Form 27D (44.03.3)

IN THE HIGH COURT OF AUSTRALIA

No. S273 of 2010

SYDNEY REGISTRY

BETWEEN:

INSIGHT VACATIONS PTY LTD t/as INSIGHT VACATIONS

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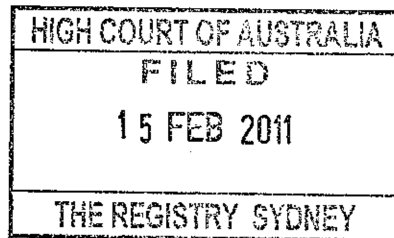
Appellant

and



STEPHANIE YOUNG

Respondent

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RESPONDENT'S SUBMISSIONS

PART I – PUBLICATION

1. The Respondent certifies that this document is in a form suitable for publication on the Internet.

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PART II – ISSUES

2. The Respondent agrees with the Appellant's statement of the issues that the appeal presents, specifically:

   (1) Whether sub-s 74(2A) of the *Trade Practices Act 1974* (Cth) (TPA) picks up and applies a State law (s 5N of the *Civil Liability Act 2002* (NSW) (CLA)) that authorises the inclusion of a contractual provision which limits or precludes liability for breach of the warranty implied into a contract by sub-s 74(1).

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   (2) If the answer to issue (1) is 'yes', whether, by operation of s 5N of the CLA, the contract between the Appellant and the Respondent applied to exclude the Appellant's liability to the Respondent.

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Filed on behalf of:	The Respondent	
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PART III – JUDICIARY ACT 1903 (CTH) SECTION 78B NOTIFICATION

3. The Respondent has considered whether any notice should be given to the Attorneys General in compliance with s 78B of the *Judiciary Act 1903* (Cth). The Respondent notes that the Appellant has already given notice.

PART IV – MATERIAL FACTS

4. The Respondent does not dispute any of the materials facts set out in the Appellant's narrative of facts or chronology.

5. The following additional events are applicable in relation to the chronology of the relevant legislation:

28 May 2002	Section 5N of the *Civil Liability Act* introduced into the NSW Legislative Assembly and read for the second time.
10 January 2003	Commencement of s 5N of the *Civil Liability Act*.

PART V – APPLICABLE CONSTITUTIONAL PROVISIONS AND LEGISLATION

6. The Respondent adopts the Appellant's statement of applicable provisions of the *Commonwealth Constitution*, Commonwealth legislation and New South Wales legislation.

7. The following additional legislative provisions are applicable to the Respondent's argument and are attached as an annexure:

Acts Interpretation Act 1901 (Cth), ss 15AA, 15AB

Trade Practices Act 1974 (Cth), s 87AB

Professional Standards Act 1994 (NSW), s 28

Law Reform (Miscellaneous Provisions) Act 1965 (NSW), ss 8, 9

Civil Liability Act 2002 (NSW), ss 5S, 16, 34, 35

PART VI – ARGUMENT

Sub-section 74(2A)

8. Sub-section 74(2A) of the *Trade Practices Act 1974* (Cth) (TPA) did not pick up 5N of the *Civil Liability Act 2002* (NSW) (CLA) for two reasons:

   (a) the terms of s 5N did not, in and of themselves, "limit or preclude liability" for breach of the sub-s 74(1) implied warranty;

(b) the terms of s 5N did not meet the requirement of sub-s 74(2A) that it be a law that applies to limit or preclude liability "in the same way as it applies to limit or preclude liability ... for breach of *another term of the contract*" (emphasis added)

Meaning of "applies to limit or preclude liability for the breach" of the sub-s 74(1) implied warranty

9. Section 5N enables a term to be inserted into a contract to limit or preclude liability for a breach of the sub-s 74(1) implied warranty. However, it does not, in itself, limit or preclude liability. The majority in the Court of Appeal (Basten and Sackville JJA) was correct in this regard.

10. Contrary to the argument of the Appellant and the reasoning of Spigelman CJ (**AB 172.10**), "applies" does not mean "brings to bear". The word "applies" does not mean that sub-s 74(2A) can extend to a contractual limitation on liability, as distinct from a direct statutory limitation. Nor should "applies" be given such a wide construction, for the following reasons:

(a) A construction that "applies" means "brings to bear" is inconsistent with the statutory context. The proper meaning of sub-s 74(2A) must be taken from the wider statutory context, including s 68B.[1] Context, in the widest sense, must be taken into account in the first instance, not only after some ambiguity is identified in the directly operative words.[2] If "applies" is given the meaning contended for by the Appellant, it would be inconsistent or at least create unnecessary statutory tension with the limited exception to s 68 provided for by s 68B.

(b) Contrary to the opinion of Spigelman CJ (**AB 173.5**), the condition within sub-s 74(2A) for a law of the State to be the proper law of the contract, does not suggest that sub-s 74(2A) should be construed in a way that gives State legislation a wide application. The precondition that the proper law of the contract needed to be the law of the State is obvious to any statutory intervention upon a contract; it is neutral as to the method or manner of statutory construction.

(c) Contrary to the opinion of Spigelman CJ, sub-s 74(2A) the condition within sub-s 74(2A) for a law of the State to be the proper law of the contract, does not stand "in contrast with s 67" (**AB 173.12**). A proper approach towards the construction of sub-s 74(2A) requires it to be construed in harmony with s 67. This is clear from the Supplementary Explanatory Memorandum to the *Treasury Legislation Amendment (Professional Standards) Bill* which relevantly stated:

[1] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Travelex Ltd v Commissioner of Taxation* [2010] HCA 33 at [82] per Crennan and Bell JJ.

[2] *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

"Item 8A inserts a new subsection (2A) after subsection 74(2) of the TPA. Section 74 implies warranties into contracts for the supply of services (other than financial services or those specifically excluded by subsection (3)). The amendment is located in section 74 rather than in Part VI of the TPA (which deals with enforcement and remedies) so as to take advantage of s 67 (to apply the State/Territory law limit even if the contract provided that the proper law of the contract is foreign law)."

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Section 67 gives primacy to provisions within Division 2 of Part V over inconsistent contractual terms. The condition within sub-s 74(2A) for a law of the State to be the proper law of the contract, is not a reason for preferring a construction that picks up and applies a State law at the expense of other provisions within Division 2 of Part V, including s 68B. It is necessary when construing para (b) of sub-s 74(2A) for it to be considered in the light of the pre-existing s 68B.

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(d) Contrary to the opinion of Spigelman CJ (**AB 173.30 – 178.45**), the "legislative history" of sub-s 74(2A) does not suggest that a construction of "applies" should be preferred which restricts the scope of recovery for breach of the implied warranty of due care and skill. As a general proposition, the CLA and such amendments to the TPA implementing recommendations of the Ipp Committee restricted the scope for recovery for negligence and related causes of action under the TPA. There is uncertainty as to which provisions related to what recommendations and to what extent.

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(e) The legislative history in relation to sub-s 74(2A) does not suggest that the provision was intended to limit or preclude liability for personal injury in relation to travel/leisure contracts of the kind presently under consideration. The reforms, of which sub-s 74(2A) formed a part, were essentially intended to support professional standards laws such as the *Professional Standards Act 1994* (NSW). These laws permit schemes for the limitation of liability of professionals such as accountants, solicitors, barrister, engineers and surveyors. The following is noted from the extrinsic materials in relation to sub-s 74(2A), to which the Court is entitled to have regard bearing in mind the ambiguity about the ordinary meaning of the provision (*Acts Interpretation Act 1901* (Cth), s 15AB):

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(i) The purpose of the *Treasury Legislation Amendment (Professional Standards) Bill* was "to amend the *Trade Practice Act 1974* and other relevant Commonwealth legislation to support professional standards laws which are currently in force in New South Wales and Western Australia, and which other jurisdictions are expected to adopt in due course".[3]

[3] Second Reading Speech, 04.12.2003, House of Representatives, *Hansard*, p 23772; Second Reading Speech, 21.06.2004, Senate, *Hansard*, p 24398.

(ii) The draft clause for sub-s 74(2A) was added to the *Treasury Legislation Amendment (Professional Standards) Bill* after its introduction into the House of Representatives on 4 December 2003 and before it was introduced into the Senate on 21 June 2004. The Supplementary Explanatory Memorandum confirmed that the Bill was intended to support State professional standard laws. It stated:

> "The amendments to the *Treasury Legislation Amendment (Professional Standards) Bill 2003* (the Bill) are to ensure that the Government's goal of supporting State and Territory reforms to improve the costs and availability of insurance to the Australian community is achieved. The Bill supports State professional standard laws by allowing liability for broad-ranging provisions which might provide an alternative cause of action to the law of negligence to be limited in certain circumstances. In that context, the prohibition of misleading and deceptive conduct in s 52 of the *Trade Practices Act 1974* (the TPA) had been broadly recognised as having the potential to be used as an alternative cause of action to negligence.
>
> Other provisions which are similarly capable of being used as an alternative to negligence in a wide range of circumstances are those in the TPA and the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) which imply into contracts an obligation to supply services with 'due care and skill', a concept which has remarkable similarities to the duty of care required by the law of negligence.
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> While contract law is ordinarily dealt with by the States and Territories, the Commonwealth has been provided with legal advice that the effect of the High Court's decision in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* is that actions in contract based on a breach of the condition that services be provided with 'due care and skill' would not be subject to any limitations which might be applied by a State and Territory to contractual remedies.
>
> The amendments will seek to ensure that State and Territory reforms of the law of contract are not undermined."

(f) The construction of "applies" that prefers a broad ranging State law so that it does not relate to professional standards laws, does not promote the purpose of object of sub-s 74(2A) when regard is had to the abovementioned extrinsic materials: *Acts Interpretation Act*, s 15AA.

(g) The construction of "applies" that enables s 5N to be picked up is not consistent with the objects and purposes of Division 2 of Part V of the TPA and a national consumer protection scheme created by the TPA nor by the *Competition and Consumer Act 2010* (Cth) now in force.

(h) The legislative history does not support a construction of "applies" that picks up s 5N of the CLA because it promotes unnecessary statutory tension and/or inconsistency with s 68B. The following is noted:

(i) Section 5N of the CLA was introduced on 28 May 2002 and commenced on 10 January 2003.

(ii) Section 68B of the TPA was introduced on 27 June 2002 and commenced on 19 December 2002.

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(iii) There had been communication between the Commonwealth, States and Territories about s 68B before it was enacted. According to the Second Reading Speech on the Bill for s 68B, namely, the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002* (Cth), "[t]his bill implements a commitment of the Commonwealth government announced after a meeting of state and territory ministers and chaired by the Minister for Revenue and Assistant Treasurer on 30 May 2002".

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(iv) Sub-s 74(2A) of the TPA was introduced on 4 December 2003 and commenced on 13 July 2004.

(v) Section 5N is significantly broader in scope than s 68B. Whereas s 68B relates only to sporting activities and similar activities that involve a significant degree of physical exertion or physical risk, s 5N relates to "any pursuit or activity engaged in for enjoyment, relaxation or leisure" (CLA, s 5K, para (b) of definition of "recreational activity"). Section 5N goes even further and applied to services that are "in connection with or incidental to the pursuit … of any recreational activity" (CLA, s 5N(4)).

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The Commonwealth Parliament was in a position to have been well aware of the proposed terms of s 5N when s 68B was enacted. The Commonwealth Parliament must also be presumed to have been aware of the terms of s 5N after it was enacted and before sub-s 74(2A) was introduced and enacted. If it was thought that sub-s 74(2A) would collide with s 68B through the picking up of s 5N, then s 68B could easily have been amended to make it consistent with the scope of s 5N. The fact that s 68B was not amended infers that it was not intended that s 5N should create an incursion upon or inconsistency with s 68B.

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(i) Section 5N was not part of the Ipp Committee recommendations, thus not part of a national co-operative approach towards the limitation of liability. There is a lack of provisions similar to s 5N in other States and Territories, which tends to confirm that sub-s 74(2N) should not be given a construction that enables s 5N to be picked up. The only other State to have a provision in terms similar to s 5N is Western Australia: *Civil Liability Act 2002* (WA), s 5J. Section 5J was inserted into the *Civil Liability Act* (WA) by the *Civil Liability Amendment Act 2003* (WA), s 8. It commenced on 1 December 2003. As with s 5N of the CLA, s 5J of the

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Civil Liability Act (WA) was commenced before sub-s 74(2A) was introduced and enacted.

(j) As with s 5N, the wide definition of "recreational activity" in s 5K of the CLA was not part of the Ipp Committee recommendations. The Ipp Committee recommended limitation of liability for obvious risks in relation to recreational activities where the activity was one undertaken "for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk" (Recommendation 12). Western Australia is the only other State to have a definition of "recreational activity" in wide terms similar to s 5N. A construction of sub-s 74(2A) that does not pick up s 5N is not inconsistent with the recommendations of the Ipp Committee.

Meaning of "law of the State"

11. The Appellant further submits that the expression "law of the State" is not confined to a statutory provision but, rather, also includes a term of a contract. The expression "law of the State" does not extend to private law made by contract. Private law is not the law of the State. In any event, see eg, *Jerger v Pearce* (1920) 27 CLR 526, in which it was held that the expression "the law of the Commonwealth" means "the law passed under the legislative authority of the Commonwealth". Equally, the expression "the law of the State" means the law passed under the legislative authority of New South Wales. Such law does not extend to private law made by contract between two parties.

Breach is a pre-condition to application of sub-section 74(2A)

12. Section 5N is not properly characterised as a law of a State which applies to limit or preclude liability for breach of the sub-s 74(1) implied warranty because it seeks to altogether exclude the warranty and thus exclude a breach of the implied term. Breach of the warranty is a pre-condition to a law of a State or Territory being picked up by subs 74(2A). By permitting a contract to include a term that excludes liability for breach of the warranty to render services with due care and skill, s 5N frustrates the scheme of implied warranties in Division 2 of Part V of the TPA. Section 5N is inconsistent with recognition of the warranty implied by sub-s 74(1).

13. When "liability" is construed in its proper context[4] in sub-s 74(2A), it means the consequence of a breach of a legal obligation,[5] specifically, the sub-s 74(1) implied warranty. It does not mean – as is the effect of s 5N – abrogation of the legal obligation. A proper construction of s 5N is one that avoids effective abrogation of the legal obligation created by sub-s 74(1) except in the case of express words or necessary implication.

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[4] *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; (1999-2000) 200 CLR 1 at [137] per McHugh J.

[5] *Ogden Industries Pty Ltd v Lucas* [1967] HCA 30; (1967) 116 CLR 537 at 584 per Windeyer J, cited with approval in *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; (1999-2000) 200 CLR 1 at [139] per McHugh J; at [252] per Hayne J.

Application of law of the State or Territory to another term

14. Even if s 5N did limit or preclude liability for breach of the warranty implied by sub-s 74(1), it did not apply to the sub-s 74(1) implied warranty in the same way as it applied for breach of another term of the contract. On its terms s 5N was only capable of applying to a single term of the contract – the sub-s 74(1) implied warranty – not another term of the contract. Sub-section 74(2A) cannot apply to a law of a State or Territory that seeks to do no more than limit or preclude liability for a breach the one term, namely, sub-s 74(1). Although this aspect of the characterisation exercise was not needed on the approach by the majority in the Court of Appeal, it nevertheless supports the conclusion that sub-s 74(2A) of the TPA cannot pick up s 5N of the CLA.

Effect of Characterisation

15. It is instructive to consider the effect of the abovementioned dual characterisation of sub-s 74(2A) in order to ascertain the reasonableness of the submission. The question is, using this characterisation, what kind of State law could be picked up by sub-s 74(2A)?

16. Section 28 of the *Professional Standards Act 1994* (NSW) is a provision that limits liability in tort, contract or otherwise directly and vicariously for any person who is a member of an occupational association acting in performance of his or her occupation, to whom a scheme made under the Act applies. It both limits liability for a breach of a sub-s 74(1) warranty *and* applies to *all* terms of a contract for the provision for professional services.

17. Section 28 of the *Professional Standards Act* is also provision that:

    (a) satisfies the requirement for sub-s 74(2A) to be construed in its wider statutory context. It is not inconsistent with s 68B of the TPA;

    (b) satisfies the requirement in s 15AA of the *Acts Interpretation Act* for a construction that promotes the purpose or object of the underlying Act. Section 28 is consistent with the purpose of the *Treasury Legislation Amendment (Professional Standards) Bill* being "to amend the *Trade Practice Act 1974* and other relevant Commonwealth legislation to support professional standards laws which are currently in force in New South Wales and Western Australia, and which other jurisdictions are expected to adopt in due course".[6] Section 28 is also not inconsistent with the national consumer protection scheme established by the TPA.

18. Other laws of New South Wales that would appear to also be picked up by sub-s 74(2A) are as follows:

    (a) Section 35(1)(a) of the CLA limits the liability of a defendant who is a concurrent wrongdoer in relation to an apportionable claim. An

[6] Second Reading Speech, 04.12.2003, House of Representatives, *Hansard*, p 23772; Second Reading Speech, 21.06.2004, Senate, *Hansard*, p 24398.

"apportionable claim" is "a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury" (CLA, s 34(1)). A "concurrent wrongdoer" is "a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independent of each other or jointly, the damage or loss that is the subject of the claim" (CLA, s 34(2)). Section 35(1)(a) limits liability of the concurrent wrongdoer in relation to an apportionable claim to "an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss".

(b) Section 9(1) of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) limits liability in cases of contributory negligence. "[D]amages recoverable in respect of the wrong [whether in tort or breach of contract] are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

(c) Section 5S of the CLA limits liability by *defeating* a claim for damages where a court thinks that it is just and reasonable to reduce damages by 100% by reason of contributory negligence. Section 5S applies to claims in tort, contract, under statute or otherwise (CLA, s 5A).

(d) Section 16 of the CLA denies recovery of personal injury damages for non-economic loss for various breaches of a duty of care to only those cases where the severity of the non-economic loss is at least 15% of a most extreme case. This applies to claims in tort, contract, under statute or otherwise (CLA, s 11A(2)).

19. The above examples demonstrate that sub-s 74(2A) has a wider application than laws that relate only or specifically to the provision of professional services. This is consistent with the general wording of sub-s 74(2A). By contrast, see s 87AB of the TPA, which specifically picked up State and Territory professional standards legislation in relation breaches of s 52 of the TPA.

20. The application of sub-s 74(2A) beyond professional standards laws is not incongruous with the legislative intent of the *Treasury Legislation Amendment (Professional Standards) Act*. Nor is it incongruous with the maintenance of the national consumer protection scheme established by the TPA and continued by the *Competition and Consumer Act*. The capping of liability for professional services was one but one outcome of the Commonwealth's *Review of the Law of Negligence* by the Ipp Committee. The Explanatory Memorandum to the *Treasury Legislation Amendment (Professional Standards) Bill 2003* clearly stated that "the Commonwealth has encouraged the states and territories to implement" the Ipp Committee's recommendation regarding a modified standard of care for professionals. The Ipp Committee recommendations were also the basis for s 5S of the *Civil Liability Act*. A construction of sub-s 74(2A) that permits laws that relate to services other than professional services is not

inconsistent with the Commonwealth's general intention to implement the recommendations of the Ipp Committee.

21. Section 35(1)(a) of the *Civil Liability Act* is in a different category. The Ipp Committee did not recommend proportionate liability. It preferred the principle of solidary liability. Nevertheless, it seems clear from the language of sub-s 74(2A) that it is capable of picking up s 35(1)(a).

Judiciary Act 1903 (Cth)

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22. Sub-s 74(2A) picks up and applies State and Territory laws that satisfy the requirements of the sub-section. This occurs in a context where the court hearing a claim for damages for breach of the sub-s 74(1) implied warranty, is exercising federal jurisdiction. A court exercising federal jurisdiction must also ensure observance of s 79 of the *Judiciary Act 1903* (Cth).

23. A State or Territory law will not be picked up by s 79 as surrogate federal law where it is inconsistent with an existing law of the Commonwealth. In *Northern Territory v GPAO* [1999] HCA 8; (1999) 196 CLR 553, Gleeson CJ and Gummow J stated (at [38]): "A State law is not applied by s 79 in circumstances where it could have no direct application by reason of its invalidity for inconsistency with an existing law of the Commonwealth, within the meaning of s 109 of the *Constitution*".

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24. Sub-section 74(2A) of the TPA does not pick up and apply s 5N of the CLA because it is inconsistent with an existing Commonwealth law, in particular, s 68B.

Clause 4

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25. If, contrary to the above submissions, sub-s 74(2A) of the TPA picks up s 5N of the CLA, it is necessary to consider whether, on the facts, cl 4 of the travel contract limited or excluded liability for the Appellant's breach of the sub-s 74(1) implied warranty.

26. The question is what was the intended meaning of cl 4.

27. Spigelman CJ held, and the Appellant submits, that the intention of cl 4 was "to ensure that the tourist wore the seat belt at all appropriate times, specifically whilst the bus was in motion" (**AB 66.42**). This interpretation depended upon construing "occupies a motorcoach seat" to mean having a motorcoach seat available (**AB 66.40**).

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28. This construction is wrong, and in any event is circular. Within the phrase "all appropriate times", the "all" would surely only be when the seat was being occupied. Common sense would inform the Court that passengers often leave their seats for good reasons when a tourist bus is in motion on a long trip, not to mention going to the toilet which such buses provide (**AB 104.15**).

29. Clause 4 is an exclusion clause. It is to be construed according to its natural and ordinary meaning and, in the case of ambiguity against the party in whose favour the clause operates (the Appellant).[7]

30. The natural and ordinary meaning of cl 4 is that it would apply where the Respondent had taken up and was actually sitting in a seat.

31. Even if "occupies" may have a broader meaning such as "available to be taken up", there was no term and no finding of fact to the effect that the Respondent had a designated seat.

32. Further, it is not clear that it was the intention that the Respondent and other passengers were required to remain seated while the bus was in motion.

33. There is ambiguity about its proper meaning. This ambiguity should be resolved against the Appellant and in favour of the Respondent.

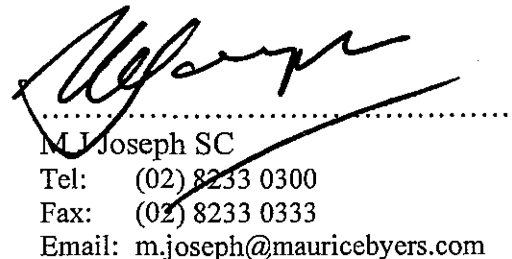
34. There is also doubt about whether cl 4 should be characterised as a term to which s 5N applies, for the following reasons:

   (a) Clause 4 is not expressed as a clause that "excludes, restricts or modifies liability ... *that results from breach of an express or implied warranty that the services will be rendered with due care and skill*" (sub-s 5N(1), emphasis added).

   (b) Clause 4 is not expressed in terms of "a person to whom recreation services are supplied under the contract engag[ing] in any recreational activity concerned *at his or her own risk*" (sub-s 5N(3), emphasis added).

35. Again, these doubts about whether cl 4 was effective to exclude the risk of injury due to non-compliance with the warranty, should be resolved in favour of the Respondent. The Appellant should not have the benefit of exclusions from liability that are expressed in general or non-specific terms. To so permit would expose persons engaged in non-risky activities and who act reasonably, to be left uncompensated from unreasonable conduct.

Dated: 14. 02. 2011



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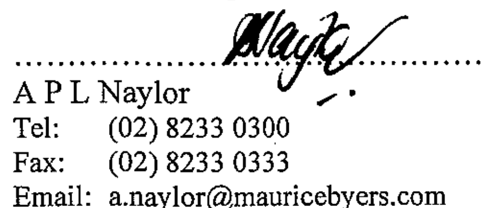

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[7] *Darlington Future Ltd v Delco Australia Pty Ltd* [1986] HCA 82; (1986) 161 CLR 500 at 510 [16].

ANNEXURE TO RESPONDENT'S SUBMISSIONS – STATUTES

ACTS INTERPRETATION ACT 1901 (CTH), SECTIONS 15AA, 15AB

15AA Regard to be had to purpose or object of Act

(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

15AB Use of extrinsic material in the interpretation of an Act

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or

furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

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(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

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(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

TRADE PRACTICES ACT 1974 (CTH), SECTION 87AB

87AB Limit on liability for misleading or deceptive conduct

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State or Territory professional standards law limits liability

(1) A professional standards law of a State, the Australian Capital Territory or the Northern Territory applies to limit occupational liability relating to an action for contravention of section 52 in the same way as it limits occupational liability arising under a law of the State or Territory.

Note: Section 52 prohibits misleading or deceptive conduct by corporations in trade or commerce and (because of sections 5 and 6) by other persons in certain types of trade or commerce.

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(2) However, the professional standards law applies for that purpose:

(a) only in relation to a scheme that was prescribed by the regulations at the time (the ***contravention time***) of the contravention; and

(b) as if the scheme were in force under that law at the contravention time in the form the scheme would have been in if:

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(i) the scheme had not been amended or revoked under that law

since the scheme was first prescribed; and

(ii) the modifications (if any) prescribed by the regulations at the contravention time had been made to the scheme.

Which State's or Territory's professional standards law applies?

(3) For the purposes of working out whether a professional standards law of a particular State or Territory applies under subsection (1) in relation to a particular contravention of section 52, choice of law rules operate in relation to the contravention in the same way as they operate in relation to a tort.

Definitions

(4) In this section:

modifications includes additions, omissions and substitutions.

occupation includes profession and trade.

occupational association means a body:

(a) that represents the interests of persons who have the same occupation; and

(b) whose membership is limited principally to such persons.

occupational liability means civil liability arising directly or vicariously from anything done or omitted by a member of an occupational association in the course of his or her occupation.

professional standards law means a law providing for the limitation of occupational liability by reference to schemes for limiting that liability that were formulated and published in accordance with that law.

PROFESSIONAL STANDARDS ACT 1994 (NSW), SECTION 28

28 Limit of occupational liability by schemes

(1) To the extent provided by this Act and the provisions of the scheme, a scheme limits the occupational liability, in respect of a cause of action founded on an act or omission occurring during the period when the scheme is in force, of any person to whom the scheme applied at the time when the act or omission occurred.

(2) The applicable limitation of liability is the limitation specified by the scheme as in force at the time of the relevant act or omission.

(3) A limitation of liability that, in accordance with this section, applies in respect of an act or omission continues to apply to every cause of action founded on it, irrespective of when the cause arises or proceedings are instituted in respect of it, and even if the scheme has been amended or has, in accordance with section 32, ceased to be in force.

(4) A person to whom a scheme applies cannot choose not to be subject to the scheme, except in accordance with provisions included in the scheme under section 17(2).

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Currency: The above provision was current at the time that the tour contract was entered between the Appellant and the Respondent in February 2005 and on the date that the Respondent was injured, 14 October 2005. On 27 October 2006, sub-s 28(2) was amended by the *Professional Standards Amendment (Defence Costs) Act 2006* (NSW), s 3, Sch 1 [10] by omitting "at the time of the relevant act or omission" and inserting "at the time at which the act or omission giving rise to the cause of action concerned occurred".

20 **LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1965 (NSW), SECTIONS 8, 9**

8 Definitions

In this Part:

claimant—see section 9(1).

contributory negligence—see section 9(1).

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court, in relation to any claim, means the court by or before which the claim falls to be determined.

damage includes loss of life and personal injury.

wrong means an act or omission that:

(a) gives rise to a liability in tort in respect of which a defence of contributory negligence is available at common law, or

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(b) amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort.

9 Apportionment of liability in cases of contributory negligence

(1) If a person (the ***claimant***) suffers damage as the result partly of the claimant's failure to take reasonable care (***contributory negligence***) and partly of the wrong of any other person:

50 (a) a claim in respect of the damage is not defeated by reason of the

contributory negligence of the claimant, and

(b) the damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

(2) Subsection (1) does not operate to defeat any defence arising under a contract.

(3) If any contract or enactment providing for the limitation of liability is applicable
10 to the claim, the amount of damages recoverable by the claimant by virtue of subsection (1) is not to exceed the maximum limit so applicable.

CIVIL LIABILITY ACT 2002 (NSW), SECTIONS 5S, 11A, 16, 34, 35

5S Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and
20 equitable to do so, with the result that the claim for damages is defeated.

11A Application of Part

(1) This Part applies to and in respect of an award of personal injury damages except an award that is excluded from the operation of this Part by section 3B.

(2) This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.

30 (3) A court cannot award damages, or interest on damages, contrary to this Part.

16 Determination of damages for non-economic loss

(1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.

(2) The maximum amount of damages that may be awarded for non-economic loss is $350,000, but the maximum amount is to be awarded only in a most extreme case.

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(3) If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with the following Table:

Table

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6.5%
26%	8%
27%	10%
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34%-100%	34%-100% respectively

(4) An amount determined in accordance with subsection (3) is to be rounded to the nearest $500 (with the amounts of $250 and $750 being rounded up).

Note: The following are the steps required in the assessment of non-economic loss in accordance with this section:

10 Step 1: Determine the severity of the claimant's non-economic loss as a proportion of a most extreme case. The proportion should be expressed as a percentage.

Step 2: Confirm the maximum amount that may be awarded under this section for non-economic loss in a most extreme case. This amount is indexed each year under section 17.

Step 3: Use the Table to determine the percentage of the maximum amount payable in respect of the claim. The amount payable under this section for non-economic loss is then determined by multiplying the maximum amount that may be awarded in a most extreme case by the percentage set out in the Table.

20 Where the proportion of a most extreme case is greater than 33%, the amount payable will be the same proportion of the maximum amount.

34 Application of Part

(1) This Part applies to the following claims (***apportionable claims***):

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take

reasonable care, but not including any claim arising out of personal injury,

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act (as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*) or under the *Australian Consumer Law (NSW)* for a contravention of section 18 of that Law.

10 (1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(2) In this Part, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

20 (3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

(5) (Repealed)

35 Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

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(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and

(b) the court may give judgment against the defendant for not more than that amount.

40 (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) In apportioning responsibility between defendants in the proceedings:

50 (a) the court is to exclude that proportion of the damage or loss in relation to

which the plaintiff is contributorily negligent under any relevant law, and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

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