9 December 2016

Further submission to Review of Australian Consumer Law, December 2016

I refer to my original submission dated 10 May 2016. Thank you for the opportunity to make oral submissions on 7 November 2016.

Understandably, the ACL Review Interim Report concentrates on a number of pressing issues concerning consumer law. I note that it does not explicitly deal with personal injury claims that can be based on the statutory guarantee provisions of the ACL, particularly s60 and s61: nor the more specialised example of injuries that may occur overseas as a result of transactions by a consumer in Australia. I wish to elaborate on my earlier submissions in this regard.

Recognition of statutory guarantees as 'key plank' in providing rights to consumers who have sustained personal injury during delivery of services by a supplier

Consumer safety is at the heart of the ACL protection for consumer products, yet consumer safety as regards services tends to be overlooked. It is important to recognise the significance of the statutory guarantee protection for consumers who have sustained personal injury as a result of services that have been negligently provided. Not all such services will be 'recreational' in nature. Other types of services where consumer safety may be compromised include: contracts of carriage with charter bus companies or ferry companies; carparks, appliance repairers, car mechanics and drycleaners, and beauty therapy.

The statutory guarantees in s60 and s61 are the 'go to' provisions for those injured during the supply of services. Without this statutory guarantee framework, a supplier of services could seek to exclude liability for personal injuries sustained by a consumer even where that injury was caused by the supplier's negligence.

It should be acknowledged that the statutory guarantee framework in the ACL is a key plank in the protection of consumers where they sustain personal injury as a result of faulty supply of services. The protection ought to be uniform between the States, certain and clear. However, as I explained in my initial submission, that is not the case. I elaborate below.

1. Consumer safety and statutory guarantees - uplift of state laws via s275 ACL is extremely problematic.

Section 275 'uplifts' state based civil liability laws as 'surrogate federal law' into the framework to determine consumer rights under the ACL. As regards personal injury claims, this setup bedevils consumer claims with complexity, uncertainty, and inconsistency between the States. The difficulties relate both to the variable assessments of quantum under the differing Acts, and the fraught question of which tests of liability in the civil liability laws are uplifted to modify or affect the statutory guarantee.

I suggested how this might be tackled in my original submission:

1. The determination of a failure to comply with the statutory guarantee should not be based on modifications effected by the CLA in force in that State.
2. The assessment of damages for personal injuries resulting from a breach of a statutory guarantee ought to be determined in accordance with the provisions within the CCA itself –provisions already contained within VIB.[1] As a result, the assessment of damages for a breach of the statutory guarantee would be uniform throughout Australia.
3. A review and update of Part VIB of the CCA be undertaken with the aim of ensuring its equivalency to the most benevolent version of the assessment of damages regimes found in any of the civil liability interventions currently operational in Australia. I would be opposed to a cap on general damages claims given the other constraints operating on the quantum of damages.[2] The adoption of the 'most generous regime' can be readily justified. It should not be forgotten that the s 60 guarantee concerns consumers who have entered a contract, and does not concern public liability at large. In relation to the s60 statutory guarantees a supplier will only be liable where it has caused injury to a person by failing to take care of a consumer's safety when **supplying a service** in which they are obliged to use due care and skill.[3] It is a potential liability which the supplier has chosen to adopt, and can insure against.

I urge the Review to consider reforms in this area.

1 This would require only an amendment to s87E(1)(a) to include Part 3-2.
2 Western Australia, for one, has no cap on non-economic loss claims for personal injuries.
3 It is my view that if a consumer sustains a catastrophic injury as a result of a breach of s60 by the supplier, then the damages payable to the consumer ought not be capped.

2. Suppliers/consumers of services need to be educated about consumer safety obligations under statutory guarantees

Suppliers of services need to be better informed of their obligations, and consumers of their rights under s60 and s61. It is not uncommon for transport providers, for example, to exclude liability for injuries caused by their negligence. An education campaign is necessary, along with investigations of recalcitrant suppliers. A fact sheet could be drafted and made available to consumers and suppliers.

3. Damages for inconvenience and discomfort/disappointment and distress under ACL and at common law: near- extinguishment by civil liability laws carried over to ACL?

Another example of what appears to be the unintended consequence of s275 concerns the interplay between the ACL, the civil liability laws and the remedy for damages for disappointment and distress (also variously termed loss of enjoyment or 'inconvenience, discomfort and mental distress'[4]) arising from a breach of a contract. These are most commonly pursued in holiday claims. The head of damages is, in essence, a non-pecuniary claim for failure to deliver the promised benefits of the contract where the expected benefit was relaxation and enjoyment.[5] The awards of damages under it have always been modest.

In some States it has been held that such a claim is to be considered 'pain and suffering' and thus a claim of personal injury caught by that State's civil liability regime.[6] As such that harm will not be recoverable unless it accompanies a physical injury of more than 15% of the most extreme case, or constitutes a recognisable psychiatric illness in its own right.[7]

Section 275 *appears* to permit uplift this CLA based argument in relation to statutory guarantee claims. There is a real risk, then, that claims for disappointment and distress arising out of a breach of contract/breach of s60/61 may be effectively extinguished in virtually all situations[8] because they are now considered a claim for 'pain and suffering' and 'personal injuries'.

This has been playing out in consumer cases

- *Flight Centre v Louw* (2011) 78 NSWLR 656, The Louws had booked a holiday to Tahiti, but their entire holiday was disrupted by building works metres from their hotel room. The Judge applied *Insight* and the CLA to extinguish a right to claim damages for disappointment and distress awarded by the assessor pursuant to *Baltic Shipping v Dillon*.

[4] See *Milner v Carnival plc* [2010] 3 All ER 701.
[5] *Baltic Shipping v Dillon* (1993) 176 CLR 344 (HCA).
[6] *Insight Vacations v Young* [2010] NSWCA 137.
[7] This is a conclusion with which I disagree: see S. Walker & K. Lewins 'Dashed Expectations? The impact of civil liability legislation on contractual damages for disappointment and distress' (2014) 42 *Australian Business Law Review* 465; and Lewins *International Carriage of Passengers by Sea* (Sweet & Maxwell London, 2016), 273.
[8] The exception being where there has also been a significant physical injury.

- *Riddell v My Bentours Viking River Cruises Australia Pty Ltd* [2011] NSWCTTT 156, the tribunal held that the carrier had promised the applicants a 12 night cruise where the ship would be a floating hotel docking in the 'heart of every destination' where the ship would dock in the middle of town, walk off the ship and join the day's activities, spending 'less time getting there and more time being there'. The ship docked in several Russian ports but was not in the centre of town, no transport to the centre was provided and it would have taken several hours to journey to the centre by public transport. The tribunal found that the carrier had misrepresented this aspect of the cruise. However, following *Louw*, the tribunal member held that the claim for disappointment and distress was a personal injury claim; that there was no evidence of recognised psychiatric illness to the requisite extent; and the applicants could not recover damages for their disappointment.
- *Childs v Scenic Tours* [2014] NSWCATCD 128 the applicants sought an order that the respondent pay compensation for failure to provide a European river cruise in accordance with the itinerary. They also claimed for stress and inconvenience. The respondent was ordered to pay damages for failure to provide the promised cruise but the claim for stress and disappointment failed. The tribunal simply accepted that "such matters are caught by the Civil Liability Act 2002 (NSW)" and that as the applicants had not met the threshold requirement of 15% of the most extreme case they could not recover for their stress and inconvenience.
- By contrast, see *Price & Ors v Flight Centre Ltd* [2012] VCAT 800 (Victoria). In *Price*, the tribunal was referred to *Flight Centre v Louw* but distinguished it, saying it was not a case of a ruined holiday but a claim for economic loss.

The provisions of the ACL itself would permit a damages claim for loss of enjoyment, modest as it is likely to be, where a supplier fails to deliver on that key obligation of the contract for a holiday.[9] This remedy ought not to be undone by dint of a seemingly fortuitous combination of s275 and state based CLA provisions designed to work in the prism of negligence. Without intervention, the remedies available under the ACL itself would appear to be usurped by the effect of the CLA provisions. That means consumers are left only with a claim for reduction in value of the services below what was paid, and no right to recover *Baltic v Dillon* damages.

I recommend that a provision be inserted into the ACL (either s275 or in the remedies provisions) designed to negate the application of Insight Vacations case to statutory guarantee claims, on the basis that it subverts the consumer's right to damages for the measure of their loss arising from the breach of the guarantee. I suggest that provision be made to note that a claim for damages for inconvenience or loss of enjoyment is not to be characterised as a personal injury claim for the purpose of Part 3-2.

[9] Section 236 ACL, and *Baltic Shipping v Dillon* (1993) 176 CLR 344 (HCA).

4. Clarity required for application of statutory guarantees to overseas suppliers of services

We are seeing more cases of Australians making arrangements in Australia for services to be supplied overseas, and then having some type of claim against that supplier, including an injury claim. These include holiday travel.[10] Australian courts have taken an expansive view of the applicability of the ACL to goods and services supplied by overseas companies, but there is an (unsurprising) lack of awareness and 'pushback' from overseas suppliers. There is no single provision that consumers can point to that clearly establishes when the ACL will apply to services supplied overseas if they have been marketed to Australians in Australia.[11]

My first submission to this Review raised my concern with s67 ACL, a key provision in this regard. The recent decision of Edelman J in *ACCC v Valve Corp (No 3)* [2016] FCA196 helpfully illuminates how the ACL statutory guarantees will apply to overseas suppliers. It concerned the supply of computer games by a Washington based supplier via the internet (and Australian servers) to Australian consumers. The games were of modest value: about $20 each. The supplier argued the ACL did not apply. Ignoring the explicit contractual provisions as required by s67, the supplier said the proper law of the contract was not that of an Australian State.[12] His Honour held that in that respect, the supplier was correct: the proper law of the contract was not an Australian State.[13] However his Honour said that s67 is not a restriction to the operation of the ACL: it just 'ensures there can be no possibility of varying the operation of the Division by contractual terms.'[14] Rather, the statutory guarantees will apply where the supplier has engaged in conduct in Australia OR carries on business in Australia-[15] being phrases found in the parent act of the ACL, *Competition and Consumer Act 2010*.

This first instance decision awaits the imprimatur of higher courts. In the meantime, an allegation that a foreign supplier has engaged in conduct in Australia when contracting for services to be supplied outside Australia is likely to be hotly contested. It is heavily fact dependent. This is demonstrated by the decision of *ACCC v Valve Corp* itself*:* which entailed an ACCC prosecution, a 3 day hearing and a 90 page judgment involving a complexity of argument only accessible to a trained lawyer. Few consumers would be in a position to fund the legal inquiry required to establish this preliminary matter, especially for a claim of modest quantum (as most services claims are likely to be). Justice will be stymied if the consumer cannot afford to mount a case to argue that the foreign supplier's conduct is in fact caught by the ACL.[16]

[10] See for example *Wilson v Addu Investments Private Ltd* [2014] NSWSC 381; *Knight v Adventure Associates* [1999] NSWSC 861.
[11] Contra the UK position, as outlined in my Submission of May 2016.
[12] See [72].
[13] [84].
[14] [119].
[15] [158].
[16] One might think that the answer is to bring the claim before a consumer tribunal, but this is not always possible. For example, ship passengers are unable to bring a claim against the carrier in a consumer tribunal as their claims are considered claims in Admiralty, which must be pursued in a court with Admiralty jurisdiction.

In my previous submission I recommended some explicit provision be inserted to provide a clear test for the application of the statutory guarantees where services are supplied overseas by foreign suppliers. Given the *ACCC v Valve* decision, I recommend that the ACL be amended to include an explicit elaboration of the phrases 'carry on business' or 'engage in conduct' in Australia. It should be made clear that the ACL will apply to services marketed within Australia or directed at Australians by overseas suppliers, even if the services (and related goods) are actually supplied overseas. For example, it could state:

> *A supplier will be engaging in conduct in Australia:*
> *a) if its services are offered for sale within Australia,*[17] *or the subject of marketing activities aimed at consumers in Australia; and*
> *b) a consumer (either while in Australia or who is habitually resident in Australia) purchases the services*
> *and the ACL shall apply to that supply of services, regardless of whether the services are to be supplied in Australia or elsewhere.*[18]

5. Considering a better form of consumer protection for contracts of carriage for passengers by sea – Athens Convention 2002

For the reasons outlined in my first submissions in May 2016, I suggest that Treasury, the Attorney General's Department and the Department of Trade and Infrastructure actively pursue the ratification of the *Athens Convention 2002* for the benefit of Australian passengers.

I would be happy to answer questions or discuss any of the above in more detail.

Yours sincerely

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[17] This has been deliberately worded to ensure that it need not be the supplier who markets the services directly: for example, the use of local agents or intermediaries to promote or book services ultimately supplied overseas would still satisfy the provision.
[18] It could be inserted in ACL Part 3-2, or in ACL Part 1.