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

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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 conventions[1] 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

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* Senior Lecturer in Law, Murdoch University. This article had its genesis in a presentation given to the Maritime Law Association of Australia and New Zealand Annual Conference in October 2003 in Brisbane, Australia. It reflects the author's understanding of the law as at 20 November 2003 save that it has been updated to take into account the Senate's rejection of the *Trade Practices Act (Personal Injury and Death) Bill 2003* in February 2004 together with the coming into force (in May 2004) of the *1996 Protocol to the Convention on Limitation of Liability for Maritime Claims 1976.*

[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 Corporation 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 S.A. (The Maratha Envoy)* [1978] AC 1, 8 (Lord Diplock).

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.[3] 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,[4] it is likely that an injured[5] 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) [6] 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.[7]

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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[3] 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 R Lewis (Int) P/L* (1975) 25 FLR 194, 208.

[4] 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

[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.[12] 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.[13] This is the only means by which the *TPA*, and therefore s52, can extend to conduct that occurs overseas.[14] 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.[15] 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.[16]

If the foreign corporation has an office or agents in Australia undertaking its business[17] 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.[18]

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[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.[19] 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.[20] 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.[21]

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.[22] 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.[23]

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.

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[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 above[24] 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 Australia[25] 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]

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[24] At text accompanying fn 13.
[25] Or some State or Territory of Australia.
[26] *Trade Practices Act 1974* (Cth), s67.
[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.
[29] *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79, 86 (Fox J).

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]

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[30] *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Limited* (1993) 42 FCR 470. This decision has fuelled controversy amongst academics – see Skapinker & Carter 'Breach of Contract and Misleading or Deceptive Conduct in Australia' (1997) 113 *Law Quarterly Review* 294 and Cornwall-Jones 'Breach of Contract and Misleading Conduct: A storm in a teacup?' [2000] *Melbourne University Law Review* 10.

[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: *Demagogue 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.'[39] 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.[40] 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.[41]

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.[42]
- S84 - which sets out a statutory definition of agency that is broader than common law.[43]
- S51A -which provides that the onus or 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.[44] Another example is that currently[45] there seems to be no

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[39] Ibid.

[40] *Trade Practices Act 1974* (Cth), s82. The section reads: '(1) A person who suffers loss or damage by conduct of another person that was done in contravention of …[amongst others, s52]…may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.'

[41] *Trade Practices Act 1974* (Cth), s80 and s87. Some remedies include an injunction (s80) 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 (s87).

[42] The section reads:

> "A reference in this part to a person involved in a contravention of a provision of [amongst others, s52] 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 other to effect the contravention"

However, the extraterritorial application of Act set out in s5 does not apply to s75B: see s5(1).

[43] For instance, a person with apparent authority can give authority to another person: *Trade Practices Act 1974* (Cth), s84(2).

[44] For a maritime example of the ignoring of exclusion clauses once s52 has been held to apply, see *Comalco v Mogal Freight Services* (*Oceania Trader*) (1993) 113 ALR 677. A disclaimer clause can only be effective if

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 omissions[46] 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 damages[48] are particularly significant.

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

Where a cruise ship operator or its agent[50] 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 but[53] 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

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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] *Puxu 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.

[51] ACCC *Travel and Tourism – and the TPA* (ACCC Publishing Unit) Nov. 1999, 9.

[52] See site by Judge Thomas A Dickerson <http://www.classactionlitigation.com> at 29 June 2004.

[53] See *Vallery v Bermuda Star Line* 141 Misc 2d 395, 532 NYS 2d 965 (NY Sup 1988) as cited by Judge Thomas A Dickerson 'The Cruise Passenger's rights and remedies' <http://www.classactionlitigation.com/library/cruiserights.htm> at 29 June 2004.

[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,[56] and have been relied upon by a passenger who has sustained loss or damage as a result, will sound in damages. [57] 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.[58]

Using s52 to pursue a personal injury claim is, at present, possible[59] but not common[60]. 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.[61] 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.[62] 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%.[63] Overall,

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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.

[63] *Henville v Walker* (2001) 206 CLR 459.

the cause of action under s52 is easier to establish than a common law cause of action.[64] For these reasons, the *TPA* has traditionally been a potentially powerful weapon against cruise ship operators. [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).[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.[67]

The panel was concerned that changes wrought to the law of negligence by its recommendations might be undermined if the *TPA* continued to provide a 'back door route' to claims for personal injury.[68] Amongst other reforms,[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 *TPA*.[70] The Bill giving effect to that recommendation, the *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.[71]

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

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[64] For the reasons discussed above, at text accompanying fns 35 to 47.

[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 *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.

[66] Final report released 2 October 2002 and available at: http://revofneg.treasury.gov.au/content/review2.asp (visited 29 June 2004).

[67] Ibid, Terms of Reference no 4 at page x.

[68] Ibid, paragraph 5.12.

[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.

[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.

[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 undercuts 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)…[77]

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[72] Australian Competition and Consumer Commission 'Second Submission to the Principles based Review of the Law of Negligence' August 2002.

[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/atr/content/publications/2002/20021115_2.asp> at 29 June 2004.

[75] See discussion accompanying fn 112.

[76] eg see ACCC press release 2 September 2002 "Consumers To Lose From Negligence Review Proposals: ACCC" <http://www.accc.gov.au/content/index.phtml/itemId/88163/fromItemId/378014> at 29 June 2004; Australian Consumers' Association press release 3 September 2002 "Proposed Reforms to Law of Negligence "Over the Top" says ACA"; Australian Plaintiff Lawyers Association press release 2 October 2002 "Coonan lacks compassion and understanding" <http://www.apla.com/links_med_sub/releases/021002.htm> at 29 June 2004.

[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 Company*[81] (*Mikhail Lermontov*) the trial judge held that s74 applied to impose a requirement to exercise due

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(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.

[81] (1989) 21 NSWLR 614.

care and skill in the navigation of a vessel carrying the plaintiff's personal luggage,[82] 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.[83] The doubts of the Court of Appeal in the *Dillon* case have been assuaged by amendments to section 74 in 1986.[84] The definition of services applicable since 1986 includes:

> the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction…[85]

On its face, it seems clear that this definition includes cruise ship contracts, and there is academic support for this conclusion.[86] 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.[87] 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.[88] 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[89]) no exclusion or limitation clause can undercut or effect that.[90]

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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.

[86] Warren Pingelly, 'The Law of Travel and Tourism' (Blackstone Press 1990), 71, fn 22; Atherton & Atherton 'Tourism, Travel and Hospitality Law' LBC (1998), [12.12 –12.16].

[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 Co*[92] 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 2002*[94] (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).

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[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.

[93] Explanatory Memorandum to the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 <http://scaleplus.law.gov.au/html/ems/0/2002/0/20020628tradeem.htm> [1.4] at 29 June 2004.

[94] No 146 of 2002, commenced 19 December 2002.

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.

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[95] Above, fn 93.
[96] As recognised by the Ipp Report, criticising the definition as being 'extremely and unacceptably wide in its terms and very difficult to understand' (at [5.61]). See text accompanying fn 99.
[97] Text accompanying fn 92.
[98] Fn 66, [5.51].
[99] Ibid, [5.61].
[100] Regardless of whether the claim was framed in tort, contract or beach of statute. The Ipp Report proposed that the Act implementing its reforms be termed the *Civil Liability (Personal Injuries and Death) Act.*
[101] Recommendation 11.
[102] Recommendation 14.
[103] Recommendation 12.

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.[104] The reforms suggested are wide ranging.[105] 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.[106] 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.[107] There will, therefore, be some types of personal injury claims that do not fall within the new s68B[108] and most claims would fall outside the narrower definition proposed by the Ipp Report.[109] 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.[110] 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. [111] 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.

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[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.[112] 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.[113] 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[114] or services[115] or a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.[116] Breach of provisions of the *TPA* (other than s52[117]) is an offence and the court can impose penalties.[118] 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

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[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).

[115] *Trade Practices Act 1974* (Cth), s53(aa).

[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,[119] 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.[120]

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.'[121] As *Baltic v Dillon* showed,[122] 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.[123] 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*[124] and the *1976 Convention*.[125] The latter has been in force in Australia since 1991 and is about to be updated by the *1996 Protocol*.[126] Secondly, there are the limitation regimes specifically directed at passengers – namely, the *Athens Convention* and its various amending protocols.[127] 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).

[124] *International Convention Relating to the Limitation of Liability of Owners of Sea Going Ships, Brussels 1957*.

[125] *Convention on Limitation of Liability for Maritime Claims done at London 1976*. (1976 Convention).

[126] *Limitation of Liability for Maritime Claims Act 1989* (Cth) (LLMC Act). In 2001 the LLMC Act was amended by the *International Maritime Conventions Legislation Amendment Act 2001* to incorporate the *1996 Protocol*. The protocol will come into effect internationally on 13 May 2004 and the LLMC Act amendment incorporating the 1996 protocol into Australian Law will come into effect on the same day. –*Commonwealth Gazette(Special)* 2004, No. S157 dated 13 May 2004.

[127] *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974* (*Athens Convention*). The *1976 Protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, done in London 1976* (*1976 Protocol*) introduced the Special Drawing Right (SDR) as the monetary unit, and increased the applicable limits. The *1990 Protocol* never came into force as it failed to receive sufficient ratifications. The *2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974* (*2002 Protocol*) has 6 of the required 10 signatories as at 30 April 2004 (Article 20).

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/stopovers 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 fn139 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.

cruise ship operator to rely on a contractual term[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.[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*.[139]

***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.[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[141] and no effort has been made to exclude *TPA* claims from its operation.[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*.[143] In this writer's view, the *LLMC Act* would take precedence over the *TPA*. Therefore, whilst the liability to the passengers would still

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[137] As opposed to a legal right to limit liability, as would be the case if Australia had ratified the *Athens Convention*.

[138] See text accompanying fn 97 above.

[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).

[140] See *Limitation of Liability for Maritime Claims Act 1989* (Cth), s6.

[141] To adopt the *1996 Protocol*: see fns 126 and 155.

[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.

[143] Article 2.1(a), Article 7.

exist and could not be excluded,[144] it would still be subject to limitation in accordance with the *LLMC Act*.[145]

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*.[146] 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).[147] 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).[148] It would seem[149] 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.[150] 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.[151] 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[152] of about AUD$49 million.[153] Without that cap, the calculated limit would be more like AUD$277 million.

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[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 those 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 fall 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/tre/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 proceedings[162] 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.

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[154] International Maritime Organisation summary of status of conventions <http://www.imo.org/Conventions/mainframe.asp?topic_id=247> at 29 June 2004.

[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.

[158] the other significant reform set out in the *1996 Protocol* is the 'default mechanism of the tacit acceptance procedure' see National Interest Analysis Protocol, done at London on 2 May 1996, to amend the Convention on Limitation of Liability for Maritime Claims, of 19 November 1976 [2001] ATNIA 15 <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/nia/2001/15.html> at 1 September 2003.

[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.[165] 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 represents 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.[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 *TPA* by relying on contractual terms limiting liability. The extraterritorial reach of the *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 *TPA*.

[166] *Trade Practices Act 1974* (Cth), s53(g).