

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

Kate Lewins

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

**This thesis is submitted in fulfillment of the requirements of the Degree of Doctor of
Philosophy**

School of Law

Murdoch University

Western Australia

May 2008

Acknowledgements

Thanks are due

to Vernon for his patient and helpful supervision;

to my parents for always believing in me;

to my many friends, both in Australia and in Canada, who told me I could do it;

and most importantly to my wonderful family, Nigel, Harry and Saskia; for inspiration and distraction

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?

Contents

Acknowledgements	i
Declaration	ii
Preface	iii
Abstract	iv
Contents	v

Chapter One

The Trade Practices Act and Shipping Law in Australia – An Introduction	1
-------------------------------------------------------------------------------	---

Chapter Two

Carriage of Goods by Sea and the TPA	11
2.1 Article: 'Corporate Morality and Commercial Maritime Contracts: Considering the impact of the Trade Practices Act 1974 (Australia) s52 on carriage of goods by sea' (2004) <i>Lloyd's Maritime and Commercial Law Quarterly</i> 197 – 218	12
2.2 Significant Developments	35
2.2.1 Amendments to the TPA	35
2.2.2 New Cases	37
2.2.3 A New Carriage Convention? <i>Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea</i>	42

Chapter Three

Cruise Ship Operators and TPA	45
3.1 Article 'The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 Trade Practices Act 1974 (Cth)' (2004) 18 <i>MLAANZ Journal</i> 30 – 54.....	46
3.2 Significant Developments	72
3.2.1 Dianne Brimble case.....	72
3.2.2 Statutory changes affecting personal injury claims under s52	73
3.2.3 Statutory changes affecting personal injuries claims under s74	75
3.2.4 Amendments to TPA - State law may override s74	77

Chapter Four

Towage contracts and the TPA	79
4.1 Article 'What's the Trade Practices Act Got To Do With It? Section 74 and Towage Contracts In Australia' (2006) 13(1) <i>Murdoch University Electronic Journal of Law</i> 58 – 76.....	80
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 (2007) 21 <i>Australian & New Zealand Maritime Law Journal</i> 101 – 105 (unrefereed).....	100
4.3 Significant Developments	106
4.3.1 Appeal in <i>Koumala</i> case.....	106
4.3.2 Other maritime services caught by s74 – the way forward	109
4.3.3 Personal injury reforms and contracts for maritime services	111

Chapter Five

TPA - A lion in its own backyard but a toothless tiger overseas? Conflict of laws implications of TPA in maritime law.....	112
5.1 Article: 'Maritime law and the TPA as a 'mandatory statute' in Australia and England: Confusion and consternation?' (2008) 36 <i>Australian Business Law Review</i> 78 – 136.	113
5.2 Significant Developments	173
5.2.1 <i>Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea</i>	173
5.2.2 <i>Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd</i> [No 3].....	174

Chapter Six

Conclusion.....	175
Appendix - Errata.....	183
References	185