Under consumption: the Australian Consumer Law (ACL) and its application to personal injury[1]

1. How fascinatingly complex is the *Australian Consumer Law* ('ACL')! It seems much like some distant unexplored and complex planet.
2. The upshot is that this paper seeks to explore some of the more complex or unusual areas of application of personal injury claims to Planet ACL and seeks to break down some of its complexity.
3. First, I wish to review the 'recreational services' exception in the ACL, whereby a defendant can seek to contract out of the statutory guarantees under the ACL. This was recently the subject of a Victorian Court of Appeal decision.
4. Secondly, I will consider whether a plaintiff has a right to make a damages claim under the common law, which is modified by State statutory law (the *Wrongs Act*), as well a separate claim for damages under the ACL (Cth), which is a Federal law. There is little judicial guidance on the point and confusion abounds.
5. Thirdly, I will look at the difficulty of bringing claims against unknown manufacturers and overseas manufacturers.
6. Finally, I will explore the application of the ACL to medical negligence suits, something one rarely sees pleaded in such suits.

THE STATUTORY GUARANTEES

7. Let us start by looking briefly at the ACL guarantees.

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[1] The writer gratefully acknowledges the contributions to this paper by Michelle Britbart QC, Lachlan Allan and Paul Lamb of the Victorian Bar. Any errors, however, are of course the writer's own.

8. The ACL provides a host of statutory guarantees, for example the guarantee to supply goods that are of acceptable quality (section 54) or the guarantee to supply services with due care and skill (section 60).

9. If a defendant fails to comply with such a guarantee, and it gives rise to loss and damage by the person receiving the goods or services, the ACL provides remedies under Part 5.4 of the ACL.

10. In the case of personal injury suits, the remedy is an award of damages, which damages are typically assessed under Part VIB of the *Competition and Consumer Act.*

11. However, confusingly, guarantees as to services are excluded from Part VIB (see section 87E(1)). For those claims, unless the State law applies, sections 259(4) and 267(4) of the ACL (Cth) provides access to damages against suppliers. I will return to whether the State law applies.

RECREATIONAL SERVICES

12. Speaking generally, 'limit of liability' or 'exclusion of liability' clauses in a contract cannot affect a person's rights under the ACL. "Unfair terms" of a contract may also be void for the purposes of the ACL[2].

13. There is one significant potential exception - 'recreational services'.

14. Provided a contract between the parties relates to a 'recreational service' and uses the wording in the contract required under the *Competition and Consumer Act 2010* (Cth), or its Victorian equivalent, a defendant may be

[2] Section 23 of the ACL. As it seems this provision would not be able to get around the statutory right to exclude recreational services, this paper will not address that exception further.

able to rely on the contract to exclude any liability under the ACL in respect of those services.

Contracts purporting to exclude the statutory guarantees

15. In everyday life, we find ourselves signing away our rights under swathes of pages of terms in contracts that we probably never read – buying goods online, joining a gym, entering a theme park - the list is endless.
16. Perhaps not surprisingly, guarantees under the ACL are exactly that, 'guaranteed'. That is, in most cases, they cannot be excluded by a contractual term.
17. Section 64 of the ACL provides that any term of a contract purporting to contract out of the statutory guarantees will be void to the extent that it seeks to affect in any way the statutory guarantees and any liability flowing from those guarantees, including the right to claim damages for personal injury.
18. There are some exceptions, however. For present purposes, I will focus on the 'recreational services' exception.

The 'recreational services' exception

19. A cause of action under either the ACL (Cth) or the *Australian Consumer Law and Fair Trading Act 2012* (Vic) ('ACL (Vic)') provide that statutory guarantees may be excluded for 'recreational services'.
20. Under the Commonwealth Act, the relevant section is 139A of the *Competition and Consumer Act 2010*. Section 22 of the ACL (Vic) provides a similarly worded exception to the Commonwealth Act, with one significant difference.

The Commonwealth exception

21. One important point to note is that section 139A only affects claims being brought in relation to the supply of services.

22. Thus, if a person was injured having been supplied with goods and services, it may be that the injured person brings the claim for a failure of the defendant to supply goods that were of acceptable quality (e.g. buying sporting equipment and then being taught to use it). This would make the 'recreational services' exception redundant. In some circumstances, moreover, an injured party might also seek to bring a claim for misleading or deceptive conduct to avoid this exclusion.

23. Naturally enough, the exception only affects recreational services as the Act defines them. It applies to sporting activities or similar leisure time pursuits or activities undertaken for the purposes of recreation, enjoyment and leisure that involve a "significant degree of physical exertion or physical risk".

24. There are many cases that immediately spring to mind where this definition could be tested. For example, is a beginner's yoga class a sport or does it involve a significant degree of physical exertion or risk? Is a journey to the sporting event covered, as opposed to the sport itself, like taking the lift up a mountain to ski down it?

25. Another important point is that the Act requires that the clause of the contract be limited to death, physical or mental injury or in respect of some diseases as set out in section 139A(3) of the ACL (Cth).

26. If the wording itself of such an exclusion clause goes beyond applying to death, physical or mental injury or in respect of some diseases, it is said to be rendered void[3].

27. However, in the Victorian decision of *Rakich v Bounce Australia* [2016] VSCA 289, the Court of Appeal agreed with the position of a defendant who sought to rely on section 139A (and its State equivalent). In that case, both pieces of prescribed wording were used in the contract, but other neighbouring clauses went far beyond the statutory wording and sought to limit any liability arising from the supply of services under a contract. The Court found that the statutory wording was effective, despite the surrounding clauses.

28. The final point to note here is that, if the conduct by the defendant in supplying the services was "reckless", then the section 139A exclusion does not apply. It seems recklessness is tantamount to gross negligence.

The Victorian provision

29. Section 22 in the Victorian Act is substantially the same as the Commonwealth's section 139A.

30. The most important difference is that it refers to prescribed particulars, or a prescribed form of wording, to be used in the contract or on a display sign, for the section to take effect (rather than simply following the wording used in the section itself under the ACL (Cth)).

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[3] *Motorcycling Events Group Australia Pty Limited v Kelly* [2013] NSWCA 361 and *Alameddine v Glenworth Valley Horse Riding Pty Limited* [2015] NSWCA 219.

31. That prescribed form of wording under the ACL (Vic) regulations is reproduced in Annexure A.

Summary of the 'recreational services' exception

32. If a plaintiff is injured in a sporting or recreational activity supplied by the defendant, lawyers must ask themselves:
    a. did the plaintiff and defendant enter into a valid contract;
    b. did the contract have the statutory wording required under the ACL (Cth) and/or the prescribed wording under the ACL (Vic);
    c. was the contract for the supply of services under the ACL;
    d. was the service of a kind that meets the definition of "recreational services" under the ACL;
    e. was the Defendant's conduct reckless?

GENERAL DAMAGES AND A SECOND BITE AT THE CHERRY?

33. In most public liability and medical negligence suits, a Victorian plaintiff must have a "significant injury" under Part VBA of the *Wrongs Act* before they are entitled to claim damages for non-economic loss (i.e general damages).
34. Ominously, section 28LC(4) says that Part VBA of the *Wrongs Act* extends to a claim for damages "even if the claim is founded on breach of contract or any other cause of action".
35. By extension, it seems that, if a plaintiff brings a suit under the ACL (Vic), section 28LC(4) captures that claim and the plaintiff must satisfy the significant injury test under the *Wrongs Act*.

36. But what if the claim is also brought under the ACL (Cth), to which Federal jurisdiction applies?

37. Section 138B(1) of the *Competition and Consumer Act* confers a State with Federal jurisdiction to determine most ACL (Cth) claims. That means that a claim brought both in negligence (say, in Victoria) and a claim under the ACL (Cth) can be heard together by the State Court. There appears to be nothing in section 138B that limits the court's ability to award damages under the ACL (Cth), so long as each such court does not exceed its own jurisdictional limit (section 138B(3)).

38. But can the substantive law of Victoria, and the significant injury threshold, apply to the claim made specifically under the ACL (Cth)?

39. If a Victorian Act purported to encroach on, and limit the rights under, a Federal Act and the two were inconsistent as a result, section 109 of the *Australian Constitution* establishes that the Federal legislation must prevail. In terms, it says:

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

40. Given the ACL prescribes its own regime for damages for the supply of services under section 259 of the ACL (Cth), which is arguably inconsistent with the significant injury test under the *Wrongs Act*, it could be argued that claims that are brought under Federal jurisdiction

under the ACL (Cth) remain grounded in the ACL (Cth) and the significant injury test does not apply[4].

41. While there seems a good argument that there is nothing inconsistent about the ACL (Cth) permitting awards of damages and the State Court requiring a significant injury threshold for general damages, why should the State Act affect a claim under the ACL (Cth)? Is that beyond the jurisdiction of the Victorian parliament to encroach on the Federal powers? Just because two separate causes of action are brought for convenience in the State jurisdiction, why should its limitations to damages suddenly apply to a Federal claim?

42. In so far as the supply of services goes, perhaps the answer to these questions is the application of section 275 of the ACL.

43. That section provides that, if the contract is properly a contract of a State, and it relates to the supply of services, any State law that precludes or limits liability will take effect, notwithstanding the guarantees in the ACL. This is said to include any award for damages.

44. Section 275's equivalent (section 74(2A)) was first introduced under the *Trade Practices Act 1974 (Cth).* Parliament's intention in inserting the provision was laid bare in the Second Reading speech[5]:

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[4] I hasten to add that the High Court has seemingly taken a fairly narrow reading to an inconsistency between Commonwealth and State Laws under the *Trade Practices Act*. It seems the Commonwealth and State Laws would need to directly collide. See, for example, *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1977) 14 ALR 257. See also section 131C of the *Competition and Consumer Act* and sections 79 and 80 of the *Judiciary Act 1903 (Cth)*, discussed in Motorcycling Events Group Australia Pty Ltd v Kelly [2013] NSWCA 361 at [37]. See also section 140H of the ACL (Cth) that provides that the ACL is not intended to exclude other applicable law to the extent both are capable of operating concurrently.

[5] *Perisher Blue Pty Ltd v Nair-Smith* [2015] NSWCA 90 at [185].

> Based on legal advice, the Commonwealth has concerns that some actions in contracts based on a breach of the condition that services be provided with due care and skill may not be subject to any limitations which might be applied by a state or territory contractual remedy. To this end, the Commonwealth has decided to make a minor amendment to clarify this issue. The proposed amendments will seek to ensure that state and territory reforms of the law of contract are not undermined.[6]

45. In other words, Parliament's intention in enacting section 275 (Cth) was to prevent two bites of the cherry.

46. Relying on this provision, both Basten JA[7] and Sackville AJA[8] in *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137 concluded that, while other provisions of the *Civil Liability Act* did not fall within section 275 ACL (Cth)[9], the caps on damages, including general damages, were captured by section 275[10].

47. They appear to have come to this conclusion by finding that limitations on damages fell within the meaning of "limiting liability" under section 275. However, they did not detail their reasons. The case was appealed to the High Court, but this part of the decision was not.

48. To add further confusion, without explicit reference to Basten JA and Sackville AJA's reasons on this point, or the purpose for which section 275 was enacted, in *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219 at [72], Macfarlan JA (with the other members of the Court concurring) found that, if a plaintiff succeeds under both causes

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6 See also section 131C of the *Consumer and Competition Act* about the preserving of State's powers.

7 At [109-110].

8 At [155].

9 Namely section 5N of the *Civil Liability Act 2002 (NSW)*, which relates to permitting contractual waivers for recreational services.

10 While the High Court considered the decision on appeal, the point of damages was not appealed.

of action (negligence at common law and under the ACL (Cth)), they are entitled to claim the more favourable of the damages awards:

> "The only issue between the parties in this context is whether the appellant should be awarded damages for non-economic loss of $57,220, calculated in accordance with s 16 of the Civil Liability Act, or of $33,628 calculated in accordance with s 87M of the Competition and Consumer Act. The respondents submit that only the latter should be awarded because an award under the Civil Liability Act, being State legislation, would be inconsistent with the award under the Commonwealth legislation. I reject this argument. The *Competition and Consumer Act* provides for compensation in respect of causes of action arising under that Act. It does not purport to, nor have the effect of, excluding recovery of non-economic loss damages under the *Civil Liability Act*, notwithstanding that the causes of action may arise out of the same factual circumstances. On my findings, the appellant's causes of action are available to her under both Acts. She is entitled to choose that which is more favourable, being that which is available under the Civil Liability Act. Accordingly, she should be awarded damages of $57,220 for non-economic loss in addition to $76,453 plus interest for other components."

49. His Honour's conclusion came off the back of finding that section 275 of the ACL (Cth), including a purported contractual indemnity, did not apply in the circumstances of that case and did not prevent the plaintiff's claim under the ACL succeeding. He therefore said damages under the ACL (Cth) were unaffected. His decision may be able to be undermined given his Honour appears to incorrectly assume that damages thresholds under VIB of the *Competition and Consumer Act* applied to the claim

against the supplier, which do not apply to the supply of services, as noted above.

50. Neither NSW decision considered any other basis for applying the *Civil Liability Act* caps on damages for a claim brought under the ACL (Cth).

51. I am not aware of any precedential judicial decision in this State on the point to provide guidance on the issue.

52. While usually under the *stare decisis* principle, a NSW Court of Appeal's decision would be hard to overcome in Victoria,[11] unhelpfully, here, their decisions are inconsistent.

53. One thing does appear clear, though, and that is that section 275 ACL (Cth) does not extend to liability in respect of the manufacturing and supplying of goods, only the supplying of services, strengthening a case that the *Wrongs Act* thresholds do not apply to such a claim under the ACL (Cth). One wonders why, however, section 275 ACL was not so enacted for claims in respect of goods?

54. Part of that answer might lie in section 67(b) of the ACL (Cth). That section says that, if there is a provision in a contract for the supply of goods or services to a consumer, and if that contract seeks to substitute any right under the statutory guarantees for another country or a State or Territory, then the statutory guarantees apply despite that provision.

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[11] See for example Blue J in *Attorney — General (SA) v Kowalski* [2014] SASC 1:

> "In general, courts in one hierarchy are not bound by decisions of court in other hierarchies as to the law. For example a single Judge of this court is not bound by a decision as to the law of a single Judge of the Supreme Court of a State or Territory or the Federal or Family Courts. However, unless considered to be plainly wrong courts in Australia apart from the High Court, are effectively bound by decisions of intermediate appellate courts of another jurisdiction as to the common law and uniform laws."

In other words, it puts the ACL (Cth) on a higher footing than a State or Territory's laws said (in the contract) to apply to that contract. This section, of course, is silent on damages.

MANUFACTURERS AND SUPPLIERS OF OVERSEAS PRODUCTS – DEEMED MANUFACTURERS & EXTRATERRITORIAL CLAIMS

55. For product liability claims, the place of the tort is said to be where the product was manufactured[12]. Consequently, if a product has been manufactured in, say, Japan, the substantive law of Japan would apply to a claim for damages arising from the negligent manufacturing of a product.

56. Rather than seeking to identify the substantive law rights of the State of Japan, the ACL seeks to remedy this situation by providing a way in which the Australian supplier can be sued for supplying the goods.

57. Section 259 of the ACL provides that the supplier may be sued for failing to comply with the guarantees relating to the supply of goods and section 267 for the failure to comply with the guarantees as to services.

58. Further, if a person cannot identify a manufacturer to sue, the person may be able to sue the supplier as a deemed manufacturer under section 147 of the ACL. The person must write to the supplier and the supplier has 30 days to identify the manufacturer, failing which the supplier is deemed to be the manufacturer of the goods.

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12 See for example *McGowan v Hills Limited & Anor (Ruling No 1)* [2015] VSC 674.

59. In turn, pursuant to section 274 of the ACL, a supplier can seek indemnification from the manufacturer if sued for the supply of goods under section 259 from the manufacturer.

60. The definition of a manufacturer in section 7 of the ACL also includes (sub-section e):

> "A person who imports goods into Australia if:
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> (i) the person is not the manufacturer of the goods; and
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> (ii) at the time of the importation, the manufacturer of the goods does not have a place of business in Australia."

61. There may, however, be some cases where suppliers cannot be caught in the manufacturer's web. In that case, and if the manufacturer is overseas, a claim may still be possible against them under the ACL under section 5 of the *Competition and Consumer Act*.

62. Section 5 provides that the ACL guarantees extend to conduct outside of Australia by body corporates incorporated in Australia or carry on business in Australia, or Australian citizens or persons ordinarily resident in Australia. It also includes New Zealand corporations.

63. Commonly, a claim against an overseas manufacturer under the ACL will come down to a test of whether that body corporate is carrying on business in Australia. The "carrying on of business" is said to be continuous or repetitive conduct by that body corporate[13].

64. Section 67 of the ACL also prevents parties inserting an overseas forum clause in contracts for the supply of goods or services, thus preventing

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[13] *Miller's Australian Competition and Consumer Law Annotated*, 38th Ed, at [1.5.15].

parties contracting out of their statutory guarantee obligations, in circumstances where Australian law would otherwise apply.

65. The final point to note that it was once the law that a private individual to sue under section 5 of the *Competition and Consumer Act* needed to seek ministerial consent to bring that action against the overseas entity.

66. Under the *Competition and Consumer Amendment (Competition Policy Review) Act 2017*, this requirement has been removed[14].

MEDICAL NEGLIGENCE CLAIMS

67. The final area of this paper is for those who practise in medical negligence.

68. While I am not aware of any case law on the point, it seems clear enough that patients attending public hospitals do not meet the definition of a 'consumer' under section 3 of the ACL and such services or goods are unlikely to be said to be provided in trade or commerce.

69. Private patients who pay for the services and goods are in a different category and should meet the definition of a consumer who has obtained the services or goods in trade or commerce.

70. In a case under the former *Trade Practices Act 1974* (Cth), *E v Australian Red Cross Soc* (1991) 27 FCR 3010, Wilcox J held that a hospital patient who received nursing services in return for payment of fees was a "consumer" of the "services" received in "trade or commerce". That case

[14] Amendments to procedural requirements under an Act are said to have retrospective application, so any cases on foot that have not complied with obtaining ministerial consent should now be entitled to proceed without doing so: *Maxwell v Murphy* (1957) 96 CLR 267 (per Dixon CJ).

related to nurses at a private hospital supplying blood to a patient that was HIV infected.

71. It seems there is no reason, then, why private patients in medical negligence claims cannot pursue their claims under the ACL, in addition to claims under negligence or in breach of contract.

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13 December 2017

ANNEXURE A: PRESCRIBED WORDING TO EXCLUDE SERVICES GUARANTEES IN RECREATIONAL SERVICES CLAIMS UNDER THE ACL (VIC)

AUSTRALIAN CONSUMER LAW AND FAIR TRADING REGULATIONS 2012 - REG 6

Limitation of liability in relation to supply of recreational services

(1) For the purposes of section 22(2)(c)(i) of the Act, a term excluding, restricting or modifying the application of, the exercise of a right conferred by, or any liability of a supplier for a breach of, the guarantees set out in sections 60 and 61 of the Australian Consumer Law (Victoria) or that has that effect must contain the following prescribed particulars—

(a) if the term is contained in or on a sign displayed at the place at which the recreational services are being supplied, include the warning and note set out in Schedule 2 in a form that complies with subregulation (2); and

(b) if the term is contained in or on a notice given to the purchaser, include the warning and note set out in Schedule 2; and

(c) if the term is contained in a form to be signed by the purchaser, include the warning and note set out in Schedule 3.

(2) For the purposes of subregulation (1)(a), the warning and note must be in a font size at least equal to the largest font size used elsewhere in the sign, excluding the name or logo of the supplier.

SCHEDULE 2

Sch. 2

Regulation 6

WARNING: If you participate in these activities your rights to sue the supplier under the Australian Consumer Law and Fair Trading Act 2012 if you are killed or injured because the activities were not supplied with due care and skill or were not reasonably fit for their purpose, are excluded, restricted or modified in the way set out in or on this *sign / *notice.

NOTE: The change to your rights, as set out in or on this *sign /* notice, does not apply if your death or injury is due to gross negligence on the supplier's part. "Gross negligence", in relation to an act or omission, means doing the act or omitting to do an act with reckless disregard, with or without consciousness, for the consequences of the act or omission. See regulation 5 of the Australian Consumer Law and Fair Trading Regulations 2012 and section 22(3)(b) of the Australian Consumer Law and Fair Trading Act 2012.

AUSTRALIAN CONSUMER LAW AND FAIR TRADING REGULATIONS 2012 - SCHEDULE 3

WARNING UNDER THE AUSTRALIAN CONSUMER LAW AND FAIR TRADING ACT 2012

Sch. 3

Under the Australian Consumer Law (Victoria), several statutory guarantees apply to the supply of certain goods and services. These guarantees mean that the supplier named on this form is required to ensure that the recreational services it supplies to you—

- are rendered with due care and skill; and
- are reasonably fit for any purpose which you, either expressly or by implication, make known to the supplier; and
- might reasonably be expected to achieve any result you have made known to the supplier.

Under section 22 of the Australian Consumer Law and Fair Trading Act 2012, the supplier is entitled to ask you to agree that these statutory guarantees do not apply to you. If you sign this form, you will be agreeing that your rights to sue the supplier under the Australian Consumer Law and Fair Trading Act 2012 if you are killed or injured because the services provided were not in accordance with these guarantees, are excluded, restricted or modified in the way set out in this form.

NOTE : The change to your rights, as set out in this form, does not apply if your death or injury is due to gross negligence on the supplier's part.

"Gross" *negligence*, in relation to an act or omission, means doing the act or omitting to do an act with reckless disregard, with or without consciousness, for the consequences of the act or omission. See regulation 5 of the Australian Consumer Law and Fair Trading Regulations 2012 and section 22(3)(b) of the Australian Consumer Law and Fair Trading Act 2012.