

## IMPACT OF AUSTRALIAN CONSUMER LAW ON CONTRACTS FOR RECREATIONAL SERVICES

### The changes

- 1 From 1 January 2011 the **Trade Practices (Australian Consumer Law) Bill No. 2 (ACL)** commences, introducing far reaching changes to the Australian consumer protection landscape as we know it.
- 2 Among other things, the ACL:
  - 2.1 introduces a new standard consumer product safety law for consumer goods and product-related services;
  - 2.2 renames the **Trade Practices Act 1974** (Cth) (TPA) as the **Competition and Consumer Act 2011**; and
  - 2.3 amends a number of other Acts such as the **Australian Securities and Investment Commission Act 2001** (Cth) and the **Corporations Act 2001** (Cth).
- 3 Most importantly, the ACL introduces a new regime of consumer guarantees which replaces the TPA method of implying consumer protection terms into contracts with consumers for the supply of goods and services. From 1 January 2011 breach of the consumer guarantees will provide the consumer with various statutory remedies against the relevant supplier of the goods and/or services instead of requiring the consumer to claim in contract, as is presently the case, when there is an alleged breach of an implied statutory term.

### Effect of ACL on Recreational Service Providers (RSP)

- 4 Fortunately for RSP the changes brought about by the ACL will not be all that different from the regime under which they presently operate pursuant to the TPA. This is subject to one important exception detailed below.
- 5 Under the TPA section 74 presently implies a warranty into contracts that the services and any materials provided in connection with the services under the contract will be rendered with "*due care and skill*". Section 68 of the TPA renders any term in a contract excluding section 74 void. However, section 68B of the TPA permits a RSP to exclude section 74 providing that the exclusion is limited to "*liability for death or personal injury*".
- 6 Under the new **Competition and Consumer Act 2011** (Cth) (CCA) RSP will still be permitted to "*exclude, restrict or modify*" the statutory guarantees appearing in Part 3-2, Division 1, Subdivision B. Like those under the TPA, these guarantees provide, among other things, that services will be:
  - 6.1 rendered with due care and skill: section 60; and

6.2 fit for a particular purpose: section 61.

- 7 The provision of the CCA corresponding to section 68B of the TPA is section 139A. Relevantly, an important limitation on the right of a RSP to exclude the guarantees provided for under the CCA is section 139A(3) and section 139A(4). Section 139A(3) provides that RSP can only exclude, restrict and/or modify the statutory guarantees in respect of liability for death, personal injury and/or for the contraction and/or aggravation of a disease.
- 8 More significantly, under section 139A(4) a RSP will not be able to rely on section 139A of the CCA where the RSP's "*reckless conduct*" has caused "*significant personal injury*" to a person.

### **What this means for RSP**

- 9 No equivalent provision to section 139A(4) of the CCA exists in the TPA, so it is not possible to say exactly how this section will be applied. Section 139A(5) provides some assistance by defining a service provider's conduct as "*reckless*" when the service provider:
- 9.1 was aware or should reasonably have been aware of a significant risk that the conduct could result in personal injury to another person; and
  - 9.2 engages in the conduct despite the risk and without adequate justification.
- 10 It also remains unclear by what criteria an injury that is merely modest will be characterised as "*significant*", so as to enliven section 139A(4) of the CCA.
- 11 For present purposes, RSP would be well advised to review their contracts and participation agreements to:
- 11.1 state expressly that the services are "*recreational services*" within the meaning of section 139A(2) of the ACL;
  - 11.2 state which of the guarantees under Subdivision B of Division 1 of Part 3-2 of the ACL are excluded, restricted and/or modified by the RSP;
  - 11.3 ensure that any waiver that a person receiving recreational services is asked to sign addresses the inherent risks of the services or activity being provided;
  - 11.4 document internally the steps which the RSP has taken to avoid the risk of death or personal injury so as to protect against potential exposure under section 139A(4) of the CCA;
  - 11.5 ensure that any equipment forming part of the services provided by the RSP is regularly maintained and that such maintenance attendances are documented; and

- 11.6 make sure that the person providing the RSP with a waiver provides written acknowledgment that the person bears the risk of receiving the services and/or engaging in the activity (note: minors usually cannot grant waivers without their parent's/guardian's consent).
- 12 Adopting these measures will ensure that RSP are able to take full advantage of the limitations to their liability available under section 139A of the CCA. In addition, keeping recent historical maintenance records and current contractual documents will allow RSP to respond in a timely and credible way to a potential claim.

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