

# What's the Trade Practices Act Got To Do With It? Section 74 and Towage Contracts In Australia

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

## **1. Introduction**

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

Towage operators expect to have to comply with regulations of a maritime nature such as those found under the Navigation Act 1912 (Cth). As an intensely commercial operation, it may come as a surprise that the contractual

terms upon which they provide their services might be affected by an Australian Act designed to protect consumers and encourage fair trade.<sup>1</sup>

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

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

It has been said that s74 is:

‘designed to achieve a large social purpose far beyond ...commercial circumstances...’<sup>4</sup>

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

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<sup>1</sup> “The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection” –Trade Practices Act 1974, s2.

<sup>2</sup> See Kate Lewins, “Corporate morality and Commercial Maritime Contracts: Considering the Impact of s52 Trade Practices Act 1974 (Australia) on Carriage of Goods by Sea” (2004) *Lloyds Maritime and Commercial Law Quarterly* (UK) 197. On cruise ship operators contracting with or operating in Australia see Kate Lewins, “The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 *Trade Practices Act* 1974 (Cth)” (2004) 18 *MLAANZ Journal* 30.

<sup>3</sup> See discussion on s 74 (3) and s68A in 2. below.

<sup>4</sup> Justice Kirby in Qantas Airways Ltd v Aravco Ltd (1996) 136 ALR 510 at 516.

very nature of the services they provide: for instance, if the services are needed at short notice or in a remote area. In those cases, the provider may well require a customer to agree to a set of standard terms, not in any real sense negotiable, which contain terms that prefer the interests of the providers.

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

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

- First, the definition of 'consumer' in the TPA deems that a service is provided to a 'consumer' where the consideration is less than a prescribed amount, currently \$40,000. The nature of the service provided is irrelevant to the definition of consumer.<sup>6</sup> Most towage services in Australian ports are for amounts well below this limit.
- Secondly, there is at least an argument that unlike other parts of the shipping industry, towage contracts are not exempt from s74. Contracts concerned with the transportation of goods are lifted out of the ambit of s74 by s74(3). Whether ss3 extends to contracts for towage is a moot point which will be discussed shortly.

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<sup>5</sup> See s68A(2) which is set out and discussed in 2. below.

<sup>6</sup> This can be contrasted with the Unfair Contract Terms Act (UK) 1977 which looks to the nature of the service.

- Thirdly, the towage industry has a heavy reliance on overseas based standard terms. These terms seek to exclude limit or in other ways offset any liability for a breach of contract in a manner which has not been designed to take s74 into account.
- Fourthly, in many ports there is only one towage operator available. If there *is* more than one operator, it seems that usually they contract on the same standard terms anyway. The customer is therefore left with no choice of conditions, nor the option of trying for better terms with another operator. In other words, they must take what they can get.<sup>7</sup> As we shall see, this may give the towage operator some headaches when trying to argue the reasonableness of limitations permitted by the TPA under s68A.<sup>8</sup>

This paper focuses on the U.K. Standard Conditions For Towage and Other Services published by the British Tug Owners Association (UK Standard Conditions), which seem to be the most commonly used set of conditions in the towage industry in Australia.<sup>9</sup>

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

<sup>8</sup> See discussion in 4.2 below.

<sup>9</sup> This is the author's view after internet research conducted over a range of Australian port internet sites within Australia, for example Port of Esperance: <http://www.esperanceport.com.au/charges.asp> Port of Bunbury: [http://www.riversidemarine.com.au/assets/documents/Towage\\_Rates\\_For\\_The\\_Port\\_of\\_Bunbury\\_2004.pdf](http://www.riversidemarine.com.au/assets/documents/Towage_Rates_For_The_Port_of_Bunbury_2004.pdf) (Accessed April 2006) Port of Geelong <http://www.esc.vic.gov.au/ports159.html>, Port of Geraldton <http://www.geroport.wa.gov.au/> (accessed September 2005). There are other forms of standard conditions, notably Towcon and Towhire produced by BIMCO: see <http://www.bimco.dk/Home/Corporate%20Area/idea/List%20of%20documents.aspx> (accessed 5 January 2006)

## **2. The relevant provisions of the TPA**

### **S 74 says:**

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

- (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.
- (2) Where a corporation supplies services to a consumer in the course of a business and the consumer...makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result....
- (3) A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:
  - (a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored....

(emphasis added)

### **Other relevant provisions: s68 and s68A TPA**

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

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

- (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:
  - (a) the application of all or any of the provisions of this Division;
  - (b) the exercise of a right conferred by such a provision;
  - (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
  - (d) the application of section 75A;is void.
- (2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

However, and importantly for towage operators, s68A offers some relief from the impact of s68. In contracts for services that are not of a personal domestic or household nature (such as most towage contracts), s68A allows

for a limitation of liability to the re-supply of services or what the re-supply would cost: so long as the consumer does not establish that reliance on the limitation clause is not fair or reasonable.

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

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

(a) in the case of goods, any one or more of the following:

.....

(b) in the case of services:

(i) the supplying of the services again; or

(ii) the payment of the cost of having the services supplied again.

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

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

(a) the strength of the bargaining positions of the corporation and the person to whom the goods or services were supplied (in this subsection referred to as *the buyer*) relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;

(b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties)....

(underlining added)

The effect of s68A can be illustrated by the High Court case of *Qantas Airways Ltd v Aravco Ltd*.<sup>10</sup> Qantas was seeking to avoid paying a claim in the vicinity of \$500,000 - \$1 million for damage sustained to an aircraft leased to Aravco. Qantas relied upon a clause in its services contract that limited liability to the cost of performing the service again. In that case, the cost of the original service was \$5000. The majority of the High Court were prepared to accept, without deciding, that this would be the effect of s68A on the facts before them.<sup>11</sup> However, as the Court noted, that was subject to the

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<sup>10</sup> (1996) 136 ALR 510. (*Qantas v Aravco*)

<sup>11</sup> *Ibid*, p 513-514.

consumer's right to argue that such a limitation is not fair or reasonable on the facts of the case. On the facts, the Court did not have to consider whether it would have been fair or reasonable for Qantas to so rely. As a result, s68A(3) was not rigorously tested in that case. We do not yet know the attitude of the Australian courts to the 'fair and reasonable' qualification in s68A(3).

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

### **3. Does S74 catch towage contracts?**

The implied warranty provisions of the TPA, of which s74 is one, will apply where the proper law of the contract is Australia. Where the parties have contracted in Australia, for a service to be supplied in Australia by a corporation itself registered in Australia, the proper law of the contract will be that of Australia.<sup>12</sup> So the vast majority of towage contracts performed in Australia will be caught, in a general sense, by the TPA.

S74 itself will apply where the transaction involved is less than the prescribed amount (currently \$40,000) and therefore deemed<sup>13</sup> to be a 'consumer transaction'. Most regular towage contracts would be for that amount or less. So far, towage contracts look to be ensnared.<sup>14</sup>

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

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

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<sup>12</sup> That is so even if the parties stipulate that the law of some other country should apply: s67 TPA.

<sup>13</sup> By s4B.

<sup>14</sup> Other spheres of the maritime industry have been held subject to s74. In particular see *Pondcil Pty Ltd v Tropical Reef Shipyard Pty Ltd* (1994) ATPR (Digest) 46-134 (shiprepairers), *Renehan v Leeuwin Ocean Adventure Foundation Limited* (sail training ships) and the cases referred to in "The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 *Trade Practices Act* 1974 (Cth)" (2004) 18 *MLAANZ Journal* 30.

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

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

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

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

“goods includes:

(a) Ships, aircraft and other vehicles...”

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

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<sup>15</sup> Summary judgement applications were dismissed: [2001] QSC 429

<sup>16</sup> Towage need not always be for cargo laden ships. For instance, a tug may be assisting a ship into drydock or providing services to offshore mining which do not involve cargo laden ships.



of services that would be caught by the provision, and included transportation of goods amongst them. As a result of some active campaigning, that changed in 1986 when the current subsection 3 was added. The Explanatory Memorandum to that amending Act<sup>17</sup>, explaining the change of attitude to transportation under s74, said:

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

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

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

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

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

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<sup>17</sup> Trade Practices Revision Act (No 17 of 1986)

<sup>18</sup> Explanatory Memorandum Trade Practices Revision Act (No 17 of 1986).

stated earlier, the main impact of s74 is to impose a standard of due care and skill in the provision of contracted services. Yet many towage contracts contain terms that contradict that imposed standard. As between contracting parties, what impact will s74 have on contractual attempts to alter where the liability falls?

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

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

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

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

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

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<sup>19</sup> Set out in full in section 2 above.

<sup>20</sup> The towage operator needs to have incorporated the standard conditions into the particular towage contract in order for them to be part of the contract.

## 4.1 Exclusion clauses

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

## 4.2 Limitation of liability clauses

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

- the limitation must expressly limit the liability to re-supplying the service or the cost of having the service re-supplied; and
- the consumer must either fail to argue or be unable to establish that it is not fair or reasonable to rely on that term of the contract based on all the circumstances of the case, and in particular the factors in s68A(3).

In maritime contracts if s74 applies, s68A makes it permissible to limit liability in maritime contracts in the manner contemplated<sup>22</sup> to either the re supply of the service or the payment of the cost of having those services supplied

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<sup>21</sup> Clause 4 reads:

“4. Whilst towing, or whilst at the request, either expressed or implied, of the Hirer rendering any service of whatsoever nature other than towing—

(a)The Tugowner shall not (except as provided in Clauses 4 (c) and (e) hereof be responsible for or be liable for

(i)damage of any description...or

(ii) loss of the tug or tender or the Hirer's vessel or of any cargo or other thing...

or

(iii) any claim by a person not a party to this agreement for loss or damage of any description whatsoever; arising from any cause whatsoever, including (without prejudice to the generality of the foregoing) negligence at any time...

(b)The Hirer shall (except as provided in Clauses 4(c) and (e)) be responsible for, pay for and indemnify the Tugowner against and in respect of any loss or damage and any claims of whatsoever nature or howsoever arising or caused, whether covered by the provisions of Clause 4(a) hereof or not... and which shall include, without prejudice to the generality of the foregoing any loss of or damage to the tug or tender or any property of the Tugowner even if the same arises from or is caused by the negligence of the Tugowner his servants or agents.”

<sup>22</sup> Because maritime contracts are rarely of a personal domestic or household nature.

again.<sup>23</sup> In other words, the limit of liability can be to the contract price for the services in question. However, if the customer can prove that it is not 'fair or reasonable' for the towage operator to rely on such a clause then the clause will be void.<sup>24</sup> As already discussed, the High Court was not required to consider that point in *Qantas v Aravco*<sup>25</sup> and there has yet to be any other judicial guidance on what will constitute 'fair and reasonable' in the context of s68A.

However, faced with such an argument under s68A in the context of a towage case, there are several factors which would come to the fore. First, no doubt the consumer would argue that it had no choice in terms: that the strength of bargaining position was wholly in the hands of the towage operator particularly if it was the only operator in the port. However most 'consumers' of towage services are hardly corporate minnows: rather, they themselves are multinational corporations well used to imposing terms and benefiting from contracts which displace liability. Such corporations, in shipping, would expect there to be standard conditions at play. Consumers of towage services would invariably know of the likely existence of terms and conditions of the tow: as it is indeed customary in the trade. However, to satisfy s68A(c), towage operators should ensure that they notify their consumers of the s68A compliant limitation clause.<sup>26</sup>

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

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<sup>23</sup> S68A(1)(b).

<sup>24</sup> S68A(2) & (3). What constitutes 'fair and reasonable' has yet to be the subject of caselaw in Australia. In England, a similar provision in the Sale of Goods Act 1979 (UK) was considered in the case of *George Mitchell v Finney Lock Seeds* [1983] 2 AC 803. The House of Lords held that in a case where the wrong seed type had been supplied, it was not fair or reasonable for the company to rely on a limitation provision similar to S68A to reduce its liability to the customer from £61,000 to £200.

<sup>25</sup> See above at text accompanying fn 11.

<sup>26</sup> One would imagine this is easily done, by notifying the various shipping agencies in that port.

Of course whether s74 will apply to towage contracts at all remains uncertain, as we have discussed. However, towage operators would be well advised to re-word their conditions around s68A so they can argue that the limitations do not fall foul of s68. That simply requires a clause seeking to limit the liability to the cost of the services (and need not concede that the TPA does apply). If the towage cost was \$5000 then liability would be limited to \$5000. In the event of a major incident, such a rewording may mean the difference between unlimited liability and notional liability.<sup>27</sup>

### 4.3 Indemnity clauses.

There are several other limitation devices that are often used in towage contracts in an attempt to ensure that liability offloaded does not rebound. One such device is the indemnity clause.<sup>28</sup> This device is in evidence in the UK Standard Conditions.<sup>29</sup> The indemnity clauses in contracts are a way of laying off the cost of liability, although not the fact of it. In *Qantas v Aravco*<sup>30</sup>, Qantas was able to convince the High Court that its entitlement to the benefit of a contractual indemnity for any liability to third parties arising from its own negligence was not an attempt to exclude or limit its liability under s74, and did not fall foul of s68.

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

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<sup>27</sup> In *Qantas v Aravco*, (above at fn 10) Qantas had a s68A compliant limitation of liability clause which would have seen it pay only \$5000 for a claim against it in the region of \$1M. In obiter, it seemed to be accepted by the High Court that Qantas could so limit subject to the clause being 'fair and reasonable'.

<sup>28</sup> Another is the deemed employee clause: see clause 3 UK Standard Conditions. The deemed employee clause is where the tugowner and its employees is deemed to be employees of the tow and therefore the hirer is vicariously liable for it. It is an open question as to whether that has effect to 'exclude, restrict or modify' any liability under s74. A similar debate could be had about the 'agreements to insure' clause which has been upheld as effective in Canada but not permitted in the US: Christopher Giaschi 'Standard Towing Conditions and Agreements to Insure' at <http://www.admiraltylaw.com/papers/TUG.htm> accessed 7 March 2006.

<sup>29</sup> See clause 4(b).

<sup>30</sup> Above fn 10, also discussed at 4.2.

Aravco for its liability to BAT in accordance with the terms of the service agreement.

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

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

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

<sup>32</sup> See discussion of s68A and ‘fair or reasonable’ in section 4.2.

The case is open to criticism that it supports form over substance – quite the opposite of the High Court’s pronouncements in earlier cases<sup>33</sup>. Certainly the dissent of Kirby was a powerful one:

“This court has a choice. It may adopt a narrow construction of the Act. But that would be inconsistent with the wide words used by parliament and with the achievement of their apparent purpose. By a simple device, it would permit the neutering of protections afforded by the Act in wide terms....<sup>34</sup>

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

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

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

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

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<sup>33</sup> *Wallace v Downard Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388 at 398-399 as cited by Justice Kirby in the Qantas case at 525.

<sup>34</sup> Qantas at fn 10, at p515 -516.

<sup>35</sup> At 524.

<sup>36</sup> *Id.*

<sup>37</sup> *Ibid.*, at 523.

## **5. Strangers to the towage contract: third party claims and s 74**

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

However, s74 could still play a fundamental role. The third parties who have suffered injury or damage will still sue someone, usually in tort. Let's assume a towage contract contains an indemnity clause, as UK standard conditions does. If the third party sues the tugowner, the tug will try to seek an indemnity from the hirer under the contract. The hirer can counter by alleging a breach of s74.<sup>38</sup> If there is a breach, then no exclusion clause will be allowed to operate, and limitation clauses will need to comply with s68A. If the third party sues the hirer, then the hirer can seek indemnity for the cost by reason of it being caused by the tug's breach of s74. The tug cannot rely on its exclusion clauses to resist liability because they offend s68.

One should bear in mind though that it is common in commercial maritime contracts for parties to be given the benefit of the contract; by widely defining the contracting parties there could be an increased pool of potential claimants and defendants.<sup>39</sup> In that situation, a person who falls within the wide net of

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

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

(vii) The expression 'tugowner' shall include any person or body (other than the Hirer or the owner of the vessel on whose behalf the Hirer contracts as provided in Clause 2 hereof) who is a party to this agreement whether or not he in fact owns any tug or tender, and the expression 'other Tugowner' contained in Clause 5 hereof shall be construed likewise.



description for 'tugowner' or 'hirer' might find that they can sue or be sued directly under s74.

## **6. Personal injury: S74 and UK Standard Conditions**

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

The 1986 revision of the UK Standard Conditions makes no attempt to exclude liability for personal injury. The Standard Conditions recognise the effect of the Unfair Contract Terms Act (UK) that forbids the exclusion of liability for death or personal injury resulting from negligence.<sup>40</sup> For Australian towage operators, this is significant. Where an Australian operator incorporates the 1986 UK Standard Conditions in their towage contract, a personal injury claim against them will be unrestricted by their contract and s68 will have no work to do.<sup>41</sup>

Some operators have cannily kept their reference to the 1974 terms (which do attempt to exclude liability for personal injury) rather than the 1986 revision.<sup>42</sup> For those operators, s74 and s68 will override that contractual exclusion for a personal injury claim where there is a direct contractual relationship between the injured and the towage operator. If there is no direct contractual

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<sup>40</sup> See Simon Rainey *Law of Tug and Tow* (LLP, 1996) at p 16. In this sense, as regards personal injury claims, the English provisions are broader than the TPA.

<sup>41</sup> Recent amendments adding Part VIB to the TPA have incorporated the recent civil liability reforms which seek to restrict and cap the damages awards available to claimants suffering personal injury.

<sup>42</sup> For example, Adsteam Marine. See website <http://www.esc.vic.gov.au/ports159.html> (port of Geelong) and <http://www.geroport.wa.gov.au/> (port of Geraldton) accessed September 2005. Where that is the case, s74 will apply to the claim for personal injury only if the injured party has a direct contractual relationship. If the injured party has a right of action against one of the parties to the contract, s74 may become an issue indirectly as discussed under the previous heading

relationship, s74 can still be indirectly relevant to potential liability in much the same way as the third party liability discussed above.<sup>43</sup>

## **7. Conclusion**

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

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

It is not uncommon for an accident involving tug and tow to cause substantial damage and consequent disputes about liability.<sup>47</sup> With the applicability of

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<sup>43</sup> In section 5.

<sup>44</sup> See fn 15 above.

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

<sup>46</sup> *Bisson v Inland Waterways Corp.* 39 US 85, [1955] AMC 899 as quoted in Giaschi above fn 28, part II.

<sup>47</sup> A recent example occurred on 24 January 2006 in the Port of Gladstone. A tug pierced the fuel tank of a bulk coal carrier during berthing causing significant oil spillage. See <http://www.abc.net.au/capricornia/stories/s1555714.htm> (accessed 1 April 2006)

s74 uncertain, and the effect of s74 and s68 on standard conditions seemingly severe, the towage industry ought to engage in some legal risk management.

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

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

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<sup>48</sup> S68A; see section 2 and 4.2 above.