention look generous.74 Also, it cannot be lost on those in power that the Bill effectively undercut the ‘consumer protection’ aspect of the TPA for those it was intended to protect, while the use of s52 in litigation by big business is flourishing.

Whilst the complications created for the cruise ship industry by the Bill and other TPA reforms are discussed later,75 cruise ship operators would undoubtedly welcome it or any other significant change to the reach of s52. On the other hand, consumer groups, academics and plaintiff lawyers have joined the ACCC in criticising the outcome.76 In any event, at this time, s52 is still important to cruise ship operators. Unless and until the Bill can be made attractive to the Senate by some further amendment, s52 can still support a personal injury claim. Even if the Bill, or one like it, were to be passed, s52 will remain relevant to non-personal injury claims.

Section 74 – statutory warranty that corporation will exercise due diligence in the provision of services

The other main provision of the TPA that has the potential to cause angst to cruise ship operators is s74. It is contained in Part 5, Division 2 of the TPA, amongst various statutory warranties concerning the provision of goods. S74 states:

(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)...

73 Ibid.
74 Discussion of the Ipp Report’s proposed general negligence reform is best left to dedicated papers, but the reforms in some Australian States involve thresholds on claimable damages (so that a small claim may be barred) and caps on awards for general damages. See the summary <http://assistant.treasurer.gov.au/au/content/publications/2002/20021115_2.asp> at 29 June 2004.
75 See discussion accompanying fn 112.
77 The remainder of the section reads:
‘Services’ is defined in s4 as:

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

The warranties in the TPA, including s74, differ from the other consumer protection provisions in the TPA because the remedies for breach are not to be found in the TPA. Instead, the remedies are those at common law - primarily breach of contract. The implied statutory warranties are designed to complement and expand pre-existing law. As such, the TPA is not providing a complete scheme, but rather imposes on the common law a statutory warranty.

Section 68 ensures compliance with the statutory warranty. It provides:

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

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

is void.78

It is possible to limit liability under s74 as set out in s68A, but this will not apply to leisure passengers.79 Indeed, it is important that, (where Australian law governs the passage contract), passage conditions do not claim a right to limit liability that does not exist. That in itself would constitute misleading or deceptive conduct as well as breach other specific provisions of the TPA.80

Does s74 apply to a cruise passenger contract for services?

In the famous Australian case of Dillon v Baltic Shipping Company81 (Mikhail Lermontov) the trial judge held that s74 applied to impose a requirement to exercise due (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 any 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 under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they 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.

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

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

78 The section allows limitation of liability in certain circumstances, but not when the services are of a kind ordinarily acquired for personal, domestic or household use or consumption. Clearly a contract for cruising would fall within that exception. Therefore limitations of liability are not permitted. An interesting argument would be whether a limitation on the time available to sue for loss under a passage contract would breach s68 as having the effect of restricting the remedy in s74.

79 Though it is arguable that it could apply to business travellers, for instance those attending an onboard conference. However such travellers would probably be entitled to protection because they are services of a kind ‘ordinarily acquired for personal, domestic or household use’ within the definition of ‘Consumers’ in s4B.

80 For example, s53g. Provisions in part 5, apart from s52, can be the subject of prosecution by the ACCC.

care and skill in the navigation of a vessel carrying the plaintiff’s personal luggage, although not to the carriage of the plaintiff herself. At the time of the Mikhail Lermontov sinking, s74 contained its own definition of services, which included only the transportation of goods, not passengers. As a result, limitations in the carriage contract seeking to limit or exclude liability in respect of luggage lost or damaged in breach of s74 were inoperative, though they were operative as regards the claim for personal injury.

The Court of Appeal seemed to doubt the Trial Judge’s finding that s74 applied to the baggage component of the contract. The Court of Appeal took the view that the contract was properly characterised as one for the carriage of a person and obiter comments indicate that the court took a dim view of the Trial judge’s device of cleaving the contract into two, one falling inside and the other outside s74. The doubts of the Court of Appeal in the Dillon case have been assuaged by amendments to section 74 in 1986. The definition of services applicable since 1986 includes:

the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction…

On its face, it seems clear that this definition includes cruise ship contracts, and there is academic support for this conclusion. Therefore, if the sinking had occurred after that amendment, Mrs Dillon would have been able to recover under s74 for personal injury caused by the defendant’s admitted failure to exercise due care and skill in the navigation of the vessel.

Importantly, the appellate courts in the Dillon case were not required to address directly the parameters or content of the duty imposed by s74 on a cruise ship operator – namely, to exercise due care and skill in navigating a vessel. Nor was that in issue before the High Court. Therefore, the first instance judgment of Justice Carruthers is the current authority for the existence of such a duty within s74. The imposition of such a duty in Dillon, and the fact that s68 does not allow its exclusion or limitation, is of great significance, particularly when one considers that shipowners have traditionally been able to claim protection against the consequent costs of negligence in the navigation of a vessel. There is no doubt that the imposition of such a duty will be challenged the next time it arises. If the imposition of s74 to navigational services is upheld, it means that all cruise contracts to which Australian law applies will contain an obligation to use due care and skill in navigation – and, (because the contracts are with consumers) no exclusion or limitation clause can undercut or effect that.

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82 Ibid at 641-642.
83 Baltic Shipping Company v Dillon (Mikhail Lermontov) (1991) 22 NSWLR 1 (Court of Appeal); see Kirby P at 22, Mahoney J. concurring.
84 The definition of services in s74 was removed and the general definition of services found in s4 then applied to s74.
85 The amendment to s74 came into effect in June 1986. The definition of services is now found in s4 as set out in the text following fn 77.
87 Baltic Shipping Co v Dillon (Mikhail Lermontov) (1993) 176 CLR 344.
88 Be it contractual, or more commonly due to the operation of an international convention such as those in operation over cargo claims, passenger claims or general liability claims. For a further discussion of limitation conventions see text accompanying fn 123 onwards.
89 So that s68A does not apply.
90 Although in certain circumstances, the shipowner may be able to limit liability under an international convention – see text accompanying fn 146.
Subject to the caveat under the next heading, it is not only injuries sustained for navigational error that would be covered by the statutory warranty - any injury sustained as a result of the so called ‘hotel functions’ of a cruise ship, or as a result of organised off shore activities, would also be subject to this statutory warranty. For instance, injury sustained in a beauty or hairdressing salon or whilst taking a shore tour will sound in liability if the cruise ship operator or its agents have failed to exercise due care and skill. As noted by Atherton,91 there seems to have been a lost opportunity to establish the application of s74 to the hotel functions of cruise ships. In the case of Gill v Charter Travel Co92 a passenger injured himself jumping into a pool that had been half emptied during the course of the day. The pool had not been covered with a net, as was usual when a pool was not available for swimming. Much of the case concerned the application of limitation clauses and a monetary cap on liability imposed by the contract. Ultimately the plaintiff recovered but his damages were capped. Had s74 been pleaded by the plaintiff and held to apply, the limitation of liability clauses relied upon by the cruise ship operator would have been in breach of s68, and the contractually imposed cap on the claim would have been of no effect.

Recent amendments to reach of s74 - Trade Practices Amendment (Liability for Recreational Services) Act 2002

Section 74 has also had its wings clipped by recent statutory intervention limiting the reach of s74. The amendment, which became effective on 19 December 2002, arose out of the desire of Federal Parliament to ensure that ‘individuals who choose to participate in inherently risky activities’93 can be permitted to take responsibility for their own safety – to voluntarily assume the risk of injury. By virtue of the Trade Practices Amendment (Liability for Recreational Services) Act 200294 (the Amending Act), a new s68B allows corporations to exclude restrict or modify its liability for death or injury as a result of a breach of the duty to exercise due care and skill imposed by s74.

Some important points to note about the Amending Act:

- This amendment does not of itself exclude liability – an effective exclusion clause or disclaimer must be properly incorporated in the contract. After a long absence, once again the ticketing cases and law relating to incorporating terms and conditions will become relevant in consumer protection under the TPA.
- Personal injury is broadly defined, including mental injury, aggravation acceleration or recurrence of an injury or disease or any form of behaviour or circumstance that can result in harm or disadvantage to the individual or the community.
- Recreation services is also broadly defined, being services that consist of participation in a sporting activity or other similar leisure pursuit, or - any other activity that involves a significant degree of exertion or physical risk and is undertaken for the purposes of recreation, enjoyment or leisure (the ‘catch all’ provision).

91 Above, fn 86, [12.15] (within fn 56).
92 Unreported, Qld Sup Ct (De Jersey J), 16 February 1996, Butterworths Unreported Judgements BC 9600812.

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Whilst the Explanatory Memorandum claims the amendments are aimed at those who ‘choose to participate in inherently risky activities’ 95 in reality the amending Act extends much further than that. 96 A ‘sporting activity or similar leisure pursuit’ would seem to encompass many activities on board a cruise ship and it is unclear where the line would be drawn – aquatic games? Quoits? Aerobics? Darts? Ballroom dancing? The provision is hardly limited to extreme or inherently risky sports. One wonders whether a situation like that in the Gill v Charter Travel case mentioned above 97 where injuries resulted from skylarking around a pool, would fall within the amendment. As for the catch all provision, much will depend on the court’s interpretation of the phrases ‘significant degree of exertion or physical risk’ and ‘for the purposes of recreation, enjoyment or leisure.’ There is at least an argument that an entire cruise could be seen as recreational services, but it seems unlikely that the courts would so broadly construe a section limiting consumers’ rights. One thing is certain - there is much scope for litigation to establish the reach of the new s68B.

This is an amendment that is of great relevance to the cruise ship operator. In a nutshell, the courts may, if the facts are right, enforce a properly drafted clause excluding liability for injury arising out of the provision of recreational services.

**Proposed further amendments to s74 - Ipp Report recommendations**

The recent amendments to the ambit of s74 appear to be only the beginning. Those amendments had been drafted before the Ipp Report and were criticised by it. The Ipp Report suggests that the amendments are both too narrow (because they only apply if there is a contract, and the exclusion is incorporated in that contract 98) and too broad (because the definition of recreational services extends even to low risk activities). 99 The Ipp Report instead favours the introduction of a separate statute which would, amongst other things, give all recreational providers 100 protection from claims for personal injury where that injury was caused by the materialisation of an obvious risk 101 and to provide that there be no liability for a failure to warn about an obvious risk. 102 In addition, the Ipp Report favoured amending the definition of ‘recreational services’ in the TPA so that it takes in only activities ‘undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.’ 103 (‘Ipp Recommendations’)

The narrowing of the definition of recreational services would help clarify the uncertainty and difficulties of the definition used in the amending Act discussed above. However a claim against a cruise ship operator for personal injuries under s74 would, in most cases, not fall within the requirement of ‘a significant degree of physical risk’. The protection proposed by the Ipp Recommendations would be of minimal relevance to cruise ship operators, compared to other types of recreational service providers. In that sense, the current law (with the new s68B) better protects the cruise ship industry.
At the time of writing, no legislation has yet been placed before Parliament to amend the TPA in accordance with the Ipp Recommendations.

Importantly, the other proposals in the Ipp Report aimed at reforming the general law of negligence will, if enacted, be relevant to any claim for personal injury or death brought under the TPA. The reforms would apply to any personal injury claim regardless of whether it is brought in contract, tort or under statute. The reforms suggested are wide ranging. At the time of writing, no legislation has been introduced into the Federal Parliament to implement those reforms, although several States and Territories have passed legislation adopting some of the Ipp Report recommendations. However, these more general reforms fall outside the ambit of this paper.

s74 is still relevant to other claims, both personal injury or other types of loss.

It is important not to lose sight of the fact that the recent amendment and Ipp recommendations as regards recreational services apply only to personal injury claims that arise out of recreational services. There will, therefore, be some types of personal injury claims that do not fall within the new s68B and most claims would fall outside the narrower definition proposed by the Ipp Report. For instance, it will not catch a claim for injury associated with a lack of due care and skill in the navigation of the ship (such as was found in the Dillon case and is discussed above), the traditional ‘slip and trip’ claims, food poisoning, negligence during beauty services, legionnaires disease and so on. There are also those types of claim that do not involve personal injury that will not be affected by the amendment – such as damage to or loss of luggage or other economic loss.

It can be seen that s74 is by no means a spent force for passengers seeking to bring a claim against cruise ship operators. Ironically, it will assume greater significance if the Ipp recommendations are eventually enacted. The fact that s74 cannot currently be excluded for anything but recreational services causing injury or death means that it is still a significant source of potential liability for a cruise ship operator. To ignore it would be perilous.

104 Recommendation 2.
105 Suggesting changes to personal injury and death claims in such areas as limitation of actions, proportionate liability, contributory negligence, foreseeability, standard of care, causation and remoteness of damage, and caps on damages. As to the latter, see the discussion at fn 74.
106 For example, Queensland (Personal Injuries Proceedings Act 2002), New South Wales (Civil Liability Act 2002 and Civil Liability Amendment (Personal Responsibility) Bill 2002); Western Australia (Civil Liability Act 2002, Volunteers (Protection from Liability) Act 2002); South Australia (Statutes Amendment (Liability for Personal Injury) Act 2002, Volunteer Protection Act 2001), Victoria (Wrongs and other Acts (Public Liability Insurance Reform) Act 2002). Until the Commonwealth legislate to implement the Ipp Report recommendations, there is a potential conflict between State and Commonwealth law, which would be likely to be decided by the operation of s109 of the Constitution.
107 A cruise ship operator might ambitiously claim that an entire cruise is a ‘recreational service’ but this would be unlikely to find favour with the courts who are committed to a broad interpretation of the TPA.
108 Unless, as seems unlikely, the courts rule that an entire cruise is a contract for recreational services within s68B.
109 Recommendation 12.
110 Although those claims would be caught by the more general amendments proposed by the Ipp Report—see above, fn 105.
111 Because the field of application of the amendment would be reduced if the Ipp Report definition of recreational services were to be adopted.
Conclusion – s52 and s74
The ruction caused by the so called public liability crisis and the push to reform the laws of negligence has had a profound effect on the TPA and the liabilities of service providers such as cruise ship operators. From a principled perspective and using the cruise ship industry as an example of the provisions in operation, the amendments have created a hotch-potch of liabilities and exclusions. The TPA has always scorned exclusion clauses where the aim is to cut down liability under the TPA, but in the context of s74, now they rise, phoenix-like, to assume significance. Depending on the circumstances, in some cases contractual exclusions for personal injury claims will be effective. But in other cases they will be struck down, and mere reliance on those exclusions could of itself constitute misleading or deceptive conduct. The amending Act and the Bill do not even show a consistent approach to personal injury claims: if the Bill had been passed, such claims would be as good as excluded from s52, but a s74 claim for personal injuries can only be avoided where the injury has resulted from recreational services for which there has been an effective disclaimer of liability. The recreational service provider amendments proposed by the Ipp Report will make the law simpler, but will have less relevance to a cruise ship operator. The approach to personal injury claims is made all the more poignant by the continued relevance of TPA in claims that would be classed as less significant, such as misleading representations about cabin size and luxury.

Whilst there may be overall a lessening of the cruise ship operator’s liability for personal injury, there is a significant increase in complexity for those attempting to both ‘manage’ their affairs in keeping with the TPA and assess their legal liabilities under it. From the passenger’s perspective, the resultant matrix of what is claimable and what is not could be described as perplexing and unprincipled.

Other provisions of TPA that can be relevant to a cruise ship operator
This paper has confined itself to an examination of s52 and s74 of the TPA. However there are several other sections of the TPA that can be relevant to cruise ship operators. Closely aligned with s52 is s53, which deals with specific types of misleading representations; such as those concerning value, price or quality of goods or services or a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. Breach of provisions of the TPA (other than s52) is an offence and the court can impose penalties. A cruise ship operator must also be careful not to accept payment for cruises at a time when it knows it will not be conducting that particular cruise or will be providing a materially

112 Trade Practices Act 1974 (Cth), s53(g). The breach of this section can be the subject of a penalty.
113 This may be due to the fact that s74 does not find its remedy in the TPA but rather in common law damages; so a restriction of the type of claim that can be brought for breach of contract may have been regarded as problematic. Also, a breach of implied warranties about the supply of goods and services often do result in personal injury or death, and perhaps this was felt to be too central to the rights of consumers to do away with in its entirety. S52, with its remedies being an entirely statutory creation, is a different matter.
114 Trade Practices Act 1974 (Cth), s53(a).
116 Trade Practices Act 1974 (Cth), s53(g). Arguably claiming a right to limit liability for breach to performing the service again, claiming as it does a right to rely on s68A (which will not apply to the vast majority of cruise passenger contracts because they are consumers not business users) would be a breach of this provision and possibly misleading and deceptive in its own right.
117 And some other provisions not the subject of this paper.
118 Trade Practices Act 1974 (Cth), s79.
different cruise, or overbooking a cruise because such conduct will offend s58. In addition the TPA imposes statutory warranties about the quality of goods supplied under a contract, which would arguably apply to the quality of meals and beverages, and may apply to equipment supplied or hired to passengers.

Finally the significance of the unconscionability provisions in Part 4A has been bolstered of late by the introduction of damages as a remedy. The unconscionability provisions in s51AB are of significance to all those in any industry, introducing ‘a general duty to trade fairly.’ As Baltic v Dillon showed, the conduct of a cruise ship operator and its advisers as regards settlement of a claim may come under scrutiny for fairness.

How does the TPA interrelate with a cruise-ship operator’s right to limit liability under International Conventions?

As is explained above, the courts fiercely defend consumers’ rights to the protection offered by the TPA, to the point that exclusion clauses and disclaimers are rarely effective in excluding TPA liability. However, there is a long tradition, enshrined in international conventions, of shipowners limiting their liability generally, and in relation to passengers in particular. There are two categories of limitation regimes that are relevant to cruise ship passengers.

First, there are general limitation regimes that seek to limit shipowners’ liability in various types of claims, including passenger claims. There are two general limitation conventions in operation internationally, being the 1957 Convention and the 1976 Convention. The latter has been in force in Australia since 1991 and is about to be updated by the 1996 Protocol. Secondly, there are the limitation regimes specifically directed at passengers – namely, the Athens Convention and its various amending protocols. Both the general conventions and the Athens Convention seek to limit the ultimate liability to passengers, but the mode of doing so is different. The 1976 Convention sets a global limit on all passenger claims arising on one distinct occasion,

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119 It would be materially different if a particular port of call were to be left out, or the time there was to be appreciably reduced, or if the total time of the cruise was altered. See Dawson v World Travel Headquarters Pty Ltd (1981) 53 FLR 455.

120 The warranty requiring equipment to be fit for its purpose could fall under s74(2) (as an adjunct to services) or under s70 and s71 which deal with a contract for the supply of goods.

121 Miller, [1.51AB.5].

122 Above at text accompanying fn 58.

123 This paper does not explore the restrictions or practical operations of the Limitation of Liability for Maritime Claims Act 1989 (Cth). For that, see Ch 10 of White (ed.), Australian Maritime Law (2nd ed, 2000) (White), and Davies and Dickey (ed.), Shipping Law (2nd ed, 1995) Ch 15 (Davies & Dickey).

calculated by multiplying a specific amount by the number of passengers the ship is permitted to carry.\(^{128}\) The *Athens Convention*, on the other hand, sets a limit for the claim of each passenger.\(^{129}\) Cruise ship operators find the *Athens Convention* scheme more attractive (which is understandable, as it is specifically geared to passenger claims). Where there are only a few claimants, the *Athens Convention* limit will apply to each of their claims. Contrast that with the 1976 *Convention* in the same scenario, which calculates a global limit for the sum total of all claims. That limit will ordinarily be so large that, in reality, there is no cap on those claims at all.\(^{130}\) As we shall see,\(^{131}\) it is only in a very serious accident that the limit under the 1976 Convention would come into play.

The existence of these limitation regimes, when taken with the attitude of the courts to exclusion or limitation of liability under the *TPA*, poses some interesting questions for injury and death claims.\(^{132}\) This paper concentrates on whether a cruise ship operator can claim limitation under these conventions for a single catastrophic event caused by failure to provide navigational services with due care and skill in breach of s74 – akin to the *Baltic Shipping Company v Dillon* fact scenario, but with a less happy outcome in terms of casualties.\(^{133}\) This scenario has been selected because of all the passenger claims a cruise ship operator may have to face, this is the type where limitation would be critical.

**Athens Convention and its protocols**

The *Athens Convention* specifically covers liability to passengers on ships. However, neither the original convention nor any of its subsequent protocols have been adopted by Australia nor incorporated in domestic law. Australia is still considering its attitude towards the *Athens Convention* and the 2002 *Protocol*.\(^{134}\) Therefore, at present, the *Athens Convention* will not apply to a cruise ship by force of Australian law.\(^{135}\)

As explained above, a cruise ship operator would prefer to have a ‘per passenger’ limit of liability, as offered by the *Athens Convention*, rather than a global limit for all passenger claims. A cruise ship operator often seeks to incorporate the provisions of the *Athens Convention* (in one of its forms) into its carriage contract. Whilst that may affect a claim for breach of contract or tort claims,\(^{136}\) its effectiveness for *TPA* claims is somewhat less certain. There would be a conflict between the intention of the *TPA* and the terms of a contractual limitation. One would expect that the Courts would continue to express their strident view of the intended operation of the *TPA* and refuse to allow a

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\(^{128}\) Article 7.

\(^{129}\) Article 7.

\(^{130}\) See further discussion of this limitation amounts commencing at text accompanying fn 146 below.

\(^{131}\) See text accompanying fn 153 below. Once the 1990 Protocol enters into force, the limit will be even higher – see text accompanying fn 157.

\(^{132}\) As an aside, a breach of s52 for matters such as cabin size or number of days/stoopers would not fall within the terms of the Athens Convention, which applies only to personal injury and damage to or loss of luggage or valuables (Art 14). The LLMC Act, however, is more broadly worded (see article 2, particularly 2(c)). In any event, a claim by a passenger for damage other than injury or death would be unlikely to reach a sufficient quantum to challenge the limitation amounts.

\(^{133}\) The same reasoning would apply to luggage claims resulting from the same scenario.

\(^{134}\) Email from Beta Zadnik, Australian Federal Department of Transport and Regional Services Friday 14 November 2003.

\(^{135}\) Although a cruise ship operator may be in a position to assert that it applies by force of law in another country: see fn 139 below.

\(^{136}\) And for instance it could affect the limit of a claim that falls within the Recreational Services amendment discussed in text accompanying fn 94 above.

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cruise ship operator to rely on a contractual term\textsuperscript{137} to limit liability for loss or damage caused by a breach of the TPA.

In a sense, the very situation in which the cruise ship operator would like to have limited its liability, a loss of a vessel with many passengers seriously injured or killed, may not be able to be subject to a contractually incorporated limitation. A s74 claim for lack of due care and skill in the provision of navigational services causing injury can be brought, and would be protected by s68 from any contractual attempt at excluding or limiting liability. The recent amendments limiting the reach of s74 are relevant only to recreational services, but that would not affect a claim for a breach of the obligation to exercise due care and skill as regards navigational services.\textsuperscript{138} Therefore such a claim – or more likely, series of claims – for a breach of s74 for the failure to navigate with due care and skill would be unlikely to be limited by contractual incorporation of the Athens Convention.\textsuperscript{139}

\textbf{Limitation of Liability for Maritime Claims Act 1989 (Cth) (LLMC Act)}

Although the Athens Convention has never been part of the law of Australia, there is still the shipowner’s more general right to limit offered by the LLMC Act. In this case, Australia has ratified the 1976 Convention and enacted it into domestic law. In this context, there is a potential clash between the TPA and LLMC Act, the latter enacting an international convention to which Australia is a party. Both have the force of law in Australia.\textsuperscript{140}

As a matter of interpretation, one expects Australia to seek to comply with its international commitments - in this case, providing a limitation of liability scheme to shipowners who may find themselves before Australian courts. As such, the LLMC Act would have precedence over the TPA. This is also a conclusion supported by the surrounding circumstances. The LLMC Act has been amended as recently as 2001\textsuperscript{141} and no effort has been made to exclude TPA claims from its operation.\textsuperscript{142} Also, the 1996 Protocol specifically allowed state parties to impose a higher limit than that in Article 7. Australia has not done so, in relation to TPA claims or any other types of claims.

The fact scenario being considered, though a breach of s74, would clearly fall within the operation of the LLMC Act.\textsuperscript{143} In this writer’s view, the LLMC Act would take precedence over the TPA. Therefore, whilst the liability to the passengers would still

\textsuperscript{137} As opposed to a legal right to limit liability, as would be the case if Australia had ratified the Athens Convention.

\textsuperscript{138} See text accompanying fn 97 above.

\textsuperscript{139} If the ship is flying the flag of or is registered in a State Party to the Athens Convention then a cruise ship operator could assert that the Convention applies as a matter of law under Article 2. There seems to be no case law within Australia that has arisen on this point. In a similar but distinguishable situation, courts in the United States of America have been known to enforce the limitation applicable in the foreign country where their citizens have been injured on a foreign cruise: see Berman v Royal Cruise Line 1995 AMC 1926 (Cal sup. Ct 1995), Kirman v Compagnie Francais de Croisieres 1994 AMC 2848 (Cap Sup Ct 1993) and other cases cited in Kaye, Rose and Maltzman LLP, Batten the Hatches; the IMO sets a stormy course with a new Athens Convention (2003) <http://www.kayerose.com/Articles/articles46.html> at 14 April 2004. But the situation discussed here is distinguishable because it involves a contract to which Australian law applies (or else s74 would be irrelevant).

\textsuperscript{140} See Limitation of Liability for Maritime Claims Act 1989 (Cth), s6.

\textsuperscript{141} To adopt the 1996 Protocol: see fns 126 and 155.

\textsuperscript{142} Indeed, had the proposed Bill become law, then the issue would have evaporated in relation to personal injury and death claims based on s52.

\textsuperscript{143} Article 2.1(a), Article 7.
exist and could not be excluded, it would still be subject to limitation in accordance with the LLMC Act.

Some comments about the limitation amount under the LLMC Act, and forum shopping issues.

Having concluded that the LLMC Act would provide cruise ship operators with the right to limit in the fact scenario in question, let us explore how the actual limitation amount would work under the 1976 Convention. The limitation applicable to passengers is contained in Article 7, which provides that the liability for all passenger claims arising on any distinct occasion shall be limited to an amount arrived at by multiplying the number of passengers the ship is authorised to carry by 46,666 Special Drawing Rights (SDR). The Article goes on to provide a cap on passenger claims of 25 million SDR, which is equivalent to the limitation amount multiplied by about 535 passengers (the cap). It would seem that each passenger’s claim is not limited to the 46,666 figure, but rather that the total pool of funds available is determined by the calculation set out in Article 7. Therefore the limitation amount would only be relevant if the aggregated damages awards were in excess of the total pool of funds. If only a few passengers are injured then they may recover amounts in excess of the 46,666 figure each, so long as the combined total does not exceed the total pool of funds. If there are many injured passengers, and the total of all the claims exceeds the total pool of funds, then the individual payouts will be diminished accordingly.

The larger cruise vessels are in a sense, better protected than the small ones by the provisions of the unamended 1976 Convention because of the cap. Smaller cruise operators would be unlikely to get close to the cap, and are therefore carrying more potential liability per passenger than a larger ship. A cruise ship with 3000 passengers on board would, under the 1976 Convention, have an upper cap on claims of about AUD$49 million. Without that cap, the calculated limit would be more like AUD$277 million.

144 Trade Practices Act 1974 (Cth), s68.
145 An interesting question will arise if the Ipp Report reforms regarding negligence are fully accepted and enacted by Federal Parliament, as these reforms contain caps on personal injury claims. Would the Ipp reforms or the LLMC provide the relevant cap on damages payable? It is certainly arguable that the LLMC Act, being specific to maritime passengers, will override a more general statute implementing the Ipp reforms. In addition, the LLMC Act has a certain stature by reason of being the implementation of an international convention to which Australia is a party. These same arguments would be available to a passenger should a carrier seek to rely on State based implementation of the Ipp Report reforms. The writer has been informed by DOTARS that it is currently considering its submission to the Ipp Review about whether the convention caps ought to take precedence, or the Ipp reform caps.
146 We will, for the moment, assume an event that occurs before the 1996 Protocol came into force.
147 As at 29 April 2004 the SDR Rate was AUD$1.98. It does fluctuate in keeping with the value of the various international currencies involved.
148 See White, fn 123, 321.
149 Ibid.
150 Any attempt by a cruise ship operator to contractually impose an individual per passenger limit on a personal injury claim made under s52 or s74 of the TPA would probably fail, and in the case of s74, most certainly fail foul of s68 unless the recreational services provisions apply. It may even breach s53 (g) as being a false or misleading representation concerning the exclusion or effect of any condition, warranty, right or remedy: see text accompanying fn 116 above.
151 Being 25 million units of account - See Article 7(1).
152 Assuming no right to break limitation under Article 4.
153 Based on an SDR rate of AUD$1.98, as it was on 29 April 2004. Current rates can be found at the IMF website: http://www.imf.org/external/np/trg/sdr/db/rms_five.cfm (visited 29 June 2004).
As already noted, the 1996 Protocol came into force internationally on 13 May 2004 after receiving its 10th signatory early in 2004. 154 The 1996 Protocol has been enacted as a schedule to the LLMC Act, and became part of Australian law on 13 May 2004 also.155 There are a number of significant changes for cruise ship operators. For a start, the limitation figure for passenger claims has almost quadrupled.156 But the more challenging aspect is that the amount for passenger claims will no longer be capped. That means a passenger ship carrying 3000 passengers will have a total limit of approximately AUD $1.039 billion.157 The reality is that the limits of liability per passenger are now so high that all but the worst accidents involving large cruise vessels would fall under the limitation amount.158

With the 1996 Protocol coming into effect, we will see at least 3 general international limitation regimes in operation simultaneously: the 1957 Convention, the 1976 Convention in its original form and then the 1976 Convention as updated by the 1996 Protocol. There is no requirement of a connection between forum and dispute as a precondition for claiming limitation.159 This must beg the question - can a cruise ship operator reduce the limitation amount applicable by choosing to set up the limitation fund in a jurisdiction with a friendlier limitation scheme than that of Australia? Having opened this can of worms, this paper limits itself to a few comments.160 The fact that a limitation fund can theoretically be constituted anywhere seems to suggest that the cruise ship operator has that very option.161 Under the 1976 Convention, there is no provision concerning multiple proceedings162 although it does give some protection to shipowners who constitute funds in a place with some connection to the claim but whose ship or property has been arrested elsewhere.163 It seems that a cruise ship operator could gain a distinct advantage, if only tactical, by carefully and quickly choosing a location for the limitation fund to be constituted. An increased advantage can be obtained by choosing from the various places with some connection to the claim.164 This will be particularly the case with the 1996 Protocol in force, as there will be relatively few jurisdictions that have ratified it.

155 The 1996 Protocol has been enacted as an amendment to the LLMC Act by International Maritime Conventions Legislation Amendment Act 2001. The commencement date of the Act was proclaimed as 13 May 2004 (Commonwealth Gazette 2004, No. S157 dated 13 May 2004).
156 Increased from 46,666 to 175,000 units multiplied by number of passengers the ship is authorised to carry.
157 175,000 units of account per passenger. That sum is calculated on a passenger carrying capacity of 3000, using an SDR conversion rate of 1 SDR = AUD$1.98 (as at 29 April 2004), see fn 153.
159 DC Jackson ‘Enforcement of Maritime Claims’ (3rd ed.) LLP 2000, 586.
160 For a lengthy discussion of the issues see Jackson, ibid, and the references to Davies & Dickey, and White (ed) above at fn 123.
161 Though it is subject to stay of proceedings if a passenger contests that another court is in the correct forum.
162 Namely where the passengers sue in one jurisdiction and the cruise ship operator constitutes a fund in another.
163 Article 13. A ship or other property that has been arrested within a state party shall always be released if a fund has been constituted at a port where the occurrence took place or the next port of call; if it occurred whilst at sea; at the port of disembarkation, or in the state where the arrest was made. The Article stops short of ruling that a fund constituted in a manner that falls within Art 13 should be regarded as the proper forum of the limitation fund and able to resist attempts to have that limitation proceeding stayed.
164 Ibid.
So it would seem that forum shopping would have to be a risk worth taking - indeed, worth fighting for - for cruise ship operators, with at least several different jurisdictions suitable for setting up a limitation fund and defending the choice of forum. For instance, imagine if a Baltic Shipping v Dillon situation were to occur again, with a cruise ship on route from Australia to New Zealand when it founders and sinks, with many passengers injured. There are passengers from both countries on board. NZ has, so far, not adopted the 1996 Protocol, and so has a friendlier limitation fund for cruise ship operators. Undoubtedly the shipowner would be advised to seek to constitute a limitation fund in New Zealand and thereafter defend its choice in the courts.

In any event, the discussion is a worst case scenario for large cruise ships. In reality, it is hard to imagine total damages claims approaching the LLMC Act limitation amount for a large cruise liner unless there are multiple passengers severely injured in one catastrophic event. The limitation amount is likely to be of more assistance to those carrying only a handful of passengers, particularly where one or more of the passengers are badly injured.

Conclusion
Over the past 10-15 years the strength of the TPA has increased and it has become a very real threat to cruise ship operators. The application of s74 has broadened and arguably includes a cruise ship carriage contract. The significance of s52 continues to grow as the courts continue to interpret it expansively.

But the pendulum has swung, at least a little. The recent and proposed changes to the TPA would measurably alter the cruise ship operator’s potential liability to passengers where personal injury or death has been the outcome. In certain circumstances where the plaintiff suffered personal injury, a well drafted and properly incorporated contractual exclusion of liability will have a degree of force long considered banished from the legal landscape in Australia, certainly in so far as consumer claims under the TPA were concerned. This is the case where the claim fits within the amendment to s74 allowing the operator to exclude liability for personal injury claims during recreational activities.

This will represent a pegging back of the passenger’s potential causes of action against a cruise ship operator. However there is a real state of flux at present because the ultimate package of legislative reforms is unknown.

In any event, the TPA will remain a potent force for those aspects left untouched by the recent amendments. For instance, even if personal injury claims are excluded from s52, the TPA will still respond to misleading or deceptive representations that result in other forms of damage, or personal injury caused by a failure to exercise due care and skill NOT involving recreational services. One claim very much still currently within the ambit of the TPA would be for personal injuries arising out of the cruise ship operator failing to exercise due diligence in providing navigational services. The significance of this is heightened by the fact that in certain circumstances the TPA will apply to events that take place outside Australia. However such a claim will, in this writer’s opinion, be subject to the shipowner’s right to limit under the LLMC Act.

The cruise ship operator will find that the burden will be attempting to accommodate these varying scenarios in its terms and conditions, and its claims management, without offending different provisions of the TPA - those that warn against excluding liability.

165 As at 29 April 2004, New Zealand had not adopted the 1996 Protocol.
for actions not able to be excluded pursuant to s68A, or making misleading representations about the effect of a contractual term.\textsuperscript{166}

It is difficult to imagine an industry so uniquely vulnerable to s52 and s74 as the cruise ship industry. This is because of the complete responsibility of the cruise ship operator for the cruise ship experience and the profile of all passengers as consumers. A cruise ship operator gains little protection against claims falling within the \textit{TPA} by relying on contractual terms limiting liability. The extraterritorial reach of the \textit{TPA} and the fact it extends to advertising for business in Australia means that even cruise ship operators with no presence in Australia offering cruises entirely outside Australia, may be bound by the Act. As such, cruise ship operators, certainly within and even outside Australia, would be well advised to ensure all their dealings with and for passengers, before, during and after cruises, are in compliance with the \textit{TPA}.

\textsuperscript{166} \textit{Trade Practices Act} 1974 (Cth), s53(g).
3.2 Significant Developments

3.2.1 Dianne Brimble case

While not related to the TPA provisions, it is pertinent to note that cruise ship regulation and consumer rights have been a topic in the Australian press as a result of the tragic death of Dianne Brimble on board the P&O cruise ship ‘Pacific Sky’ in 2002. The sordid details aired at the inquest, including claims of a cover-up by cruise ship staff, led then Prime Minister John Howard to remark that he was willing to consider proposals to regulate the cruise ship industry. As at the date of writing, the coroner has yet to hand down her findings, but the Brimble family have accepted a settlement from the cruise ship operator, P&O. Once the findings are handed down, there may be some impetus to consider regulation of the industry, or at least a more streamlined approach to investigating crimes committed on board.

Meanwhile in the United States of America, the rise and rise of claims against cruise ship companies has led to the springing up of websites concerning claims against cruise ships and maritime commentators believe that a discrete sub-area of cruise ship law is developing.

80 See R Myers, below at 81, fns 1-12.
82 ibid.
83 For example, see http://www.cruisebruise.com.
84 David W Robertson & Michael F Sturley ‘Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits’ (2007) 31 Tulane Maritime Law Journal 463 at 540, 539 (Robertson & Sturley).
3.2.2 Statutory changes affecting personal injury claims under s52

The reforms concerning proportionality and contribution to damages awarded under the TPA apply equally to claims that may be brought by passengers against cruise ship operators. In addition to those changes, there have been specific changes that affect a plaintiff’s right to claim damages for a breach of s52 where injury or death has been the result. This section concentrates on those particular amendments.

Soon after the article in 3.1 was published, the Government of the day watered down the Ipp Report proposal to prohibit awards of damages for personal injury or death as a result of s52 in order to secure the passage of the proposed changes through a hostile Senate. As a result, legislation was passed to enact a similar scheme of damages caps and limitation period limits as had been implemented in the States and Territories as a result of the Ipp Report. Under that amendment, a personal injury claim could still be brought for a breach of s52, although subject to the limitations of the new Part VIB of the TPA. This ensured that the TPA would not provide a ‘back door’ to a higher quantum award, but that the TPA was still preserved as a cause of action for personal injury claims.

However, after the 2004 election the balance of power in the Senate passed to the Government. Using this parliamentary advantage, the original proposals were revived and in 2006 a new

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85 See 2.2.1 above.
86 Or other provisions in the same division: see p 40 of the article in 3.1, at text accompanying fn 68.
87 The TPA provisions impose a limit on non-economic loss (s87L) loss on earning capacity (s87U) and damages for gratuitous attendant care services Division 5 of Part VIB).
88 Trade Practices Amendment (Personal Injury and Death) Act (No 2) no 113 of 2004.
amending provision was enacted. This amendment$^8^9$ removed the ability to use s52 to pursue a personal injury claim for damages under s82, unless it was for tobacco related injuries or death:

\[
S82 \text{ (1AAA) A person who suffers loss or damage by conduct of another person may not recover the amount of the loss or damage by an action under subsection (1) to the extent to which:}
\]

\[
(a) \text{ the action would be based on the conduct contravening a provision of Division 1 of Part V; and}
\]

\[
(b) \text{ the loss or damage is, or results from, death or personal injury; and}
\]

\[
(c) \text{ the death or personal injury does not result from smoking or other use of tobacco products.}
\]

The potential liability under s52 of cruise ship operators for other non personal injury claims clearly still exists. However, as personal injury claims are likely to represent the larger quantum claims, the cruise industry is a happy beneficiary of the 2006 reforms to s82. As the amendments are not retrospective, injuries sustained on cruise ships until the date of commencement$^9^0$ would appear to be entitled to rely on s52 should they so wish.

Once s52 claims peter out, consumers will need to rely on common law or s74 TPA. Whether a common law claim can be brought, and the quantum of any claim, depends on the civil liability reforms$^9^1$ and any exclusions properly incorporated in the contract. Developments as to s74 are set out below.

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$^8^9$ Inserted by s2 of Trade Practices Amendment (Personal Injury and Death) Act No 11 of 2006.


$^9^1$ Which are outside the scope of this paper.
3.2.3 Statutory changes affecting claims under s74 – personal injuries

As was noted in the article itself, the Ipp Report left intact the ability to claim personal injuries for breach of s74. This has been the effect of the amendments noted in 3.2.2 above. Damages awarded for breach of s74 are not awarded under s82 as they are, in fact, common law damages. However, damages so awarded will be affected by the State and Territory legislation enacted in pursuance of the Ipp Report.

As far as s74 is concerned, the focus of the Ipp Report related to contracts for recreational services. As discussed in the article at 3.1, the Ipp Report recommended that s68B be brought into line with the State legislation concerning liability for recreational services. State legislation provides that a provider of recreational activities should not be liable for injuries sustained as a result of inherent risks, or obvious risks in dangerous recreational activities.

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92 See fn 70 of the article in 3.1.
93 Section 87E makes the amendments applicable to various divisions of the TPA but not Part 5 Division 2, which contains the statutory warranties.
95 For examples of the legislation enacted see fn 106 of the article in 3.1.
96 See article in 3.1, at page 44.
97 s68B (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.
98 See for example s5K Civil Liability Act 2002 (NSW). In the case of Lormine Pty Ltd v Xuereb [2006] NSWCA 200 (Supreme Court of New South Wales – Court of Appeal) the Court upheld the trial judge’s finding that dolphin watching was not a ‘dangerous recreational activity’ where the vessel was within 35 metres from the beach, in waters the
However, the Ipp Report recommendations have not led to any amendments of s68B\textsuperscript{99} and it is unlikely to be a priority for the new Federal Government which, in opposition, opposed the more draconian aspects of the reforms.\textsuperscript{100}

As such, the discussion of that provision contained in the article set out in 3.1 still holds true. For example, it is at least arguable that a cruise, in its entirety, constitutes ‘recreational services’. If that is the case, then a properly worded exclusion clause, incorporated in the contract for cruise ship services, would be effective to exclude s 74 liability pursuant to s68B.\textsuperscript{101} However, this writer remains of the view that a court is unlikely to interpret s68B so broadly as to find that an entire cruise ship is a ‘recreational service’, given the intent displayed in the explanatory memorandum of the Act which introduced that provision.\textsuperscript{102} Further strength for that view can be drawn from the more recent interpretation of another exception to s74(1), being that contained in s74(3).\textsuperscript{103}

If this is correct, and the courts do not take an ‘entire cruise’ interpretation of s68B, then the court should look at the actual activity that led to the injury and ask the question - was it within s68B’s

\textsuperscript{99} See the article in 3.1, at text accompanying fn 98.
\textsuperscript{100} As is indicated by the history behind the Trade Practices Amendment (Personal Injury and Death) Act (No 2) 2004 and the Trade Practices Amendment (Personal Injury and Death)2006 as outlined in 3.2.2 above.
\textsuperscript{101} See the article in 3.1, text accompanying fn 95.
\textsuperscript{102} See fn 93 of the article in 3.1.
\textsuperscript{103} This is dealt with further in Chapter 4.
definition of ‘recreational services’? Clearly many things on board a cruise ship will not be a recreational service within s68B: a visit to the doctor\textsuperscript{104} or hairdresser, or eating a meal, for example. Such services, if not carried out with due care and skill, may ground liability. If they do, then s68 will render void any attempt to exclude or limit that liability; and as the contract is for ‘goods ordinarily acquired for personal domestic or household use or consumption’, s68A of the TPA will not permit contractual limitation clauses to operate. Nor would such claims reach a quantum that would trigger international Limitation Conventions.\textsuperscript{105} The cruise ship will, in that instance, bear the full quantum of liability.

3.2.4 Amendments to TPA - State law may override s74

In 2004, as part of the overall tort reform designed to ensure insurance was available and affordable,\textsuperscript{106} the Federal Government introduced amendments to the TPA to protect professionals from claims that allege the TPA as an alternative cause of action to tort. As part of those amendments a new s74 (2A) was introduced. It reads:

\begin{quote}
(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 a liability, for breach of another term of the contract.
\end{quote}

\begin{footnotes}

\textsuperscript{104} See the unreported case of Gordon v Norwegian Capricorn Line (Aust) Pty Ltd [2007] VSC 517 in which the cruise ship operator was able to escape liability as a result of negligence on the part of the plaintiff’s solicitors who had allowed the writ of summons to elapse without service and failed to convince a court to allow proceedings to be issued out of time. The plaintiff, to whom the court ascribed no fault for the delay, had sustained a heart attack on board a cruise ship. He alleged that the ship was negligent in failing to have thrombolytic medication on board which he alleged would have had a dramatic effect on his recovery and resultant health. In USA, there is a growing body of law holding cruise ship lines vicariously liable for the actions of on board doctors; See Robertson & Sturley above n 84, 540.

\textsuperscript{105} Save in the event of a catastrophe, and a claim for breach of s74 focussing on navigation. See discussion of the various limitation conventions at p 48 – 52 of the article in 3.1.

\textsuperscript{106} Explanatory Memorandum, Treasury Legislation Amendment (Professional Standards) Bill 2003 (Cth), 1.1.
\end{footnotes}
The intent, as exhibited by the Explanatory Memorandum to the amending Act,\(^\text{107}\) was to reverse the effect of the High Court’s decision in *Wallis v Downard-Pickford (North Queensland) Pty Ltd*\(^\text{108}\) so that State legislation could limit liability for professionals. However, subsection (2A) is clearly broader than that. Should any State legislate to limit liability of cruise ships towards their passengers, then that will be effective to negate the effect of the implied warranty under s74. Although one would imagine such a step might be politically unpalatable, given the push for civil liability reform and the general erosion of plaintiff rights that has already occurred, it cannot be ruled out. Section 74(2A) is also of significance for commercial operators - as we shall see in the next chapter.\(^\text{109}\)

The next chapter deals with the application of the TPA to maritime services, using the particular example of towage contracts.

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\(^{107}\) Ibid.

\(^{108}\) (1994) CLR 388.

\(^{109}\) See Chapter 4.3.1.
Chapter Four

Towage contracts and the TPA

This article was cited with approval by Justice Helman in PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v The Owners of the Ship Koumala [2007] QSC 101 at [48]. That decision is discussed at 4.2 below and has since been reported at (2007) 210 FLR 243.
What’s the Trade Practices Act Got To Do With It? Section 74 and Towage Contracts In Australia

By Kate Lewins
Murdoch University

The towage industry plays an integral part in shipping movements through Australian ports. Usually the ship gets no choice of towage operator, nor usually any opportunity to negotiate the terms of the tow. This article examines the extent to which contracts for towage in Australia might be affected by s74 Trade Practices Act, which imposes an obligation to exercise due care and skill in the provision of services to consumers. If towage contracts are subject to s74, there are some steps that towage operators can take to minimise their contractual exposure.

1. Introduction

As an island nation of exporters and importers, Australia relies heavily on its maritime industry. The maritime industry plays an important supporting role for other Australian industries too, such as offshore oil and gas projects. The maritime industry extends well beyond the visiting vessels to the extensive range of ancillary services required to satisfy the logistics of the maritime trade. One of those ancillary services is the provision of towage in ports.

Towage operators expect to have to comply with regulations of a maritime nature such as those found under the Navigation Act 1912 (Cth). As an intensely commercial operation, it may come as a surprise that the contractual
terms upon which they provide their services might be affected by an Australian Act designed to protect consumers and encourage fair trade.¹

The Trade Practices Act 1974 (Cth) (TPA) sets standards of obligation between consumers and their suppliers, whether supplying goods or services. However, the TPA manages to weave its tendrils far from its home base of consumer protection and well into the commercial and maritime industries.²

Section 74 of the TPA seeks to impose a duty to exercise due care and skill in a contract for the provision of services. That duty is essentially non excludable, although as we shall see, it does not apply in all cases; further, it is also possible to limit the liability to some degree in certain circumstances.³

It has been said that s74 is:

‘designed to achieve a large social purpose far beyond …commercial circumstances…”⁴

It is undoubtedly a thorn in the side of businesses that provide services in Australia. Generally, those businesses providing services (‘service providers’) would prefer to be able to exclude liability in contracts so as to minimise the cost of doing business, in particular their insurance costs. It could be alleged by service providers that s74 interferes with their ability to be able to arrange their affairs with customers with a degree of certainty. On the other hand, the law is often suspicious of exclusions - particularly where consumers are concerned. This is heightened in situations where the service providers are in a position of some contractual strength, due to market circumstances or the

¹ “The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection” –Trade Practices Act 1974, s2.
³ See discussion on s 74 (3) and s68A in 2. below.
very nature of the services they provide: for instance, if the services are needed at short notice or in a remote area. In those cases, the provider may well require a customer to agree to a set of standard terms, not in any real sense negotiable, which contain terms that prefer the interests of the providers.

Where a contract for services contains a standard set of conditions which seek to exclude liability and/or seek indemnity, one must always have regard to s74. S74 imports an implied term in the contract as to the basic ideal: that the services must be carried out with due care and skill. Anything less is a breach of contract; any attempt to exclude restrict or modify that duty is void under the Act by virtue of the withering provision of s68. While s68A allows a service provider to limit its liability under s74 where the transaction is not of a personal, domestic or household nature, that is subject to the consumer’s right to argue that reliance on that term is not fair or reasonable.5

The towage industry in Australia would seem to be peculiarly vulnerable to the impact of s74 for several reasons:

- First, the definition of ‘consumer’ in the TPA deems that a service is provided to a ‘consumer’ where the consideration is less than a prescribed amount, currently $40,000. The nature of the service provided is irrelevant to the definition of consumer.6 Most towage services in Australian ports are for amounts well below this limit.

- Secondly, there is at least an argument that unlike other parts of the shipping industry, towage contracts are not exempt from s74. Contracts concerned with the transportation of goods are lifted out of the ambit of s74 by s74(3). Whether ss3 extends to contracts for towage is a moot point which will be discussed shortly.

5 See s68A(2) which is set out and discussed in 2, below.
6 This can be contrasted with the Unfair Contract Terms Act (UK) 1977 which looks to the nature of the service.
• Thirdly, the towage industry has a heavy reliance on overseas based standard terms. These terms seek to exclude limit or in other ways offset any liability for a breach of contract in a manner which has not been designed to take s74 into account.

• Fourthly, in many ports there is only one towage operator available. If there is more than one operator, it seems that usually they contract on the same standard terms anyway. The customer is therefore left with no choice of conditions, nor the option of trying for better terms with another operator. In other words, they must take what they can get. As we shall see, this may give the towage operator some headaches when trying to argue the reasonableness of limitations permitted by the TPA under s68A.

This paper focuses on the U.K. Standard Conditions For Towage and Other Services published by the British Tug Owners Association (UK Standard Conditions), which seem to be the most commonly used set of conditions in the towage industry in Australia.

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7 It is fair to say that this is a position which sits uncomfortably with many in government (with their unrelenting drive towards competition and price surveillance); and governmental reviews of the towage industry in particular are not unheard of: for example see the Productivity Commission report available at [http://www.pc.gov.au/inquiry/harbourtowage/finalreport/](http://www.pc.gov.au/inquiry/harbourtowage/finalreport/) (accessed 5 January 2006). In it, the Productivity Commission accepts that in many ports there is a natural monopoly (at p XXV).

8 See discussion in 4.2 below.

2. The relevant provisions of the TPA

S 74 says:

S74 Warranties in relation to the supply of services

(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...makes known to the corporation any 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 under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result....

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

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

(emphasis added)

Other relevant provisions: s68 and s68A TPA

In a sense, these sections are the real power behind s74. Section 68 renders void any contractual term that has the effect of excluding, restricting or modifying the impact of the Act:

S68 Application of provisions not to be excluded or modified

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

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

is void.

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

However, and importantly for towage operators, s68A offers some relief from the impact of s68. In contracts for services that are not of a personal domestic or household nature (such as most towage contracts), s68A allows
for a limitation of liability to the re-supply of services or what the re-supply would cost: so long as the consumer does not establish that reliance on the limitation clause is not fair or reasonable.

SECT 68A
Limitation of liability for breach of certain conditions or warranties

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

(a) in the case of goods, any one or more of the following:
   ....
(b) in the case of services:
   (i) the supplying of the services again; or
   (ii) the payment of the cost of having the services supplied again.

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

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

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

(underlining added)

The effect of s68A can be illustrated by the High Court case of *Qantas Airways Ltd v Aravco Ltd*. Qantas was seeking to avoid paying a claim in the vicinity of $500,000 - $1 million for damage sustained to an aircraft leased to Aravco. Qantas relied upon a clause in its services contract that limited liability to the cost of performing the service again. In that case, the cost of the original service was $5000. The majority of the High Court were prepared to accept, without deciding, that this would be the effect of s68A on the facts before them. However, as the Court noted, that was subject to the

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10 (1996) 136 ALR 510. (*Qantas v Aravco*)
11 Ibid, p 513-514.
consumer’s right to argue that such a limitation is not fair or reasonable on the facts of the case. On the facts, the Court did not have to consider whether it would have been fair or reasonable for Qantas to so rely. As a result, s68A(3) was not rigorously tested in that case. We do not yet know the attitude of the Australian courts to the ‘fair and reasonable’ qualification in s68A(3).

Having laid out the relevant provisions, the first question is - does s74 apply to towage contracts?

3. Does S74 catch towage contracts?

The implied warranty provisions of the TPA, of which s74 is one, will apply where the proper law of the contract is Australia. Where the parties have contracted in Australia, for a service to be supplied in Australia by a corporation itself registered in Australia, the proper law of the contract will be that of Australia. So the vast majority of towage contracts performed in Australia will be caught, in a general sense, by the TPA.

S74 itself will apply where the transaction involved is less than the prescribed amount (currently $40,000) and therefore deemed to be a ‘consumer transaction’. Most regular towage contracts would be for that amount or less. So far, towage contracts look to be ensnared.

But can towage contracts escape by virtue of the proviso in s74(3)? That subsection says:

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

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12 That is so even if the parties stipulate that the law of some other country should apply: s67 TPA.
13 By s4B.
14 Other spheres of the maritime industry have been held subject to s74. In particular see Pondcil Pty Ltd v Tropical Reef Shipyard Pty Ltd (1994) ATPR (Digest) 46-134 (shiprepairers), Renehan v Leeuwin Ocean Adventure Foundation Limited (sail training ships) and the cases referred to in "The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 Trade Practices Act 1974 (Cth)" (2004) 18 MLAANZ Journal 30.
(a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored....

Whether towage contracts fall within s74(3) is in issue in the case of *PNSL Berhad* v *Deutsche Morgan Grenfell Leasing (ACT)* Pty Ltd (formerly known as *Bain Leasing Pty Ltd*)\(^\text{15}\) (*PNSL Berhad*), a Supreme Court action in Queensland due to go to trial in 2006.

In order to fall within that exception, a towage operator will need to establish that the contract is “for or in relation to the transportation of goods...” Is it sufficient that a towage operator is moving a ship that usually (though not always)\(^\text{16}\) contains consignments of goods? The words ‘for or in relation to’ in ss3 could be seen to encompass the contract for towage as one of those many ancillary contracts necessary for the goods on board the ship to be delivered to their destination – similar to stevedoring contracts, for example. However, stevedores’ contracts are more directly concerned with the consigned goods, which are loaded and unloaded via the stevedore. Towage operators however, bear a more remote relationship with the goods on board a ship. And, indeed, the ship movement may have nothing to do with loading or unloading of goods. Can it still be ‘in relation to the transportation of goods’?

Towage operators can argue that it does. The definition of goods in s4 says:

"goods includes:
(a) Ships, aircraft and other vehicles..."

That has been the definition of goods since the original Act in 1974 so it must have been borne in mind at the time that subsection 3 was amended in 1986. Towage operators can also draw some comfort from the history of amendments to s74. The original subsection 3 contained a narrow definition

\(^{15}\) Summary judgement applications were dismissed: [2001] QSC 429

\(^{16}\) Towage need not always be for cargo laden ships. For instance, a tug may be assisting a ship into drydock or providing services to offshore mining which do not involve cargo laden ships.
of services that would be caught by the provision, and included transportation of goods amongst them. As a result of some active campaigning, that changed in 1986 when the current subsection 3 was added. The Explanatory Memorandum to that amending Act\textsuperscript{17}, explaining the change of attitude to transportation under s74, said:

\begin{quote}
\textit{..a new sub-s s74(3) will provide that the section does not apply to contracts for the storage or transportation of goods for a commercial purpose...in the area of transportation and storage of goods for the purpose of a business, business parties have well established insurance arrangements which sometimes involve the limitation of liability in a way contrary to s74. No useful purpose would be served in upsetting these arrangements, and for this reason contracts for the storage and transport of goods for a commercial purpose have been exempted from the application of the section.}^\textsuperscript{18}
\end{quote}

This explanatory memorandum does give strength to an argument that ss3 does exempt towage contracts from s74 because the explanation given to justify the exemption of transport from s74 encompasses towage contracts. These contracts have well established insurance and liability arrangements with limitations of liability which are contrary to s74.

However, one also has to look at the words of ss3 and whether it ought to be read narrowly or broadly. Its more natural meaning might see the provision limited to everyday contracts for goods in the context of a consignment on board a ship, in that, for instance, a new fishing vessel might be the cargo on board a ship, rather than itself being the means of transportation.

Whether this provision takes towage out of the ambit of s74 is, therefore, unsettled and controversial. The \textit{PNSL} case will, one hopes, present some answers.

For the balance of this paper, we will assume that the section applies to towage contracts in order to determine what the effect of s74 would be. As

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\begin{footnotesize}
\textsuperscript{17} Trade Practices Revision Act (No 17 of 1986)
\textsuperscript{18} Explanatory Memorandum Trade Practices Revision Act (No 17 of 1986).
\end{footnotesize}
\end{flushright}
stated earlier, the main impact of s74 is to impose a standard of due care and
skill in the provision of contracted services. Yet many towage contracts
contain terms that contradict that imposed standard. As between contracting
parties, what impact will s74 have on contractual attempts to alter where the
liability falls?

Whilst the effect of s74 is to insert a statutory term in the contract between the
parties, if one party breaches that term, the remedy follows at common law in
much the same way as any other breach. However, if the terms relied upon
by the party in breach somehow diminish the impact of the s74 warranty, then
parties need to consider sections 68 and s68A.19

Having completed an overview of s74 and its related provisions, and
considered the potential that these provisions might indeed be relevant to
towage operators in Australia, let us now consider what the effect of these
provisions might be on the terms of a towage contract.

4. Towage contracts – how their terms might be affected by
TPA.

Commonly, a towage operator has a set of conditions which purport to
somehow relieve it of liability should there be any form of collision or accident
during the tow.20 A wide range of devices are used in modern day contracts
to shift liability between the parties. We have seen that the power of s74 is
not only to impose an obligation of due care and skill but to render void
attempts to exclude or limit it, unless they comply with s68A.

So how do these TPA provisions react when mixed with the traditional liability
shifting devices found in towage contracts?

19 Set out in full in section 2 above.
20 The towage operator needs to have incorporated the standard conditions into the particular
towage contract in order for them to be part of the contract.
4.1 Exclusion clauses

Total exclusions fall foul of s68 as being attempts to exclude, restrict or modify liability under s74 and will be void. For example, much of clause 4 (a) of the UK Standard Conditions\textsuperscript{21} would be likely to suffer that fate in the event that the loss disclaimed was caused by a lack of due care and skill on the part of the tugowner.

4.2 Limitation of liability clauses

The position is not as clear for limitation of liability clauses. If they are crafted in the language of s68A TPA, then there is a chance that they will be effective. As we have seen, in order to rely on s68A:

- the limitation must expressly limit the liability to re-supplying the service or the cost of having the service re-supplied; and

- the consumer must either fail to argue or be unable to establish that it is not fair or reasonable to rely on that term of the contract based on all the circumstances of the case, and in particular the factors in s68A(3).

In maritime contracts if s74 applies, s68A makes it permissible to limit liability in maritime contracts in the manner contemplated\textsuperscript{22} to either the re supply of the service or the payment of the cost of having those services supplied

\textsuperscript{21} Clause 4 reads:

"4. Whilst towing, or whilst at the request, either expressed or implied, of the Hirer rendering any service of whatsoever nature other than towing—
(a) The Tugowner shall not (except as provided in Clauses 4 (c) and (e) hereof be responsible for or be liable for
(i) damage of any description... or
(ii) loss of the tug or tender or the Hirer's vessel or of any cargo or other thing... or
(iii) any claim by a person not a party to this agreement for loss or damage of any description whatsoever; arising from any cause whatsoever, including (without prejudice to the generality of the foregoing) negligence of the Tugowner at any time...
(b) The Hirer shall (except as provided in Clauses 4 (c) and (e)) be responsible for, pay for and indemnify the Tugowner against and in respect of any loss or damage and any claims of whatsoever nature or howsoever arising or caused, whether covered by the provisions of Clause 4 (a) hereof or not... and which shall include, without prejudice to the generality of the foregoing any loss of or damage to the tug or tender or any property of the Tugowner even if the same arises from or is caused by the negligence of the Tugowner his servants or agents."

\textsuperscript{22} Because maritime contracts are rarely of a personal domestic or household nature.
again. In other words, the limit of liability can be to the contract price for the services in question. However, if the customer can prove that it is not ‘fair or reasonable’ for the towage operator to rely on such a clause then the clause will be void. As already discussed, the High Court was not required to consider that point in Qantas v Aravco and there has yet to be any other judicial guidance on what will constitute ‘fair and reasonable’ in the context of s68A.

However, faced with such an argument under s68A in the context of a towage case, there are several factors which would come to the fore. First, no doubt the consumer would argue that it had no choice in terms: that the strength of bargaining position was wholly in the hands of the towage operator particularly if it was the only operator in the port. However most ‘consumers’ of towage services are hardly corporate minnows: rather, they themselves are multinational corporations well used to imposing terms and benefiting from contracts which displace liability. Such corporations, in shipping, would expect there to be standard conditions at play. Consumers of towage services would invariably know of the likely existence of terms and conditions of the tow: as it is indeed customary in the trade. However, to satisfy s68A(c), towage operators should ensure that they notify their consumers of the s68A compliant limitation clause.

In any event, towage operators in Australia who incorporate the UK Standard Conditions into their contracts would not be in a position to rely on s68A. The UK Standard Conditions in their pure form, do not comply as they do not seek to limit to re-supply of the service, or the equivalent amount.

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23 S68A(1)(b).
24 S68A(2) & (3). What constitutes ‘fair and reasonable’ has yet to be the subject of caselaw in Australia. In England, a similar provision in the Sale of Goods Act 1979 (UK) was considered in the case of George Mitchell v Finney Lock Seeds [1983] 2 AC 803. The House of Lords held that in a case where the wrong seed type had been supplied, it was not fair or reasonable for the company to rely on a limitation provision similar to S68A to reduce its liability to the customer from £61,000 to £200.
25 See above at text accompanying fn 11.
26 One would imagine this is easily done, by notifying the various shipping agencies in that port.
Of course whether s74 will apply to towage contracts at all remains uncertain, as we have discussed. However, towage operators would be well advised to re-word their conditions around s68A so they can argue that the limitations do not fall foul of s68. That simply requires a clause seeking to limit the liability to the cost of the services (and need not concede that the TPA does apply). If the towage cost was $5000 then liability would be limited to $5000. In the event of a major incident, such a rewording may mean the difference between unlimited liability and notional liability.\footnote{In Qantas v Aravco,\cite{Qantas:2004} Qantas had a s68A compliant limitation of liability clause which would have seen it pay only $5000 for a claim against it in the region of $1M. In obiter, it seemed to be accepted by the High Court that Qantas could so limit subject to the clause being ‘fair and reasonable’.}

4.3 Indemnity clauses.

There are several other limitation devices that are often used in towage contracts in an attempt to ensure that liability offloaded does not rebound. One such device is the indemnity clause.\footnote{Another is the deemed employee clause: see clause 3 UK Standard Conditions. The deemed employee clause is where the tugowner and its employees is deemed to be employees of the tow and therefore the hirer is vicariously liable for it. It is an open question as to whether that has effect to ‘exclude, restrict or modify’ any liability under s74. A similar debate could be had about the ‘agreements to insure’ clause which has been upheld as effective in Canada but not permitted in the US: Christopher Giaschi ‘Standard Towing Conditions and Agreements to Insure’ at http://www.admiraltylaw.com/papers/TUG.htm accessed 7 March 2006.} This device is in evidence in the UK Standard Conditions. The indemnity clauses in contracts are a way of laying off the cost of liability, although not the fact of it. In \textit{Qantas v Aravco}\footnote{See clause 4(b).}, Qantas was able to convince the High Court that its entitlement to the benefit of a contractual indemnity for any liability to third parties arising from its own negligence was not an attempt to exclude or limit its liability under s74, and did not fall foul of s68.

In that case, Qantas had agreed with Aravco (the lessee of the plane) that it would service the aircraft (‘the service agreement’). In so doing, Qantas damaged the aircraft. The owner of the plane, BAT, sued Qantas and was held liable in negligence for the damage. Qantas claimed an indemnity from

\cite{Qantas:2004}
Aravco for its liability to BAT in accordance with the terms of the service agreement.

This decision is a powerful but dangerous one for the maritime industry generally and the towage industry in particular. It is powerful because it shows that contractual indemnities between the parties to a service contract can stand outside the prohibition in s68. But the Qantas v Aravco decision is dangerous because it can give service providers a false sense of security.

Looking at the headnote of the case, or even references to it in well regarded TPA commentaries\(^\text{31}\) one gets the impression that an indemnity clause can slip under the s74/s68 radar. However, in the Qantas v Aravco case there was particular set of circumstances – fortuitous events – during the litigation that would not be easy to replicate but were crucial to the High Court's finding. Critical to the outcome was the fact Aravco had not claimed a breach of s74 but instead alleged that Qantas could not rely on the indemnity clause because it was void under s68. This caused Aravco some difficulty when the matter got to the High Court. Aravco had not itself alleged that Qantas had breached its contract by failing to exercise due care and skill in completing the service agreement. Had Aravco claimed Qantas had breached s74 then the issue would have become whether it was fair and reasonable\(^\text{32}\) for them to rely on the limitation of their liability to $5K. But because there had been no claim of breach of s74, the case did not unfold that way. Aravco had not claimed that there was a breach of contract, therefore the indemnity did not alter Qantas’ liability to Aravco for breach of contract. There was no ‘mischief’ for s68 to cure, because there was no explicit allegation of a breach of s74. The indemnity provision was held to be effective – and Aravco had to pay.

\(^{31}\) Russell Miller, *Miller’s Annotated Trade Practices Act* (26th ed. 2005) at par. 1.74.15 sets out the facts of Qantas v Aravco and then states ‘The indemnity clause was found not to be void under s68.’ *Trade Practices Law and Consumer Law, Trade Practices Commentary* (CCH) states: Provisions entitling a supplier of services to indemnity in respect of those services was void under sec 68, and subject to sec 68A, but not void insofar as they provided that the acquirer would indemnify the supplier as against liability to third parties. (at ¶23-145]). Accessed online (subscription service) 1 April 2006.

\(^{32}\) See discussion of s68A and ‘fair or reasonable’ in section 4.2.
The case is open to criticism that it supports form over substance – quite the opposite of the High Court’s pronunciations in earlier cases\(^{33}\). Certainly the dissent of Kirby was a powerful one:

“This court has a choice. It may adopt a narrow construction of the Act. But that would be inconsistent with the wide words used by parliament and with the achievement of their apparent purpose. By a simple device, it would permit the neutering of protections afforded by the Act in wide terms….”\(^{34}\)

“It would be extremely odd, as it seems to me, if the prohibition effected by s68(1) of the Act were so readily susceptible to circumvention by the mere use of the device of a promise of "indemnity".”\(^{35}\)

Justice Kirby considered that the words of s68 were intentionally broad, and focussed on the ‘effect’ rather than the language of the impugned term.\(^{36}\) In His Honour’s view, the contractual indemnity did in fact have the effect of modifying and probably restricting the application of the provisions of the TPA, and modifying the liability of Qantas for the breach of warranty implied by s74.\(^{37}\)

Lawyers faced with a case concerning the effect of s 74 on limitation provisions would be well advised to make this case bedtime reading so as not to repeat the mistakes that Aravco made. In that sense the case is likely to be restricted to its particular facts and the circumstances of how that case was pleaded by Aravco. However, this case does tell us that while a contractual indemnity can be relied upon by the party in breach, it can be countered effectively by an alleged breach of s74. That in turn will trigger s68 and s68A in much the same way as for limitation clauses discussed above.

The Qantas and Aravco case concentrated on the dispute between the two contracting parties, although the initial liability to a third party was fundamental to the case. In the context of the towage industry, how can the claim of a third party to the towage contract lead to allegations of a breach of s74?

\(^{33}\) Wallace v Downard Pickford (North Queensland) Pty Ltd (1994) 179 CLR 388 at 398-399 as cited by Justice Kirby in the Qantas case at 525.

\(^{34}\) Qantas at fn 10, at p515 -516.

\(^{35}\) At 524.

\(^{36}\) Id.

\(^{37}\) Ibid, at 523.
5. Strangers to the towage contract: third party claims and s 74

Section 74 requires the exercise of due care and skill, which in a towage context would amount to a requirement for competency and safety in the provision of the towage service. A failure to exercise due care and skill could cause significant damage (be it to wharves, port installations or other ships) and injury (to the members of the crew of either tug or tow, or to members of the public). However, the obligation to exercise due care and skill under s74 can only be enforced by a contracting party. It cannot be enforced by strangers to the contract - at least, not directly.

However, s74 could still play a fundamental role. The third parties who have suffered injury or damage will still sue someone, usually in tort. Let's assume a towage contract contains an indemnity clause, as UK standard conditions does. If the third party sues the tugowner, the tug will try to seek an indemnity from the hirer under the contract. The hirer can counter by alleging a breach of s74. If there is a breach, then no exclusion clause will be allowed to operate, and limitation clauses will need to comply with s68A. If the third party sues the hirer, then the hirer can seek indemnity for the cost by reason of it being caused by the tug's breach of s74. The tug cannot rely on its exclusion clauses to resist liability because they offend s68.

One should bear in mind though that it is common in commercial maritime contracts for parties to be given the benefit of the contract; by widely defining the contracting parties there could be an increased pool of potential claimants and defendants. In that situation, a person who falls within the wide net of

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38 It is important that they do not just allege that there is no entitlement to exclude liability – that is where Aravco fell down – but rather allege an actual breach of an implied term of the contract, being s74.

39 While it does limit the ambit of the potential claimants able to rely on s74, if the tugowner used a 'Himalaya' type clause or indeed broadly defined the parties, then that would increase the potential defendants caught by s74 by effectively making them parties to the contract. The UK Standard Conditions clause 1(b)(vii) provides:

(vii) The expression 'tugowner' shall include any person or body (other than the Hirer or the owner of the vessel on whose behalf the Hirer contracts as provided in Clause 2 hereof) who is a party to this agreement whether or not he in fact owns any tug or tender, and the expression 'other Tugowner' contained in Clause 5 hereof shall be construed likewise.
description for ‘tugowner’ or ‘hirer’ might find that they can sue or be sued directly under s74.

6. Personal injury: S74 and UK Standard Conditions

As the effect of s74 is to impose a contractual term rather than a new cause of action, plaintiffs can rely upon a breach of the implied term contained within s74 in claiming relief for personal injury.

The 1986 revision of the UK Standard Conditions makes no attempt to exclude liability for personal injury. The Standard Conditions recognise the effect of the Unfair Contract Terms Act (UK) that forbids the exclusion of liability for death or personal injury resulting from negligence. For Australian towage operators, this is significant. Where an Australian operator incorporates the 1986 UK Standard Conditions in their towage contract, a personal injury claim against them will be unrestricted by their contract and s68 will have no work to do.

Some operators have cannily kept their reference to the 1974 terms (which do attempt to exclude liability for personal injury) rather than the 1986 revision. For those operators, s74 and s68 will override that contractual exclusion for a personal injury claim where there is a direct contractual relationship between the injured and the towage operator. If there is no direct contractual

40 See Simon Rainey Law of Tug and Tow (LLP, 1996) at p 16. In this sense, as regards personal injury claims, the English provisions are broader than the TPA.
41 Recent amendments adding Part VIB to the TPA have incorporated the recent civil liability reforms which seek to restrict and cap the damages awards available to claimants suffering personal injury.
42 For example, Adsteam Marine. See website http://www.esc.vic.gov.au/ports159.html (port of Geelong) and http://www.geroport.wa.gov.au/ (port of Geraldton) accessed September 2005. Where that is the case, s74 will apply to the claim for personal injury only if the injured party has a direct contractual relationship. If the injured party has a right of action against one of the parties to the contract, s74 may become an issue indirectly as discussed under the previous heading
relationship, s74 can still be indirectly relevant to potential liability in much the same way as the third party liability discussed above.\(^{43}\)

7. Conclusion

One can certainly debate whether the TPA should apply to towage contracts. Many would have expected that argument to have been resolved in 1986, when ss3 was added to s74. The proper interpretation and parliamentary intent behind s74(3) is at the heart of the PNSL case\(^{44}\) being argued before the Queensland Supreme Court this year. One cannot see either side being content to let the matter rest on a first instance decision, and so it may be several years before the courts hand down a final decision on the ambit of s74(3).

It is noteworthy that other countries also impose protective provisions which can extend to towage. Both the UK and the USA impose some limits on the towage operator’s ability to exclude liability. In the UK, the Unfair Contract Terms Act 1977 purports to apply to towage, albeit using a different formula and to a much more limited extent\(^{45}\) than our TPA does. In the US, the Supreme Court has refused to allow tugs to exclude all liability for negligence.\(^{46}\)

It is not uncommon for an accident involving tug and tow to cause substantial damage and consequent disputes about liability.\(^{47}\) With the applicability of

\(^{43}\) In section 5.

\(^{44}\) See fn 15 above.

\(^{45}\) The UK Act looks to the nature of the contract. If it is commercial in nature then the Act only applies to a limited extent, as concerns liability for personal injury. If one party is transacting as a consumer (not entering the contract in the course of a business.) then the provisions of the Act: see s12. The EC provisions are even narrower, applying only if the consumer is a natural person. See Rainey Law of Tug and Tow (1996) at p 16 – 17.

\(^{46}\) Bisson v Inland Waterways Corp. 39 US 85, [1955] AMC 899 as quoted in Giaschi above fn 28, part II.

\(^{47}\) A recent example occurred on 24 January 2006 in the Port of Gladstone. A tug pierced the fuel tank of a bulk coal carrier during berthing causing significant oil spillage. See http://www.abc.net.au/capricornia/stories/s1555714.htm (accessed 1 April 2006)
s74 uncertain, and the effect of s74 and s68 on standard conditions seemingly severe, the towage industry ought to engage in some legal risk management.

If s74 does apply to towage, then conditions drafted with the TPA in mind can allow towage operators to limit liability, potentially to a reasonably nominal amount. This is always subject to attack as to the term’s reasonableness,\textsuperscript{48} nevertheless, it is still a far better position for a towage operator than to find oneself with a series of conditions which can give virtually no protection.

Assuming that s74 does apply to towage contracts, towage contractors would be well advised to reconsider their reliance on UK standard conditions. Either they should be finessed to account for local law; or perhaps it is time for the towage industry to come up with a set of Australian standard conditions for towage.

\footnote{S68A; see section 2 and 4.2 above.}
4.2 Casenote ‘UK Standard Conditions for Towage and s74(3) TPA: PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v The Owners of the Ship ‘Koumala’ [2007] QSC’

Introduction

This case concerns damage done to the ship Pernas Arang (the Ship) as a result of a collision between it and the tug Koumala (the Tug) whilst the Tug was readying itself to tow the Ship. The case deals with the important question as to whether the warranty to exercise due care and skill imposed by s74 of the Trade Practices Act 1974 (Cth) (TPA) applies to a towage contract, or whether such a towage contract can be said to fall within the exception contained within ss3, which reads:

S74 Warranties in Relation to the Supply of Services

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

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

The case also considers whether the collision occurred ‘whilst towing’ within the meaning of that phrase in the contract.

The facts

The towage was the subject of a contract between Dalrymple Marine Services Pty Ltd (the Defendant) and the owner of the Ship, PNSL Berhad (the Plaintiff). The terms of the towage contract were the UK Standard Conditions for Towage and Other Services (1974 revision) (UK Standard Conditions), and the fee for the service to the Ship was agreed at A$12,500.\(^1\)

The collision occurred on 28 February 1995. The Ship, a dry bulk carrier, was approaching the Dalrymple Bay Coal Terminal (the Terminal) at the port of Hay Point, Queensland in order to load a cargo of coal. The Tug and another tug, the Kungurri, were preparing to tow the Ship to the Terminal. A pilot was on board the Ship and had ordered the tugs, then on the port side of the Ship, to ‘make fast’ at points on the starboard side. The Tug crossed ahead of the Ship, but once on the starboard side it turned quickly to starboard and was seen to be blowing black smoke.\(^2\) It lost steering due to a blocked air filter element in the starboard generator which provided power for steering. Within a minute or so,\(^3\) the Tug collided with the Ship, causing damage sufficient to abort the planned loading of cargo and require repairs to be effected in Brisbane.\(^4\)

The finding - negligence

Helman J found as fact that the Master of the Tug and its engineer had been negligent on several grounds (many other grounds alleged were not made out). His Honour found that the engineer should have promptly switched power from the failed starboard generator to the port generator, rather than

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\(^{1}\) Senior Lecturer, Murdoch University School of Law.

\(^{2}\) PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v The Owners of the Ship ‘Koumala’ [2007] QSC [29].

\(^{3}\) Ibid, [28].

\(^{4}\) Above n 1, [4].

\(^{5}\) The exact time between loss of steering and collision was not certain, but the judge found it was between one and a half and two minutes – par [11]. It was another 5 -7 minutes before the steering control was restored.

\(^{6}\) Above n 1, [4].
UK Standard Conditions for Towage and s74(3) TPA

having wasted time attempting to operate the generators in parallel.\(^6\) If the engineer had done so, the power would have been restored in time to prevent the collision. The Master was negligent in failing to steer the Tug away from the Ship in the time available between the first sign of a generator problem and the loss of steering. He was also negligent for not immediately stopping the main engine to slow the movement of the Tug towards the Ship.\(^7\) However, Helman J found that the effective cause of the collision was the engineer’s negligence because, if power had been restored to the steering when it should have been, then the Master would have been able to steer the Tug off the collision course or stop it completely.\(^8\)

The parties had agreed that if the Defendant was liable, the damages were limited to 167,000 special drawing rights pursuant to the Limitation of Liability for Maritime Claims Act 1989 (Cth).\(^9\)

**Applicability of s74 and s68 TPA - the arguments**

The decision then focused on the applicability of two provisions under the TPA, s74 and s68. They read as follows:

**S74 Warranties in relation to the supply of services**

(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... makes known to the corporation any 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 under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result.\(^{..}\)

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

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

**S68 Application of provisions not to be excluded or modified**

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

(a) the application of all or any of the provisions of this Division;

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

(c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or

(d) the application of section 75A; is void.

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

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\(^6\) Ibid [40].

\(^7\) Ibid [38].

\(^8\) Ibid [40].

\(^9\) Ibid, [2].
It was not in issue that the towage contract was a contract for the supply of services to which the TPA applied – it was a contract for the supply of services by a corporation in the course of a business, for a sum less than AU$40,000. The Plaintiff contended that s74 applied to the contract, and was breached by the failure of the engineer and/or the Master to act with due care and skill. The Plaintiff claimed that the Defendant was not entitled to rely upon the exclusion clauses in the UK Standard Conditions because they had the effect of excluding the liability of the Defendant under s74 and as such were rendered void by s68.

The Defendant alleged that the warranties in s74 did not apply as the contract fell within the exception contained in s74(3) as the contract was ‘for or in relation to the transportation … of goods’. The definition of ‘goods’ in the TPA includes ships. The Defendant submitted that either the contract was one for or in relation to the transportation of goods, being the Ship, or alternatively, the contract was one in relation to the transportation of goods, being the coal, which was to be loaded onto the Ship. The Defendant argued that if the towage contract was not a contract ‘for’ the transportation of the Ship it was undoubtedly a contract ‘in relation to’ transportation of either the Ship or the coal. The Defendant submitted that this construction of ss3 accorded with a common sense and commercial approach to the statute, relying on Comalco Aluminium Limited v Mogul Freight Services Pty Ltd (Comalco) and Wallis v Downard –Pickford (North Queensland) Pty Ltd.

The decision - TPA

Helman J considered whether the towage contract could be said to have been a contract for or in relation to the transportation of goods.

‘Contract for the transportation of...’

Helman J pointed out that the two cases relied upon by the Defendant had not decided what constitutes the transportation of goods; and that in the Comalco case, Sheppard J had been content to apply the section to ‘the commercial shipping of goods to an overseas destination’. He posed the question - is towing a ship the same as transporting that ship or its cargo? His Honour considered definitions of transport and concluded:

There is, I think, a distinction in ordinary language between carrying or conveying something and towing it… in my view then the towing contract was not a contract for the transportation of either the ship or any cargo carried by the ship. Was it however a contract in relation to the transportation of ship or cargo?

‘Contract in relation to the transportation of...’

Helman J cited with approval the treatment given to that phrase by the Full Court of the Federal Court in the judgement of Braverus Maritime Inc. v Port Kembla Coal Terminal Ltd & Anor. While only obiter, the court in that case stated that if the pilotage services had been by way of a contract, it would not have been for the transportation of goods, nor in relation to the transportation of goods for the purposes identified by s74(3). As the Full Court had noted, ‘the purpose of ss3 was to ensure the well known law governing transportation of goods (by air land or sea) was not radically amended by s74’ and ‘with that purpose in mind, there is no relevant relationship between the contract to provide the services and the transport of goods’. Helman J agreed with this analysis, and applying the same reasoning, found that there was no relevant relationship between a contract to provide towing services

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10 Ibid [43].
11 Ibid [45].
12 Ibid [44] and [47].
13 Ibid, [47].
16 Above n 1, [46].
17 Ibid.
18 Ibid [48].
19 Above n 1, [59], quoting the Braverus judgement ibid at 118.

(2007) 21 A&NZ Mar LJ 103
UK Standard Conditions for Towage and s74(3) TPA

and the transportation of goods. While agreeing that there is a connection between the services and transportation of goods, in His Honour’s view it lacked the relevant relationship, and there was ‘no reason to conclude that the purpose of s74(3) extended to removing contracts like towing contracts from the purview of s74(1) and (2).’

As a result the Defendant was not able to rely on the UK Standard Conditions to exclude liability as the exemption clause was rendered void by s68 TPA.

If the UK Standard Conditions apply, did the accident occur ‘whilst towing’?

Whilst not necessary given his conclusions on the TPA argument, Helman J outlined his findings on the effect of the UK Standard Conditions. The Defendant relied on cl 1, 3 and 4 asserting that it was exempt from liability as the collision occurred ‘whilst towing’. That phrase is defined in the UK Standard Conditions as follows:

The expression ‘whilst towing’ shall cover the period commencing when the tug … is in a position to receive orders direct from the Hirer’s to commence pushing, holding, moving, escorting, or guiding the vessel or to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner… (the Definition)

The Defendant relied on the fact that the collision occurred while the Tug was in the course of moving in response to the pilot’s direction, and that as such it was in the course of carrying out orders at the time of the steering failure. The Plaintiff claimed the Tug was not at that time ready to receive orders such that would fall within the Definition.

His Honour conducted a review of the case law concerning the phrase ‘whilst towing’. In essence it depended on whether the pilot’s order requiring the Tug to move to starboard of the Ship was of such a nature that it was part of the towing process or merely preparatory. He drew considerable support from Herring CJ in Australiasian Steamships Pty Ltd v Koninklijke-Java-China Lynen who said:

The orders that a tug is to be in a position to receive are orders which can only be carried out when the tug is in a state of readiness, and this means both correctly positioned so far as the vessel is concerned and with everything ready on the tug itself to pick up the necessary ropes or lines…

and from Simon Rainey’s text The Law of Tug and Tow:

The towage service is to commence… when the tug, in all practical respects, is alongside and at the disposal of the tow… the epithet “direct” signifies the close proximity and immediacy of preparation between tug and tow… such, realistically and commercially, is when the towage service in fact begins.

His Honour concluded that the order given by the pilot was a general order, not a specific order as contemplated in the definition. The true question was whether at any time after that general order was given and before the steering failure, the Tug was in fact in a position to receive orders direct from the Ship to commence pushing, holding, moving escorting or guiding it or to pick up ropes or lines. His Honour concluded that the Tug was not in the requisite position to respond to any of the specific orders referred to in the definition. It was manoeuvring to put itself in that position but had not yet reached it at the time when the steering failed. From that point on, it was not in a position to receive orders direct from the Ship in due to the failure. As a result, the Defendant would not have been entitled to rely on the exemption clause, even if it had not been rendered void by the operation of the TPA.
Comment

As yet it is not clear if the Defendant plans to appeal the decision. Regardless of any appeal, towage operators and their advisors should now consider rewriting their standard terms to comply with the TPA and, in particular, to take advantage of s68A. 31 By doing so, a towage operator can reduce their likelihood of being liable for the full amount of the loss. 32 A towage operator could effectively limit its liability for damage arising from negligence to the invoice cost of the service in question. In the PNSL case, that would have been the difference between A$12,500 (plus interest) and approximately A$306,000. 33

31 'SECT 68A
Limitation of liability for breach of certain conditions or warranties

(1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty… to:
(a) in the case of goods, any one or more of the following:…
(b) in the case of services:
(i) the supplying of the services again; or
(ii) the payment of the cost of having the services supplied again….’

32 Subject to any right to limit liability under the Limitation of Liability for Maritime Claims Act 1989(Cth).
33 Being the approximate value of 167,000 SDRs as at 20 April 2007.
4.3 Significant Developments

4.3.1 Appeal in *Koumala* case

The towage operators Dalrymple Marine Services Pty Ltd (Dalrymple) appealed from the first instance decision of Helman J noted in 4.2 above. The appeal was on 2 primary grounds –

- first, that the collision occurred ‘whilst towing’ (in which case an exclusion clause in the contract would apply) and
- secondly, that the towage contract was caught by the exception in s74(3), such that s74 did not neutralise the contractual exclusion (the TPA issue).

The Supreme Court of Queensland - Court of Appeal handed down its decision dismissing the appeal on 30 November 2007.¹¹⁰ Only the TPA issue need concern us here.

S74 (3) exempts certain contracts from the scope of s74:

\[S74(3)\] A reference in this section to services does not include a reference to services that are, or are to be, provided granted or conferred under:

(a) a contract for or in relation to the transportation... of goods for the purposes of a business...

Dalrymple argued that this subsection was triggered in one of two ways – either because the towage contract facilitated the transportation of coal which the vessel was about to load, or that the towage contract was itself a contract for the transportation of goods, as the definition of ‘goods’ in s4 of TPA

includes a ship. The Court of Appeal rejected Dalrymple’s arguments unanimously, finding no error in the trial judge’s findings in this regard.

Briefly disposing of the first argument, the Court found that the contract was not a contract to transport, carry or take the ship from one place to another. It was for the purpose of guiding the ship to its berth under its master and on the pilot’s advice. The key to the operation of s74(3) was to identify the purpose of the contract. Here the contract could not be said to be ‘for’ the purpose of transporting the coal (although the towage contract was a necessary prerequisite for loading the coal). The contract:

concerns a service to be rendered to the ship itself without regard to whether the ship is laden or unladen, and without regard to the identity, characteristics or movement of any goods. Nor can the ‘purpose of the business for whom the [coal is] transported’ be relevant to a contract of towage. Such purposes and the identity of the relevant business are not matters of concern to the tug owner.

Justices Williams and Muir both cited the dicta of the Full Court of the Federal Court in Braverus Maritime Inc v Port Kembla Coal Terminal Ltd v Anor, (Braverus), that had been similarly relied on by the trial judge in Koumala.

In the Braverus case, already discussed, the Full Court of the Federal Court decided that there was no relevant contract for pilotage onto which the warranty in s74 could be grafted.

\[\text{\footnotesize{\begin{enumerate}
\item[112]} Ibid. Muir JA, [81], with whom Daubney J concurred. Williams JA did not deal with this argument expressly.
\item[113]} Ibid. Williams JA at [33]; [80] – [83].
\item[114]} Ibid. Muir JA at [83]. A similar point was made in the article reproduced in 4.1 above at text accompanying fn 16.
\item[115]} (2005) 148 FCR 68. It has been discussed already in the context of carriage of goods by sea (see 2.2.2 above), and is discussed below at 4.3.2.
\item[116]} As discussed in the article at 4.2 above, at text accompanying fn 19.
\end{enumerate}}\]
Nonetheless, dicta made it clear that had there been a contract, subsection 3 would not exempt it from the operation of the warranty. A contract for pilotage would not be a contract ‘in relation to transportation of goods’:

Was it a contract in relation to the transportation of goods for the purposes identified by the subsection? We think not. The purpose of s 74(3) was to ensure that the well-known law governing transportation of goods (by air, land or sea) and storage of goods was not to be radically amended by s 74, in particular given the well established insurance arrangements in respect thereof: Explanatory Memorandum accompanying Trade Practices Revision Bill 1986 at para 153; see Heydon JD Trade Practices Law Vol 2 at para 16.850. With that purpose understood, there is no relevant relationship between the contract to provide the services and the transportation of goods. It could be no more said that a contract to provide pilotage services related to the transportation of goods because it was a necessary precondition to get the ship to the berth, than it could be said that a contract to repair the ship before sailing related to the transportation of goods because, without the repairs, the ship would not sail.119

While this view of ss3 awaits the imprimatur of the High Court, the Full Court’s interpretation was approved and applied in the Koumala case.

With respect, the Koumala decisions, both of the trial judge and the Court of Appeal, seem right. In keeping with its role as an exception to the warranty, subsection 3 ought to be interpreted, not broadly, but in such a way that it does not thwart the intentions of s74 and the TPA more generally. While one hesitates to call this a ‘narrow’ reading of the subsection, it is a realistic interpretation of the intended reach of a provision, given the legislative history of s74. Dalrymple has lodged an application for special leave to appeal to the High Court, due to be held in the coming months.120 That application should see the appropriate reach of this exception settled - finally. In the meantime, towage operators, and other maritime service industries in Australia, would be forgiven for holding their breath.

117 Above at n 111.
118 (2005) 148 FCR 68 [192].
119 Ibid, [195].
120 As at the date of writing, no date for the hearing has been set but it is expected to be heard sometime in June 2008.** see end of chapter for update.
4.3.2 Other maritime services caught by s74 – the way forward

This Chapter deals with towage services as a particular manifestation of the application of s74 to maritime services contracts in Australia. Towage contracts, in the writer’s view, provide a good example of the type of maritime services industry that is less than likely to escape the TPA provisions, but which could protect itself against those provisions reasonably easily – by including in their contracts a limitation clause which fits s68A. At this moment in time, the approach of the towage industry still appears to be to thrust their collective heads in the sand. If the High Court affirms the lower court judgments, as it should, then perhaps then the towage companies will finally consider a small rewrite of their conditions in order to better protect their business.

Other ancillary maritime industries will also be caught by s74, subject to their ability to rely on the subsection 3 exception. Given that the contract needs to be ‘in relation to’ transportation, probably the industry with the strongest argument to fall within that exception would be stevedores. They are directly involved with the loading and unloading of goods on vessels which have, or are about to, transport them. It would satisfy, it seems, the nexus required by Muir JA when, to paraphrase His

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121 For the reasons set out at p 60 of the article reproduced in 4.1 above; and at least while the TPA provisions are in their current form.

122 When the original paper was written, many towage operators set out their conditions on their website. That practice appears to be the exception rather than the rule; rarely can one locate a reference to towage conditions on the websites of either the major towage companies (such as Australian Maritime Services: http://www.ams2000.com.au/main-nb.htm Adsteam, now taken over by Svitzer http://www.svitzer.com/Frontpage ) or ports - for instance, Geelong, Melbourne, Fremantle, Brisbane ( as at 18 March 2008)

123 Alternatively they could lobby either Federal or State Government as outlined in the previous paragraph.
Honour, he stipulated that the service would relate to transport of goods if it had regard to whether the ship is unladen or laden, and to the identity, characteristics and movement of the goods.\textsuperscript{124}

Whatever the decision of the High Court,\textsuperscript{125} if Federal Parliament disagrees with it, amending subsection 3 is a possibility. For instance, an amendment could extend the exception to ancillary services, preferably by specifying the types of contracts it means to cover: such as towage, or stevedoring. Specifying the types of contracts would leave less room for argument, because extending the exception using general words such as ‘ancillary contracts’ would lead to greater uncertainty. But it would also create the need to limit the ambit of the subsection – for instance, should contracts for ship repairs be included? What about provider contracts?

A far less satisfactory method of negating the \textit{Koumala} case might occur via the newly presented route of s74(2A). This subsection was introduced in the previous chapter.\textsuperscript{126} If a State Government could be persuaded to legislate a right to limit or exclude liability for towage operators, then that would override the s74 warranty. However, this is hardly a route to be encouraged; better a considered amendment at Federal level than a piecemeal approach at a State and Territorial level.

While amending s74(3) would be a possibility so as to better protect the ancillary maritime service industries,\textsuperscript{127} it is the writer’s view there is no good reason to exempt Australian maritime service operators, contracting in Australia for the provision of services within Australia, from the operation of s74 – particularly when they can escape liability easily with a well constructed limitation clause.

\begin{flushright}
\textsuperscript{124} (2005) 148 FCR 68, [83].
\textsuperscript{125} Either by dismissing the application for special leave to appeal, or upon hearing the appeal.
\textsuperscript{126} See 3.2.4 above.
\textsuperscript{127} Assuming for a moment that the High Court confirms the lower decisions in \textit{Koumala}.
\end{flushright}
4.3.3 Personal injury reforms and contracts for maritime services

As we saw in chapter 3, the new s68B seeks to deny a claimant the right to rely on s74 for a damages claim as a result of personal injuries or death – but this is only in the context of recreational services. As such, the provision will not apply to towage contracts or other maritime services contracts. It is unlikely that the person killed or injured will be a party to the towage contract itself and trigger s74 in his or her own right. However, s74 may still be relevant to any action establishing liability for the accident as between, for instance, the wrongdoer, the injured party and his or her employer.

The following chapter will look at the particular difficulties facing an Australian litigant who wishes to rely on the TPA in the face of a contractual provision which either stipulates that another law applies, obliges litigation to take place in the exclusive jurisdiction of an overseas court, or requires the parties to undertake arbitration overseas.

** since submission of this thesis, the High Court of Australia has refused special leave to appeal.

Chapter Five

TPA - A lion in its own backyard but a toothless tiger overseas? Conflict of laws implications of TPA in maritime law.
Maritime law and the TPA as a “mandatory statute” in Australia and England: Confusion and consternation?

Kate Lewins*

This article is concerned with the clash between party autonomy in contracts and mandatory rules of a State in the context of maritime law. Where litigation takes place in Australia, the Trade Practices Act (TPA), as a mandatory law of the forum, applies to the contract. However, in many transnational contracts involving Australian parties, the parties have agreed that the law of a different country is to govern their contract or granted a non-Australian court exclusive jurisdiction over any disputes. Alternatively they may have agreed to submit disputes to arbitration outside Australia. Commonly the parties choose English Courts or London Arbitration. In doing so, the parties have exercised a choice, which, if permitted to operate, will take their contract out of the reach of the mandatory law of Australia. How do Australian and English courts treat this apparent clash of policies and what is the consequence for contractual parties who find themselves litigating a jurisdictional dispute both in Australia and England?

The Trade Practices Act 1974 (TPA) constitutes arguably the most significant reform of the commercial law of Australia. Its so-called consumer protection provisions are a misnomer – they extend well beyond mere consumers thanks to a wide definition of consumer in the Act itself, and the Courts’ expansive interpretation of its substantive provisions.1 Significantly, the Act also provides for extraterritorial application in certain circumstances.2 A proper awareness of the scope and impact of the TPA is imperative when doing business in Australia, whether with or by Australians.

It is trite to say that the commercial sector is now more multinational than ever. It is commonplace for large-scale commercial transactions to involve overseas parties and performance in a number of countries. In particular, much of Australia’s economy is geared to international trade – both international sales contracts and international contracts for the carriage of goods. It is clear that

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1 See Miller at [1.52.45]: For instance, in Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191, the HCA decided that s 52 did not apply only to litigation by consumers but could be used by trade competitors in the context of challenging representations in advertising; in Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594, the HCA held that the person misled need not be a member of the public to be misled. Initially, private contracts were held to be outside the purview of s 52: Westham Dredging Co Pty Ltd v Woodside Petroleum Development Pty Ltd (1983) 66 FLR 14 (FCA); but by 1985, the FCAFC held otherwise: Bevanere Pty Ltd v Lubidineuse (1985) 59 ALR 334.

2 See Pt II of this paper.
the TPA can have an impact in this realm, although it is probably the case that the exact extent of its influence is yet to be established. For instance, there have been several maritime cases where the TPA has, in the end result, added little to the more traditional analysis of liability. Nevertheless, the TPA remains a force to be reckoned with insofar as litigation conducted in Australia is concerned.

The TPA is one of the few Australian statutes concerning commercial matters that are regarded as being “mandatory rules” of Australia. The other Commonwealth Acts are the Insurance Contracts Act 1984 (Cth) (ICA) and the Carriage of Goods by Sea Act 1991 (Cth) (Australian COGSA). The Australian Parliament has attempted to enshrine the mandatory status of each by differently-worded provisions designed to overcome contractual attempts to avoid them.

Commonly, parties to a contract will insert clauses as to applicable law, exclusive jurisdiction and submission to arbitration, and such clauses will usually be upheld by the courts – both in Australia and abroad. It is an accepted tenet of international commerce that the terms to which the parties have agreed are of utmost importance – this is the notion of party autonomy. Exclusive jurisdiction clauses have been described by Bell as “anticipatory forum shopping” – where the shopping is done in advance – although with the notable difference being that the exclusive jurisdiction clause is in fact the result of “consensual stipulation for which … a premium may have been paid by the party who principally benefited by the choice.” The English courts, as primary providers of legal services to international maritime industries, have a distinct interest in upholding the right of parties to choose English law to govern their contracts and English courts to resolve their disputes. To this end, the dictum of Lord Denning is still relevant to many in international trade and carriage:

[Eng] is a good place to shop in, both for the quality of the goods and the speed of the service.

Clearly in many cases of international trade, these clauses as to applicable law, jurisdiction and arbitration may well have been freely negotiated between the parties. However, it is just as likely that the clauses have been presented by one party to the other on a “take it or leave it” basis – so-called “boilerplate” provisions. In a carriage of goods context, the terms are drafted to benefit the carrier, who wishes to ensure, for its convenience, that all suits are brought in one central location.

Not only are the clauses commonly not open for negotiation, it is often the case that the party wishing to sue on the contract did not know of the contents of those clauses prior to shipment. The clause may have been “inherited” by a consignee or indorsee via a sea-carriage document that is only

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3 Examples of cases where the Trade Practices Act 1974 (Cth) has been successfully relied upon include Comalco v Mogal Freight Services (Oceania Trader) (1993) 113 ALR 677 (freight forwarder liable for representations of competency); Woolworths Ltd v APL Co Pte Ltd (2001) NSWSC 662 (carriage of goods); PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v The Owners of the Ship “Koumala” (2007) QSC 101 (towage contract); Olex Focys Pty Ltd v Skodalexport Co Ltd (1988) J VR 380 (bank guarantee).


5 Nygh p 202; Mortensen RG, Private International Law in Australia (LexisNexis Butterworths, 2006) at [15.12]. There are also some examples of mandatory statutes to be found in the State statute books – such as the Contracts Review Act 1980 (NSW). This paper is primarily concerned with Commonwealth legislation.

6 As we shall see, however, express provisions in the Trade Practices Act 1974 (Cth) apply only to s 74 and not to s 52.


8 Bell A, n 7, at 53-54.


11 Although Von Ziegler argues that transport law should not be tasked with the responsibility of seeing that the consignee is informed of exclusive jurisdiction clauses, the consignee is able to require the seller to negotiate transportation to its liking, so long as it is prepared to pay the inevitably higher freight rate that would result: Von Zeigler A, “Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea” (Ch 3) in Davies M (ed), Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force (Kluwer Law International, 2005) 85 at 115-116.

12 Although the consignee/indorsee is taken to know that such clauses exist.
seen after the goods have been loaded on board the ship;\(^\text{13}\) it may have been incorporated in a sea carriage document issued pursuant to a charterparty, where the exact terms of the charterparty are not made available; or it may have been included in a contract that the original carrier of the goods entered with a sub-bailee. In those cases,\(^\text{14}\) cargo interests will nevertheless be bound by the standard form of the carrier. In England the courts make no legal distinction between the situation where both parties actively negotiate such a clause as opposed to when the clause is imposed on a consignee by reason of a small printed clause not known or brought to its attention beforehand. Indeed, a number of legal devices have been employed to bind a consignee or indorsee to the terms of the carrier’s contract without any direct or actual knowledge of the terms of the sea carriage document;\(^\text{15}\) and there is no concern that such contracts might be what are called “contracts of adhesion” in other countries.\(^\text{16}\) In the main, Australia also adopts the convenient compendium of legal devices developed in English law.\(^\text{17}\)

In any event, most consignees are regular parties to contracts of international trade, who insure their risks and knowingly take on the vagaries of the trade such as the likely inclusion of an exclusive jurisdiction or arbitration clause.\(^\text{18}\) Nonetheless, these issues are not the focus of this article; rather, the assumption is that the particular contractual clause in question has been incorporated in the contract and is enforceable.

The area dealt with by this article is where the notions of mandatory law and party autonomy collide. To what extent can the parties sidestep the Australian mandatory law by the simple expedient of a contractual term choosing the law or jurisdiction of another place?\(^\text{19}\) Or put another way, can the Australian legislature expect courts of other countries to, in effect, defer to Australian mandatory law rather than uphold the notion of party autonomy?

This article will examine the tension between the parties’ right to select the law and court applicable to their contract, and the mandatory laws of a State (in this case Australia) in an international maritime law context. Given the dominance of the English jurisdiction in the area of maritime dispute resolution, the attitude of Australian and English courts will be explored in the context of relevant clauses in the contract and conflict of laws principles. Because the question of jurisdiction often also decides the question as to applicable law\(^\text{20}\) or even the outcome of the dispute,\(^\text{21}\) the article will concentrate on the jurisdicitional dispute – namely, which country’s claim to jurisdiction over a particular dispute should be paramount; and in what circumstances an arbitration

\(^\text{13}\) While it might be said by some that the consignee, as the buyer in a sales contract, has the power to insist that its seller negotiate a more favourable choice clause, it would be extremely unlikely in practice for a buyer to do so, or a seller to agree to it.

\(^\text{14}\) However, in the context of sub-bailement on terms, we are still awaiting the authoritative acceptance of the doctrine for Australia from the High Court.

\(^\text{15}\) The various devices include the deeming of contracting on usual terms; the use of Himalaya and circular indemnity clauses and the doctrine of sub-bailement on terms (which has not yet been authoritatively accepted for Australia by the HCA).


\(^\text{18}\) *Akai Pty Ltd v The People’s Insurance Co Ltd* (1996) 188 CLR 418. For example, where the Australian party and Singapore party could not agree on which of their laws would apply and therefore selected the law of England. The Akai decision will be discussed in Pt II of this paper.

\(^\text{19}\) *Akai Pty Ltd v The People’s Insurance Co Ltd* (1996) 188 CLR 418.

\(^\text{20}\) See Dicey, Morris and Collins at 1-004.

\(^\text{21}\) This was the result of a survey conducted in the United States of cases which had undergone a jurisdictional challenge based on an exclusive jurisdiction clause. The survey found that enforcement of a forum selection clause by the United States courts
clause will operate to remove a claim from the jurisdiction of a court. Pt I of this article outlines the relevant clashing policies: party autonomy and mandatory rules. Pt II considers the Australian manifestation of mandatory rules, namely the TPA provisions before considering how the Australian and English courts have dealt with the clashing principles in the skirmish for jurisdiction. That Pt concludes that, with one important exception, the courts in Australia and England currently approach such a scenario in such a way that each considers they have a superior right to deal with the dispute. As such, the outcome may well be dictated by an unseemly race to court for pre-emptive relief against the other party. Pt III discusses the ramifications of this state of affairs, and the various options open to Australian policymakers and Australian litigants.

**PART I**

**If contract is silent as to law and jurisdiction – default position**

This article addresses situations where a contract contains clauses agreeing on proper law, exclusive jurisdiction clauses or an arbitration clause. Those clauses alter the enquiry that the courts would otherwise make to establish proper law and appropriate jurisdiction. Nevertheless, many of the concepts are similar. Therefore it is as well to outline the position where there is a dispute between contracting parties in different countries, whose agreement contains no express terms as to law, jurisdiction or arbitration.

Plaintiffs have “first mover” advantage… there is nothing neutral about the choice of jurisdiction by a plaintiff… motivations for choosing a venue vary: some are perfectly legitimate and some offend any objective test of the purposes of the administration of justice…in between such cases of legitimate and illegitimate motivation is a wide range of advantages and disadvantages in the litigation process about which different opinions can be held. This includes…[amongst other factors] the existence of “mandatory rules” under local statutes, which provide causes of action or procedural advantage unique to a particular jurisdiction.

Where the contract does not stipulate a preferred jurisdiction or governing law, the party who has suffered loss will commence litigation in the forum of their choosing; it might be, for example, the forum with a suitable connection to the defendant, the breach of the contract, or where the loss was suffered.

The plaintiff’s selected forum is assessed as a question of jurisdiction of the court in question; in Australia and England, this is contained in the Rules of Court. As Australia’s civil procedure rules are derived from those of England, historically these provisions have been very similar. No leave is required to commence proceedings against a defendant based in the territory of the court in which the plaintiff commences proceedings (the forum court). However, if the plaintiff has to serve proceedings

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22 As questions of choice of law can be relevant to that enquiry, so choice of law provisions will be explained and dealt with where relevant.


25 The forum non conveniens test no longer applies in England to matters involving parties within the European Union (EU) due to the operation of the 1968 Brussels Convention (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), since replaced by the Brussels Regulation, European Council Regulation 44/2001 as found in the United Kingdom (UK) Civil Jurisdiction and Judgments Act 1992 (Brussels Regulation). There is a parallel provision which regulates jurisdictional matters between EU countries and three non-EU countries, Switzerland, Norway and Iceland– the Lugano Convention 1989, which is due to be replaced by a new version agreed at the end of 2007. See Nygh and Davies at 7.14 fn 56; Dicey and Morris at 391-395.

26 Although the United Kingdom has now codified its Rules in the Civil Procedure Rules, see r 6.20.
on a defendant who is outside the forum court’s territory, then at some early stage of proceedings the plaintiff must satisfy the court that its jurisdiction has been properly invoked – in other words, that the court is the appropriate forum because prima facie the required connection between the court and the defendant exists.

Disputing the plaintiff’s choice of jurisdiction

As the above quotation from Spigelman CJ shows, the plaintiff (and their advisers) will be influenced by a range of factors in selecting a venue. In particular, if a plaintiff has grounds to allege a breach of the provisions of the TPA then the plaintiff’s lawyers will advise that proceedings are best commenced in Australia because, if the TPA is applicable, the courts in Australia are obliged to enforce it.

Assuming the court does grant leave to serve the defendant, the defendant can dispute the plaintiff’s choice of jurisdiction by application to the court for a stay on forum non conveniens grounds. The test is different in England and Australia. In England, and the many other countries who have adopted it Spiliada Maritime Corp v Consulex Ltd [1987] 1 AC 460 dictates that the test is whether there is a “more appropriate court” than the English court to hear the dispute. The court looks for the forum with which the action has the most real and substantial connection, considering a range of factors. These factors include convenience and expense of proceedings, availability of witnesses, law governing the relevant transaction, and the places where the parties reside or carry on business. If there is no “more appropriate” forum than England, the courts will refuse a stay. If there is a forum that is prima facie more appropriate, then the court will normally grant a stay unless there were circumstances militating against a stay, such as if the plaintiff would not obtain justice – or would lose some juridical advantage – in the foreign jurisdiction.

In Australia, to the regret of many the enquiry is different. The case of Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 (Voth) determined that the test for Australia is whether the Australian court is a “clearly inappropriate” forum; again looking at a range of factors. The same factors cited in Spiliada will be relevant to that enquiry. Because of the requirement that the Australian court must be clearly inappropriate, a stay is less likely to be granted under the Australian test. If a plaintiff in Australian proceedings is seeking relief under the TPA then it will more easily rebuff a forum non conveniens stay application by a defendant. The plaintiff can assert that it would be at a “juridical disadvantage” if the action proceeded elsewhere as it would probably be deprived of its...
cause of action under the TPA. In Australia, then, the assertion of a TPA cause of action will mean it is more likely that the stay will be refused and litigation will be permitted to continue in Australia.

Where proceedings are on foot in one country and the defendant has applied for a stay of those proceedings on forum non conveniens grounds, a court in the second country is unlikely to get involved on the basis of lis alibi pendens. If the defendant does commence proceedings in the second country, the defendant in that case (plaintiff in the first country) can seek a stay in that foreign action until the courts have played out the jurisdictional point in the first country. If the case does have a stronger connection with the first country, then the forum non conveniens analysis should lead to the stay in the second country in all but the most finely weighted cases. However, this is where the differences in tests between Australia and England might lead to an “unseemly clash of jurisdictions”. Although such a result might occur anyway, because of the judicial discretion in weighing the factors to be considered, the differences in tests increases the likelihood of inconsistent results. In the abstract at least, one would hope that respect between judicial authorities in different countries, so-called “judicial comity”, would ensure that such a stay is granted in all but the most difficult cases.

As between the European Union (EU) States, the likelihood of such an unseemly disagreement between the courts has been reduced by the provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention). It provides that the first court seized of the matter is left to resolve the jurisdiction point without interference from any other court from which the other party has sought assistance, although this formulation has not been free from criticism.

### Applicable law

If it is unsuccessful in obtaining a stay on forum non conveniens grounds, the defendant may nonetheless assert, as a matter of substance, that a foreign law, not the law of the forum court law, is the proper law of the contract. Determining the proper law of the contract, where the intention of the parties cannot be ascertained, is a question of establishing the country with the “closest and most real” connection with the contract. This would require pleading the foreign law and proving the law, and its effect, at trial. If the forum court concludes that the foreign law is the proper law of the contract, then it will apply it – but unless the parties bring evidence as to the content of the foreign law, the court will assume that the foreign law is the same as the forum law.

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36 Dicey and Morris, r 33 at 395.

37 For instance, if the would-be plaintiff in England can establish that there is some personal or juridical advantage in the English action only available in England and that is of such importance that it would cause injustice for him to be deprived of it: Dicey and Morris at 395. We are assuming, in this section, that there are no contractual choice of law/jurisdiction clauses.

38 Nygh and Davies at [7.18].

39 One such extreme case involves just the scenario this paper considers – where one court claims its entitlement to hear a matter based on application of its mandatory statute, and the other claims an entitlement based on a contractual clause agreed by the parties. This is dealt with further in due course.

40 See discussions at “Concept of Party Autonomy” in Pt I and “The Way Forward: a More Digestible Stew?” in Pt III of this paper.

41 Even where there is an exclusive jurisdiction clause in favour of the second court, the second court must await the decision of the first court. Further, it has now been established by the European Court of Justice that the second court is not to issue an anti-suit injunction where the Brussels Convention applies – Turner v Grovit [2005] 1 AC 101. No such restriction exists as between an EU country and a country outside the EU, such as Australia.

42 Dicey, Morris and Collins (14th ed, 32-005, p 1539). The EU Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention) refers to the country to which the contract is most closely connected: see Art 4.

43 If the plaintiff was alleging a breach of s 74 of the Trade Practices Act, it can assert that the objective proper law is not Australian law. That will mean it escapes from s 74 by reason of s 67. However, if the claim against it is based on s 52, this argument will be of no assistance. If s 52 applies to the case (because there has been misleading or deceptive conduct either in
We move on now to see how the agreement to certain contractual terms can complicate this default position. We will see that the key difference, where the parties have agreed on some relevant express term, or there is a likelihood of a mandatory law applying to the facts, is that a court is much more willing to get involved: making the “unseemly clash” a near certainty.

**Important concepts in the debate – party choice and mandatory rules**

There are two important “principles” at work when a dispute between parties includes a term of the contract specifying a particular law or jurisdiction, or resolution by arbitration, but the effect of that clause clashes with a statute upon which one of the parties wishes to rely. The first principle is party autonomy, the cornerstone of freedom of contract. The second important principle is the concept that some rules (often in statutes) are to be regarded as being of such importance that the wishes of the parties will be subservient to them. This is the principle of mandatory rules. Of particular relevance is the reach of those rules beyond the territory of their own country, in circumstances where the subject matter of the dispute is transnational.

Both of these principles are briefly outlined below.\(^{44}\)

**Concept of Party Autonomy**

It is a critical premise of contract law that parties be free to enter arrangements as they wish and be entitled to have their “legitimate expectations” of the bargain upheld by the courts. This is the concept of party autonomy – or to put it another way, the “sanctity of the contractual bargain”,\(^{45}\) which has had a chequered history outside of Europe\(^{46}\) and Anglo-Australian law\(^{47}\) but

… has now almost universal support. It is the cornerstone of the *Rome Convention*\(^{48}\) and the ALRC has recommended that the parties’ right to choose the law governing their contract should be upheld.\(^{49}\)

Examples of the manifestation of party autonomy include clauses in the contract stipulating that:

- the law of a certain country is to apply to the contract (choice of law clause);
- litigation should take place in a particular country (exclusive jurisdiction clause); and/or
- the parties will submit any dispute to arbitration, usually with a stipulation as to where the arbitration should take place (arbitration clause).

Commonly, a contract will contain more than one of these clauses – for instance, a choice of law and arbitration clause, or a choice of law clause coupled with an exclusive jurisdiction clause. In particular, the parties’ choice of law or jurisdiction can have a very real bearing on the outcome of a dispute:

[such] clauses are inserted in international commercial contracts not simply for “neatness” and “certainty” but also as an important function of transactional negotiation.[they] go to the value of the contract in question to either party.\(^{50}\)

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\(^{44}\) Discussion in greater detail can be found in the authoritative texts in the area of conflict of laws as regards contractual obligations – see, for instance, Dicey and Morris, Cheshire and North, Nygh and Davies, Nygh etc.

\(^{45}\) Per Waller J in *Phillip Alexander Securities & Futures Ltd v Bamberger* [1996] CLC 1757 at 1778.


\(^{47}\) See Dicey Morris and Collins at 32-063 (p 1561) where it is explained that the United States will uphold party autonomy so long as important policies of the law which would otherwise be applicable, are not avoided. This seems to suggest that arguments based on mandatory laws otherwise applicable may fare better in the United States than in England, and is considered further at ‘Mandatory Rules of a Third Closely Connected’ Country (Other Than the Forum or Chosen Law)” in Pt I of this paper.


\(^{49}\) Nygh and Davies at 19.1.

\(^{50}\) Bell A, n 7, at 57.
Generally the courts, both in Australia and abroad, are keen to keep the parties to their contract. To do so aids certainty, and keeps down transaction costs. Further, Anglo-Australian law does not require any connection between the territory of the contract and the chosen law or venue of litigation. The choice of a “neutral” venue will be upheld by the courts.\(^1\) Where the parties have actively negotiated the clause, the courts talk of “keeping the parties to their bargain”. In the leading English case of *Vita Food Products Inc v Unus Shipping Co Ltd*\(^2\) Lord Wright said:

Where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.\(^3\)

As already mentioned,\(^4\) even if the clause has not been freely negotiated, but rather imposed by one party upon the other, in a so-called “boilerplate provision” in standard set of terms and conditions, the courts, particularly the English courts, will uphold the enforceability of the clause. What is more, prior to the abolition of privity in England,\(^5\) the English courts had developed doctrines circumventing privity issues in order to allow a carrier to enforce such a term against third parties to the contract – such as the doctrine of sub-bailment on terms, which was given new life in the *Pioneer Container* case. The Privy Council held that the exclusive jurisdiction clause bound the cargo claimants, despite the fact that they were not parties to the contract, because they had authorised the contractual carrier to subcontract “on any terms”. Lord Goff, at the opening of the Council’s judgment, set the tenor for what was to come:

[We] think it right to observe, at the outset, that in commercial terms it would be most inconvenient if these two groups of plaintiffs were not so bound [by the exclusive jurisdiction clause]. Here is a ship upon which goods are loaded in a large number of containers… one incident may affect goods owned by several cargo owners, or even (as here) all the cargo owners with goods on board. Commonsense and practical convenience combine to demand that all these claims should be dealt with in one jurisdiction, in accordance with one system of law. If this cannot be achieved, there may be chaos...It is scarcely surprising therefore that shipowners seek to impose an exclusive jurisdiction and an agreed governing law, as in the present cl. 26 in the shipowners’ standard bill of lading. Within reason, such an attempt must be regarded with a considerable degree of sympathy and understanding.\(^6\)

The cargo owners’ proceedings in Hong Kong were stayed, as there was not “sufficiently strong grounds” to exercise the discretion to ignore the clause, and because they had not issued proceedings in the contracted jurisdiction of Taiwan within time, their claims were time-barred.

Examined under the previous heading is the “default” situation where no clause as to jurisdiction/choice of law or arbitration is inserted. We saw that if the defendant wishes to dispute the plaintiff’s preferred forum then the issue becomes, on a jurisdictional point, whether the court in which the plaintiff has commenced proceedings is forum non conveniens (using the different tests adopted in Australia and England.) The onus is on the defendant, being the party bringing the application, to “show cause” why the court ought to stay the proceedings before it. One relevant factor will be where the parties have chosen a different law to apply. However, if the parties have included an exclusive jurisdiction clause,\(^7\) then the courts of Australia and England will uphold the contract and

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\(^1\) *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 290. The facts of the case are outlined in “Domestic Mandatory Laws of a Foreign Country with Close Connection to the Contract vs Party Choice for Forum Court?” in Pt II of this paper.

\(^2\) *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 290.

\(^3\) *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 290.

\(^4\) See text accompanying nn 15-17 above.

\(^5\) Privity was subsequently abolished in England by the *Contracts (Rights of Third Parties) Act 1999*, which has no equivalent in Australia.

\(^6\) *The Pioneer Container; KH Enterprise* [1994] 2 All ER 250 at 255. It is interesting to note that Lord Goff then goes on to note the “technical problem” raised by the English privity of contract, and the ability of bailment to “circumvent this difficulty”. England now has the *Contracts (Rights of Third Parties) Act 1999*.

\(^7\) If the clause is non-exclusive, Garnett (above n 32, at 62) says that the general test of *Voth* is to be used, citing *Contractors Ltd v MTE Control Gear Ltd* [1964] SASR 47.
issue appropriate relief – unless the party in breach can show “strong reasons” as to why the court should exercise its discretion not to uphold the contract. What constitutes “strong reasons” will be discussed below in the context of exclusive jurisdiction clauses. Alternatively, where the parties have agreed on arbitration of their disputes, then the typical effect of the United Nations Convention on the Recognition of Foreign Arbitral Awards entered into in New York 1958 (New York Convention) is to compel courts of signatory States to stay legal proceedings before them in favour of arbitration as contracted.

The party seeking to enforce the contractual term will either apply for a stay of the litigation in breach of the contract, or will seek what has become known as an “anti-suit injunction” in the jurisdiction specified in the contract. That injunction restrains the errant party from commencing proceedings elsewhere in breach of either the exclusive jurisdiction clause or the arbitration agreement. If the litigation before the court itself has been commenced in breach, that court should protect party autonomy by staying its own proceedings in favour of the contracted forum. There is an important distinction between a court ordering a stay of proceedings, or an anti-suit injunction. A stay, issued by a court over its own proceedings, is an “act of self denial”. However, the anti-suit seeks to control litigation in another jurisdiction, is an “act of self elevation in spite of another forum” on the part of the court issuing the injunction. For example, if the parties have agreed in their contract to commence proceedings in England, but party A commences proceedings in Australia, an application by party B to the Australian court will usually result in the Australian court ordering a stay of its own proceedings. The English court is not imposed upon by the Australian court. However, if party B chooses to enforce the contract in England, then the English courts will most likely issue an anti-suit injunction – which does, at least indirectly, proclaim that the Australian court should not continue albeit through attempting to control A’s behaviour.

While this represents the common law position in Australia and England, for England the treatment of contractual clauses and jurisdictional disputes is subject to certain EU Conventions, which will be outlined below.

**Litigation contrary to exclusive jurisdiction clause**

Tussles over jurisdiction have become more prevalent than choice of law arguments before the courts. Securing as the venue the most beneficial court (whether that benefit comes in the form of the procedural or substantive laws of the plaintiff’s preferred jurisdiction) can be viewed as so crucial that parties will engage in significant litigation to determine the point, leaving the substantive dispute to be

58 In England, the authority is *The Eleftheria* [1970] p 94. In Australia, *Huddart Parker Ltd v Mill Hill* (1950) 81 CLR 502. See Peel E, “Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws” [1998] LMCLQ 182 at 190-200 for a discussion of the various elements of the “strong reasons” test and his view that the English courts are less quick to grant a stay of English proceedings in favour of a foreign arbitration clause than they are to grant an anti-suit injunction in favour of an English arbitration clause: at 201. See, for example, Gaskell at 20.218 discussing the *MC Pearl* [1997] 1 Lloyd’s Rep 566 where a Korean exclusive jurisdiction clause was not enforced.


61 Whincop and Keyes at 151-152 (Whincorp).

62 Whincorp, n 61.

63 The anti-suit injunction is a crucial element in this debate and is discussed further throughout this paper. The English courts have continually stressed that an anti-suit injunction does not impinge upon the autonomy of a foreign court and is no way binding upon it, given that the order acts only against the plaintiff in the foreign proceedings. The indirect effect can nevertheless not be doubted.
deal with a long time in the future – or not at all. A US study has shown that the jurisdictional battle can be one from which the plaintiff never recovers, so that it effectively decides the outcome of the case.

Proceedings brought in breach of exclusive jurisdiction clause should be stayed unless there are “strong reasons”

Where there is no (or no effective) exclusive jurisdiction clause, the forum non conveniens test as outlined above applies, with some variation, in Australia and England. However, there is a different test where the parties have agreed to an exclusive jurisdiction clause.

[The test is] of a different order from that required in a case where the plaintiff has simply chosen to sue in one form rather than another, both being available to him. Where proceedings have been brought in a non-contractual forum in breach of such a clause, then the court should stay the proceedings in order for it to be commenced or continued in the contracted forum, in the absence of “strong cause” to the contrary. The basis of the test was outlined by Brandon J in The Eleftheria:

The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue...

64 See, for example, the Akai litigation, and OT Africa litigation discussed in Pt II of this paper.
65 Force R and Davies M, n 17, pp 8-10.
66 One basis upon which an exclusive jurisdiction clause can be attacked is by alleging there was no consent to it. The issue of consent to the terms of a bill of lading in the hands of the consignor is dealt with by common law: Leduc & Co v Ward (1888) 20 QBD 475, Pyrene v Scindia [1954] 2 QB 402 and the position of the consignee/indorsee has been neatly sewn up in Anglo-Australian law by legislation: Carriage of Goods by Sea Act 1992 (UK); Sea Carriage Documents Acts in all Australian States and Territories. However, in other countries, the requirement of consent to such a clause is a very real stumbling block to its enforcement. For an explanation of this, and a survey of American and European attitudes to the validity of such clauses, see Yackee JW, “A Matter of Good Form: the (Downsized) Hague Judgments Convention and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements” [2003] 53 Duke LJ 1178. See also Tetley WT, Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea” published in Davies M (ed), Jurisdiction and Forum Selection Clauses in International Maritime Law—Essays in Honor of Robert Force, (Kluwer Law International, 2005), available online at pp 11-16 http://www.mcgill.ca/files/maritimelaw/jurisdiction.pdf viewed 17 October 2007. Another attack can be made on the basis that the exclusive jurisdiction clause was not properly incorporated into the contract because it was not contained in the bill of lading itself – this is often the case when a bill of lading seeks to incorporate underlying charterparty terms: see Heilbrunn v Lightwood PLC [2007] FCA 1518; for the United States position, see Force R and Davies M, n 17, p 27; and the discussion in Dicey, Morris and Collins at 12-098-099.
67 The English courts do not require the word “exclusive” to be present in order to determine that it is indeed an exclusive jurisdiction clause: see Steel J, “The Modern Maritime Judge – Policeman or Salesman” (2003) 17 MLAANZ J 6 at 15, referring to Sohio Supply Company v Gatoil (USA) Inc [1989] 1 Lloyd’s Rep 588.
68 For a summary of the position as regards the treatment of exclusive jurisdiction clauses in other countries, see Peel E, n 58, at 212.
70 In the United States, the usual order is a dismissal. Martin Davies argues that in fact stays should be sought in that jurisdiction so that the staying court retains a residual jurisdiction. See Davies M, “Forum Selection Clauses in Maritime Cases” (2003) 27 Tul Mar LJ 367 at 382.
71 The Eleftheria (1970) p 94.
in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.\footnote{72}

The “strong cause” or “strong reasons” test has been pronounced time and again in the English courts\footnote{73} and adopted in Australia.\footnote{74} In England there are critics of the test, because it is felt that in fact too much discretion can be given to the court to find a reason to ignore the party’s choice. It is said that the test invites overturning the exclusive jurisdiction clause on grounds that would have been known to the parties at the time of contracting.\footnote{75} Bell and Peel say that court should disregard factors to the extent that parties would have known of them at time of contracting.

In England, the courts have on only rare occasions ignored an exclusive jurisdiction clause in favour of a foreign court, where it considers “strong reasons” have been made out.\footnote{76} Almost invariably, the factor that seems to tip the balance in favour of overlooking the clause is the necessary involvement in the litigation of strangers to the contract. Being strangers to the contract, they cannot be compelled to appear in the contracted forum, and this means there is a likelihood of parallel proceedings in different countries. As the courts have an overall interest in effective justice between the parties to the litigation and prefer all the issues in dispute to be resolved in one place, the involvement of these other parties in related litigation properly brought in a foreign court can constitute strong reasons militating in favour of a stay.\footnote{77} However, in England, the fact that the plaintiff’s action is time-barred in the contracted jurisdiction usually does not constitute “strong reasons” of itself, because failure to protect the time bar by commencing proceedings in the forum court is typically seen as unreasonable on the part of the plaintiff.\footnote{78}

Australian courts have historically been more likely to find “strong reasons” exist, with the result that the plaintiff in Australia is permitted to continue its Australian litigation in breach of the exclusive jurisdiction clause.\footnote{79} This can be said to be consistent with the “homeward” trend exhibited by the High Court in \textit{Voth}. However, in more recent times the Australian courts have been more rigorous in upholding the exclusive jurisdiction clause.\footnote{80} In any event, both the Australian and English courts have been subject to criticism on the grounds of parochialism.\footnote{81}

\textbf{Proceedings can be brought in the stipulated forum to enforce the exclusive jurisdiction clause – anti-suit injunctions.}

\footnote{72} The \textit{Eleftheria} [1970] p 94, at 100.\footnote{73} The \textit{Eleftheria} [1970] p 94; \textit{Donohue v Armco Inc} [2002] 1 Lloyd’s Rep 425.\footnote{74} \textit{Oceanic Sun Line Special Shipping Co Inc v Fay} (1988) 165 CLR 197 per Brennan J, at 259 per Gaudron J and adopted by numerous cases since.\footnote{75} See Peel E, n 58; Bell A, n 7, at 67.\footnote{76} For a relatively recent example, see \textit{Bouygues Offshore SA v Caspian Shipping Co} [1998] 2 Lloyd’s Rep 461 in which the English Court of Appeal chose to discharge an anti-suit injunction preventing litigation in South Africa in breach of an exclusive jurisdiction clause favouring England. The “strong reasons” made out were the necessary involvement of another party not bound by the contract, the proper founding of jurisdiction by the South African Courts as a result of the presence and arrest of the vessel, and the fact that the natural seat of the dispute was South Africa. The court made this finding despite the fact that the limitation regime in England would be more favourable to the defendants than that applicable in South Africa, although decrees had been made as to the defendant’s maximum limitation and the limitation proceedings themselves were not stayed. It was for the South African courts to decide whether or not that decree would be applied: see the judgment of Sir John Knox at [474-475]. See also the article which Evans J referred to in his judgment in Peel E, n 58.\footnote{77} \textit{Donohue v Armco Inc} [2002] 1 Lloyd’s Rep 425; see particularly the cases cited by Lord Bingham at 433-434. The \textit{Donohue case} was relied upon in the Australian case of \textit{Intec Ltd v Alkimos Shipping Corp; Incitec Ltd v Alkimos Shipping Corp} (2004) 206 ALR 558 (Allsop J, FCA) In that case, the court decided not to enforce an exclusive jurisdiction clause in favour of English courts by granting a stay of Australian proceedings because of the involvement of third parties in local proceedings and consequent fragmentation which would occur if the stay was granted.\footnote{78} \textit{The Pioneer Container; KH Enterprise} [1994] 2 All ER 250.\footnote{79} See Garnett R, n 31; also Keyes M, \textit{Jurisdiction in International Litigation} (Federation, 2005) at 159-177.\footnote{80} Garnett R, n 31 at 7; 15; 19.\footnote{81} See n 58 for criticisms of English decisions; Garnett R, n 31 and Keyes M, n 79 for criticisms of Australian decisions.
The wronged party will increasingly turn to the courts in the jurisdiction stipulated in the contract seeking an enforcement order, termed an anti-suit injunction, to prevent a breach of contract that would occur if the other party commenced proceedings elsewhere than the agreed forum. The English courts, particularly in recent times, have been strident in the protection of the contracts entered that have selected England as their forum, even if it might mean treading on the jurisdictional toes of another country. The modern attitude to granting anti-suit injunctions was stated by Millett LJ in The Angelic Grace:

The time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them. (emphasis added)

Initial hesitancy on the part of the English Court of Appeal and some conflict of laws scholars about this more strident approach has been overcome by the House of Lords, with two recent cases citing The Angelic Grace with approval. Australian courts have also embraced The Angelic Grace. The English courts are not prepared to await the finding of the foreign court as to whether they have jurisdiction, for fear that they make what the English court considers to be the wrong decision, and that the interference would be greater at that point should the English courts then try to reclaim jurisdiction. In other words, better a pre-emptive anti-suit, which heads off the errant party at the pass, than a messy wrestle between courts in different countries.

The rise and rise of the anti-suit injunction since then is well documented as are the protestations from courts issuing them that they are not intending to interfere with the sovereignty of the foreign court, but merely restrain the party from commencing or continuing foreign proceedings in breach of its bargain. However, this has only led to the development of the anti-anti-suit injunction, and even the anti-anti-anti-suit injunction as each court attempts to prevent what it perceives as an

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82 Per Millett LJ, The “Angelic Grace” [1995] 1 Lloyd’s Rep 87 at 96. Millett LJ went on to say, “I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause” (at 98). However, the latter has more likelihood of interference with the machinations of a foreign court, while the former does not.

83 See PASF v Bamberger [1996] CLC 1757 at 1789-1790. See also the discussion on this point by Males S, n 60, at 548.

84 Briggs A, “Anti-Suit Injunctions in A Complex World” (Ch 12) in Rose F (ed), Lex Mercatoria: Essays on Commercial Law in Honour of Francis Reynolds (LLP, 2000) p 238. See also the discussion by Peel E, n 58.

85 Donohue v Armino Inc [2002] 1 Lloyd’s Rep 425; West Tankers Inc (Respondents) v RAS Riunione Adriatica di Sicurtà SpA (Appellants) [2007] UKHL 4 (The “Front Comor”). However, in the latter case, despite their Lordships’ view that the English approach was justified, the House of Lords felt compelled to submit to the European Court of Justice the question as to whether the use of an anti-suit injunction to prevent breach of arbitration agreement was consistent with the Brussels Convention. As at the time of writing, that case is pending.


87 See Males S, n 60 at 549.

88 For an example, see the OT Africa litigation discussed in Pt II of this paper.


91 Williams J, n 89, p 5.
abuse of its own jurisdiction. This has led one commentator to muse that there is in theory, no end to the anti-suite,92 and another to refer to the battle of the “duelling anti-suits”.93

Constitution, particularly in Europe,94 about the question of exclusive jurisdiction clauses led to various multilateral attempts to standardise courts’ approaches to exclusive jurisdiction clauses.95 In EU countries, the effect of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels I) and its successor, the Brussels Regulation96 is that the first country seized of the matter is required to consider and decide on jurisdiction, and any other court must stay its own proceedings until the first court has decided, and then respect that decision. This is a more civilian notion, excising the degree of discretion to which the English courts are accustomed. English courts initially took the view that they were not prevented by Brussels I from issuing anti-suits to prevent litigation in other EU States in breach of an exclusive jurisdiction clause. The European Court of Justice (ECJ) ruled otherwise in the case of Turner v Grovit.97 The ECJ stated that concept of “mutual trust” underpins the jurisdictional framework of Brussels I and that concept is paramount.98 However, Australian lawyers should note that, as Brussels I and Brussels Regulation only bind EU States, English courts are free to issue anti-suit injunctions against defendants in non-EU countries such as Australia according to common law principles of conflict of laws.99

**Litigation in different country than choice of law clause**

Parties will often elect which law shall apply to their agreement. The effect of mandatory laws on choice of law provisions will be considered later, but absent such a law, an express choice of law will be enforced by a court in England100 and Australia.101 This is also the effect of the EU Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention), which an English court will apply to any proceedings before it. Under the Rome Convention, a contract shall be governed by the law chosen by the parties.102

Usually such a clause is coupled with an exclusive jurisdiction clause as well, but in some cases the contract will be silent as to forum. A party may then elect to commence proceedings in a court with jurisdiction over the matter according to the usual procedural rules of that Court.103 If the chosen law is different to that of the forum court, the defendant may decide to bring an application for a stay alleging that the more appropriate court would be the court that naturally applies the chosen law. In other words, that if there is an express choice that German law be applicable to the contract, then the case would generally be better heard in the German court rather than an Australian or English court.

92 Briggs A, n 84, p 220.
94 Civil law countries do not seem to have a procedural equivalent to the anti-suite injunction – see Spigelman CJ, n 24 at 324 quoting Kessedjian C, “Dispute Resolution in a Complex Society” (2005) 29 MULR 765 at fn 134.
95 For a comprehensive explanation of the impact of EU jurisdictional conventions on maritime law, see Gaskell at 20C.1.
96 Council Regulation 44/2001 (Brussels Regulation). The Regulation has introduced important changes particularly for enforcement of judgments throughout EU member states. See Blobel F and Spath P, n 89, at 530.
97 Art 6.
99 Dickenson A, n 89, at fn 5.
100 Dicey, Morris and Collins at [32R -061] r 203.
101 Nygh and Davies at [19.2].
102 Art 3.1. The Rome Convention applies to neither jurisdiction clauses nor arbitration clauses. Arbitration clauses are subject to the New York Convention. See also Hague Convention on Choice of Court Agreements 2005 (2005 Convention) discussed in Pt III of this paper.
103 For examples of circumstances where proceedings can be commenced when the defendant is not based in the jurisdiction, see English Rules of Court CPR Pt 6.20, and O 11 of the former Rules of the Supreme Court; O 11 of the Rules of Supreme Court (WA); Rules of Supreme Court (Vic) and Federal Court Rules at O 8, r 2. Of particular note is the ground allowing service where the parties have agreed for the forum to be the court in question.
This is a forum *non conveniens* argument, and the parties’ express choice of law will be one of the factors likely to sway the court towards granting a stay in favour of a court that exercises the law chosen by the parties. Another relevant factor will be where the foreign court may apply its own public policy to defeat a claim based on a contract. As we will see, this was a relevant factor in the English decision in *Akai Pty Ltd v The People’s Insurance Co Ltd* (*Akai*).

Depending on the weight of the other factors, the choice of law clause does not guarantee a stay in a court other than the chosen country. If the court does not stay the proceedings, the action will proceed in that court. In this context, the Australian and English courts will accept evidence as to the effect of foreign law. If none is presented, there is a presumption that the foreign law will be the same as the law of the forum. In other words, it is for the litigants and their lawyers to plead and present evidence of the effect of the foreign law that they agree applies in the case. If the foreign law is repugnant to the forum court, then it will, as a matter of its own public policy, ignore that law.

**Litigation despite agreement to arbitrate**

The most predictable outcome of dispute concerning court jurisdiction is where the plaintiff has commenced proceedings in breach of a submission to arbitration. Both Australia and England have enacted provisions giving effect to the *New York Convention*. The *New York Convention* has been broadly accepted, and ensures countries and their courts enforce the parties’ agreement to arbitrate their disputes. For example, s 7(2) of the *International Arbitration Act 1974* (Cth) (IAA), which gives effect to the *New York Convention*, states:

7 Enforcement of foreign arbitration agreements

(1) …

(2) Subject to this Part, where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration; on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

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104 Which has been outlined above at text accompanying n 29.

105 *Spiliada Maritime Corp v Consulex Ltd* [1987] 1 AC 460. This is also the case with tort cases, to which s 52 claims might be more akin. For instance, in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, four justices of the HCA stated “in deciding whether it has been established that the chosen forum is clearly inappropriate, the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties is a material consideration” (1990) 171 CLR 538 at 566; as quoted by Callinan J in *Regie National Des Usines Renault SA v Zhang* (2002) 210 CLR 491; 187 ALR 1, at 55.

106 *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90. See discussion in Pt II of this paper.

107 Dicey, Morris and Collins at [9-001] Rule 18; Nygh and Davies at 325-327.


109 This is explained further in “Mandatory Rules of the Forum” in Pt I of this paper.

110 Although historically the courts viewed arbitration clauses with suspicion, they now uphold the right of the parties to choose alternative dispute resolution: see Allsop J, “International Commercial Law, Maritime Law and Dispute Resolution: The Place of Australia, New Zealand and the Asia Pacific Region in the Coming Years” (2007) 21 ANZ Mar LJ 1 at 10.

111 Where:

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

(b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;

(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country; this section applies to the agreement.
(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

The English equivalent is s 9 Arbitration Act 1996 (UK):

9 Stay of legal proceedings

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) …

(3) …

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) …

Parties are regarded as free to choose the law applicable to the arbitration clause as well as the law applicable to the agreement as a whole. However, in an assessment of an application for a stay, the forum court will determine the right to a stay based on its own law. Significantly, the English provision does not give an express right to the court to impose conditions on the stay of litigation, while the Australian provision does.

Therefore, the court will stay proceedings if a party to an arbitration agreement seeks such an order and the matter falls within the equivalent to s 7(2). Further, if litigation is commenced in a different country in breach of the arbitration clause, the courts of the stipulated seat of arbitration may issue an anti-suit injunction to keep the errant party to their contract – although this is a product of common law, because the New York Convention gives no right to issue such relief. As arbitration is excluded from the ambit of the Brussels Convention and Brussels Regulation, the English Courts may do so even if the proceedings have been issued in an EU Member State – although there is currently a case pending before the European Court of Justice as to whether the English approach is correct.

In determining whether it should stay proceedings, typical questions involve whether the arbitration clause is broad enough in scope to cover the precise dispute between the parties. This is sometimes called the “engagement issue” – namely, has s 7(2) been engaged so as to lead to a stay. For some time the approach of the courts to contracts containing an arbitration clause, both in England and Australia, was dogged by semantic arguments over the proper construction to be given to arbitration clauses chosen by the parties. In this regard, pre-contractual representations have been contentious, with the courts analysing closely the breadth of expressions such as “arising under”.

112 See Nygh at 76.


114 See Allsop J in Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102 (unreported) at [88].


116 See Kiukiang Chinese Corporation v Lloyd’s of London [2008] 4 All Er 615 at [69].
or “arising out of” the agreement, to determine if they were intended to capture pre-contractual representations. In Australia, pre-contractual representations are fertile ground for s 52 claims and as such TPA claims have brought new focus to these discussions regarding the scope of the arbitration clause.

However, in very recent times, calls have been made in Australia for an end to such semantics:

A liberal approach … ought to be taken [to interpreting an arbitration clause] without any policy attempting to restrict their scope. That is not to say that all arbitration clauses should be given an identically broad meaning. The parties… are free to choose such language as they wish. A liberal interpretation of words with an elastic meaning does not entitled one to give the words in question meaning they do not bear… This liberal approach can be seen as underpinned by the following consideration. The courts will presume that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places.117

This “liberal approach” has been embraced by the House of Lords in the recent case of Premium Nafta Products Limited v Fili Shipping Company Ltd [2007] UKHL 40:

The distinctions [between wordings of different clauses] reflect no credit upon English commercial law…the time has come to draw a line under the authorities to date and make a fresh start… the construction of an arbitration clause should start from the assumption that the parties are likely to have intended any dispute arising out of the relationship into which they have entered …to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.118

This area has not been free from judicial disagreement in the past,119 but, subject to the mandate of the High Court (about which one can be fairly certain, but is never guaranteed), the new liberal approach to interpreting arbitration clauses, casting aside semantic analysis, will be cemented in Anglo-Australian law.120

The “sting in the tail” – enforcement of judgments, and costs

Anti-suit injunctions have already been outlined above as a tool (some say weapon121) available to a court looking to keep a party to its contract to litigate before that court, or to arbitrate.122 However, anti-suit injunctions will not always be granted in those circumstances. As some cases show, sometimes it is inappropriate to do so; usually because of the necessary involvement of strangers to the contract in the litigation, which is proceeding in a place that, absent the contract, would have been an appropriate forum.123

Apart from anti-suit injunctions there are other methods by which the courts enforce the parties’ agreement. First, the English courts have made it clear they will use costs, and awards of damages, to

117. Allsop J in Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102 (unreported) at [41]-[42], citing cases in support of these propositions at [43].

118. Lord Hoffman at [12], with whom the other Law Lords agreed.

119. See, for example, the criticism of the Kiukiang Career contained in Allsop J’s judgment in Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102 (unreported) at [68]. Allsop J regarded “arising out of” and “arising from” as being the same in effect, and as a result considered himself bound by the Full Court decision in Kiukiang Career. That case had decided upon what Justice Allsop considered to be a narrow interpretation of the words “arising from”. The effect of the Full Court decision in Kiukiang Career, and consequently in Walter Rau, was that the pre-contractual representation claims founded on s 52 were regarded as outside the scope of the arbitration agreement. This aspect of the decision in Kiukiang Career was finally overturned by Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; (2006) 238 ALR 457 which is discussed in Pt II of this paper.

120. There has been the occasional hiccup while the lower courts adjust to this new approach. For an example, see Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd [2007] FCA 881 (unreported, Gilmour J) One should note, however, that the decision was made on an ex parte application for injunctive relief as well as leave to serve proceedings out of the jurisdiction.

121. Gross P. n 60 at 26.

122. See discussion at “Litigation Contrary to Exclusive Jurisdiction Clause” in Pt I of this paper.

123. For example, Donohue v Armo Inc [2002] 1 Lloyd’s Rep 425 (HL); Bouygues Offshore SA v Caspian Shipping Co [1998] 2 Lloyd’s Rep 461 (CA).
compensate those parties forced to litigate contrary to their contracts. As such, the court will grant the innocent party costs of the anti-suit injunction or stay application on an indemnity basis. The English courts also recognise the entitlement of the innocent party to damages for breach of contract as a result of litigation other than in accordance with the contract. Further, the party may be entitled to damages even if the court in its preferred jurisdiction has refused an anti-suit injunction because of the legitimate involvement of strangers to the contract in the foreign litigation.

Secondly, the courts can refuse to enforce a foreign judgment obtained in breach of contract. Both Australia and England have entered into a reciprocal arrangement for the recognition of foreign judgments and have agreed to enforce those judgments in their own territories subject to certain conditions. Section 32 of the Civil Jurisdiction and Judgments Act 1982 (UK) allows the English courts to refuse to recognise a judgment obtained contrary to an agreement under which the dispute was to be settled somewhere other than the judgment country. A similar provision is found in s 7(4) of the Foreign Judgments Act 1991 (Cth). The clear policy is to counteract systems of law that disregard arbitration or exclusive jurisdiction clauses. If the plaintiff wishes to enforce judgment obtained in Australia against English assets despite a contractual clause to either arbitrate or submit to English courts, this will be a major difficulty that may render the judgment hollow.

Party autonomy – conclusion

The Australian and English approach to party autonomy is very similar. Both countries seek to uphold party choice. Both countries are willing to uphold that choice by the issuing of anti-suit injunctions against the errant party; England is permitted to do so where the other court involved is outside the EU. If the errant party nevertheless proceeds in the other forum, the English courts may well grant indemnity costs against it. The English courts are also willing, at least in theory, to hold that party liable for damages for breach of contract; even if the court has agreed that there are “strong reasons” not to uphold the jurisdiction clause. Further, if the errant party has ignored an exclusive jurisdiction clause or arbitration clause, but needs to enforce that judgment in England or Australia, it may find that the courts will refuse to recognise the judgment under the reciprocity of judgments provisions.

Concept of Mandatory Rules

The law applicable to a particular contract will be determined according to the express terms of the contract, or absent that, by a court locating the place that has the “closest and most real connection” to the contract. Once the law applicable has been determined, then that is the law that is applied by the forum court. Therefore, if the court in country A determines that the laws of country B are in fact the proper law of the contract then it will apply the law of country B.

However, even if country B’s laws apply, the courts in country A may still be obliged to override B’s laws and supplant their own law, where their law makes it clear that this is what is required. Laws that do so are termed mandatory rules.

In domestic contract law there are now two very different sorts of rules. There are the traditional rules which are concerned with settling disputes between parties, such as the rules on consideration. Then there are the

125 Dicey Morris and Collins at 12-142.
126 See discussion in House of Lords in Donohue v Armco Inc [2002] 1 Lloyd’s Rep 425, at [36].
128 Donohue v Armco Inc [2002] 1 Lloyd’s Rep 425 (HL) at [36] and[48], although the point was conceded by counsel.
129 Assuming that the other litigation took place outside the European Union.
130 Bonython v Commonwealth [1951] AC 201 at 219 per Lord Simons.
131 There are mandatory rules covering a whole raft of legal issues, from human rights, to money laundering and racketeering, but our discussion is limited to those relevant to commercial contracts.
more modern rules which are concerned with protecting some group of persons or the national economic system – rules that arise as the result of state interference with contracts. The concept of mandatory rules only deals with this second class of rules.

A state’s interest in upholding protectionist laws may be so strong that it prohibits the parties from contracting out of such rules in a domestic situation. Going beyond this and into the realms of private international law, the State’s interest in upholding certain laws may dictate that those laws must apply even though the issue is, in principle, governed by a different law selected by contract choice of law rules. An exception to the normal choice of law rules is therefore created. In English law [it] is called an overriding statute ie the statute overrides normal choice of law rules so as to apply the rules in the statute.

Mandatory rules need not be encapsulated in statutes, but they are increasingly so. Statutes intended to be of mandatory status usually indicate their intent to take effect regardless of the proper law of the contract using one of a number of different drafting methods. As a result, the court may have to apply a law despite the fact that the proper law of the contract, determined using the traditional analysis, is not the law of the mandatory rule. In that way, mandatory rules skew the traditional choice of law analysis. Those mandatory rules encapsulated in statutes perhaps have a worse effect: it is difficult for legislative drafters to anticipate every situation and draft a clear provision accordingly. Despite academic criticisms of such provisions and the complications posed by interpreting their intended effect, they exist; and the courts and parties are placed in the difficult situation of having to deal with them.

In transnational litigation there are usually two or more countries which can legitimately claim that the dispute falls within their territory. The multifaceted nature of a court’s extraterritorial jurisdiction makes this the case. Undoubtedly, the laws of the two (or more) countries are different, both procedurally and substantively. One of the countries might have a mandatory rule that would have applied had the proceedings been instituted in that jurisdiction. However, the litigation is commenced in the other jurisdiction that also has a legitimate jurisdictional entitlement to adjudicate the dispute. If both parties are content to avoid the mandatory rule in question, then the forum court will never be troubled by the question of the foreign mandatory rule. That is because of the useful and pragmatic presumption already discussed, that the forum court will assume foreign law is identical to local law. Indeed, nor will the other country be troubled because its jurisdiction was never triggered by the issuing of proceedings in that country. In that sense then, it is possible to avoid a mandatory law of another country – where both parties wish to do so.

More troublesome is the situation where one party wishes to rely on the mandatory law of country B in the litigation taking place in country A. Practical and conceptual difficulties arise in this situation. Each country expects its own laws to be respected by the parties when they are operating within that
jurisdiction, but can one party simply avoid the operation of such a law by commencing proceedings in another jurisdiction? What, if any, consideration should the forum state give to the mandatory laws of another country? If consideration should be given to a foreign country’s laws – how and in what circumstances should this occur? As any review of the English and European academic commentary will show, this is a vexed question, with some for\textsuperscript{139} and many against\textsuperscript{140} the broad recognition of foreign mandatory laws.\textsuperscript{141} Furthermore, there is debate about what, if any, methodology of recognition could or should be adopted.\textsuperscript{142} The adoption of conflict of laws rules in statutes remains a quagmire, interfering as they do with the relatively ordered principles of conflict of laws.

What makes a law mandatory is an expression of policy which overrides bilateralism and, in effect, denies it… it is unilateralism triumphant.\textsuperscript{143} In Anglo-Australian law at least, it would seem that the concept of mandatory laws has traditionally been more a preoccupation with the application of the forum’s own laws as overriding any choice of law of the parties,\textsuperscript{144} rather than a consideration of the mandatory rules of another country altogether. However, the English and Australian courts have had to consider whether and in what circumstances they will take into account the mandatory rules of a country that is neither the forum country nor represents the proper law of the contract. The application of mandatory rules in each of these three situations is different as is outlined below. In this regard, as we shall see, the Rome Convention is relevant, as an EU Convention\textsuperscript{145} that seeks to standardise the treatment of choice of law provisions in contracts. There are several provisions concerning mandatory rules within the Rome Convention. It is of universal application to conflict matters appearing before any court in a contracting State and is therefore relevant to an Australian party appearing in the English Courts. However, its effect is restricted only to assessing the proper law, rather than the effect of an exclusive jurisdiction or arbitration clause.\textsuperscript{146}

**Mandatory Rules of the forum**

A court in country A is bound to enforce the (internationally)\textsuperscript{147} mandatory rules of country A, even if it has concluded that the proper law of the contract is that of country B.

The basic principle that some forum laws can override the law otherwise applicable, in English law at least, appears to have grown from an exception to the party autonomy principle enunciated in 1939 in the famous *Vita Foods case*. It was held in that case that the parties’ choice of law should be given effect provided it was “bona fide, legal and not contrary to public policy”\textsuperscript{148} namely – the public

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\textsuperscript{141} As opposed to a form of recognition on narrow grounds, such as when the law of the place of performance renders the contract illegal: see “Mandatory Rules of a Third ‘Closely Connected’ Country (Other Than the Forum or Chosen Law)” in Pt I of this paper. See also Chong A, n 139, at 33-34.

\textsuperscript{142} See Dickenson A, n 140. Necessarily only a broad overview of the complex issues posed by mandatory statutes can be raised here. For more, see authorities cited in Chong A, n 139, at 28, fn 9.

\textsuperscript{143} Nygh at 202.

\textsuperscript{144} In some European courts, the principle is applied without apparent distinction, to enforce either local or foreign mandatory laws: ALRC Rep 8.28. However, if one looks at Dicey and Morris (11th ed), the main discussion of mandatory rules concerns the imposition of English overriding statutes on transnational litigation in England: see pp 21-25.

\textsuperscript{145} A full discourse on the *Convention*, and its effect on English law, is beyond the scope of this paper.

\textsuperscript{146} The question of proper law is of course relevant to a discussion as to forum, because it is one of the factors in the forum non conveniens test.

\textsuperscript{147} See n 137.

\textsuperscript{148} *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, per Lord Wright, delivering the judgment of the Privy Council. For a summary of the criticisms of the *Vita Foods case*, see Tetley W, “*Vita Food Products Revisited (Which Parts of the Decision are Good Law Today?)*” (1992) 37 McG L J 292.
policy of the law of the forum court. The idea of public policy was used to ensure rejection of an objectionable foreign law – for example, a country permitting the sale of slaves – or to apply local law where concepts of justice had been disregarded – for instance, when the parties had, by contract, attempted to evade the mandatory law of the forum. It is, in a sense, the ultimate escape clause – if the court concludes a foreign law applies, but is discontented with that result due to a clash of that law with some fundamental principle, it can refuse to apply the foreign law to the extent of the repugnancy.

This public policy can be exemplified in statute form, where the statute makes it clear that it bears that nature. Where a statute embodies public policy, the courts will not allow parties to contract out of it. One of the main reasons it does so is because "otherwise the intention of the legislature to regulate certain commercial matters could be frustrated if it were open to the parties to choose some foreign law to govern their contract." Therefore, once triggered, the forum will apply the mandatory law of their territory, and disregard the law chosen by the parties to the extent of any inconsistency.

A commonly cited example is The Hollandia [1983] 1 Lloyd’s Rep 1. The dispute concerned a shipment loaded in Scotland. The carrier sought to stay proceedings brought in England in breach of the exclusive jurisdiction clause favouring Amsterdam. The bill of lading stipulated that the law of the Netherlands applied to the contract. A lower limitation amount would have applied to the cargo claim the exclusive jurisdiction clause favouring Amsterdam. The bill of lading stipulated that the law of the shipment loaded in Scotland. The carrier sought to stay proceedings brought in England in breach of

To ascribe to it the narrow meaning…would leave it open to any shipowner to evade the provisions of Article III Rule 8 by the simple device of inserting in his bills of lading… a clause in standard form for resolution of disputes in what might aptly be described as a Court of convenience, viz one situated in a country which did not apply the Hague Visby Rules.

The Hollandia is an example of the principle that if they are applicable, mandatory rules of a particular State will be enforced by that State within their own territory. Australian examples are the

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149 See Cheshire at 583.

150 Chong argues (n 139, at 34-35) that the public policy of the forum can also operate positively where it recognises a foreign law rendering performance of a contract in that country as being illegal, saying that this constitutes an indirect application of foreign mandatory law under the guise of applying English public policy. However, she notes that the line of cases used to support the argument is likely to have been overruled by the Rome Convention, and in any event is distinguishable from the types of rules the subject of this paper. Other commentators view the same cases as being an application of English public policy rather than conformance with foreign mandatory statutes: See Dickenson A, n 140, at 78-81. For our purposes, it is important to note that the commercial Acts being discussed in this paper, such as Trade Practices Act, Carriage of Goods by Sea Act and Insurance Contracts Act, do not render performance of contracts illegal.

151 For an oft-cited Australian example, see Golden Acres Ltd v Queensland Estates Pty Ltd [1969] Qd R 378.

152 Dicey Morris and Collins at 1-053.

153 If a forum court finds that a mandatory rule of that forum is applicable, then it does not alter the proper law of the contract. Instead, the mandatory law will override the chosen law, to the extent necessary. See Gleeson CJ in Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160 (NSWCA) at 164.

154 This would also be the effect under Art 7(2) because the mandatory law of the forum (England) would override the mandatory foreign law (eg Australia’s Carriage of Goods by Sea Act.)


156 Had the exclusive jurisdiction clause been for a country that had enacted the Hague Visby Rules, then it would not have offended Art III, r 8. Presumably that other jurisdiction would have applied Art X to establish that the shipment, from a contracting state, was one to which the Hague Visby Rules applied. Similarly, if the shipment was one to which the Hague Visby Rules were not mandatorily applicable, then the court would not impose the Hague Visby Rules: See Hellenic Steel Co v Svolamar Shipping Co Ltd (Komninos S) [1990] 1 Lloyd’s Rep 541.
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ICA, COGSA and TPA. Although each operates slightly differently, each is regarded as being a mandatory rule of the Australian forum that overrides any law otherwise applicable.

The Rome Convention recognises the power of the forum to override the proper law of the contract in Art 7(2):

Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Mandatory Rules of the Proper Law of the Contract

A forum court will apply foreign law if it is established to be the proper law of the contract. Clearly part of that bundle of foreign law includes any mandatory laws of that forum. Thus, if an English court held that Australian law was the proper law of the contract, it would apply Australian law such as the TPA or ICA. However, as seen under the previous heading, the forum court would retain the right to override the effect of these laws as a result of the general principle of conflict of laws that courts will not apply any foreign law if and insofar as its application would lead to results contrary to the fundamental principles of public policy of the forum. That public policy could be exemplified by its own mandatory statute, or it could be as a result of general public policy. What is the public policy of one country can be the opposite of that in another country. For instance it might be the public policy of one country that an insurer be entitled to rely on its right to avoid the contract in the case of misrepresentation, while another country may have a public policy determined to minimise the insurer’s rights in that regard. Thus if either court concludes that the law of the other country applies, it will be placed in a difficult position of assessing whether to override the policy of that country with its own public policy. This highlights the importance of forum non conveniens applications and that appropriate weight be given to the importance of a local court deciding issues of local law.

Mandatory Rules of a Third “Closely Connected” Country (Other than the Forum or Chosen Law)

Foreign mandatory laws will not be applied in England unless they are part of the proper law of the contract, at least, not directly. Historically, this attitude can be seen as a natural consequence of the principle of territoriality. States are competent under international law to regulate persons and


159 Either at common law, or in England, pursuant to the provisions of the Rome Convention.

160 Although it is accepted that a foreign court will not be as familiar with that foreign law and errors are more likely: Whincop and Keyes, Policy & Pragmatism in the Conflict of Laws (Ashgate, 2001) pp 28, 41.

161 Dicey and Morris, p 1226. See also Tetley, Ch 5 where the so-called “public order” reservation is discussed in the context of the laws of various countries.

162 Of the few English cases where the courts appear to apply or recognise foreign laws, the foreign laws criminalised acts that constituted performance. There are the occasional hints, by some judges, that they might be willing to recognise a foreign legislative provision on a contract by virtue of the comity of nations: Al Battani [1993] 2 Lloyd’s Rep 219 at 214 as cited by Davies M, n 28. This decision seems out of step with the tide of recent English authority and perhaps it can be better summarised as saying that the English courts will recognise it where it gives assistance to their conclusion that England should have jurisdiction – as was the case in Al Battani. There the Judge held that as the exclusive jurisdiction clause was void in Egyptian law, “there is no reason why as a matter of comity this court should enforce this contractual clause.” (at 224). The Judge did not say he would have enforced the clause – rather that the judge was of the view he did not have to consider it. To that extent, Al Battani should not be relied upon as supporting the view that the English judiciary will take into account the statutes of other countries as a matter of comity.

163 See Chong, Dickenson at n 150 above.

activities within their territory, and its citizens wherever they may be, but it has no right to impose its laws on other states or insist that they be applied by foreign judges.\textsuperscript{165}

The English position is encapsulated in the eminent commentary of Dicey and Morris:

Where [mandatory] legislation is part of the law of the forum it applies because it is interpreted as applying to all cases within its scope. Where the legislation is part of the applicable law it will be applied, subject to English public policy, in accordance with the normal rules. Where the legislation is neither legislation of the forum nor of the applicable law, it has no application in England.\textsuperscript{166}

In continental Europe, the recognition of foreign mandatory rules is still controversial\textsuperscript{167} but Nygh says that there is “considerable support in principle for some recognition of the mandatory rules of third States”, although the support “is far from universal”.\textsuperscript{168} European scholars have argued that the social purpose or function of a mandatory rule may, if it is important enough, constitute a ground for its application internationally, even if it is neither the proper law nor the law of the forum,\textsuperscript{169} particularly where the rule exists in the place of performance of the contract.\textsuperscript{170} While outside the parameters of this paper, it is interesting to note that the US position is similarly adaptable to foreign mandatory law; the \textit{Restatement (Second) of Conflict of Laws} the chosen law will be applied to the contract unless:

\begin{quote}
the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would be the state of the applicable law in the absence of an effective choice of law by the parties.\textsuperscript{171}
\end{quote}

When the EU decided to standardise treatment of choice of law in contracts to avoid forum shopping, this continental influence led to Art 7(1) of the \textit{Rome Convention}, which recognises that a court could apply foreign mandatory laws in certain circumstances.\textsuperscript{172}

\textbf{Article 7 Mandatory rules}

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

\begin{footnotes}
\footnotetext{165} Dickenson A, n 140, at 74-75. See though the distinction made by Chong between public policy in statute as opposed to general public policy: Chong A, n 139, at 68.
\footnotetext{166} Dicey and Morris, 14th ed. at [1-055].
\footnotetext{168} Nygh at 222. For example, Germany will apply foreign public laws that have a “special connection” with the contract: Chong A, n 139, at 42.
\footnotetext{170} Particularly where the law of place of performance renders the performance of the contract illegal: See Chong A, n 139, at 46; 61-70.
\footnotetext{171} See Dickenson A at 71-72 for a discussion of s 187(2)(b) of the \textit{Restatement (Second) of the Conflict of Laws} (US), which would apply in the other major commercial dispute resolution centre of New York. While that section disarms parties’ choice of law, it does so only in favour of the otherwise applicable law.
\footnotetext{172} Mandatory Rules are also referred to in other parts of the \textit{Rome Convention}, but are of limited effect. For example, Art 3 prevents derogation from a mandatory law of a country where all other relevant elements are connected to that country. In international matters this will not be the case.
\end{footnotes}
Art 7(1) was unacceptable to England and seven other countries, who exercised their right to “opt out”.173 The provision was criticised for being too uncertain in its effect.

According to European commentators,174 there have been no reported cases on Art 7(1) – perhaps this, as they say, because the parties have recognised the applicability of the foreign laws, or because actions were unreported. Alternatively, perhaps Art 7(1) has proved to be a toothless tiger because of the number of reservations, or that it is too vague to apply. In any event, there are plans to replace the Rome Convention with an EU Regulation (Rome Regulation). As there is no concept of reservations in European regulations, the UK has refused to agree to the Rome Regulation, citing its concerns about the new Art 8.3; and at the time of writing it is unclear what the fate of Art 8.3 will be.175

The history of Art 7(1) is a clear illustration of English intransigence on the question of recognising foreign mandatory laws and the supremacy of party autonomy in that country. The Rome Convention, being the outcome of compromise within the EU, probably represents the “high water mark” of likely English acceptance of foreign mandatory laws – which is, in actual fact, a refusal to accept them as relevant to the law applicable to the contract.176

It has been suggested in literature and case law on the continent that the forum may take account of foreign mandatory rules even if they do not form part of the applicable law. This suggestion is reflected in Article 7 [of what is now known as the Rome Convention]. That this provision is contrary to the English approach is evidenced by the fact that the United Kingdom exercised its right of reservation to Article 7(1) when it signed the Convention.177

There is nothing to suggest that the current state of the law in Australia is any more receptive to foreign mandatory law than that in England.178 In its Report on Choice of Law, the Australian Law Reform Commission (ALRC) was critical of this stance and by majority179 proposed developing an exception to party autonomy based on the mandatory laws of the place of most real and substantial connection.180 The ALRC proposed that Australia recognise and apply the mandatory laws of that country which is indicated as the objective proper law of the contract.181 While the ALRC proposal has some similarity with the Rome Convention Art 7182, it is less discretionary in nature, and perhaps more similar to the approach taken in the US as outlined above. The proposal, like the Report itself, has been left to wither on the vine.

173 Lando and Nielsen at p 45 cites Germany, Austria, Luxembourg, United Kingdom, Portugal, Latvia, Slovenia and Ireland. However, as Dickenson notes, much depends on the wording of the reservation by each country – in some cases, this is not necessarily a statement that the courts will not apply Art 7, merely that they are not are entitled not to do so. See s 2(2) Contracts (Applicable Law) Act 1990 (UK).


175 Tellingly, the UK Government stated that: “[Art 8.3] introduces an unacceptable degree of legal uncertainty. In addition to increased legal costs and litigation, it could lead to the loss to other jurisdictions, probably New York, of significant volumes of international contract business such as commercial and governmental securitisations”: as cited by Dickenson A, n 140, at 53.

176 Dicey and Morris (14th ed) at [1-055].

177 See Nygh and Davies at 19.7 at 366. The ALRC report recommended that Australia apply the proper objective law of the contract, and if that is a foreign law which includes a mandatory law, then that mandatory law ought to apply. As already noted, the recommendations of the ALRC report have not been taken up.

179 Nygh J dissented, holding the view that the only way Australian courts should protect the mandatory laws of a foreign country should be by treaty. See Ch 8, fn 52.

180 Ironically, while that was not the position of the initial Rome Convention, the proposals for change in the EU Regulation (Rome Regulation) seemed to have adopted a similar test – for criticisms of the proposed Art 8(3) as compared to Art 7, see Dickenson A, n 140.

181 See ALRC Rep No 58 at 8.35-8.36 and cl 9(8) of the proposed Uniform State and Territory Choice of Law Bill 1992.

182 Although the Rome Convention goes on to stipulate the presumption that the contract will be most closely connected with the law of the country in which the party who is required to perform the characteristic obligation of the contract has his habitual residence.
In summary, England will apply foreign law only if it is the proper law of the contract, and even then, always subject to its own public policy (of which mandatory statutes form a part) to override that foreign law to the extent it is abhorrent to its public policy. In this regard, England, parts from the majority of EU countries who may recognise foreign mandatory laws according to the provisions of the Rome Convention. Despite attempts to change Australian law so as to recognise foreign mandatory statutes in certain circumstances, the Australian position appears to remain closer to the English position at common law.

**Conclusion – Part 1**

The primary jurisdiction of choice for maritime contracts is the UK. If there is an express provision in the contract, it is more than likely that it will stipulate English law. Australian litigants who comply with their contract terms who might want to rely on TPA will then find themselves in a forum that does not favour the enforcement of mandatory laws of a third State over the parties’ choice. Therefore, the most likely outcome is that the action will be decided without reference to the TPA.

For that reason, a party who wishes to rely on a mandatory law will do their best to improve their chances by commencing proceedings in the place bound to apply the mandatory law (for our purposes, Australia), so that the application of that mandatory law to the substance of the dispute is beyond question – at least once the court has accepted that the mandatory law does, of its terms, apply. Conversely, a party who wishes to retain the advantage of the initial bargain will be doing everything to avoid an Australian court. This will include applying for a stay of the Australian proceedings, or seeking the aid of the court initially chosen by the parties to enforce the contract against the errant party by anti-suit injunction.

In this context, the battle to establish forum is critical.

In the next part we will look at the TPA as a mandatory rule and its effect on the parties’ scramble to establish jurisdiction in their preferred court.

**PART II**

**Relevant provisions of the TPA - a summary**

This section provides an outline of the relevant provisions of the TPA, dealing with the main substantive provisions and the related provisions concerning extraterritoriality and contracting out.

**Section 52 – Misleading or Deceptive Conduct**

For those involved in international carriage, the most relevant provision is s 52. It reads:

**TRADE PRACTICES ACT 1974 – S 52**

Misleading or deceptive conduct

S 52(1) A Corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

This is a “comprehensive provision of wide impact… (which) establishes a norm of conduct.”

It has flourished as the cause of action of choice in almost all commercial disputes in Australia, nurtured by its supporting provisions in the Act and brought to flower by the judiciary charged to give effect to its revolutionary nature. For instance, it contains none of the limitations of privity of

183 Although one should also bear in mind the potential of Pt IVA, the unconscionable conduct provisions of the *Trade Practices Act*, which can also apply to business, but fall outside the scope of this paper.


185 Miller, p 526.

186 For example, it was not always clear that s 52 would apply in private business contracts – but it is now entrenched in that context. See n 1 above.
contract; as an alternative to a tort claim, in a cargo claim scenario, there is no requirement that of ownership or immediate entitlement to possession of goods at the time of the loss or damage;\textsuperscript{187} intent to mislead or deceive is not necessary;\textsuperscript{188} and the effect of exemption clauses will depend on the facts.\textsuperscript{189} Nevertheless, it is not without boundaries.\textsuperscript{190}

The TPA applies to corporations that are Australian trading corporations, or foreign corporations registered as such in Australia,\textsuperscript{191} and will apply to their conduct outside of Australia.\textsuperscript{192} However, it can also apply to a corporation who is not necessarily registered in Australia if it is “carrying on business in Australia.”\textsuperscript{193} If it is carrying on business in Australia, then its conduct outside of Australia will be caught by the Act\textsuperscript{194} and actionable in Australian litigation.

The TPA can also extend to the overseas conduct of corporations, either Australian or foreign corporations “carrying on business within Australia”.\textsuperscript{195} This is known as the extraterritorial application of the Act. For example, a carrier considered to be “carrying on business in Australia” might be subject to a breach of s 52 for a clean bill of lading issued overseas but intended for an Australian consignee, if that bill of lading ought to have been claused.\textsuperscript{196} Reliance on extraterritorial conduct in legal proceedings requires ministerial consent.\textsuperscript{197}

In addition, an overseas party can be caught by the provisions of s 52 by communications received in Australia. For example, representations as to the cargoworthiness of a vessel made by a shipowner to a potential charterer based in Australia could also be caught by s 52 if the representations were received in Australia, by way of fax, email or telephone.\textsuperscript{198} This is not by operation of any extraterritorial application (even though it might look that way), but rather because the conduct that triggers the application of the Act has occurred in Australia. Although the cause of action under s 52 is not based in tort,\textsuperscript{199} but is rather an entirely separate and statutory cause of action, for the purposes

\textsuperscript{187} Cf Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd, (The Aliakmon) [1986] 2 All ER 145.
\textsuperscript{188} Fox J in Brown v Jam Factory Pty Ltd (1981) 53 FLR 340 at 348, as quoted in Miller at [1.52.5].
\textsuperscript{189} There was a time when exclusions and disclaimers were given no effect, but in 2004 the High Court decided that such clauses are to be considered as part of the conduct as a whole in order to determine whether the representation was misleading or deceptive. See Butcher v Lachlan Elder Reality Pty Ltd (2004) 218 CLR 592.
\textsuperscript{190} See articles in n 184.
\textsuperscript{191} Section 4 of the Trade Practices Act. Equivalent provisions in State law will apply to individuals: see, for example, Fair Trading Act of (WA).
\textsuperscript{192} Section 5 of the Trade Practices Act.
\textsuperscript{193} See Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd (1993) 117 ALR 507, where the judge concluded that Hyundai was not carrying on business in Australia, despite the fact that vessels it controlled were using Australian ports to load and discharge cargoes for Australian interests, with whom Hyundai had contracted. Further, the Plaintiff had failed to obtain the requisite ministerial consent entitling it to rely on extraterritorial conduct pursuant to s 5 of the Trade Practices Act.
\textsuperscript{195} Section 5 of the Trade Practices Act.
\textsuperscript{196} Roughly, the factual scenario that occurred in the Hyundai case.
\textsuperscript{197} Which is to be given in all but narrow circumstances: see s 5(3). As Nygh and Davies note at [22.13], no such equivalent requirement exists in the State Fair Trading Acts.
\textsuperscript{198} Assuming the fax or email was sent to Australia, or the phone call was made with one party being present in Australia: see ACCC v Hughes (2002) FCA 270 as cited in Miller at [1.5.10], Bray v F Hoffman –La Roche Ltd (2002) 190 ALR 1. In a maritime context, see Pan Australia Shipping Pty Ltd v The Ship “Comandate” (No 2) (2006) FCA 1112 per Rares J at [101]. The Act can also apply to individuals who breach the Trade Practices Act while using telephonic services: see Smolongov v O’Brien (1982) 67 FLR 311 and other authorities outlined in Miller at [1.6.30].
\textsuperscript{199} Williams v Society of Lloyd’s [1994] 1 VR 274, as cited in Nygh and Davies (7th ed) at [22.13], p 426.
of assessing where the “conduct” has taken place the same rules are applied as for foreign torts. As such, depending on the facts, the conduct may have taken place in Australia or overseas. Therefore, where the “conduct” is received in Australia, then the law of the place of the wrong is Australia and the *Trade Practices Act* applies. If the conduct is entirely overseas but captured by the extraterritorial provisions of the TPA, then ministerial consent is required to rely upon that conduct as a breach of s 52. In either case, if the conduct is caught by the localising provisions of the TPA, an Australian court will apply s 52 even if the parties have chosen English law to apply to their contract.

There is no general express provision that forbids contracting out of s 52 and its related provisions. This is in contrast to s 74, which is outlined below. However, the attitude of the courts has been that once the circumstances fall within s 52 because of conduct in Australia, or overseas by a party caught by the Act, then the Act is triggered.

### Section 74 – Exercise Due Care and Skill in Contract for Services

Section 74 is the other provision of the TPA likely to be of relevance in some maritime matters. Unlike s 52, this section only attaches to contracts. This section reads:

**TRADE PRACTICES ACT 1974 – S 74**

**Warranties in relation to the supply of services**

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. … [warranty of fitness for purpose of materials supplied with services]
3. A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:
   a. a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored;
   b. …

(emphasis added)

The effect of the warranty in s 74(1) is to impose into a contract for services a warranty that due care and skill will be taken in carrying out those services. It is less revolutionary than s 52 because it draws more on common law concepts, and a breach of it is to be contested as a breach of contract rather than a breach of statute. Due to the fact that any contract for services under the prescribed amount, currently $40,000, constitutes a contract with a “consumer” to which s 74 applies, this warranty is imposed on many more modest commercial contracts in Australia.

Section 74(3) means that ordinary contracts of carriage, such as charterparties or bill of lading contracts, will not be caught by the implied warranty. The warranty does apply to the carriage of

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200 Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd (1993) 117 ALR 507 at 518-520 per Sheppard J as cited in Nygh and Davies at [22.13].


202 An expression coined by Kelly D, n 135.


204 Although the cases show that a disclaimer of the truth of representations, if brought to the attention of the other party, may make it difficult for the requisite reliance on the statement to be made out: see Miller 1:52.75


206 See Miller 1:74.5.

207 The definition of consumer is contained in s 4 of the *Trade Practices Act*. 
passengers.\textsuperscript{208} The current law seems to be that s 74 will apply to other ancillary maritime contracts such as towage,\textsuperscript{209} and ship repairs,\textsuperscript{210} although there have been no cases yet on whether cargo and ship inspection contracts might fall within s 74(3).\textsuperscript{211}

This warranty is technically non-excludable as a result of s 68,\textsuperscript{212} but liability can be limited so long as the limitation clause complies with the provisions of 68A of the TPA.\textsuperscript{213} Those corporations who work within the framework of s 68A find that they can effectively limit their liability to the amount of the contract – namely, a relatively insignificant amount.\textsuperscript{214}

In contrast to s 52, s 74 does have an express provision dealing with choice of laws:

S 67 Conflict of laws
Where:

\textsuperscript{208} Although it is excludable in relation to recreational services – see the discussion of liability of cruise ship operators to passengers in Lewins K, “The Cruise Ship Industry – Liabilities to Passengers for Breach of s 52 and s 74 Trade Practices Act 1974 (Cth)” n 184.

\textsuperscript{209} Helman J in PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v The Owners of the Ship “Koumala” [2007] QSC 101 (19 April 2007), which has recently been upheld on appeal: [2007] QCA 429 (30 November 2007).

\textsuperscript{210} Pondcil Pty Ltd v Tropical Reef Shipyard Pty Ltd (1991) FCA (unreported, Cooper J, 15 July 1994) is distinguishable because while s 74 was applied to the contract for ship repairs, it concerned a passenger vessel.

\textsuperscript{211} However, see the decision of Braverus Maritime Inc v Port Kembla Coal Terminal Ltd (2005) 148 FCR 68. (FCAFC) where the Court said, as obiter, that it did not consider a contract for pilotage would fall within the s 74(3) exception: at p 118 (as cited by Helman J in PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v The Owners of the Ship “Koumala” [2007] QSC 101, at [49]).

\textsuperscript{212} Section 68
Application of provisions not to be excluded or modified
(1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:
(a) the application of all or any of the provisions of this Division;
(b) the exercise of a right conferred by such a provision;
(c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
(d) the application of s 75A;

is void.

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

\textsuperscript{213} Section 68A
Limitation of liability for breach of certain conditions or warranties
(1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under s 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by s 69) to:
(a) in the case of goods …
(b) in the case of services:
(i) the supplying of the services again; or
(ii) the payment of the cost of having the services supplied again.

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

In the case of an arms length, freely negotiated commercial contract, it would not be difficult to secure compliance with the requirements of s 68A. Simply incorporating into the contract a clause limiting liability to the cost of the services rendered should, in most cases be sufficient – the “fair and reasonable” test will be unlikely to pose difficulties in a maritime context. As a result of Qantas v Arauco (1996) 185 CLR 43; 136 ALR 510 (HC), it is arguable that an indemnity clause will not offend s 68A although the writer has cautioned elsewhere about placing too much reliance on the case: see Lewins K, “What’s the Trade Practices Act Got To Do With It? Section 74 and Towage Contracts in Australia” (2006) 13(1) Mur UEJL 58 at 71.

\textsuperscript{214} The biggest risk for a corporation is to fail to take full advantage of s 68A so as to expose oneself to full liability. See discussion on this point at Lewins K, “What’s the Trade Practices Act Got To Do With It? Section 74 and Towage Contracts in Australia”, n 213, at 70-72.
Maritime law and the TPA as a “mandatory statute” in Australia and England

(a) the proper law of a contract for the supply by a corporation of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of Australia; or
(b) a contract for the supply by a corporation of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country or of a State or Territory for all or any of the provisions of this Division;

this Division applies to the contract notwithstanding that term.

As a result of s 67, an Australian court will perform an analysis as to the objective proper law – namely which country has the closest and most real connection. Importantly, s 67 does not apply to s 52, which is contained in a different Division of the TPA.215

Disputes about the extraterritorial reach of s 74 are less common in maritime matters. Mostly these services will be provided by Australian corporations or individuals in Australia’s territory and therefore litigation in Australia may be a more natural consequence. However, an Australian Court would hold that it is possible for s 74 to apply to services provided overseas if there is a sufficient substantial connection with Australia such to render Australian law as the objective proper law of the contract. In that way, if a contract for towage is entered in Australia between an Australian towage operator and a vessel owned and managed overseas, proceedings in Australia might allege a breach of contract. In that way, if a contract for towage is entered in Australia between an Australian towage operator and a vessel owned and managed overseas, proceedings in Australia might allege a breach of s 74 if the task was undertaken without due care and skill. Once it is established that Australian law applies, the existence of a choice of law or exclusive jurisdiction clause could be disregarded by an Australian court under s 67.216 Perhaps contracts likely to fall within s 74 are less formalised than their carriage counterparts, such that one might be less likely to find the existence of a choice of law/jurisdiction or arbitration clause in their terms.217

TPA as mandatory law

The TPA is regarded as public policy of “central importance”… to the regulation of commercial life and commerce in Australia.218 Therefore, the TPA provisions join with the ICA and COGSA as mandatory laws that the Australian courts will enforce over and above any preference as to law displayed by the parties themselves.219 As has been stated:

If it were otherwise, the provisions of the statute could easily be circumvented.220

As Kirby P (as he then was) said in the context of similar221 provisions in the ICA:

Notions of freedoms of contract and principles of private international law, important though they are, must give way to a right of Parliament within power to make laws overriding such norms within its

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215 That seems to be because s 52 is intended to apply even if the proper law is that of a different country: See Gleeson CJ in Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160, at 164. In the terminology of Mann F “Statutes and the Conflict of Laws” (1972-1973) 46 British Yearbook of International Law 117. It could be said that s 52 operates as a self-limiting or localised provision because it is only triggered in certain circumstances and can only apply once a conflict of laws analysis concludes that the law of Australia applies (at 123).

216 This is an example of how an overseas shipowner might benefit from a Trade Practices Act cause of action.

217 If there were such a clause, then the party seeking to uphold the contract could itself call upon the contractual forum court to issue an anti-suit against the party seeking to sue in Australia. As the party wishing to rely on the Trade Practices Act in a maritime services case is likely to be the shipowner, in this situation the usual position of the parties would be reversed: the Australian towage company would be seeking the assistance of the English court to enforce the contract, and the shipowner would be seeking to rely on the Trade Practices Act to keep proceedings in Australia.

218 Allsop J in Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; at [195].

219 See Tilbury, Davis & Opeskin p 866, 869; Mortensen at 15.46–15.49, ALRC Report on Choice of Law at 8.14, 8.27.

220 Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160, at 164 per Gleeson CJ. At that point Gleeson CJ was the Chief Justice of the NSWSC; in 1998 he was appointed Chief Justice of the HCA.

221 The provisions are of a similar intent but perhaps less clearly worded. Section 8 provides as follows:

(1) Subject to s 9, the application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.

(2) For the purposes of subs (1), where the proper law of a contract or proposed contract would, but for an express provision to the contrary included or to be included in the contract or in some other contract, be the law of a State or of a Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory.
jurisdiction. Contract law has often been the subject of regulation by the legislature. When a statute exists with a clear policy to prevent circumventory expedients, the common law principles of contract or conflict of laws must be modified. 222

(emphasis added)

Similar statements have been made in the context of s 11(2) of COGSA, which renders of “no effect” agreements that purport to preclude or limit the jurisdiction of an Australian court in relation to inward or outward shipments. 223 However, as we shall see, even within Australia and at the highest level, 224 there is dissent and disquiet about taking such a robust attitude toward Australian mandatory laws. It is at least arguable that such statutes are only intended to have domestic mandatory effect, 225 and that it was not intended to be applied in a foreign court unless Australian law is the proper law of the contract.

So to sum up, the main provisions of the TPA that have something to say about applicability of the Act are s 67 and 68; but the substantive provisions of s 51 and 74 are the ones that the parties will be seeking to impose or deflect, as the case may be. Certainly the courts’ interpretations of the provisions in a broad fashion, as is appropriate for a remedial statute, have contributed to its reach. 226 The Australian statute is drafted in such a way that it expects to have some impact, some relevance, even when there is an overseas connection – an extraterritorial element. However, the method or process by which the application of the Act is determined will be different depending on which provision is relied upon. Section 52, for instance, is unaccompanied by a statutory provision making clear its mandatory nature. The courts have concluded that it will apply regardless of the proper law of the contract — it will not oust the proper law, but will override it where inconsistent. 227 But s 74 does have the benefit of an accompanying provision – s 67 – which ensures it will only apply if the objective proper law is found to be that of Australia.

The Attitude of the Courts to Party Autonomy vs Mandatory Rules During the Skirmish for Jurisdiction – Cases

Contemporary practice respecting transnational litigation suggests that choice of law questions tend to be decided in the course of interlocutory processes before trial…Such interlocutory applications may consume what appears to be excessive time and expense but they are a consequence of the reach of the “long arm” jurisdiction enjoyed by Australian courts. This renders inevitable disputes as to where to litigate. 228

More than ever in trans-national litigation there is a process whereby the parties “litigate in order to determine where they shall litigate”. 229 While usually the parties seek a particular procedural

This section was the subject of High Court analysis in Akai v People’s Insurance Company which is discussed in “Domestic Legislation as Mandatory Rules of the Forum Court in Face of Foreign Jurisdiction Clause – Strong Reasons Against a Stay?” in Pt II of this paper.

222 Akai Pty Ltd v The People’s Insurance Co Ltd (1995) 126 FLR 204 at 212 per Kirby J (NSWCA). Kirby J acknowledges, as the emphasised words show, that there are inherent territorial limits to the power of any Parliament. The extent to which those laws can be held to affect the outcomes of cases outside the Australian jurisdiction is to be explored in this paper.

223 See “International Conventions with ‘Force of Law’ as Mandatory Laws of the Forum Court – A Strong Reason Militating Against a Stay in Favour of Contractual Forum.” in Pt II of this paper.

224 See discussion of the minority of Akai in the High Court at “Domestic Legislation as Mandatory Rules of the Forum Court in Face of Foreign Jurisdiction Clause – Strong Reasons Against a Stay?” in Pt II of this paper.

225 See Whincop and Keyes at 65.

226 See cases referred to in n 1.

227 Nygh and Davies at [19.6].

228 Regie National Des Usines Renault SA v Zhang (2002) 187 ALR 1 at 20 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). This quotation applies equally to English courts, from which Australia inherited its long arm jurisdiction. In our context, it could be said to apply equally to jurisdiction clauses.

advantage that one forum offers.\textsuperscript{230} In other cases it is the substantive law of one place that attracts the parties. Where one party seeks to rely on a particular domestic statute, clearly the best bet is for litigation to take place in that territory. A party wishing to rely on the TPA would much prefer to have litigation proceed in Australia, where the courts have no choice but to impose the Act.

Australian courts will be faced with the need to assess the impact of the TPA in an international dispute against a foreign defendant in several instances.\textsuperscript{231} First, when initially asked for leave to serve out of the jurisdiction. Secondly, there can be a challenge to the court’s jurisdiction by the defendant who seeks a stay of the Australian proceedings, particularly in the face of a contractual clause that has something to say on arbitration/choice of law/jurisdiction. Thirdly, the Australian court can be asked to issue an anti-anti-suit injunction against a foreign defendant on the basis that proceedings ought to be commenced in Australia.

English courts will come across an Australian mandatory statute in a slightly different context. The foreign party may have commenced proceedings in England seeking a declaration that it is not liable and seeking an anti-suit injunction against the Australian party to prevent it commencing, or continuing, proceedings in Australia. Of relevance is whether there is a contractual clause, such as a submission to arbitration, choice of law or jurisdiction clause that stipulates England. The Australian party then needs to seek a stay of the English proceedings and/or defend the anti-suit application in the English court, relying on the importance of the TPA to the dispute. Alternatively, if the Australian action proceeds, the English court might be asked to refuse to enforce the Australian judgment.\textsuperscript{232}

We have seen that whether in Australia or England, Brandon J’s judgment in \textit{The Eleftheria}\textsuperscript{233} has become the cornerstone of these types of applications.\textsuperscript{234} Where there is an exclusive jurisdiction clause in the contract that favours a foreign court, then the test is whether there are “strong reasons” to refuse the stay despite the parties’ agreement to litigate elsewhere. (As we shall see, one of the factors in the \textit{Eleftheria} analysis, the loss of juridical advantage, has become particularly significant when assessing the impact of local mandatory laws.) Although in theory the test applied by English and Australian courts may well be the same, there does seem to be a difference in the extent of factors and evidence needed to “tip the balance” in favour of a stay: Garnett suggests that the attitude of the Australian courts in stay applications is pro-Australian in any event.\textsuperscript{235} To do so is in the interests of the local litigants. England’s comparative strictness is similarly in its own interests, because it is more likely to be the beneficiary of an exclusive jurisdiction clause, and one commentator has pointed out that the strictness does not extend to staying its own proceedings in favour of a clause favouring a foreign court.\textsuperscript{236}

This paper will now look at the position in each of the countries as regards mandatory rules and a clashing provision in the contract. Assistance can be gathered by the attitude of the courts, both Australian and overseas, to other so-called “mandatory” Australian statutes – the ICA and Australian COGSA. While these Acts contain slightly different wording to that of the TPA, they each seek to oust


\textsuperscript{231} If a foreign plaintiff wishes to assert a Trade Practices Act breach against an Australian defendant and commences in Australia, there is little the Australian defendant can do as the court has jurisdiction over it: unless of course there is a foreign arbitration clause (see “International Convention Upholding Party Autonomy – What Effect Domestic Mandatory Law? The Exceptional Case of Arbitration Clauses.” in Pt II of this paper). Otherwise the Australian courts will ignore the choice of law/jurisdiction clauses and impose the Trade Practices Act. However, the Australian defendant could call on the aid of the UK court to enforce that clause with an anti-suit injunction.

\textsuperscript{232} See s 32(1) of the Civil Jurisdiction and Judgments Act 1982 (UK), which provides for non-recognition of an arbitration award or judgment obtained in breach of an agreement.

\textsuperscript{233} \textit{The Eleftheria} [1970] p 94; [1969] 1 Lloyd’s Rep 237, discussed at “Litigation Contrary to Exclusive Jurisdiction Clause” in Pt I of this paper.

\textsuperscript{234} Adopted by the High Court in \textit{Akai Pty Ltd v The People’s Insurance Co Ltd} (1996) 188 CLR 418, at 445 (Toohey, Gaudron and Gummow JJ) and 427-428 (Dawson and McHugh JJ).

\textsuperscript{235} Garnett R, n 31 at 9-21.

\textsuperscript{236} Peel E, n 58, at 200.
any attempt to exclude the proper applicability of their provisions and the attitudes of the Australian and English courts to those provisions are illuminating.

**International Conventions with “Force of Law” as Mandatory Laws of the Forum Court – A Strong Reason Militating Against A Stay in Favour of Contractual Forum**

In several cases both the English and Australian courts have held that the mandatory rules of the forum may constitute “strong reasons” to decline to stay proceedings despite an exclusive jurisdiction clause favouring a foreign country, where the plaintiffs would lose a juridical advantage if a stay was granted. Relevantly for maritime lawyers, they include carriage of goods cases, both in England and Australia.

In England, a leading example is the *Hollandia* decision,\(^{237}\) in which granting a stay in favour of an exclusive jurisdiction clause favouring Amsterdam would have led to a lower compensation package against the carrier than that available under the overriding law of England pursuant to the *Hague Visby Rules* enacted by *Carriage of Goods By Sea Act 1971* (UK) (UK COGSA). UK COGSA was triggered because the shipment was from a Scottish port – a port of a Contracting State. Australia, in cases of carriage that fall within Australian COGSA, and its predecessors, has regularly disregarded the exclusive jurisdiction clauses in bills of lading where they can be seen to have offended s 11 of Australian COGSA. In effect, then, where a carriage dispute comes before the courts and the relevant COGSA applies by virtue of the shipment from a Contracting State, then the courts will apply the *Hague Visby Rules* “by the force of law”.\(^{238}\)

Nevertheless, there is still scope for a clash between mandatory laws of England and Australia on this front. Australia has modified the *Hague Visby Rules* applicable in the Australian COGSA, which, as Davies and Dickey predict, will create an interesting issue once a dispute concerning an Australian – England shipment comes before the English court.\(^{239}\) Davies and Dickey argue that an English Court may well use its own mandatory law, UK COGSA, to justify application of the original *Hague Visby Rules* rather than applying the Australian version of the Rules, relying on the *Hollandia* case to do so.\(^{240}\) It could be argued that the Australian modifications are not caught by the *Hollandia*, as they do not offend Art III Rule 8 – the Australian modifications increase the protection offered to shippers rather than derogate from the original *Rules*.\(^{241}\) However, if the English courts do apply *Hollandia* and hold that the Australian laws are inconsistent, then the Australian reforms will be muzzled. In that case, an English consignee would be well advised to consider the advantages posed by the Australian reforms before commencing proceedings as it may prefer to do so in Australia, which would be entitled to hear them due to s 11 of Australian COGSA. That may lead the carrier to seek out the jurisdiction of the English court, and if there is an exclusive jurisdiction clause in the bill that nominates England, its case for an anti-suit injunction would be significant. Although related to our discussion on TPA, this interesting point is somewhat of a diversion and will not be considered further by this paper.

Despite the interesting issues that might arise, the carriage of goods regimes, such as *Hague Visby Rules* are distinguishable as they have accepted mandatory status “built in” by virtue of being an accepted international convention that each contracting state is bound to apply. One commentator terms this a “closed system” that reduces or extinguishes party autonomy.\(^{242}\) As such, this can be distinguished from the situation where purely local or domestic legislation, such as consumer

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237 *The Hollandia* [1983] 1 Lloyd’s Rep 1 as outlined at “Mandatory Rules of the Forum” in Pt I of this paper.

238 See s 8 of the *Carriage of Goods by Sea Act* (Cth) and s 1(2) of the *Carriage of Goods by Sea Act* (UK).

239 Davies and Dickey, p 172.

240 An English Court would also be supported by the decision of *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (see “Domestic Mandatory Laws of a Foreign Country with Close Connection to the Contract vs Party Choice for Forum Court?” in Pt II of this paper).

241 This point arose from a comment made by Paul Myburgh of University of Auckland on an earlier draft of this article.

protection legislation, is relied upon as providing a “juridical advantage”. In Australia, the existence of causes of action under both Australian COGSA and TPA does appear to strengthen the claim that there are “strong reasons” in militating against a stay of proceedings to enforce an exclusive jurisdiction clause.

**Domestic legislation as mandatory rules of the forum court in face of foreign jurisdiction clause – strong reasons against a stay?**

In England and Australia it is accepted that mandatory rules of the forum, in the nature of domestic legislation, may constitute strong reasons for a stay. Perhaps the major difference between the two jurisdictions on this point is not therefore the general principle, but the statutory implementation of public policy. UK Parliament, at least at the time of writing has interfered very little with the ordinary commercial workings of business, preferring to regulate only consumer transactions. On the other hand, the Australian statute books contain more examples of the willingness of Parliament to reform commercial practices, both generally (in the case of the TPA) and specifically (in the case of the ICA, and to an extent, the Australian COGSA).

The leading authority in Australia for the proposition that mandatory rules of the forum may constitute strong reasons to decline a stay in the face of an exclusive jurisdiction clause is the *Akai* decision. In that case the parties, both large corporations, had freely negotiated for the law of England to apply to their insurance contract, and for the English courts to have exclusive jurisdiction. However, when the Australian insured sought to enforce the policy, it sued the insurer in Australia. It wanted the benefit of the Australian ICA, the provisions of which would have given the insured a far greater chance of recovering against the insurer. The insurer sought a stay of proceedings relying on the contractual terms. Both at first instance, and on appeal, the stay was granted. The insured appealed to the High Court. The insured argued that the provisions of the ICA rendered those terms of no effect, because the Act applied where the objective proper law of the contract was Australian law, and s 8 of the ICA provided that express provisions to the contrary were to be disregarded. The High Court, by majority, granted a stay, concluding that as a matter of objective proper law that the law of the contract was Australia. Toohey, Gaudron and Gummow JJ gave a wide reading to the ICA provisions in keeping with their remedial status and held that the exclusive jurisdiction clause was an “express

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243 While England does have mandatory consumer protection provisions, they are tightly drafted so that purely commercial transactions do not trigger them: see *Unfair Contracts Act 1977* (UK).

244 The United Kingdom Law Commission is currently reviewing the law of insurance and there have been submissions made that it ought to consider reform along the lines of Australian law. Whether it does so, or includes provisions to avoid contracting out like the Australian legislation, remains to be seen.

245 See s 8 of the *Insurance Contracts Act*:

8 Application of Act

(1) Subject to s 9, the application of this Act extends to contracts of insurance and proposed contracts of insurance whose proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.

(2) For the purposes of subs (1), where the proper law of a contract or proposed contract would, but for this subsection, be the law of a State or of a Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory.

Also relevant is s 52, which provides:

52 “Contracting out” prohibited

(1) Where a provision of a contract of insurance (including a provision that is not set out in the contract but is incorporated in the contract by another provision of the contract) purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act, the provision is void.

246 In doing so the High Court rejected a tripartite analysis to determine the proper law of the contract, instead preferring to see it as a two-stage process: first, was there an express choice, and secondly, what is the objective proper law, being the place with the closest and most real connection with the contract; see 390-391. Viewed in this way, the exclusive jurisdiction clause was to be taken to be an “express choice”, which was then to be disregarded under s 8 of the *Insurance Contracts Act* when determining the proper law of the contract. In the Court of Appeal, the exclusive jurisdiction clause was held not to be an “express” clause, and as such could lead to an inferred choice of law that was not affected by s 8 of the *Insurance Contracts Act*.
The provision to the contrary” and as such was to be disregarded under s 8. The objective proper law was that of Australia. In considering whether there were “strong reasons” militating against a stay, they assumed that an English court was likely to apply English and not Australian law that would deprive the plaintiff of the legitimate juridical advantage and would be inconsistent with the court’s obligation to give effect to the ICA and the policy it manifested. As such, there were strong reasons for giving a stay due to the public policy of the forum.

The minority, Dawson and McHugh JJ, were unwilling to read the provision so widely. Their Honours found that the ICA only dealt with choice of law clauses and as such did not preclude enforcement of an exclusive jurisdiction clause. Nor did it preclude the foreign court from applying its own law as to the proper law of the contract. They found that no “strong reasons” were apparent which would justify refusal of a stay. The reasoning of the minority was consistent with a finding that the ICA was only a domestically mandatory statute.

The response to the Akai decision in Australia has been mixed. It would appear to have been welcomed by Australian insurance lawyers and academics but it has received a cooler reception from the leading academic commentators on private international law in Australia. Certainly the minority approach is less intrusive for international litigation and would create a more seamless knit with the attitudes of English courts. However, it has to be said that the majority decision ensures that, at least so far as the Australian courts can control it, the apparent intent of the legislation is not thwarted by such a clause.

The outcome of the parallel English proceedings shows that the Australian courts’ view is hardly the end of the story. That sequel is best dealt with under the next heading.

Based on the High Court decision in Akai, Australian plaintiffs have relied on the existence of a TPA cause of action to defend their decision to commence proceedings in Australia. The plaintiff can allege that the granting of a stay will deprive it of a “juridical advantage”, namely the ability to assert its TPA cause of action. The test has been stated in Australia as being “whether a protective Australian Statute would be avoided by forcing the plaintiff to sue in the courts of the nominated jurisdiction.”

This is not always a guaranteed home run – in some Australian cases (admittedly not maritime cases), the courts have considered whether similar relief to s 52 might be possible in the alternative forum. In addition, it might be possible on the facts of a given case for the defendant to the Australian litigation to establish that the TPA cause of action in fact adds little to the plaintiff’s case. However, there are some dicta to suggest that a court should not place so much weight on an exclusive jurisdiction clause in determining a stay application where there is a consumer situation and one party

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247 See Davies M, n 28, at 220 where he criticises the majority’s reasoning in this regard.

248 Akai Pty Ltd v People’s Insurance Co Ltd (1996) 141 ALR 374 at 381.


250 See Greene J, n 139, for a feisty defence of the majority position.

251 Garnett R, n 31, at 21-22; Davies M, n 28; Whincop M and Keyes M, Policy and Pragmatism in the Conflict of Laws (Adgagate, 2001) at 66. Whincop and Keyes say that the Akai decision goes a long way towards permitting a party to defect opportunistically from express promises where the party can identify a mandatory rule in his or her interest in a forum; see “Putting ‘Private’ Back into Private International Law: Default Rules and the Proper Law of the Contract” (1997) 21 Melb Univ L Rev 515 at 529.

252 Although note the argument that if the legislature intends to negate exclusive jurisdiction clauses it could do so through the use of express language, and that it would be preferable for such statutory provisions to be given a narrow rather than broad meaning: Whincop and Keyes, n 251, pp 65-68.


had to “take it or leave it”, although it is not clear to what extent that same approach applies as regards boilerplate provisions in international commercial contracts.

**Domestic mandatory laws of a foreign country with close connection to the contract vs party choice for forum court?**

When the exclusive jurisdiction clause nominates England, the position of the English courts as regards the foreign mandatory law can be found in the parallel proceedings on foot in England in the *Akai* litigation. As it happened, the proceedings that *Akai* had commenced in England out of “an abundance of caution” continued before the English courts after the decision of the High Court of Australia, as did proceedings in Singapore brought by the insurer to deflect any attempt to enforce a judgment against it in that country. In any event, Thomas J held that (contrary to the High Court’s conclusion) the defendant had not in fact submitted to the jurisdiction of the Australian courts. As such the English court could refuse to recognise the High Court’s decision that the English law and jurisdiction clause were void.

According to Thomas J, the proper law of the contract was, as the parties had agreed, English law. *Akai* alleged that the Australian court had done nothing more than apply the reasoning of the decision of *The Hollandia*: therefore the Australian decision ought to be given effect because the legal reasoning was the same as that which an English court would use in the same circumstances. The judge dismissed this as a relevant factor. While the consideration of issues on jurisdiction that has taken place in a foreign court might be respected as a matter of comity, here:

> ... the basis of the High Court’s decision was not the exercise of a discretion on principles familiar to this Court, but the application of Australian public policy set out in an Australian statute regulating insurance contracts. The real question for the Court is whether it should give effect to that public policy as set out in the Australian statute as determined by the High Court of Australia.

Thomas J then reviewed the applicable principles, which had been set out in two leading clauses concerning clauses exempting the shipowner from liability for negligence. In the first case, *Re Missouri Steamship Co* (1889) 42 ChD 321 the bill of lading incorporated English law but contained an exemption clause that was void in the country of shipment, being the United States. The judge relied on Lord Halsbury’s statement that:

> It is enough for me to say that whatever be the American law ... the law which the parties have elected as the law of their contract makes this stipulation [the exemption clause] valid.

The only exception seemed to be where the contract itself was void in the country where it was made, in which case it would not be enforced in England.

Thomas J moved on to consider the decision in *Vita Food Products Inc v Unus Shipping Co Ltd* (*Vita Foods*) (1938) 63 Ll. L. Rep 21. In that case a bill of lading was issued in Newfoundland for a

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256 *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90 at 101-102 issued in England in case their Australian proceedings were stayed in favour of England. Indeed, *Akai* probably wished that they had thrown caution to the wind and not issued these proceedings at all. The insurer did not seek an anti-suit injunction in England against *Akai* in the earlier stages of this case. Without the English proceedings on foot, the Australian proceedings might have been left to run their course. As the judge pointed out in defending the insurer’s failure to obtain an anti-suit injunction earlier, the state of the law regarding anti-suit injunctions was still nascent at that time: Thomas J at 107. It is unlikely that such a scenario would be replayed nowadays.

257 *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90.

258 *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90 at 92.

259 Which the English courts were entitled to ignore due to s 32 of the *Civil Jurisdiction and Judgments Act 1982*; discussed above at n 232.

260 *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90 at 98.


262 *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90 at 99.

263 As quoted in *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90 at 99.
shipment from Newfoundland to New York. The bill was subject to English law. It contained a provision that would have been void in Newfoundland. However, the suit was brought in the state of Nova Scotia, where the cargo had been discharged. The issue as to the weight to be given to the Newfoundland provision went before the Privy Council, which held that while the Newfoundland courts would be obliged to refuse to give effect to the contractual provision:

… it does not follow that any other court could properly act the same way. If it has before it a contract good by its own law or by the proper law of the contract, it will in proper cases give effect to the contract and ignore the proper law…

Thomas J then stated:

Lord Wright went on to say that the fundamental principle of English conflict of laws was that intention was to be the general test of what law to apply; a court should ascertain what was the bargain of the parties and give effect to the bargain unless debarred by a provision of foreign law that bound the court. In general legislative provisions of the type being considered did not have extraterritorial effect and did not debar the court from giving effect to the bargain of the parties.

Thomas J then applied those cases to the facts before him:

It is clear that the parties to the insurance policy bargained for English law. This court should therefore give effect to that intention, unless it would be contrary to English public policy (which includes international public policy) to give effect to the enforcement of the jurisdiction clause which is otherwise valid. That is not to say that in an appropriate case the court will not take into account…the public policy of a jurisdiction with which the insurance has a close connection. …in this case however, the court is concerned with the enforceability of the parties freely chosen choice of law and jurisdiction in a credit insurance policy. In contracts of this kind between commercial enterprises, there is no equivalent restriction in English law on the choice of law… In my judgment this Court should give effect to the bargain of the parties and their freely negotiated choice of law and jurisdiction. It should not, as a matter of comity, give effect to the decision of the High Court that overrode that bargain and that choice.

Thomas J granted an anti-suit injunction to prevent Akai from continuing with the proceedings in the Supreme Court of New South Wales, although he also dismissed the insurer’s application for summary judgment based on a time bar. The matter settled thereafter. The Chief Justice of the Supreme Court of New South Wales, speaking extra-curially has recently pointed to the decision as an example of the futility of arguing about jurisdiction.

An awkward trans-national squabble between England and Canada of even greater magnitude, and in a maritime context, has only recently come to an end. In the now infamous case of Magic Sportswear Corp v OT Africa Line (OT Africa) proceedings took place on both sides of the Atlantic, despite the modest quantum of CAD$30,000. The proceedings concerned short delivery of a shipment of goods from a consignor based in the USA to the consignee in Liberia. OT Africa had issued a bill of lading in Toronto, Canada, where it maintained business offices. The bill of lading contained an exclusive jurisdiction/law clause in favour of England. Cargo interests nonetheless commenced proceedings in the Canadian Federal Court, relying upon s 46 of the Canadian Marine Liability Act (2001). That section provides:

46.(1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where

264 At p 30, as quoted by Thomas J at Akai Pty Ltd v The People’s Insurance Co Ltd [1998] 1 Lloyd’s Rep 90 at 100.
265 Akai Pty Ltd v The People’s Insurance Co Ltd [1998] 1 Lloyd’s Rep 90 at 100.
266 Akai Pty Ltd v The People’s Insurance Co Ltd [1998] 1 Lloyd’s Rep 90 at 100. Other issues were raised by the parties, but the judge dismissed PIC’s application for summary judgment based on the time bar contained within the contract.
267 The judge ruled that the time bar issue should be argued as a preliminary issue.
268 Spigelman CJ, n 24, at 325.
(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;

(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or

(c) the contract was made in Canada.

[emphasis added]

This section took its inspiration from the *Hamburg Rules*, but had been introduced to make it easier for Canadian traders to bring proceedings in their own courts rather than being subject to litigation in foreign countries where it was perceived the cost and procedures would favour the shipping lines rather than cargo interests. In the Canadian Parliament, much had been made of the fact that similar provisions already existed in Australia and New Zealand.

Within one month of the commencement of Canadian proceedings, *OT Africa* commenced proceedings in England obtaining an anti-suit injunction against the plaintiffs, relying on the exclusive jurisdiction clause. *OT Africa* then sought a stay of the Canadian proceedings based on the exclusive jurisdiction clause and on the basis of forum non conveniens.

While our focus here is on the English response to the facts, for completeness one should note that the Canadian courts, at first instance and on the initial appeal, found that s 46 grants jurisdiction to the Canadian courts where its conditions are met, despite a forum selection clause that states otherwise, but that the Canadian court still needs to determine if it is the most convenient forum. At first instance and on appeal the Canadian Federal Court held that, on reviewing the various factors, Canada was the most convenient and appropriate forum for the claim. *OT Africa* appealed that decision to the Canadian Federal Court of Appeal.

Before that final appeal in Canada could be heard, *OT Africa* sought to join and restrain the insurers of the cargo interests in the English proceedings. As well as defending that application, the cargo interests sought a stay of the English proceedings and discharge of the anti-suit injunction against them.

On the cargo interests’ application for a stay, Langley J outlined the general approach in favour of enforcing jurisdiction clauses unless there were strong reasons not to do so. He then stated:

> It requires, therefore, some exceptional justification for an English Court to stay proceedings in their country when England is the exclusive jurisdiction chosen by the parties to resolve the very dispute between them. I see nothing in the present circumstances which could begin to justify such an exceptional course unless it is to be found in the very fact that Canadian legislation seeks to override the agreement of the parties.

Leaving aside the Canadian legislation, Langley J could find no reason “which would begin to justify” a non-enforcement of the jurisdiction clause. His Honour then turned to the overriding issue of the Canadian legislation, and said that the only basis upon which the cargo interests could justify their relief was that:

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269 *United Nations Convention on the Carriage of Goods by Sea* at Hamburg, 31 March 1978 (*Hamburg Rules*). The *Hamburg Rules* are in force, but have not been accepted by the major shipping nations.

270 Judgments of both the Canadian and English courts quoted from the debates in Canadian parliament concerning the proposed s 46. See, for example, *Magic Sportswear Corp v Mathilde Maersk* [2004] FC 1165 at [19]-[21] (O’Keefe J, Federal Court of Canada.)

271 See *Magic Sportswear Corp v Mathilde Maersk* [2004] FC 1165 at [20].


274 O’Keefe J at [19].

275 *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 1 Lloyd’s Rep 252 (QBD (Comm)).

276 *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 1 Lloyd’s Rep 252 at 258.

277 *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 1 Lloyd’s Rep 252 at 258.
... if this Court does not follow that course then there will be a clash of jurisdictions, with the appalling prospect of an apparent challenge from this Court to Canadian legislation and the cost and disruption of the same claims proceeding in two jurisdictions with the added risk of different outcomes. Moreover those prospects have already resulted in expense out of all proportion to the amount involved in the cargo claim.  

While admitting that the answer was not so easy, the Judge concluded that there is “insufficient logic” in treating s 46 in giving rise to some exceptional circumstance beyond the usual case, and that as English law has established at the highest level that anti-suit injunctions should be granted to ensure that parties abide by their agreement. As such, he found for OT Africa.

The cargo insurers appealed that decision to the English Court of Appeal, who handed down their decision two days before the Canadian Court of Appeal was due to hear the matter. In a judgment at pains to explain why the decision was not an attack on the legislature or Courts of Canada, the English Court of Appeal held that as the parties had chosen English law and the English courts, that English conflict principles meant that the choice of the parties had to be upheld unless there were strong reasons to persuade the court to the contrary. The only possible reason was the existence of s 46 and the decisions of the Canadian courts in refusing to stay the proceedings. Despite the argument that the Canadian legislation was simply a domestic manifestation of an international Convention (the Hamburg Rules), the court pointed out that England has not enacted that provision, and as such there was no “closed system” in which it can be assumed that every contracting state will come to the same decision. Without that closed system, English private international law provides that “the autonomy of the parties is more important” than the domestic law of Canada. Where two courts each had apparent legitimate jurisdiction according to their own law, the answer was to be found by application of the proper or applicable law of the contract. The proper law of the contract was to be determined by the parties’ express choice – here, English law. Citing Vita Foods and Akai, Longmore LJ held that:

There is no doubt that the Canadian courts have jurisdiction; the only question is whether a party is to be allowed to invoke that undoubted jurisdiction. If he has agreed not to do so, there is no impropriety in his being restrained from so doing.

Rix LJ made it clear that the fact the clause in question was a standard form document into which individual shippers have little input did not alter its effectiveness, and dismissed arguments based on the view that the clause was a “mere contract of adhesion” as “weak”. The court upheld the anti-suit injunction against the cargo interests, and refused to stay the English proceedings. Leave to appeal to the House of Lords was refused.

Faced with this insurmountable barrier, the Canadian Federal Court of Appeal dealt with the appeal of OT Africa. OT Africa alleged that the court ought to stay proceedings on forum non conveniens grounds, bearing in mind principles of freedom of contract, commercial certainty and desirability of avoiding parallel proceedings in Canada and England. Cargo interests alleged that s 46 removed that discretion, or alternatively no weight should be given to the exclusive jurisdiction clause or the English judgments because to do so would be to defeat the purpose of s 46(1).

Evans J, with whom Decary and Sharlow JJ agreed, was of the view that s 46(1) did not remove the discretion of the court to stay proceedings on forum non conveniens grounds. He considered that the lower courts ought to have considered the fact that the cargo interests had not contested

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279 As it happened, the Canadian Court of Appeal hearing was adjourned pending the outcome of the application for leave to appeal to the House of Lords. It finally took place in mid 2006: OT Africa Line Ltd v Magic Sportswear Corp [2007] 1 Lloyd’s Rep 85 (CA Civ Div) at 87.
280 OT Africa Line Ltd v Magic Sportswear Corp & Ors [2005] 2 Lloyd’s Rep 170 (English CA) at 175.
Evans J also considered that the English judgments were relevant and ought to be considered in the forum non conveniens analysis. Further, he noted that s 46(1) did not neutralise the choice of law provision in the contract, which was still effective. Nor did s 46(1) render foreign exclusive jurisdiction clauses as null and void, which distinguished it from the Australian and New Zealand provisions. In fact, s 46(1) gives the option of instituting proceedings in Canada, but does not require them to do so.

Evans J proceeded to consider the factors relevant to the forum non conveniens enquiry. In that analysis, factors in favour of England were that its law was the proper law of the contract, the carrier had commenced proceedings in that forum as it was entitled to do under the contract, that there were parallel proceedings there and any judgment against OT Africa would need to be enforced in England. In favour of Canada was that the contract was made and freight paid in Canada, and the Toronto-based cargo insurer had some advantage in its chosen forum of Canada due to the saving of expense. There were other factors that favoured neither Canada nor England. Evans J concluded that the factors connecting the dispute with Canada were minor, and those connecting it with England were cumulatively more significant. As such, he was persuaded that the Federal Court of Canada was a less convenient forum than the High Court in London, and stayed proceedings in Canada. The impasse over which country should hear the $30,000 cargo claim was resolved.

Although the OT Africa case concerned Canadian carriage of goods law, (and a provision more equivocal than the Australian equivalent at that) it confirms and solidifies the English position concerning foreign laws that seek to interfere with exclusive jurisdiction clauses favouring English courts. Such foreign laws will not, of themselves, constitute “strong reasons” sufficient to entice the courts to ignore the exclusive jurisdiction clause. Party autonomy is to be almost universally upheld, even recognising that there may in fact be no “choice” in the contractual provision for one of the parties to the contract. As these clauses are usually accompanied by a choice of law clause, the English principles of conflict of laws will be applied – incorporating as they do, not only the primary factor of party choice, but also respecting that choice of a neutral venue even if there are few other connecting factors with England. There is no reason to consider that the analysis of the English courts would be any different should the foreign statute be the Australian TPA. In fact, if anything, the position of the English courts could be stronger where the case concerns s 52 because there is nothing in the TPA itself that expressly voids contracting out of that provision.

This then begs the question: how will these cases and courts in conflict be able to be reconciled? The English courts will apply English law, being the proper law of the contract. The Australian courts will either view the TPA as overriding the proper law to the extent its provisions apply (in the case of s 52) or disregard the choice of law altogether (if s 74, and thereby s 67, apply). In either case, both courts will consider that they are the correct forum. It is submitted that on the current state of the law in both countries, the result may well depend on which party has got the first injunction against the other. This would be a regrettable state of affairs, because the result will be uncertain and costly for

287 OT Africa Line Ltd v Magic Sportswear Corp [2007] 1 Lloyd’s Rep 85 at 94.
290 Section 11 of the Carriage of Goods by Sea Act, as noted by the Canadian Court of Appeal; OT Africa Line Ltd v Magic Sportswear Corp [2007] 1 Lloyd’s Rep 85 at 93.
291 And several strong connecting factors with Australia, as was the case in Akai litigation.
292 Or indeed the unconscionability provisions of s 51AA – s 51AC of the Trade Practices Act.
293 Although the Australian courts have interpreted it as having that effect, by reason of the purpose and public policy of the Act: Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160 at 164: but the court went on to find that the Trade Practices Act claims were arbitrable: see discussion under the next heading.
the parties, and would encourage an unseemly and possibly ill-considered rush to the court doors. In
the final part of this paper various possible solutions are posed to this dilemma.

Prior to moving on to that final part, for the sake of completeness, this paper will consider the one
area where the international legal community appears united in its quest for uniform treatment of cases
– or at least, more united. Nevertheless, even in this area, the treatment of the TPA has posed
difficulties.

**International Convention upholding party autonomy – what effect domestic
mandatory law? The exceptional case of arbitration clauses.**

Subject to one proviso, a foreign defendant will be more likely to obtain a stay of Australian
proceedings, even if those proceedings rely on the TPA, if there is an arbitration clause in the contract
between the parties. That is because Australia is a party to the *New York Convention 1958*, which is
enacted for Australia in the *International Arbitration Act 1974* (Cth). As we have seen above, s 7 of
the IAA requires a court to stay proceedings that are in court if they have been subject of an
agreement to arbitrate. Once there is a dispute that falls within an arbitration clause and is capable
of settlement by arbitration, a court of a Convention country is bound to stay any legal proceedings
brought in breach of the clause. Importantly, the court may impose conditions on the stay "as it sees
fit". However, once it has been determined that the dispute falls within the arbitration clause, and
s 7 applies, then there are no further enquiries to be made or discretion left to be exercised. As we
shall see, this differentiates the treatment of arbitration clauses by the courts from other clauses – there
is no forum non conveniens issue or "strong reasons" analysis to be done.

The *New York Convention* is the high water mark of co-operation and uniformity between
countries as regards matters of civil dispute resolution; and also the high water mark of upholding
party choice. Nevertheless, the TPA as a mandatory statute poses some challenges for the operation of
the *New York Convention* via the IAA. The particular issues that have arisen concerning TPA claims
and s 7 of the IAA fall into several broad categories:

- The scope of the agreement clause has proven important in Australia in the context of TPA
  claims, the question being whether the arbitration clause can cover TPA allegations.
- Whether a TPA claim is "arbitrable" within s 7(2).
- Whether and what terms can be imposed on any stay under s 7.
- Whether the effect of domestic mandatory law can lead to a conclusion that the agreement to
  arbitrate is null and void, or incapable of being performed under s 7(5).

It will become clear that the Australian and English courts, are generally becoming more liberal in
their interpretation of the *New York Convention* and their respective Acts with the aim of increasing,
not decreasing, the effectiveness of a nomination to arbitrate despite the existence of TPA causes of
action.

**Are TPA claims “capable of settlement” under IAA?**

This is often called the “arbitrability” issue. In the early days of both the IAA and the TPA, it was
not clear whether an arbitrator was able to exercise the wide powers of a court in matters concerning
the TPA. If not, then, so the argument went, a TPA allegation could not be “capable of settlement by
arbitration” within s 7(2) and therefore would have to be the subject of separate litigation. It was

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295 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the United Nations

296 See “Litigation Despite Agreement to Arbitrate” in Pt II of this paper.

297 See “Litigation Despite Agreement to Arbitrate” in Pt II of this paper.

298 And this same trend can be witnessed in England: see the recent House of Lords judgment in the case of *Premium NAFTA
Products Limited v Fil Shipping Co Ltd* [2007] UKHL 40 (17 October 2007) in which the Law Lords, affirming the decision of
the Court of Appeal, said it was time to draw a line under the authorities that distinguished between different wordings of
arbitration clauses. If the parties agreed to arbitration, then it is to be assumed that they expected all the issues between them to
be resolved by arbitration, unless there are clear words to the contrary. In this regard, Lord Hoffmann cited the *Comandate
Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 238 ALR 457 as Australian authority for that
approach.
decided in 1991 in the case of *IBM Australia Ltd v National Distribution Services Ltd* that TPA allegations could be heard, and relief granted, by an arbitrator.\(^{299}\) In that case, the arbitration was to take place in Australia. The *IBM case* was followed in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, which held that TPA claims were "capable of settlement" by an arbitrator, albeit an English arbitrator sitting in London. By submission to arbitration, the parties clothed the arbitrator with the ability to grant relief available in a court of law, including relief pursuant to s 87 of the TPA. The court accepted that the arbitrator would have to decide, based on principles of conflict of laws, the role to be played by the TPA in the arbitration – it was not for the court to interfere. But there was no reason in principle why the TPA claims were not arbitrable.\(^{300}\)

In more recent times the Federal Court seemed out of sync with approach of the State courts in this regard. In *Kiukiang Career* [1998] 159 ALR 142, the Full Court discussed arbitrability in obiter. Emmett J\(^{301}\) would have been prepared to rule that if a party wished to rely on TPA allegations in the courts, then it could not be compelled to arbitrate in accordance with its arbitration clause, if the effect of that would be to exclude the jurisdiction of the court. If it had the effect of allowing contracting out of the TPA then that provision would be void.\(^{302}\) This represented the high water mark of protection of the statutory rights created by the TPA. However, the Full Court has more recently swung into line with State authority in *Pan*, in which Allsop J was at pains to point out:

> There is nothing inimical to Australian public policy or to the terms of the TPA in commercial parties agreeing to commercial arbitration in London under English law....The TPA is not being undermined; rather another law of the Parliament is in operation [being the IAA].\(^{303}\)

In the *Pan case*, the *IBM* and *Francis Marketing* cases were reviewed and cited with approval by the Full Court of Federal Court. It is clear that the obiter of Emmett J in the *Kiukiang Career* is now to be disregarded.

One of the factors influencing the subservience of the TPA to the public policy of the IAA is the distinction between the Parliament’s treatment of the TPA when compared with COGSA. As Allsop J pointed out in the *Pan case*,\(^{304}\) the Parliament chose to excise the operation of COGSA from the sphere of operation of the IAA. By reason of s 11 of the COGSA, an arbitration clause may be regarded as being of "no effect", at least to the extent it deals with issues of carriage of goods by sea to which COGSA applies. However, such an exception was not made for the TPA. Further, there is no provision in the TPA akin to the express words of s 52 of the ICA.\(^{305}\) One must take from that, then, an intention that TPA matters are to fall within the IAA; that, in effect, the public policy of the IAA is more important than the TPA.

There is one crucial difference between TPA and COGSA as mandatory laws of Australia. The IAA specifically defers to COGSA.\(^{306}\) Therefore, foreign arbitration clauses, which would in other

\(^{299}\) *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, 100 ALR 361 (NSWCA). That same case was also notable for its criticism of narrow interpretations of arbitration clauses: See Kirby P (as he then was) at 366.

\(^{300}\) *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 167, per Gleeson CJ (with whom Meagher and Sheller JJ agreed). Indeed, in *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175, it was held that *Trade Practices Act* claims raised in legal proceedings in Australia after the granting of an award by a Singaporean arbitral tribunal were arbitrable, even though the tribunal had already given its award in which it concluded that the *Trade Practices Act* was not applicable to the contract. Had Justice Hollingworth not already concluded that service ought to be set aside on other grounds, he would have been inclined to stay the proceedings pursuant to s 7 of the *International Arbitration Act* (Cth) at [79].

\(^{301}\) With whom Branson J agreed. Beaumont J issued short reasons in general agreement with those of Emmett J.

\(^{302}\) *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1; 159 ALR 142 (FCAFC) at 23-24.

\(^{303}\) *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 238 ALR 457 at 515.

\(^{304}\) *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 238 ALR 457 at 504 and 515 ([196]-[240]).

\(^{305}\) *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 238 ALR 457 at 515 ([240]).

\(^{306}\) See s 2C.
contexts entitle the parties to a stay of proceedings commenced in Australia.\textsuperscript{307} will be caught by s 11 COGSA and will be considered “of no effect”.\textsuperscript{308} Once that is the case, s 11 applies to give the Australian courts jurisdiction within the terms of s 11. Sea carriage document disputes will be covered by COGSA (and therefore immune to IAA stays) Where the same case contains allegations of breaches of the TPA, these will be sheltered from a stay as a result of s 7 by the skirts of COGSA. Charterparty disputes\textsuperscript{309} and other maritime disputes fall outside COGSA and are therefore subject to s 7 of the IAA.\textsuperscript{310}

\section*{Does the scope of the arbitration agreement extend to TPA causes of action?}

An important precursor to a stay is whether the agreement to arbitrate properly covers the dispute in question. The tendency of the courts, at least in more recent times, is to attempt to construe arbitration clauses broadly, so as to discourage the fragmentation of disputes.\textsuperscript{311} An arbitration clause anticipates contractual claims between the parties. However, claims such as those arising under s 52 of the TPA are more troublesome. They are not contractual but statutory claims, and often the conduct relied upon may have taken place during negotiation of the contract but prior to its entry.\textsuperscript{312} Broad language in an arbitration clause will see them caught by its scope, however the Australian courts will not artificially elasticate the clause to fit.\textsuperscript{313}

Early cases, largely in the State Supreme Courts, tended to emphasise the importance of a broad reading of the arbitration clause (and, as we shall see, the arbitrability of TPA issues). In \textit{IBM Australia Ltd v National Distribution Services Ltd} [1991] 22 NSWLR 466, the New South Wales Court of Appeal held that the words “any controversy or claim arising out of or related to the agreement or the breach thereof” were sufficiently wide to include TPA claims. Clarke JA said:

There are no indications in the contract that the words should be construed narrowly. Nor in my opinion are there any compelling reasons in favour of reading down the meaning of the phrase. On the contrary there are powerful considerations in favour of the contrary view … it is likely … the parties intended that all the disputes between them concerning the terms of the contract, the performance … and matters connected … should be referred to the one tribunal for determination … I would find it difficult to ascribe to the parties to a contract an intention to submit only part of a dispute to an arbitral tribunal reserving the reminder for consideration by the court as this would, on any view, be inefficient and costly.\textsuperscript{314}

This was affirmed in 1996 by a differently constituted Court of Appeal in \textit{Francis Travel v Virgin Atlantic Airways} (1996) 39 NSWLR 160.

However, in the Federal Court, the intersection of arbitration clauses, maritime matters and TPA allegations led to a difference of approach by the Full Court in \textit{Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (Kiukiang Career)} (1998) 90 FCR 1; (1998) 159 ALR 142 at 163. The case concerned the contamination of fertiliser as a result of unclean holds, leading to its rejection by quarantine authorities upon arrival in Australia. The cargo interests alleged a breach of the contract of carriage and a breach of s 52 concerning representations about the previous cargoes carried by the vessel. The Defendants sought a stay of proceedings based upon an arbitration clause in the relevant charterparty.

\textsuperscript{307} Pursuant to s 7 of the \textit{International Arbitration Act} (Cth)
\textsuperscript{309} Although possibly voyage charters will fall within the sea carriage docs category – see Davies and Dickey at 280-281.
\textsuperscript{310} This leads to some “unfortunate” fragmentation of disputes – such as the \textit{Hi-Fert} litigation saga.
\textsuperscript{312} \textit{Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)} (1998) 90 FCR 1; 159 ALR 142 (FCAFC).
\textsuperscript{313} \textit{Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)} (1998) 90 FCR 1; 159 ALR 142 per Emmett J at 160.
\textsuperscript{314} \textit{IBM Australia Ltd v National Distribution Services Ltd} (1991) 22 NSWLR 466 at 483.
At first instance, Tamberlin J had relied upon the IBM and Francis Travel decisions, and found that the arbitration clause was sufficiently wide to cover all the matters raised by the plaintiffs, including the TPA claim.\textsuperscript{315} As such, he ordered the stay of proceedings in favour of London arbitration as agreed by the parties in the various contracts.\textsuperscript{316} Tamberlin J proved unconcerned that in this case at least, it would be arbitrators based in London who would be interpreting and applying the TPA.\textsuperscript{317}

On appeal however, the Full Court of the Federal Court seemed keen to protect the plaintiff’s right to prosecute the TPA claim. The Court took the view that the reference in the charterparty to arbitration as agreed by the parties in the various contracts.\textsuperscript{316} It would of course be open to the parties to agree on arbitration of the question as to whether a TPA claim arose, or to refer such a claim to arbitration when it did arise.

The proviso is that if such a dispute did arise, and one party wished to have the dispute resolved by a court with appropriate jurisdiction, that party could not be compelled to have the matter resolved by arbitration if the effect would be a contract excluding the application of the \textit{Trade Practices Act}. If the effect of the agreement would be to exclude a claim under the \textit{Trade Practices Act} and to deprive the parties of the remedies which a court may grant under the \textit{Trade Practices Act}, in favour of a determination by an arbitrator, the provision may be void by the operation of the \textit{Trade Practices Act}. If the effect of such a provision would be to exclude the jurisdiction of the court and enable the parties to contract out of the remedies conferred by the \textit{Trade Practices Act}, the provision may be void.\textsuperscript{319}

The Full Court of the Federal Court held that as the non-contractual claims (including a TPA claim) were not generated by the carriage contract, an arbitration clause in that contract that provided for arbitration of claims “arising out of” the agreement was not broad enough to cover the non-contractual claims.\textsuperscript{320} The Full Court went on to doubt that the existence of the arbitration clause could be a factor in the court’s determination of whether to stay the litigation on forum non conveniens grounds because it had been found to have no effect due to the operation of COGSA.\textsuperscript{321} In any event, the Court concluded that there was a significant connection with Australia such that Australia was not forum non conveniens.\textsuperscript{322} Nor was it vexatious and oppressive for proceedings to continue in Australia when significant parts of the dispute were referred to arbitration in London. The defendants submitted that

\begin{itemize}
  \item \textsuperscript{315}Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1996) 71 FCR 172; [1996] 150 ALR 54.
  \item \textsuperscript{316}Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1996) 71 FCR 172; [1996] 150 ALR 54 at 62. Tamberlin J went on to decide that the proceedings against the other defendant, the shipowner who issued the bill, would also be stayed in favour of London, which was the forum stipulated in the contract. This was to avoid the fragmentation of disputes, and despite the provisions of s 11 of the \textit{Carriage of Goods by Sea Act}, which he held did not force him to take jurisdiction nor removed his discretion to decide whether proceedings in Australia were clearly inappropriate. His findings as to the effect of s 11 of the \textit{Carriage of Goods by Sea Act} were overturned on appeal: Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [1998] 159 ALR 142. Prior to that appeal, the plaintiffs brought a constitutional challenge to the effectiveness of s 7 to the extent it ousts the jurisdiction of the Federal Court sitting in Admiralty and purported to give judicial power to London arbitrators, which challenge was rejected by Tamberlin J: [1997] 755 FCA (unreported). The appeal on these issues was dismissed: see Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1; 159 ALR 142. The appeal decision is discussed further below.
  \item \textsuperscript{317}Hi-Fert Pty Ltd, Cargill Fertilizer Inc v Kiukiang Maritime Carriers & Western Bulk Carriers (Australia) Ltd [1997] 75 FCR 583; 145 ALR 500 at 509.
  \item \textsuperscript{318}Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1; 159 ALR 142 at 163.
  \item \textsuperscript{319}Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1; 159 ALR 142 at 165.
  \item In doing so they allowed an appeal on that point from the primary judge, Tamberlin J who, mindful of courts “favour[ing] a one-stop adjudication of all disputes if this can be accommodated consistently with the language of the clause” and that the current thrust of authority favours the adoption of a broad interpretation of arbitration clauses. Tamberlin J had held, following Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160, that the clause was sufficiently broad to encompass pre-contractual \textit{Trade Practices Act} claims, being equivalent to “arising out of” or “arising in connection with”. The parties had “clothed the arbitrator, by agreement, with jurisdiction to deal with Australian trade practices allegations” at [1996] 150 ALR 54 at 62. The Full Court decision in the \textit{Pan case} has vindicated the position of Tamberlin J in this regard.
  \item \textsuperscript{321}Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [1998] 159 ALR 142 at 165 per Emmett J, referring to s 11(3) of the \textit{Carriage of Goods by Sea Act}. In this respect, the Court disagreed with Tamberlin J.
  \item \textsuperscript{322}Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [1998] 159 ALR 142 at 165 per Emmett J.
\end{itemize}
fragmentation of the dispute could be avoided if the court exercised its discretion to stay the Australian litigation so that it could be sent to arbitration in London. Emmett J conceded fragmentation was undesirable, but was unrepentant as he fired a broadside across the bows of the foreign litigants –

…it would always be open to WBC to submit to the proceedings in the Federal Court. Section 7(2) is only invoked upon the application of a party. It is open to a party not to invoke s 7(2) or the discretionary inherent jurisdiction of the court. If a party chooses to make no application … The Federal Court could then provide “one stop adjudication”.

The arbitration clause was valid for contractual claims not caught by COGSA, but not wide enough to catch non-contractual claims such as those relying on the TPA. As a result, part of the claim was sent to arbitration in London, and part remained in Australia before the Federal Court. Given that conclusion, the Full Court did not need to decide whether and to what extent an arbitrator in London would have been able to determine TPA type claims. Ultimately the Trade Practices Act claims were unsuccessful.

In Hi-Fert Pty Ltd v United Shipping Adriatic Inc (United Shipping) (1998) 89 FCR 166; 165 ALR 265, the same arbitration clause came up for further discussion in related proceedings, again before Emmett J. The carrier argued that s 11 of COGSA only had effect where the governing law of the agreement was Australian. Emmett J rejected that view saying that s 11 has effect “irrespective of whether the governing law of the agreement is Australian or the law of some other jurisdiction” citing the reasons for the enactment of s 11 and its predecessors in earlier carriage legislation.

If it were possible to avoid the operation of s 11(2) by the simple expedient of providing that the contract was to be governed by the law of a jurisdiction other than Australia, those objectives and reasons would be easily put at nought.

Emmett applied the Kiukiang Career case, holding that the TPA claims did not fall within the particular wording of the arbitration clause, and the arbitration clause was of no effect as regards those claims to which COGSA applied. The remainder of the claims, being charterparty issues, were properly the subject of the arbitration clause and a stay was granted in relation to those matters.

In both United Shipping and Kiukiang Career, the allegations included TPA but also were claims to which, at least in part, COGSA applied; as such they were sheltered from a stay under s 7 of the IAA.

The Kiukiang Career and United Shipping decisions allowed Australian mandatory statutes to dominate. Insofar as COGSA applied, there could be little argument about its effect given the terms of the IAA. However, the relatively narrow construction given to the arbitration clause, leading to fragmentation of the dispute between arbitration in London and courts in Australia, caused rumblings from at least one judge involved in maritime matters in the Federal Court. In Walter Rau Neuser Oel

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523 Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [1998] 159 ALR 142 at 618.
524 The Court held that although the representations were made, by the relevant time they were no longer being relied upon by the plaintiff: see Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [2000] 173 ALR 263 at 278.
525 Hi-Fert Pty Ltd v United Shipping Adriatic Inc (1998) 89 FCR 166; (1999) 165 ALR 265 at 278.
526 Hi-Fert Pty Ltd v United Shipping Adriatic Inc (1998) 89 FCR 166; (1999) 165 ALR 265.
527 Hi-Fert Pty Ltd v United Shipping Adriatic Inc (1998) 89 FCR 166; (1999) 165 ALR 265 at 278. Emmett J went on to consider whether, as a question of fact, the London solicitors for Hi-Fert had in fact made an ad hoc submission to London arbitrators of the bill of lading issue, despite s 11. He concluded that there had not been, and concluded (with what appears to be some relief) “in those circumstances it is not necessary for me to consider the question of whether s 11 applies to an ad hoc submission to arbitration. That appears to me to be a matter that is not without some difficulty and since it is not necessary for me to resolve it, I do not propose to attempt to do so.” (at 293)
528 A month earlier, Emmett J had issued an anti-suit injunction against United Shipping pending the determination of these issues: Hi-Fert Pty Ltd v United Shipping Adriatic Inc [1998] FCA 1426
Und Fett AG v Cross Pacific Trading Ltd, Allsop J made no secret of his view that although he was bound to follow Kiukiang Career it gave him no pleasure to do so.\textsuperscript{329} His Honour only had to wait a year before correcting the ledger.

An appropriate vehicle for reconsidering the United Shipping and Kiukiang Career cases presented itself in 2006 in the case of Comandate Marine Corp v Pan Australia Shipping Pty Ltd (Pan) (2006) 238 ALR 457 (FCAFC). While the entirety of that complicated dispute need not be canvassed,\textsuperscript{330} one issue was whether the arbitration clause would give the arbitrators power to determine the TPA claims and whether the litigation in Australia ought to be stayed pursuant to s 7(2) of the IAA. After an extensive review of the authorities, Rares J held that the words “arising out of this contract” did not extend to the TPA claims because the contract was not the source of the claim.\textsuperscript{331} His Honour was bound by the views of the Full Court in Kiukiang Career, but unlike Allsop J, was of the opinion that the Kiukiang Career was correct in any event. The defendant appealed.

On appeal, Allsop J (with whom Finkelstein J agreed),\textsuperscript{332} considered that the TPA claim concerning pre-contractual representations did in fact “arise out of” the formation of the contract, because without the charterparty there would have been no act of reliance with which to found a cause of action under the TPA. As to submissions that the Court was not able to so decide, based on Kiukiang Career, Allsop J held that the Kiukiang Career was distinguishable because that case had considered the words “arising from” rather than “arising out of”. In any event, the judge concluded that giving a narrow interpretation to the words of the arbitration clause was wrong:

I am persuaded that [Kiukiang Career] is wrong and inconsistent with the approach of modern authority to which I have referred. Because of the importance of the issue to commerce in this country, my view is that I should not merely expose my disagreement but should take the step… to bring the views of this court into conformity… concerning the approach to the construction of arbitration clauses. So, to the extent that the reasoning in The “Kiukiang Career” is inconsistent with that set out above, I am persuaded that it is wrong and should be departed from.

His Honour concluded that the pre-contractual TPA claims were encompassed by the scope of the arbitration clause.\textsuperscript{333}

**Imposing terms on the stay pursuant to s 7(2) of the IAA**

In both Walter Rau and Pan, the Federal Court was alive to the concern of Australian parties that an overseas arbitrator may choose to disregard the TPA in considering the dispute. In Walter Rau, Allsop J acknowledged that the fact an arbitrator in London might see the TPA as being “irrelevant as a statute of a [foreign] legal system”\textsuperscript{334} would not be relevant to the operation of s 7(2) for a stay. However, he was prepared to find that likelihood could be relevant to the terms of such a stay. That led to the judge’s solution, in Walter Rau, to impose a condition on the stay of proceedings. In Walter Rau, the condition was expressed as:

…to consent to all aspects of the TP Act claims which would have been justiciable in this court, being litigated in the arbitration irrespective as to any conclusion as to proper law. Such a condition would solve the potential conflict of Australian domestic statutory policy and the operation by a foreign

\textsuperscript{329} Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102 (unreported, Allsop J) at [68]–[69].


\textsuperscript{331} Pan Australia Shipping Pty Ltd v The Ship “Comandate” (No 2) [2006] FCA 1112 per Rares J at [113].

\textsuperscript{332} Finn J disposed of the matter on narrower grounds.

\textsuperscript{333} A recent first instance decision on an interlocutory ex parte application for service outside the jurisdiction followed Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [1998] 159 ALR 142 without reference to Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; (2006) 238 ALR 457: see Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd [2007] FCA 881 (unreported, Gilmour J).

\textsuperscript{334} Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102 (unreported, Allsop J) at [73].
arbitrator of the rules of conflicts of law to set at nought governing Australian law. The arbitration agreement is a contract about submission. Its enforcement should not undermine the operation of a statute such as the TP Act.\textsuperscript{335}

This condition to allow the raising of TPA issues was apparently imposed on the parties, ostensibly in exercise of the discretion permitted to the court by s 7(2) of the IAA to impose "conditions, if any, as it thinks fit". In the Walter Rau case, leave to appeal was granted to both parties\textsuperscript{336} but never heard, and the matter appears to have settled. Whether the imposition of the condition was a ground of the appeal cannot be gauged.

In Pan, the facts were different. The party seeking the stay gave an undertaking that it would allow the arbitration to determine "all issues between the parties arising under the TPA".\textsuperscript{337} As such, Allsop J did not have to consider making such an order, although His Honour appeared more circumspect about the wisdom of such an order. Allsop J said, in his view on the facts of that case, and with the benefit of argument\textsuperscript{338} he thought he would not have made such an order as it may pre-empt the decision of the arbitrator and the operation of the arbitration clause.

Some circumspection in this regard is warranted, with respect. Whether the court’s discretion extends to requiring the arbitrator to consider the mandatory law of a country different to the chosen law remains hazy. Clearly the parties can agree to such a thing, as was done in Pan.\textsuperscript{339} However, whether imposed upon or agreed between the parties, one wonders how an arbitrator is to deal with such an order. In Pan, the relevant charterparty contained an English choice of law provision. We have already seen that English courts will dismiss a plea based on a foreign statute when English law applies. Would an English arbitrator be within his discretion to apply the same approach?\textsuperscript{340} Could the arbitral panel technically comply with the Federal Court order by allowing the parties to deal with the TPA claim, but ultimately concluding it is irrelevant because of the choice of English law? Would the party who had given such an undertaking to the Australian court, still be entitled to make that argument, or would it be constrained from doing so by the form of the undertaking?\textsuperscript{341} Certainly, given the attitude of the English courts to foreign law where the parties have chosen English law, it would be fairly safe to conclude that any appeal from the arbitrator’s decision on that basis would fall on deaf ears.

Also worthy of note is that, in any event, this pragmatic solution of the Federal Court is made possible by the wording of s 7(2) is only a clear option when the matter is bound for arbitration. Different considerations arise if conditions were imposed on matters headed to a foreign court. Would it offend judicial comity for one court (Australian) to make such an order directly affecting the other court? There is some initial attraction to the view that an order could be made to bind the party not the court (by way of analogy with the arguments made as to the operation of anti-suit injunctions). That option will be explored further in Pt III below.

**Does the TPA render an agreement to arbitrate “null and void” under s 7(5)?**

Another significant question is whether or in what circumstances s 7(5) IAA might be invoked. That subsection reads:

\textsuperscript{335} Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102 at [110].


\textsuperscript{337} Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; (2006) 238 ALR 457 at [241]-[245].

\textsuperscript{338} Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; (2006) 238 ALR 457 at [245].

\textsuperscript{339} The concession probably doesn’t go so far as to be an agreement to change the applicable law, despite the fact that this is possible, at least in theory: Nygh at 120.

\textsuperscript{340} Depending on the arbitration agreement, there may be an entitlement to appoint an arbitrator from Australia to sit on the panel in England, or perhaps an English Arbitrator with some Australian experience.

\textsuperscript{341} One would expect that it would be open to the party giving the undertaking to nevertheless argue that, on the facts, the provisions of the Trade Practices Act do not apply because, for instance, there was no conduct in Australia, or conduct overseas caught by the extraterritorial provisions of the Trade Practices Act.
A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

It is clear that any hopes of Australian litigants being able to use the TP A to trigger this section are false. It is now settled that arbitration clauses are separate and severable contracts which survive any vitiating factors affecting the contract at large. A mere allegation of fraud affecting formation of the contract, without evidence, will not be permitted to “undermine the intent of the operation of the New York Convention”. With the bar set so high, it is difficult to imagine that a mere breach of a statute representing domestic policy would be permitted to void an agreement to arbitrate, unless of course the statute has that express effect. The TP A is not such a statute.

Conclusion on TP A claims and arbitration

The position regarding TP A claims and arbitration clauses in Australia finally seems reasonably settled, although it does await the imprimatur of the High Court. Such claims are arbitrable, subject to the arbitration clause wording not being too narrow, and such clauses are to be construed broadly given the parties’ likely intention to resolve all their disputes in one forum. This means that claims with TP A issues can and will be arbitrated on foreign soil where the arbitration clause so provides. Therefore when a TP A cause of action is alleged, an arbitration clause will have the effect in Australia that a foreign jurisdiction clause will not – an Australian court will order that the dispute be heard, and resolved, overseas.

How exactly TP A allegations might fare in that foreign arbitration is something that is not clear, and unlikely to become so given that most arbitrations are private. One might imagine that, unless the parties have agreed to raise TP A issues in the arbitration, it might be a ground to appeal a finding if liability was found to exist under an Australian statute when the proper law of the contract was otherwise. If in fact the Australian courts have ordered the parties to allow the airing of TP A claims, and the arbitrator makes a positive finding of liability on TP A grounds, then there may be an unfortunate result. The matter may come before an English court on appeal, which may then find itself critiquing the original condition imposed by Australian courts allowing the TP A claims to be aired in the first place.

Conclusion – Clash between Australian mandatory laws and party autonomy

In summary, the Australian position as regards international litigation of maritime matters in which a breach of the TP A is alleged is as follows:

• If COGSA applies to the claim, happily for the Australian party, proceedings commenced here can remain in Australia, even if the litigation is in breach of exclusive jurisdiction or arbitration clause. Any accompanying claim under TP A will be allowed full flight.

• Where a TP A cause of action exists in a maritime claim concerning a contract with an arbitration clause, then the opposite seems true, (subject to the High Court ruling otherwise) – the case must go overseas. The TP A claim is arbitrable, and unless the arbitration clause is clearly worded in a manner that displays a contrary intent, the TP A claim will fall within it. The court may impose “conditions”, although whether those conditions can extend to a requirement permitting the airing of the TP A claims is not yet clear. The court will prefer parties to agree to such a condition.

• When a TP A cause of action exists in a maritime claim to which COGSA does not apply and where the contract contains no arbitration clause but does contain an exclusive jurisdiction clause, then an Australian court is likely to ignore that contractual provision as being contrary to the mandatory law of Australia, being the TP A. The TP A will apply and the court will maintain jurisdiction. Whether a court might accept concessions from the defendant that it will allow TP A to be raised in a foreign court will be dealt with in the next part.

343 Carriage of Goods by Sea Act 1991 is possibly the only Australian example of such a provision. See Nygh, Autonomy in International Contracts, p 229.
344 Akai Pty Ltd v The People’s Insurance Co Ltd (1996) 188 CLR 418.
In the same situation as immediately above, but containing a choice of law clause rather than an exclusive jurisdiction clause, the Australian courts will nevertheless apply the TPA as an overriding law, as it does not interfere with the proper law of the contract.\textsuperscript{345}

In England, the position can be more shortly stated:

- Aside from some narrow exceptions not applicable to maritime claims, the English courts will uphold the parties’ agreement in all circumstances, unless it will cause fragmentation of claims due to the involvement of parties not bound by the jurisdiction clause.
- The English courts are bound to enforce the mandatory laws of their own forum but will not take cognisance of the mandatory laws of another State unless that is the proper law of the contract.
- The court is more than willing to issue anti-suit injunctions in defence of party autonomy, which, in the context of the TPA, will have the effect of disregarding the mandatory rules of Australia.\textsuperscript{346}

The extent of the potential clash is clear. Both the Australian and the English courts are willing to enforce the contract by either staying proceedings brought in breach, or issuing anti-suit injunctions against a party threatening to act in breach of their contract. However, Australian courts will also issue anti-suit injunctions to prevent parties litigating in the contracted forum where that would be in breach of the mandatory laws of Australia.\textsuperscript{347} Therefore it is easy to envisage a situation where both parties are entitled to anti-suit injunctions against the other, from the courts of different countries. In that case, it may well come down to which party “strikes” first. However, an Australian party would be well advised to have an eye on the “end game” being enforcement of any eventual judgment. If such a judgment is likely to be enforced in England, there may be an issue with registering and enforcing it there, if the judgment was obtained in a court in breach of a foreign jurisdiction clause. If that is the case, then the battle will have been fought for nothing.

The next part of this paper considers what can be done to minimise the clashes between courts in the context of jurisdictional battles.\textsuperscript{348}

\section*{The way forward: A more digestible stew?}

The conflict of laws cannot afford to continue to fudge the issue as to the international ramifications of the growth in the mandatory control of contracting. This is an issue which … standard proper law techniques do not resolve … The \textit{Rome Convention} Art 7(1) is only a beginning. What is urgently needed is some more specific formulation as to what types of mandatory rule are to be recognised, or rather, how mandatory rule problems are to be resolved.\textsuperscript{351}

The tussle between the two clashing notions of mandatory law and party autonomy has been slowly developing over much of the last century. Throughout the 20\textsuperscript{th} century, the notion of party autonomy has been on the rise; first in England and then spreading to other legal systems. Mandatory statutes may have existed in a maritime sense for some time, this was as a product of the adoption of the carriage conventions, particularly the \textit{Hague Visby Rules} in 1968, Australia’s earliest dalliances

\textsuperscript{345} \textit{Francis Travel Marketing Pty Ltd} v \textit{Virgin Atlantic Airways Ltd} (1996) 39 NSWLR 160.

\textsuperscript{346} In fairness it should be noted that the Australian courts would probably take exactly the same view of a third party country seeking to impose its law on a contract which has stipulated that Australian law applies.

\textsuperscript{347} \textit{Pan Australia Shipping Pty Ltd} v \textit{The Ship “Comandate”} [2006] FCA 881 at first instance is an example of this occurring, albeit that it was eventually discharged because the existence of an effective arbitration clause required a stay under s 7 of the International Arbitration Act.

\textsuperscript{348} Leaving aside arbitration, which as we have seen is reasonably settled.

\textsuperscript{349} \textit{Tracomin SA} v \textit{Sudan Oil Seeds Co Ltd} [1983] 1 WLR 662 at 664, as quoted in Males S, n 60, at 543.

\textsuperscript{350} \textit{Hi-Fert Pty Ltd} v \textit{United Shipping Adriatic Inc} [1998] FCA 1426 per Emmett J.

\textsuperscript{351} McLachlan C, n 230, at 626-627, as cited in ALRC report at [8.32].
include the *Sea Carriage of Goods Act 1924* (Cth), which contained a precursor to COGSA’s s 11. In a more general commercial context however, mandatory statutes did not really surface until the latter part of the last century. In Australia, the mid-1970s saw the introduction of the TPA, and the ICA came about in the mid-1980s. It has taken time for those statutes to reach their ascendency via case law, at around the same time that party autonomy has reached its zenith as an accepted universal principle in the interpretation of contracts.

What has fuelled the fire in the last 20 or so years is the development of the anti-suit injunction and the increasing willingness of the courts to use that as a means of imposing their own view as to the “correct” forum for the dispute to be heard.

The home truth for Australian litigants is that in all but very limited circumstances, the English courts will uphold contractual clauses as to jurisdiction, choice of law or arbitration above all else, even an Australian statute that nullifies such a clause which would apply if the matter was before Australian courts. English courts will uphold their own mandatory laws (hence the decision in *The Hollandia*), but this will have little effect on commercial matters (save perhaps that it is arguable, although by no means settled, that the UK COGSA may “trump” the Australian version352). Apart from COGSA, the English laws are much more “hands off” business than Australian laws, and there is no corporate equivalent of the TPA in their statute books. The English courts do not and will not recognise the mandatory rules of another State.353

Other countries such as Australia, and their litigants, may see this as the stronger contractual party flouting the will of their Parliament, supported by the courts of England. While it might seem logical to Australians for an English court to take into account the laws of Australia such as COGSA, ICA and TPA, particularly when the contract has its most real and substantial connection with Australia, this is clearly not how the English courts perceive it. They consider it all-important to keep parties to their bargain. Scholars generally agree that, in the complicated field of international litigation, the simplest and most economic system for establishing the law applicable to a contract is to let the parties choose both the law and the court they wish to hear the dispute.354 But for the English courts there is a common-sense reason too. As commercial litigation alone represents over £800 million of invisible export value to the UK each year355 “judges are expected to play their part in ensuring that the economic benefits are at least retained if not improved”.356 In turn, the commercial community will continue to choose England to resolve its disputes while this certainty remains the cornerstone of that jurisdiction. Indeed, certainty is the commodity in which the English Courts trade, and they are at pains to protect it.

As it happens, the Australian courts also value party autonomy highly, but the public policy of the Australian legislature requires contractual certainty to give way to enacted public policy in certain circumstances. Where proceedings are before Australian courts, then, there will be no choice but to apply the mandatory laws of Australia. Although it was open to the courts to interpret the reach of extraterritorial provisions in a more circumspect fashion, that door slammed shut after *Akai* and can only be levered open by the High Court. It is extremely unlikely that a narrow interpretation of the reach of Australia’s mandatory statutes is going to be initiated anytime soon. In a sense, the commercial courts in Australia are between a rock and a hard place – the importance of Australia’s mandatory laws in Australia cannot be questioned, but the application of laws such as the ICA and the TPA to purely commercial transactions means that the courts are prevented from giving full effect to the parties’ own agreement.

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352 See discussion at n 156.

353 For instance, if the contract to be enforced would be illegal in the country in which it is to be performed: *Regazzoni v Sethia* (1958) AC 301 as cited by Hartley T, “Mandatory Rules in International Contracts – the Common Law Approach” (1998) Recueil des Cours, Academie de Droit International de la Haye; 266 at 353, and discussed by Chong A, n 139, at 33-34, 41-42.

354 Nygh at 11 and authorities cited there; Whincop and Keyes at 29.

355 Steel J, n 67, at 7.

356 Steel J, n 67, at 7.
In the end result, an English Court will therefore hand down a different decision on jurisdiction as an Australian court on the same matter. Of significance is the practical consequence of the discordance between the supremacy of party autonomy on the one hand and the insistence on broadly drafted “consumer” protection laws on the other. That consequence is played out in the very early stages of the dispute, at which point the forum for the dispute is itself disputed. The tendency is for one party to “shoot first” and obtain a hearing, and an order, in their preferred court before the other party has the chance to do the same in their own preferred court. The Australian court will be required to claim jurisdiction by reason of the mandatory statute, which is “strong cause” to ignore an exclusive jurisdiction clause in favour of England. The English court will ignore the Australian statute, and enforce party autonomy saying there was not “strong cause” to ignore the exclusive jurisdiction clause. Both courts will consider themselves entitled to issue an anti-suit injunction to prevent the opposite party from continuing with the parallel proceedings in the other court.

This discordance ensures that the “duelling anti-suits” will continue because there is potentially so much at stake, even despite the warnings of the judges, speaking extra-judicially, of the “futility” of such an exercise. Those stakes have been raised by the “budding species” of claims in the English courts for damages sustained as a result of litigation being pursued in a different forum in breach of contract. Such proceedings, together with the possibility of English courts refusing to enforce a court order obtained in Australia flouting an exclusive jurisdiction clause choosing England, should send a warning to Australian litigants that they start upon a rocky road when they decide to hitch their wagon to Australian mandatory laws in an attempt to avoid the contracted forum.

So what then can be done to smooth the path? There are things that can be done – practically, by parties, undoubtedly; and certainly, unilaterally, by Australia. Of course, by far the most attractive is a broadly acceptable international solution – tantalisingly unattainable as it may be. McLachlan points out that the practical problems of private international law “may potentially be solved either by unilateral solutions which bring the courts of one state into conflict with others; or by cooperation”. In other words, countries have a choice between “conflict or coordination.” Perhaps, so too do the courts.

**Solution by Convention?**

**A convention recognising foreign mandatory laws with close connection to the contract?**

For Australia and other countries with mandatory laws, the ideal solution would be a convention or a treaty that recognises mandatory laws of a country closely connected with the contract. However, such a concept has been shown to be deeply unattractive as far as the United Kingdom is concerned. The stance of the UK is shown by its steadfast refusal to participate in any Convention that requires such recognition. In relation to the *Rome Convention*, it nailed its colours to the mast when it opted out of Art 7; it is not interested in recognising mandatory laws of other countries. That same insistence continues through the negotiations to *Rome Regulation* and *Brussels Regulation*. It is also afflicting transport law in the context of the *UNCITRAL Draft Instrument on Transport Law* insofar as the Convention would specify where the plaintiff may commence proceedings with only one option being the jurisdiction stipulated in the contract. Given that the English have been intransigent in the face

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537 Hawke F, n 93.
538 Spigelman J, n 24, at 325; also see Steel J, n 67, at 7.
539 Blobel F and Spath P, n 89, at 545.
540 McLachlan C, n 230, at 613.
541 See Letter to House of Commons Select Committee on European Scrutiny from Baroness Ashton of Upholland concerning the *Brussels Regulation* proposed Art 8(3) (application of the mandatory rules of third countries) where she states: “The legal uncertainty that would be created by the proposal in paragraph (3) has been much criticised by commercial operators. The potentially significant adverse economic consequences of this constituted the greatest single reason behind the Government’s decision not to opt-in under our Protocol. The deletion of this paragraph is clearly a major negotiating objective.” [http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xxxvii/34x04.htm](http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xxxvii/34x04.htm) viewed 30 October 2007.
of Europe and the international community respectively does not bode well for Australia, or the international community for that matter, attempting to entice it to change its position.

In any event, even if the UK could be persuaded, then the form of such recognition would be problematic. Article 7 of the Rome Convention is one model, as is its successor\(^363\) but both are as yet, an unknown quantity – there are no reported cases on it, according to European commentators – and it has been the subject of significant and principled attacks from commentators\(^364\) as containing too much discretion with a consequent lack of certainty in outcome. The US model\(^365\) would be a better choice. Further in ratifying any convention that recognises foreign mandatory laws, Australia would have to realise that it is a two-way street – that it too would find itself having to, on occasion, apply the law of a country with a close connection to the dispute, although not the contractual forum. This was indeed the proposal of the ALRC in its Choice of Law report, which was by no means universally well-received and looks to be never taken up.

**Convention upholding party autonomy in (nearly) all cases**

If broad agreement to recognise foreign mandatory law cannot be strung, then it is possible that international agreement can be forged by recognising party autonomy as overriding foreign mandatory law. This is the effect of a newly-minted Convention that has just been opened for signature: the Hague Convention on Choice of Court Agreements 2005 (2005 Convention).\(^366\) Unlike Brussels I and its successor Brussels Regulation, the 2005 Convention is international in reach. It arose from the ashes of an earlier more ambitious and ultimately unsuccessful attempt to standardise Common Law and Civil Law approaches to jurisdiction.\(^367\) While dramatically oversimplifying the provisions, in essence the 2005 Convention relevantly provides that the court nominated by the parties to an international\(^368\) agreement will have jurisdiction unless the agreement is null and void under the law of the designated State. Article 6 provides that any other court must decline to hear the case\(^369\) unless the agreement is null and void under the law of the State of the chosen court, or giving effect to the agreement is null and void under the law of the State of the court seised. Article 6 provides that any other court must decline to hear the case\(^369\) unless the agreement is null and void under the law of the State of the chosen court, or giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the Court seised.

The inspiration for this Convention was the model operating in international arbitration, the New York Convention,\(^370\) where a court will stay proceedings brought in breach of an agreement to submit disputes to arbitration.\(^371\) The 2005 Convention is modelled also on the Brussels Convention,\(^372\) although there are several important differences. One is that it specifically states it will neither require

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\(^363\) *Rome Regulation* - see text accompanying n 175 also see generally Dickenson A, n 140.


\(^365\) Outlined in brief in Pt I of this paper.


\(^368\) A “case is ‘international’ unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.” – Art 1.2. The 2005 Convention only applies to civil or commercial matters.


\(^372\) Discussed at “If Contract is Silent as to Law and Jurisdiction – Default Position” and “Concept of Party Economy” in Pt I of this paper.
nor preclude the issue of interim measures, which means anti-suit injunctions are still available.\textsuperscript{373} The second is that there is no paramountcy of the first seized court\textsuperscript{374} – the trigger for a court staying one’s own proceedings is the existence of a clause favouring another jurisdiction, not that it is the second court in which proceedings have been commenced. This neatly leapfrogs over the issue that has on occasion tied up the European courts regarding \textit{Brussels Convention}, where the first seised court takes its time in assessing its own jurisdiction, to the frustration of the court that appears to have exclusive jurisdiction under the parties’ contract.\textsuperscript{375}

It has been said that the “defined rules of allocation of cases between States” contained within the \textit{Brussels Convention}, without any discretion to override inappropriate cases, has as its price a “certain rigidity, which can lead to unwelcome and unjust results, but has to be accepted when it occurs.”\textsuperscript{376} This would likewise afflict the 2005 Convention, but the trade-off is contractual certainty.

While it is clear that no one Convention is going to be perfectly attuned to all the needs of the international business community, the 2005 Convention, although not perfect,\textsuperscript{377} may be an answer, or at least the beginnings of an answer. It has a broad definition of international agreement, which means all but totally domestic agreements would be effective. Therefore, if a contract was between two Australian companies who chose England as the exclusive jurisdiction for their dispute, then the 2005 Convention would not operate to require the court to stay proceedings in breach of that clause; in that instance the mandatory provisions of the TPA could not be avoided. It will not apply where natural persons are contracting as “consumers”.\textsuperscript{378}

It is too early to say if this Convention will obtain broad acceptance in the international community, or what the Australian or English attitudes towards it are likely to be. The 2005 Convention has at least one important supporter in Australia – the Chief Justice of the Supreme Court of New South Wales.\textsuperscript{379} The 2005 Convention is perhaps of less relevance to maritime lawyers because it excludes from its operation matters concerning carriage of passengers and goods, marine pollution, limitation of liability for maritime claims, general average and “emergency” towage and salvage.\textsuperscript{380} If it does come into force\textsuperscript{381} and is ratified by Australia, it may be nonetheless important in maritime cases that might fall through the cracks of this definition – such as time and demise charter

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\textsuperscript{374} Which is the case in the \textit{Brussels Convention} – see Art 21.

\textsuperscript{375} See Blobel F and Spath P, n 89 at 531-532.

\textsuperscript{376} Males S, n 60, at 551.


\textsuperscript{378} In a narrower sense than the \textit{Trade Practices Act}. The definition of a consumer contract in the 2005 Convention is where “a natural person acting primarily for personal, family or household purposes (a consumer) is a party”.

\textsuperscript{379} Spiegelman J, n 24, at 326.

\textsuperscript{380} Art 2.

\textsuperscript{381} At time of writing, the \textit{Convention} has only one signatory, being Mexico. It requires two signatories to come into effect, but clearly it would require adoption by most countries in order to be of the level of significance of the \textit{New York Convention}.
disputes, and contracts for “ordinary” towage. As Garnett observes, if Australia signs the 2005 Convention, it will have to take care to align its laws accordingly. As regards mandatory laws and maritime law in Australia, this would mean:

- Addressing which mandatory laws, if any, will be exempt from the operation of the Convention in Australia. As Australia has excised COGSA from the operation of IAA in Australia, the Parliament will need to decide which Australian laws are not going to be susceptible to a stay under the 2005 Convention. Given the exceptions to its operation outlined above, COGSA should be expressed as falling outside the 2005 Convention. Similarly, the ICA should be exempted. Should the parliament wish the TPA to be an exception to the operation of the 2005 Convention, it ought to do so expressly, in the adopting statute. As Allsop J opined in relation to the TPA and the IAA, there is a choice between public policy statutes here – will the legislature choose the 2005 Convention to be dominant, leading to the transfer of proceedings overseas regardless of TPA allegations? Given the all pervading presence of TPA allegations in commercial litigation in Australia, a decision to exempt the TPA from the operation of the 2005 Convention would be a serious blow to the effectiveness of the 2005 Convention in Australia.

- Addressing in the enacting statute whether the Australian Courts will retain a power to impose appropriate conditions on the stay. This power was not express in the New York Convention but was inserted by Australian Parliament. There is at least one judicial comment inclining to the view that a statute requiring a stay without including a power to impose conditions would constitute an impermissible interference with the judicial process.

- The need for clarification of the exceptions to Art 6 and the triggering or otherwise of those exceptions by the TPA and other “mandatory rules” of Australia. Will an agreement to litigate in a forum that will not apply the TPA, (or indeed ICA or COGSA), be “manifestly contrary” to public policy? This is likely to be played out in subsequent case law rather than an enabling statute, but it is submitted that those exceptions should apply only to matters of international public policy, and not be broadly interpreted as including matters of domestic public policy.

If the TPA were subject to this Convention, it would narrow the number of instances where the Australian courts would permit litigation in Australia in breach of contract. In effect, it would bring at least some matters into line with the English position, and the position in arbitration law worldwide, that party autonomy is of prime importance. However, for maritime lawyers, the exceptions to the 2005 Convention will be as important as its inclusions. As COGSA falls outside of it, parasitic TPA claims will still receive the protection of the Australian courts. Further, the fact it does not restrict anti-suit injunctions means that no matter what restrictions the Australian legislature imposes to protect its own law, if the UK signs the 2005 Convention, there will be no change in the practices of their courts in issuing anti-suit injunctions. Those courts will apply their own law, not the Australian law.

382 Commonly not regarded as contracts for carriage of goods but contracts for the hire of a vessel.
383 If it did apply, it would mean that towage contracts in standard form that contracted for English jurisdiction would have to be upheld, and the effect of not only s 52 of the Trade Practices Act but also s 74 would be avoided. See Lewins, What’s the TPA got to do with it… Although in the context of a towage contract, where there are other close connections with a forum other than the contracted forum, and where the English court permitted the case to proceed in the other forum despite an exclusive jurisdiction clause, see the case of Bouygues Offshore SA v Caspian Shipping Co [1998] 2 Lloyd’s Rep 461.
385 See also Spigelman J, n 24, at 325-326.
386 That would be consistent with the High Court decision in Akai Pty Ltd v The People’s Insurance Co Ltd (1996) 188 CLR 418. If the ICA were not excluded from the 2005 Convention, it would represent a major shift in the current law.
387 Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; (2006) 238 ALR 457 per Allsop J at [240].
388 Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1998) 90 FCR 1; 159 ALR 142 at 145 per Beaumont J.
389 Although perhaps an Explanatory Memorandum could deal with this aspect.
390 Of course the Carriage of Goods by Sea Act itself may well be replaced with the next sea carriage convention although that would still appear to be some way off.
law, and therefore any excision to protect the rights of Australian litigants under COGSA, ICA or TPA would not be relevant to the grant of an anti-suit injunction in the same way that they are of no relevance at present.

The 2005 Convention may ease some of the discordance but not by recognition of foreign mandatory laws, but rather through adopting the arbitration model denying their relevance – effectively falling into line with the English position. Even that Convention is not necessarily assured of success.

**Judicial co-operation and conditional orders?**

As Lord Denning once said:

> In the interests of comity, one [court] must give way. I wish we could sit down together to discuss it.\(^{391}\)

This rather soulful aside might hold the key to another method of resolving the problem of courts with overlapping jurisdiction: judicial cooperation. In his article on the subject,\(^ {392}\) Westbrook contends that traditional conflict rules are increasingly unsatisfying, and mechanisms such as anti-suit injunctions are highly intrusive and offensive to the other court. Perhaps one solution to parallel litigation is for the courts themselves to “negotiate” with the other court. What is intended is not that the judges necessarily speak directly to one another (although one would be forgiven for thinking that might not be a bad idea). As Westbrook suggests, there are a range of ways in which one court could enlighten the other about its law, the litigation thus far in its country, or even come to a joint judgment on the merits. As Spigelman CJ notes, the possibilities are still evolving, but are to be encouraged as a method of resolving jurisdictional disputes on a case-by-case basis. The idea that both courts might work together with the parties to find a solution to the jurisdictional dispute is deserving of further thought, although one more akin to court mandated mediation rather than adjudication. In any event, direct contact between the courts is some way off, if it is achievable at all.

One specific manifestation of this approach is, according to Westbrook, that one court makes a court order “conditional” on parties behaving a certain way in the other court. This method of compromise of systems seems to be occurring in a phlegmatic manner. It may be, for instance, that a local court will agree to a conditional stay. Such orders are already made in circumstances where the stay is conditional on the prompt progression of the other proceedings and where the stay is only rendered permanent when compliance is assured.\(^ {393}\) However, it is rather a different proposition to suggest that the condition might be that the parties allow the litigation of the TPA aspects of the dispute in the foreign court – this is a variation of what occurred in the Pan case, where one side conceded that the TPA issues could be raised before the arbitrator. This is where the difference between arbitration – as a private procedure where the scope of the arbitrators mandate is agreed by the parties, and court proceedings, where a court is exercising its own jurisdiction, looms large. It seems unlikely that, an English court would be prepared to accept an Australian court’s entitlement to, in effect, dictate what is to be raised in their court – at least without both parties’ consent to that course.\(^ {394}\)

However, if the courts could bring themselves to such a concession, the resolution of the problem might be achieved. There is some precedent in its favour. For instance, in the seminal House of Lords case of *Donohue v Arasco Inc* [2002] 1 Lloyd’s Rep 425, the House of Lords found the necessary involvement of litigation in New York involving third parties to the contract, and the consequent multiplication of proceedings, a sufficiently strong reason not to grant a stay based on a breach of an exclusive jurisdiction clause. In discussing the weighing of one party’s interest to proceed in the chosen forum, versus the advantages to the other party of proceeding in a foreign forum, the court noted that the problem can often be overcome by appropriate undertakings given by the defendant, or

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\(^{392}\) Westbrook JL, n 392.

\(^{393}\) Westbrook JL, n 392, at 577-578.

\(^{394}\) Or perhaps some sort of bilateral agreement between governments.
by granting an injunction or stay upon appropriate terms. \(^395\) In this case, the defendant seeking discharge of an injunction enforcing the exclusive jurisdiction clause gave an undertaking that it would not enforce against the plaintiff any multiple or punitive damages awards that may be given by the US courts. \(^396\) Lord Hobhouse explicitly noted that the undertaking “altered the position” as it had appeared to the lower courts, and was one to be given weight in exercising its discretion. \(^397\)

Similarly, in the case of *Bouygues Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd’s Rep 461 an undertaking made by the applicant for a stay that it would only exercise the right of damages against a fund already raised in London seemed to be one of the factors that persuaded the court to issue the stay despite the exclusive jurisdiction clause favouring London. In *Baghla\v Al Zafer Factory Co v Pakistan National Shipping Co* \(^398\) a stay of English proceedings brought within time but in breach of the foreign exclusive jurisdiction clause was granted on condition that the shipowners waived the right to rely on the time bar which had since expired, because the plaintiff had acted reasonably in suing in England where it could recover a reasonable package limitation while in the contracted country, Pakistan, it would be limited to a fraction of the claim. \(^399\)

The US experience is an enlightening one for Australia, as it too wishes to preserve the advantages that its traders enjoy under local law. A study has shown that when a US court dismisses local proceedings in giving force to the contractual exclusive jurisdiction clause favouring another country, it often leads to the case settling, thus thwarting adjudication of the case on its merits. \(^400\) US commentators have also urged their courts to use conditional dismissals rather than outright dismissals of local proceedings in favour of contractually selected courts or arbitration, \(^401\) pointing out that “a more generous use of the conditional dismissal device not only may avert the need to resolve these difficult choice of law issues but may facilitate a determination on the merits of the dispute”. \(^402\)

It remains to be seen just how the use of conditional stays can work, and whether it can extend to an order conditioning the stay on the basis that one party be allowed to raise an entirely new, and foreign, cause of action in the contracted forum, and whether the court will look for such a concession to be offered by one party rather than imposed by the court.

As stated, while it is unclear whether an English court will allow the imposition of a mandatory statute of Australia just because an Australian court has asked politely; it may, however, be willing to do so if the parties concede the point. \(^403\) While this would be, one might think, initially deeply unattractive to the party pressing for proceedings to be brought in England, strategically it might have some merit. First, it cuts a swathe through the potential jurisdictional battle: saving both time and money and ensuring that the entire dispute is dealt with in one forum – and the chosen forum.

\(^395\) *Donohue v Armco Inc* [2002] 1 Lloyd’s Rep 425 at 431. Some of the Law Lords also acknowledged the possibility that the plaintiff could recover damages being the additional costs for breach of the exclusive jurisdiction clause: see p 439 (per Lord Hobhouse), p 433 (per Lord Scott).

\(^396\) See Lord Bingham, giving the leading judgment, at p 437.

\(^397\) At p 439, Lord Scott said he would have come to the conclusion that there were strong reasons against a stay without the proffered undertaking, but that the “undertaking offered by Armco confirms it”.

\(^398\) *Baghla\v Al Zafer Factory Co v Pakistan National Shipping Co* [1998] 2 Lloyd’s Rep 229, as cited in Gaskell 20.220. (book – defined on first page)

\(^399\) This case is contrary to the earlier cases where the courts would not consider the expiration of the time bar as a factor against a stay: see above at n 76, also discussion at Gaskell at 20.20.213–20.220.

\(^400\) Force R and Davies M, n 17, at 50–55.

\(^401\) As is often the case in forum non conveniens cases where there is no exclusive jurisdiction clause: see Davies M, “Forum Selection Clauses” (2003) Tul Mar LJ at 381.

\(^402\) Force R and Davies M, n 17 at 55.

\(^403\) If the parties were willing to do so, there would have been no dispute as to jurisdiction in the first place – however, in the race to secure best position, the parties may not have raised or negotiated this point.
Secondly, the fact that the TPA issue is aired does not mean it is going to be decisive. The party wanting to rely on it would still have to establish, for instance, its applicability to the circumstances, which previous cases have shown, in a TPA context is not a foregone conclusion; what is more, that party still faces an uphill battle to convince a court unfamiliar with the TPA of its effect and application. Nevertheless, the party wanting to rely on the TPA would at least be able to raise and argue the issue; although the treatment in the foreign jurisdiction might not be directly in alignment with the way an Australian court would have dealt with it, it is better than nothing and a whole lot cheaper besides. On the downside, however, the same sorts of issues arise here as are highlighted in relation to such a course of action in arbitrations – what exactly is open to the courts, and how will they proceed? While the problem of multiple fora may be resolved, it would replace that battle with relatively uncharted questions relating to the power to order conditional stays and their effect on foreign proceedings. Given the fact that these types of claims are not regularly before the courts at the highest levels, the rules of engagement for conditional stays, and their effect on the contractual forum, may take some time, and expensive litigation, to play out. Nevertheless, this approach has the benefits of flexibility and tailored solutions delivered at the precise point where they are needed, not to mention a synchronicity with the case management principles in operation in courts in recent times.

Given that such an idea is in its infancy, perhaps then it is better to consider the recommendation of Dickenson and Whincop and Keyes – that countries should look to reduce the effect of their mandatory laws, rather than increase them. This option, which is considered next, has the advantage of being one, at least, that Australia can bring about unilaterally.

Amendment of TPA

The TPA as a mandatory statute in the context of international contracts has been the subject of a lot of litigation over the years. One has to wonder, pragmatically, whether the public policy objective of the TPA is worth this price – at least insofar as international commercial litigation is concerned. In addition, one also might ponder whether this was the desired effect of s 52 of the TPA in particular, given that there is no applicable provision outlining its effect on exclusive jurisdiction or choice of law clauses. There may be an argument that s 52 is an example of a “localising” statutory provision, with its operation predicated on conduct within Australia or by Australian companies, such the parliament had no intent for it to be a mandatory rule overriding parties’ choice as to foreign law or jurisdiction. Indeed, the fact that there is an express provision for another division (including s 74) but not capturing s 52, would seem to support that.

It has been suggested that, from a conflict of laws perspective, courts should not be eager to bestow mandatory status on a statute unless the statute says as much in clear words. However, over the last 30 years, the Australian judiciary has interpreted the Act broadly in keeping with its apparent

404 Although the agreement to allow Trade Practices Act issues to be raised may be taken to be an agreement to change the applicable law of the contract (or that, at least, the Trade Practices Act is applicable): see Nygh, n 343, at 120. Lawyers acting for such a party would need to tread carefully and with eyes wide open in case their client was taken to concede that the Trade Practices Act was triggered, for instance.


406 See Dickenson A, n 140, at 84.

407 Whincop and Keyes at 61 and 65.

408 See Whincop and Keyes at 65-67. Also see Mann, “Statutes and the Conflict of Laws” (1972–1973) 46 British Year Book of International Law 117. Tetley calls such laws “obligatory forum statutes”, being a statute that the forum court is obliged to apply, but which has no place in any system of international law. Tetley W, International Conflict of Laws: Common Civil and Maritime BLAIS (1994) at 103.

409 Although one could also argue that, as s 52 deals with conduct that may or may not be contractual, a provision such as s 67 would not be a good fit with s 52.

410 Whincop and Keyes, p 65.
policy. It would certainly seem too late for any narrowing of that interpretation by judicial means.\footnote{411} Therefore it is submitted that clarification as to the application of the TPA should occur as a matter of statutory amendment.

One possible reform would be to “beef up” the TPA by extending the operation of s 67 to s 52 and surrounding provisions.\footnote{412} However, as was shown in \textit{Akai}, this does not improve the chances of it being recognised by an English court. Alternatively, it could be added to s 2C of the IAA so the TPA has a similar status as COGSA for international arbitrations. However, this would see Australia drop further from international uniformity in the one situation where this appears to have been achieved – arbitration under the \textit{New York Convention}. It would be preferable for the IAA to remain as it is, with the court making use of its entitlement to impose conditions to ensure the TPA is heard. Further, the differences in treatment of TPA allegations in the context of enforcement of arbitration clauses compared to exclusive jurisdiction clauses is difficult to justify, in particular because there is no explicit applicable provision in the TPA which indicates how s 52 is to be treated in a conflict situation.\footnote{413}

Therefore, the most effective means of achieving the desired end would be to reduce the scope of the TPA in relation to commercial contracts with an international perspective. There are a number of ways that gateways out of the TPA could be crafted. It could be done by keeping the TPA mandatory for domestic contracts but allowing contracting out of TPA in circumstances where there is an international commercial contract – namely where both parties are commercial entities, at least one party is based outside Australia, performance occurs outside Australia (at least in part) and some of the connecting factors are outside Australia. An additional factor for contracting out might be the consideration for the transaction – for international transactions over a certain amount, the TPA will not apply.\footnote{414} Alternatively, reforms could allow contracting out of s 52 by certain industries such as the carriage of goods by sea (whether the contract is contained in a charterparty or sea carriage document) and international trade – which would, in a sense, be an extension of the effect of s 74(3).

Consider the advantages of such an amendment. If these types of transactions fell outside the TPA it would have a double benefit. First, it would add to certainty in enforcing jurisdictional clauses, and lead to a lessening of jurisdictional clashes, which are expensive and lead to delays in resolving disputes. (Those plaintiffs whose claims fall under COGSA would nonetheless maintain their right to bring an action in Australia.\footnote{415}) Further, as it currently stands, the overseas party holds all the cards. For instance, if the overseas company in fact wanted to rely on the TPA against the Australian party, it could institute proceedings in Australia and the courts would permit it to continue here in breach of a contractual provision to sue elsewhere, possibly even obtaining an anti-anti-suit injunction in Australia. An Australian party might have earlier obtained an anti-suit from the English courts to prevent the overseas party from continuing here. But if the judgment is to be enforced in Australia against the Australian party, there would be no “downside” for the overseas party in continuing in Australia, because there is no way for the English courts to take advantage of the enforcement process to display its displeasure. However, where the Australian party wishes to rely on the TPA against the overseas party, the same situation will not work in reverse. There, the overseas party would be entitled

\footnote{At least insofar as a breach of s 52 is said to have occurred in a contractual context.}
to an anti-suit injunction and, if England is the place where its assets are, then enforcement of any 
Australian judgment in England would be subject to challenge.

Secondly, the quarantining of TPA from international transactions would make the Australian 
forum a more attractive one for litigation and as a nominated seat of arbitration.416 Frankly, the TPA 
might be giving Australia a bad name in this regard.417 If this issue were resolved, Australia could 
legitimately promote itself as a provider of first class legal services at a reasonable price, with a legal 
system highly supportive of international trade: in short, a worthy neutral venue for litigation and 
arbitration.

On the other hand, admittedly such an exception opens up a can of worms. Any such reform 
would need to take place after extensive review of the business, economic and legal imperatives for 
change. If the reform was to be limited only to international trade and maritime contracts, the review 
would have to consider whether and why those fields should be allowed an exception, and not other 
forms of international commerce.418 Perhaps a special case can be made for maritime law; but it 
would be preferable to have a wider exception for international commerce generally. Perhaps it is 
simply the case that Australian businesses taking their place on the world stage should be allowed to 
stand up for themselves, and importantly, agree to abide by agreements made as to forum and law.

In considering reform such as that proposed, the realities of the current situation need to be borne 
in mind. An exclusive jurisdiction clause in favour of England brings a strong likelihood of the grant 
of an anti-suit injunction in England restraining an Australian party from commencing or continuing 
proceedings in Australia.419 As we have seen, the likely conclusion of the English courts will be that 
English law applies, and that the mandatory domestic law of Australia has no part to play. That being 
the case, it is as if, de facto, parties to an international transaction may contract out of the provisions 
of the TPA. Perhaps it is time to bring the statute into line with this reality so as to minimise cost and 
uncertainty for those parties.

Depending on the form that the amendments might take, those parties who freely negotiate their 
contracts could still bargain for Australian law.420 Those parties who find themselves subject to 
so-called “boilerplate” provisions will not have that luxury. However, those types of provisions are 
most likely to be found in sea carriage documents caught by COGSA so as to give them some 
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416 While it is true that Australia could be nominated as the contractual forum and the law of, say England apply to the 
contract/arbitration, in reality it is more sensible to have the nominated place enforce its local law.

417 Another way to improve Australia’s prospects as a country offering arbitration services is to include in the Trade Practices 
Act a provision similar to that in s 27(1) of the Unfair Contract Terms Act 1977 (UK) which recognises that if the law of 
England is applicable only by choice of the parties, not because the English law is the proper law of the contract, then the Act 
will not apply. Dicey and Morris term this a “self denying statute” and the Law Commission specifically included the provision 
so as not to discourage business from selecting England as a neutral venue for their disputes: see 14th ed at 1-062.

418 Although there is a precedent for this: Section 74 provides part of the argument – carriage is already exempt from this 
section. In addition, in what seems a purely political idiosyncrasy, engineers and architects are exempt from s 74. The 
Law Commission accepts this is unfair but there is no detailed justification.

419 As we have seen, the likely conclusion of the English courts will be that English law applies, and that the mandatory domestic law of Australia has no part to play. That being the case, it is as if, de facto, parties to an international transaction may contract out of the provisions of the TPA. Perhaps it is time to bring the statute into line with this reality so as to minimise cost and uncertainty for those parties.

420 For instance, if the Act permits contracting out in certain circumstances rather than excising certain types of transactions from 
the operation of s 52.

421 At least in the context of the Carriage of Goods by Sea Act, in most cases, the basis of the claim is likely to be the same in 
England and Australia because of the common root of the Hague Visby Rules. It seems that carriers are accepting of litigation 
concerning cargo claims delivered in Australia being litigated in Australia – undoubtedly, it has been a common feature of cargo 
claims for a long time – but also perhaps because the efficient litigation process, cheaper legal costs and close parallels between 
English and Australian law. However, one possible hiccup would be where the Australian modifications are directly in issue, at which point it may be worth a carrier’s while attempting to have the matter heard in England, and relying on The Hollandia for 
the application of the “pure” Hague Visby Rules by the English court. However, in this regard, see n 156.
to negotiate with the seller of the goods to ensure the carriage contract contains the terms it prefers, even though that may be commercially unrealistic.

For now, the solution lies in the hands of the parties

Unless and until any of the above changes can be wrought, the parties are left with a difficult situation when one wishes to enforce the exclusive jurisdiction clause and the other wishes to assert that an Australian court should adjudicate because the TPA applies. The following should be borne in mind by Australian parties involved in international transactions:

1. First, pay attention to the terms of the contract being negotiated. To preserve an entitlement to rely on TPA, ideally a contract should stipulate for Australian law. A premium may have to be paid. For consignees in CIF sales, then it is possible to stipulate in the contract of sale that the contract of carriage must have an exclusive jurisdiction clause to your liking. Again, expect to pay a premium for the privilege. If it is not possible to negotiate, then the lawyers will simply have to work with what they have got.

2. Secondly, when a dispute happens, move quickly to assess and act. Where there is an arbitration clause, the law is clearer (and therefore so too are your options). But it is also clear that it might still be worth commencing proceedings even if the obvious result is to obtain a stay against you in favour of arbitration – because, based on previous cases, you might be able to get an order that the arbitral panel considers TPA law. The other party may even agree to such an order, seeing it as a trade off for the stay in Australia. Indeed, the parties may be able to agree to the inclusion of the TPA in the reference to arbitration from the outset, avoiding the need for court proceedings at all.

3. Similar advice can be given where the clause is an exclusive jurisdiction clause. It may be worth an attempt to negotiate with the other side about the raising of TPA matters. This may involve some idealistic concession for the party seeking to uphold the contractual provisions. But the concession could be framed on the basis that the triggering of the TPA is still in issue, although the applicability of it is accepted. It may well be unrealistic to think parties might do this, but if it means that at least the forum of the dispute will not itself be disputed, it might be worth the concession: particularly if it seems that the TPA is unlikely to add much to the matrix of liability in any event. On that basis, any proceedings in breach of the contract might be able to be stayed on condition that the TPA issues can be raised, and the court that is the chosen forum may be able to endorse this in the manner suggested by Westbrook.

It has to be conceded that both of these suggestions do sacrifice total primacy of contractual terms, but upon the altar of pragmatic resolution of the whole of the dispute in one forum, and in the spirit of the recent cases in Australia and England in the context of conditional stays.

If negotiations are not fruitful then unfortunately, the stand off between the courts means that the parties have little choice but to engage in the pre-litigation stoush. The difficulty is that there is little time for the lawyers to consider whether the TPA cause of action adds anything to the claims already possibly under the contract. With sufficient time to assess, it might be that the lawyers conclude there is no substantial advantage to pleading a TPA claim. However, the very nature of the pre-litigation battle, and the importance of commencing proceedings and obtaining initial orders, the opportunity to assess this might not occur until after the parties have run up the very real expense of court orders. A party that has fought hard to maintain its right to bring a TPA claim is going to be reluctant to give that claim away at a later point; but keeping the TPA claim on foot will add to the expense of the litigation. Perhaps again, there is a practical solution – that all parties agree to a moratorium period while options are canvassed.

Where the parties are unable to achieve any sort of agreement, then, while we are awaiting more considered reform or guidance from the Australian legislature, the rule of thumb for measuring the

422 Von Zeigler A, n 11, at 95. See also 112-117 for a spirited defence of the carrier’s entitlement to insert and rely upon exclusive jurisdiction clauses in its contracts of carriage.

423 Although perhaps unlikely.

outcome of these disputes will be no more elegant or principled than a scramble for an anti-suit (or anti-anti-suit injunction) on a “first snout in the trough” basis.

The uncertainty thus induced, taken with the perceived prize of the party’s perceived jurisdiction, stokes up the enthusiasm for expensive and prolonged jurisdictional arguments. This is the least attractive option but also the status quo, unless and until there is some impetus for change. Perhaps the rumblings of English courts willing to refuse to enforce judgments obtained in breach of contract, or to seek indemnity costs for pursuing proceedings in breach of contract, will render parties and their lawyers more circumspect and governments more willing to consider reform.

An indigestible stew, indeed.

425 Steel, J, n 67, at 18.
5.2 Significant Developments

5.2.1 Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The article in 5.1 discusses the TPA as a ‘mandatory’ statute. The article distinguishes the operation of mandatory statutes that are enacting international conventions dealing with carriage of goods regimes on the basis that they are ‘closed systems’ that reduce or extinguish party autonomy. Indeed, the clashes between jurisdictions that occur are usually because of the differing carriage regimes enacted in countries relevant to a particular carriage transaction. An example mentioned in the article is that of the *Hollandia*. These clashes may well get worse before they get better, with the looming introduction of the *Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Draft Convention)* introduced in Chapter 2 above. The *Draft Convention* is to apply where any one of the following places is located in a country which has enacted it: the place of receipt, the port of loading, the place of delivery or the port of discharge. A plaintiff may bring proceedings in one of a range of jurisdictions; the domicile of the carrier, the place of receipt or delivery agreed in the contract, the place of loading or of discharge of the goods, or a court which the parties have agreed. Exclusive choice of court clauses will only be enforceable if within a volume contract.

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128 See article set out in 5.1, at text accompanying fn 242.
129 [1983] 1 Lloyd’s Rep 1 as discussed in article set out in 5.1, at text accompanying fn 155; and also fn 237.
130 Above, in Chapter 2.2.2.
131 *Draft Convention* Article 5.
132 Ibid, Article 68.
and only in certain circumstances.\textsuperscript{134} Significantly, countries will only be bound by the jurisdiction and choice of court provisions in Chapter 14 of the Draft Convention if they declare that to be the case.\textsuperscript{135} If many countries, or even just the more influential countries such as England, choose not to be bound by Chapter 14 on jurisdiction, then it would seem that the issues concerning selection of the forum by the plaintiff might be as fractured as ever.

5.2.2 Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd [No 3]\textsuperscript{136}

This case was mentioned in the article at 5.1 above.\textsuperscript{137} The defendant sought the discharge of ex parte injunctions preventing banks paying the defendant pursuant to performance guarantees issued by the plaintiff.\textsuperscript{138} The judge undertook a full consideration of the matter, including the construction of the guarantees, in order to properly deal with the application.\textsuperscript{139} He concluded that the plaintiff was in fact in breach of the relevant contract and that accordingly, the defendant was entitled to call upon the guarantees. The judge did not conduct any further review of the authorities concerning TPA and arbitration. A stay of the order discharging the injunctions has been granted pending the hearing of an application for leave to appeal.\textsuperscript{140}

\textsuperscript{133} Defined in Article 1(2) of the Draft Convention as ‘a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range’. This definition would encompass the so called contracts of affreightment commonly used in Australia to export commodities. The Attorney General’s department is also concerned that a simple contract for shipment of two containers on two different ships could be interpreted as a ‘volume contract’. ‘Summary of draft Convention on contracts for the international carriage of goods wholly or partly by sea for Australian Industry’ 11 March 2008 circulated to MLAANZ members on 12 March 2008. A copy is held by the author.

\textsuperscript{134} Article 69 of the Draft Convention. There are also limits on its enforceability on third parties to the carriage contract: Article 69 (2).

\textsuperscript{135} Ibid, Article 76.

\textsuperscript{136} [2007] FCA 2082 (unreported, Gilmour J 21 December 2007).

\textsuperscript{137} See article set out in 5.1 above, n 120.

\textsuperscript{138} Who had entered a conditional appearance; above n135 at [7].

\textsuperscript{139} Ibid, [20].

\textsuperscript{140} Clough Engineering Ltd v Natural Gas Corporation Ltd [No 4] [2007] FCA 2110 (unreported, Gilmour J.)
Chapter Six:

Conclusion
This thesis set out to explore the uneasy relationship between Australian maritime law and the TPA. It sought to provide guidance to maritime lawyers in Australia and abroad as to the operation of the provisions of s52 and s74 of the TPA, their pitfalls and potential application in maritime and shipping matters.

The thesis considered the potential applicability of the TPA in 3 main types of maritime contracts: carriage of goods, carriage of passengers, and towage contracts, as an example of contracts for maritime services. It then dealt with the reality which faces Australian maritime lawyers who seek to rely on the TPA on behalf of their clients: that the TPA, afforded great respect in Australia, has little influence when the contract between the parties confers exclusive jurisdiction on the English courts. As England remains the centre of preference for dispute resolution of matters maritime, this conclusion has more impact than one might otherwise think.

It was not always clear that the TPA would apply to purely commercial, private contracts where there is no consumer in sight.\textsuperscript{141} However, now there can be no doubt that the TPA does apply to maritime law in Australia, although its application creates discord with the accepted matrix of legal liabilities that constitutes the commonality of maritime law. What is more, as shown by chapters 3 and 4 in particular, recent amendments have created a hotch-potch of exceptions and caveats to the application of the TPA in any given instance. The end result is that the law is neither clear nor certain. There are uncertainties as to the extraterritorial reach of the TPA,\textsuperscript{142} whether the limitation provisions in International Conventions apply to TPA claims,\textsuperscript{143} whether State laws will be brought in

\textsuperscript{141} See the article reproduced at 5.1 at fn 1 and the cases cited there.
\textsuperscript{142} See Chapter 2 and 5.
\textsuperscript{143} See Chapters 2 and 3.
to overrule s74,\textsuperscript{144} whether and to what extent a contractual indemnity might be valid,\textsuperscript{145} to what extent cruise ship passengers are engaging in a ‘recreational activity,’\textsuperscript{146} and whether an arbitrator based overseas will hear TPA issues,\textsuperscript{147} to name but a few. The TPA’s application, reach and integration with international conventions are all uncertain. What is worse, one cannot even comfort oneself with the thought that the TPA is continuing to perform its original function well because the amendments result in even less protection for those who were the original beneficiaries – the consumers.

An uncertain legal environment is the enemy of commercial endeavour. The strength of demand for Australian commodities at present ensures that international commerce will be transacting here for the foreseeable future. However, as noted in Chapter 5, the deviation from commonality of laws that the TPA represents may well be harming the attempts to increase Australia’s profile as a centre for dispute resolution and arbitration in maritime matters. One cannot imagine that a well advised overseas commercial entity would knowingly agree to an arbitration or exclusive jurisdiction clause in favour of Australia at present if there was even a whiff of the possibility that the TPA might apply. It is true that arbitrations could be conducted in Australia pursuant to the laws of England (or some other place). However, one would imagine a businessperson would choose either England itself, or a place perceived to have laws more closely aligned with that international ‘commonality’ of laws.

The current complexity of the TPA in maritime law must similarly be affecting Australian based plaintiffs. Plaintiffs are understandably eager to preserve their rights to allege helpful local causes of action

\textsuperscript{144} See Chapters 2 and 3.
\textsuperscript{145} See Chapter 4.
\textsuperscript{146} See Chapter 3.
\textsuperscript{147} See Chapter 5.1.
such as the TPA,\textsuperscript{148} and if there is no dispute as to jurisdiction (as is discussed in Chapter 5) then
the addition of the TPA claim may not add a great deal of expense to the litigation. However, if the
plaintiff is forced to engage in expensive and drastic strategies\textsuperscript{149} in order to preserve its rights to
pursue a TPA claim then it would be preferable for the application, reach and limits of the TPA to be
more readily ascertainable. At least then the plaintiff, and its legal advisers, would have some
reasonable scope to decide whether it is worthwhile undertaking those drastic strategies. The
present situation seems to be, as we saw in chapter 5, that when there is a commercial maritime
contract\textsuperscript{150} it is likely that the applicability of the TPA will be decided not by a reasoned and logical
application of facts to law, but rather by a scramble to the courthouse. That route is hardly likely to
produce a principled outcome, nor at an economical price.

Further, we have seen that the current arrangement could be said to favour foreign shipowners in
some instances.\textsuperscript{151} The \textit{Koumala} case has shown that they are able to rely on the TPA themselves
in their dealings with local service providers. However, there is more than a little irony in the fact
that, at least where COGSA does not apply and there is a contractual exclusive jurisdiction or
arbitration clause, the shipowner has a good chance of avoiding any TPA liability by being the first to
court to obtain an anti-suit injunction. The \textit{Draft Convention} is likely to skew that outcome further with
some important signatories refusing to countenance the suite of jurisdictional options it proposes for
the Plaintiff, instead giving full force to exclusive jurisdiction provisions.

\textsuperscript{148} Mary Keyes says that ‘the use of TPA claims in foreign jurisdiction cases may be for strategic purposes’ –
\textit{Jurisdiction in International Litigation} (2005) at 154. Insofar as maritime cases are concerned, the author maintains that
the TPA can be a meaningful cause of action for a plaintiff, quite apart from its consequences in any jurisdictional
dispute.

\textsuperscript{149} Such as anti-anti-suit injunctions. See for instance the lengthy \textit{Kiukiang Career} litigation and the \textit{Pan} case
discussed in the article at 5.1, Part II.

\textsuperscript{150} Not caught by COGSA.

\textsuperscript{151} See Chapter 5.1, Part III.
Ultimately, this thesis has argued that the ideal, but seemingly unattainable, solution would be an international convention on jurisdiction with broad acceptance.\(^{152}\) Only time will tell us the fate of the *Hague Convention on Choice of Court Agreements 2005*. In the meantime, further juridical development of the notion of co-operation and conditional orders may be of assistance in individual cases; but this has the disadvantage of being piecemeal – as a result, not contributing to certainty in this area. The options are canvassed in Chapter 5; but it has to be said that – aside from unilateral action by Australia to make the problem disappear\(^{153}\) - no particular negotiated solution presents itself as workable at present. The remaining option, then, is for Australia to take unilateral action by amending the TPA.

This thesis contends that the Australian policymakers, and eventually the Australian Parliament, ought to make a clear choice between preservation of the lofty ideals of the TPA, or comity in international maritime law. It may well be that the suggestions in chapter 5, to excise commercial maritime transactions from s52\(^{154}\) (the excision option) gives the best outcome. The certainty that would result would contribute to the enhanced attractiveness of Australia as a venue in which to litigate or arbitrate.\(^{155}\)

In one area in which the writer is certain the TPA should continue to play a role is that of cruise ship passengers. This is a manifestation of the original purpose of the TPA and should be maintained. Further, the recent changes barring a personal injury or death claim as a result of a breach of s52

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\(^{152}\) Chapter 5.1.

\(^{153}\) By excision of maritime law from the TPA.

\(^{154}\) Although an argument could also be made for this excision only to affect s52 as maritime services claims might still be regarded as validly caught by s74.

\(^{155}\) Indeed, one could claim a loose analogy with the exception of liner shipping from the competition provisions of the TPA.
ought to be wound back to the 2004 position. In that way the TPA can found a personal injury claim (consistent with its consumer protection mantle) but damages will be consistent with those awarded for a common law claim.\footnote{156}

One could also make a sound argument for preserving the application of s74 to maritime services performed in Australia. An exemption from s74 would seem to give those industries some sort of ‘favoured status’ over non maritime industries operating in Australia. It would be far neater for the requirement to remain, and the contracting parties to agree a limitation provision compliant with s68A. After all, other Australian industries have had to adapt to commercial life with s74. However, the maritime services industries may argue that if they are to lose the protection of s52, they ought to lose the burden of s74. These issues deserve some dialogue between industry and government.

If the excision option is not taken up and the TPA is to continue to apply as it does at present, then a number of matters need to be made clearer. The application, reach and limits of the TPA need to be clarified, and the festering issue of party autonomy clashing with the TPA also requires tending.

Looming on the horizon is an opportunity for Australian policy makers to at least consider clarifying the place of the TPA in Australian maritime law. The international community is currently finalising a new cargo regime, \textit{UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea}.\footnote{157} The speed of adoption of Conventions is notoriously glacial - assuming

\footnote{156}{While the writer does not agree with the civil liability reforms, one can appreciate the importance of consistency in relation to damages available for different causes of action.}
that the Convention will receive sufficient acceptances to come into force at all. But if the Convention does receive widespread acceptance, and Australia decides to commit to it, then it presents both a challenge and an opportunity as regards the TPA. While considering carriage of goods by sea, and wider maritime law, in the Australian framework of legislation, Australia should also review the impact of the TPA in maritime law and give it a more thoughtful treatment. Should Australia choose to ratify and then enact enabling legislation, it should take that opportunity to consider whether the TPA should play a role in commercial maritime law at all. If the answer is yes, then the interface between the TPA and the Convention could be made clearer. For instance, the Convention could stipulate that the time and monetary limits within the Convention extend to any other causes of action against the carrier. This alone should help minimise extraneous TPA allegations in carriage claims, because the TPA will not be a backdoor to receiving uncapped damages, or avoiding the time limits.

In conclusion, it is important to note that the areas canvassed in this thesis – carriage of goods, carriage of passengers and contracts for maritime services – are merely some of the examples of maritime and trade law caught by the TPA web. Some, such as pilots and performance guarantees, have been the subject of TPA case law already; and the field of unconscionability in international trade and transport remains relatively unexplored. Clearly there are others who may be affected by the law as it currently stands. For instance, ship surveyors and classification societies could find s52 achieves for a non-contractual plaintiff what the law of negligence has not been able to deliver. Port authorities and those providing navigational aids services such as VTS might similarly find TPA allegations against them in the event of a casualty. Likewise, TPA allegations

158 See Braverus case discussed at 2.2.2 and 4.3 above.
159 Note Olex Focas Pty Ltd v Skodaexport Co Ltd [1998] 3 VR 380 as cited in chapter 2.1 at fn 108.
160 See Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd [2007] FCA 881 Gilmour J.(unreported) as discussed in chapter 5 above in Part II.
might be aimed at a salvor for mismanaged salvage operations. Those topics will have to wait for another day.
Appendix 1 - Errata

Errors in published articles:


Page 199, should read ‘Section 52 prohibits a corporation from ‘engaging in conduct” that is misleading or deceptive or likely to mislead or deceive’.

At p 217; ‘Indeed it could be said that Australian COGSA recognizes as much when it does not specifically make COGSA overrule s52, but only other parts of COGSA.’ Should read: ‘other parts of the TPA.’

Page 213 onwards; 4 (b) and (c) of the Article, need to be read subject to Chapter 5 of this thesis. Chapter 5 discusses the fact that in most if not all cases, charterparties will include a stipulation that any disputes be resolved by arbitration or be subject to the exclusive jurisdiction of a country other than Australia. Chapter 5 discusses the ramifications of such a clause for an Australian litigant who wishes to rely on a TPA cause of action. The Draft Convention is discussed again in this context.


At text accompanying fn 165 the article discusses the limitation scheme applicable in New Zealand for claims against shipowners. It should have been pointed out that the New Zealand no – fault compensation scheme for personal injuries means that a passenger on a cruise line who sued in

162 From p213 onwards.
163 At text accompanying fn 165.
New Zealand would receive much less than might be the case in a country without such a scheme, such as Australia. One assumes this was the motivation behind Mrs Dillon’s lawyers commencing proceedings in Australia rather than the location of the accident, New Zealand.

At p 48, fn 127, it states that the 2002 Protocol ‘has 6 of the required 10 signatories’. That is a misprint. As at 28 March 2008, it has only 4 of the required 10 signatories.164

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*Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974*


*SDR Protocol amending the Brussels Convention as amended by the Visby Protocol (1979).*


*2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974.*


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