10 IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S179 of 2013

BETWEEN

Susan Joy Taylor
in her own capacity and
for and on behalf of the
dependants of the late Craig Taylor
Appellant

and

20 **The Owners – Strata Plan No 11564**
First Respondent

Alison Margaret Lamond
Second Respondent

Gordon Sunn
Third Respondent

Clifford Sunn
Fourth Respondent

Duncan Rae
Fifth Respondent

30 **Manly Council**
Sixth Respondent

Ryan Winton Taylor
Seventh Respondent

Lisa Jane Taylor
Eighth Respondent

Mitchell Alan Taylor
Ninth Respondent

Zara Zoe Taylor
Tenth Respondent

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APPELLANT'S SUBMISSIONS

Part I: Certification for publication

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. The following issues arise:

   (1) Does the restraint to damages applied by s 12(2) *Civil Liability Act 2002* (NSW) require a court assessing a claim for damages under ss 3 and 4 *Compensation to Relatives Act 1898* (NSW) to disregard the expected earnings of the deceased, but for the death, exceeding the prescribed amount?

11 October 2013

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(2) Does "claimant" in s 12(2) mean or include "deceased"? If not, is the section to be read as though the words "or deceased's" were added after the word "claimant"?

(3) If the ordinary meaning of a statutory text is consistent with the purpose of the statute may the court read the text as though it contained other words?

(4) If the court may read statutory text as though it contained other words, may any meaning be ascribed that would be consistent with the purpose of the statute or must the construction be limited to a reasonably available meaning of the words actually used?

(5) Is finding drafting error a necessary precondition to construing a statute as though additional words appeared? If so, what is sufficient to establish such error?

Part III: Section 78B Judiciary Act 1902 (Cth)

3. We consider notice is not required pursuant to s 78B of the Judiciary Act 1903 (Cth).

Part IV: Reports of reasons for judgment

4. The decision of the Court of Appeal is reported at (2013) 83 NSWLR 1. Order 4 made by the Court of Appeal (as to costs) was varied on 5 June 2013 and that decision is unreported. The media neutral citation is *Taylor v Owners-Strata Plan No 11564* (No 2) [2013] NSWCA 153.

5. The decision of the primary judge is unreported. The media neutral citation is [2012] NSWSC 842.

Part V: Relevant facts

6. The appellant is the widow of the late Mr Craig Taylor. Mr Taylor was killed on 7 December 2007 when a shop awning and brick wall collapsed onto the public footpath where he was standing.

7. The appellant brings proceedings in the Supreme Court of New South Wales under s 6B(1) *Compensation to Relatives Act 1897* (NSW) ("*Relatives Act*") for damages pursuant to ss 3 and 4 of that Act. The proceedings are listed for trial on all issues commencing 14 July 2014.

8. Mr Taylor's six children (three children of his first marriage and his three step-children) may also be entitled to damages. Pursuant to ss 4(1), 5 and 6B(2) of the *Relatives Act*, the appellant's action is a representative one brought for the benefit of all entitled relatives. The seventh to ninth respondents are Mr Taylor's children of his first marriage. (The seventh respondent was no longer a party at the time of the primary judge's order.) The eighth and ninth respondents supported the appellant's submissions before the primary judge and did not appear in the court below. The tenth respondent, Mr Taylor's youngest stepchild, is the second plaintiff in the Supreme

Court proceedings: she submitted save as to costs before the court below and does so in the Court.

9. The first to fourth respondents are the strata corporation and the unit owners and occupiers of the shops. The fifth respondent is an engineer alleged to have certified the structural integrity of the awning. He argued the separate question before the primary judge but submitted save as to costs in the court below and has entered a submitting appearance in the Court. The sixth respondent is the local council responsible for the footpath: the council is alleged to have known of the risk and to have given directions and advice to the first to fourth respondents about the awning.

10. Damages are claimed under the *Relatives Act,* relevantly, for the loss of benefits the appellant and any entitled relatives expected to receive dependent on the continuation of Mr Taylor's life derived from his personal exertion and investment, his creation and maintenance of capital assets and the value of services it was expected he would provide.

11. Personal injury claims are also made by the appellant and the tenth respondent and, in separate proceedings, by the eighth and ninth respondents: those claims include particulars of economic loss resulting from the personal injury to them. However, it is not alleged in the *Relatives Act* claim that any of the entitled relatives suffered diminution of her or his own earnings as a result of the loss of some pecuniary benefit dependent on the continuation of Mr Taylor's life.

12. With agreement of the parties, the primary judge ordered a separate question be determined in the proceedings as to the construction and application of s 12(2) of the *Civil Liability Act 2002* (NSW) ("*Liability Act*").

13. Mr Taylor was a registered land valuer in private practice. For the purposes of the separate question, the parties assumed the appellant would prove at any trial that, but for his death, Mr Taylor would have earned substantially in excess of 3 times average weekly earnings.

14. The primary judge determined the separate question adversely to the appellant and the relatives. The separate question, as reformulated by the primary judge, was

> Insofar as the plaintiffs claim damages pursuant to ss 3 and 4 of the *Compensation to Relatives Act* 1897, is any award of damages limited by operation of s 12(2) of the *Civil Liability Act* 2002? (SC [1])

and was answered

> The claim by the first plaintiff in proceedings 2010/405732, for damages pursuant to the *Compensation to Relatives Act* 1987(sic) is insofar as it includes damages for the loss of an expectation of the financial support provided by the late Mr Taylor, to be determined in accordance with s 12(2) of the *Civil Liability Act* 2002 by the Court disregarding the amount (if any) by which the late Mr Taylor's gross weekly earnings would (but for his death) have exceeded an amount that is three times the amount of average weekly earnings at the date of the award. (SC [83])

15. The appellant was granted leave to appeal but the appeal was dismissed (per McColl JA (CA [1]-[45]) with whom Hoeben JA agreed (CA [98]); Basten JA agreeing that

leave should be granted but dissenting as to dismissal of the appeal, his Honour would have allowed the appeal and answered the separate question "no" (CA [46]-[97])).

Part VI: Argument

16. In the courts below, the construction of s 12 turned on the statutory purpose identified and the meaning of the word "claimant". As the primary judge and majority in the court below accepted, when given its ordinary and natural meaning, s 12(2) does not have the effect of limiting the award of damages in these proceedings because the court is not required to disregard any of the benefits expected to have been provided by Mr Taylor. The issue then became whether s 12(2) may be read contrary to its ordinary meaning as if additional words are read in, directing the court to disregard any earnings of the deceased in excess of the prescribed amount.

ERRORS OF THE PRIMARY JUDGE

17. His Honour did not explicitly analyse the text of s 12, its mechanism or place in the Act. His Honour's reasons relevantly began at (SC [42]-[48]) with a short historical review of the perceived "insurance crisis". At (SC [59]), his Honour assumed a general purpose in the Act to limit claims for damages and a specific intention in s 12 to restrict financial loss claims *for* high-earning individuals. This overstated the purpose of the section and oversimplified the purpose of the Act. In the appellant's submission, the purpose of the section is to limit claims *by* high-earners for loss assessed by reference to their earnings.

18. His Honour moved from the statement of legislative purpose directly to the conclusion at (SC [59]) that it would be "consonant with" the purpose to read the section as applying to the deceased's income. His Honour held the word "death" in s 12(2) to "clearly suggest" the deceased's earnings are "the relevant compilation of earnings" (SC [61]). This is not a necessary connection and the text is better explained by the construction for which the appellant contends.

19. To achieve the purpose assumed, his Honour concluded that the word "claimant" "includes a deceased" (SC [56]) or that it means "the earnings of the deceased person" (SC [74]) or that s 12(2) should be construed as though it read

> "In the case of any such award, the court is to disregard the amount (if any) by which:
> **(a) in the case of an injury,** the claimant's; or
> **(b) in the case of death, the deceased's**
> gross weekly earnings would but for the injury or death have exceeded an amount that is three times the amount of average weekly earnings at the date of the award." (SC [75] – [80])

It was incorrect to substitute for the statutory language words suited to the purpose his Honour assumed from matters of general history and extrinsic material. The word "claimant" read in context in s 12(2) in respect of an award of damages to which s 12(1)(c) applies cannot mean " the deceased".

20. His Honour appeared to accept at (SC [58]-[59]) the appellant's submission s 12(1)(c) is not void or superfluous because when read with s 12(2) it applies restraint to *Relatives Act* claims for the relatives' own lost earnings. But his Honour held this was an insufficient restraint if the section did not also restrain 'paradigm' *Relatives Act* claims and his Honour equated its application to only "rare" or unusual cases with the section having no 'work to do' relevant to its construction (SC [60]). The appellant submits his Honour was wrong to consider it was necessary and open to give the section a greater reach than its ordinary meaning provided.

21. His Honour seemed to misidentify the mechanism of the section. His Honour considered that if "claimant" in s 12(2) was given its ordinary meaning, the award in a *Relatives Act* case would be limited by reference to the executor's earnings (in a claim brought by the procedure specified in s 4(1) of the *Relatives Act)* or by reference to the relative's earnings (in the alternative action brought under s6B *Relatives Act)*, independently of whether the relative's earnings are relevant to the assessment of damages (SC [65]-[73]). That does not correctly state the effect of s 12(2).

22. It is submitted that his Honour misdirected himself at (SC [62]-[63]) as to matters to be taken into account and mischaracterised an award of no more than full compensation for the relatives' financial loss as a "financial bonus or windfall". The Act does not treat all claims alike and does not restrain all types of claim equally or at all. The operation of s 12 in respect of *Relatives Act* claims should not be considered "anomalous" (SC [62]) when it is read in its context in Division 2 of Part 2.

FINDINGS OF MAJORITY IN THE COURT BELOW

23. The majority did not endorse the primary judge's reasoning, making no comment on it other than to depart, in a minor way, from his Honour's reformulation of s 12(2) (CA [28], [43]).

24. Justice McColl, with whom Hoeben JA agreed (CA [98]), came to a similar result as the primary judge but by a different route (CA [42]–[43]).

25. The majority accepted the grammatical or ordinary meaning of s 12 is unambiguous and insusceptible of any alternate meaning that would achieve the purpose attributed to the provision by McColl JA (inferentially from the reasons, as if there had been a range of meanings available McColl JA would have given them explicit consideration and would not have had resort to the approach her Honour felt constrained to adopt).

26. Justice McColl started the construction task with a search for purpose outside the statutory text (CA [29]–[33]).

27. The majority concluded if s 12(2) is read in its ordinary sense that s 12(1)(c) has no operation and that this was due to an unintended gap in the legislation which the court could and should supply by reading in the words "or deceased person's" so that the subsection would have effect as

> (2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's **or deceased person's** gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.

The effect of the construction with the additional words would be to restrain the award of damages in this case.

ERRORS OF MAJORITY IN THE COURT BELOW

28. The appellant submits there are seven errors in the majority reasoning:

(1) 'discerning' the purpose of s 12 *Liability Act* from consideration of the purpose of a section of another act expressed in materially different terms (s 125 *Motor Accidents Compensation Act 1999* (NSW) ("*MACA*") and assimilating that purpose to s 12 (CA [33]);

(2) assuming that the difference in text between the provisions of the two acts bespeaks unintended error instead of intended difference in purpose and effect (CA [34]);

(3) elevating a general purpose in the *Liability Act* of restraint of damages to a specific purpose in s 12 to restrain damages in a particular way and to a particular extent, despite the ordinary meaning of the text and overlooking other contrary indications expressed and implied in the Act;

(4) failing to apply ordinary principles of statutory interpretation which conduce to the result that the ordinary meaning of the text in s 12 cannot or should not be displaced;

(5) failing to deal with the appellant's submission that s 12(1)(c) read with s 12(2) has operative effect ('work to do'), to restrain *Relatives Act* claims for loss assessed with reference to the relatives' own earnings, that is not unreasonable and is consistent with the purpose of the section and the Act and that there is no necessity for any implication;

(6) applying incorrect principles in respect of statutory implication by way of "gap-filling" or "supplying an omitted case": where, on proper principle, this is either not authorised at all or is subject to limits exceeded by the majority approach;

(7) incorrectly applying principle in respect of statutory implication by way of "gap-filling" or "supplying an omitted case": the majority reasoning did not conform to the proper limits of statutory implication and their Honours' rewriting of s 12(2) went too far and has the appearance or effect of "judicial legislation".

Section 125 MACA vs s 12 Liability Act

29. This is the nub of the controversy in the case: the text of s 125 *MACA* actually directs the court to

> disregard the amount (if any) by which **the injured or deceased person's** net weekly earnings would (but for the injury or death) have exceeded the [prescribed amount].

whereas the restraint in s 12 is expressly confined to the "*claimant's* gross weekly earnings but for the injury or death".

30. Despite disavowing *a priori* assumptions at (CA [32] and [33]), the majority commenced the task of construction by searching for the purpose of the provision with reference to extrinsic materials and legislative history rather than the text itself (CA [29] – [33]). Justice McColl reasons from a textual association drawn between the primary judge's reformulation of s 12 *Liability Act* (CA [28]) to s 151I of the *Workers Compensation Act 1987 (NSW)* ("*WCA*") and s 125 *MACA* (CA [29]); from that legislation to the later s 9 *Health Care Liability Act 2001* (NSW) ("*HCLA*") (CA [30]); from that Act to a reference in the Second Reading speech for the Civil Liability Bill to the reforms (generally) having been "tried and tested" in the earlier legislation (CA [31]) and finally to Court of Appeal authority on the purpose of s 125 *MACA* (CA [33]). Her Honour then states that she 'discerns' s 12 to have the same purpose as s 125 *MACA* "both in its terms and read in its statutory context" but does not explain on what terms or context her Honour relies for that construction or how the same purpose may be discerned from language that is strikingly different.

31. The purpose attributed to s 125 by the Court of Appeal in *Kaplantzi v Pascoe* [2003] NSWCA 386; (2003) 40 MVR 146 at [32], as cited by her Honour at (CA[33]), is based on the actual text of that section. Her Honour does not explicitly refer to or examine the textual difference between the two sections or consider the other textual and contextual differences between the two acts.

32. The *Liability Act*, the *WCA* and the *MACA* undoubtedly have some similarities and adopt some common mechanisms but they have many more dissimilarities. They each have distinct fields of operation, different statutory objects (in the *MACA,* s 5), different regulation for funding of awards by insurance and, most importantly, each impose different restraints on damages generally with various differing mechanisms and different degrees of harshness (cf the regime of common law damages for workers involved in a motor accident has been described by Ipp JA in *Landon v Ferguson* (2005) 64 NSWLR 131 (at 135) as a "hodgepodge" of different caps and categories).

33. It was wrong for her Honour to assume the purpose of s 12 *Liability Act* is the same as that of s 125 *MACA* (cf *Certain Lloyds Underwriters Subscribing to Contract No IH00AAQS* (2012) 87 ALJR 131 [2012] HCA 56 per French CJ and Hayne J at [26] – [27]; per Kiefel J at [97]-[99]).

Drafting choice not drafting error

34. Assuming the purpose of the two sections is the same, the majority next assumes the text of s 12 to be defective because it is incapable, in its terms, of giving effect to part of that assumed purpose (to restrain *Relatives Act* damages assessed by reference to the deceased's earnings) because its wording departs from s 125 *MACA* (CA [34]). This reasoning is circular.

35. Her Honour assumes that the draftsman of s 12 unintentionally erred by selecting the word "claimant" and failing to include the word "deceased's" (CA [34]).

36. Her Honour referred at (CA[30]) to the likelihood that s 9 *HCLA* was used as a model for s 12. This may be a reasonable assumption on the legislative history. Her Honour considered that s 9, and with it s 12, was the product of "inadvertence" by the draftsman of s 9 "failing to appreciate" that claimant's earnings are irrelevant to an award of damages to which s 9(1)(c) (s 12(1)(c)) applies (CA [42]). This finding overlooked the appellant's submission as to whether that is a correct characterisation of the relevance of subsection (2), as drafted, to (1)(c) awards, a point which is addressed later in these submissions.

37. However, it is of significance as to what, if anything, the court could or should do about perceived drafting error, that her Honour finds more than a *mere drafting error* of punctuation or syntax. The 'error' is also of a different order of seriousness and deliberation to mere mistranscription or the failure to completely carry through an amendment to a set of related provisions or an incompletely provided transitional provision.

38. Her Honour assumes the draftsman mistook both the law and the appropriate means of providing for the legislative purpose. If there was such a basic failure to appreciate the significance of concepts key to the supposed objects of the provision, this would be a mistake of a very large degree and would cast doubt on what can have been intended. Even without taking into account the appellant's arguments which follow, in the case of such error, the court should not seek to re-write the legislation as this is the function of parliament. If parliament were to re-write the provision, the draftsman and the legislature would reconsider the law. Account would be taken of further or different considerations regarding the assessment of damages in affected cases and the balancing of private and public needs, rights and interests which might inform the policy of restraint to be applied. Eleven years have elapsed since the passage of the Act and different considerations might arise from the evaluation of the claims experience in that period, including whether any restraint should now be applied to awards of *Relatives Act* damages at all.

39. Her Honour did not carry through the analysis of the development of the provisions from s 125 *MACA* through s 9 *HCLA* to s 12 *Liability Act.* Such analysis would show advertence (not inadvertence) to differences of language in the text and evidences deliberate choice by the draftsman to alter the language from that used in s 125 *MACA*. Under s 125 *MACA,* the monetary cap prescribed by s 125(2) is a sum of money identified in the subsection and indexed in accordance with s 146 of that Act. Section 9 *HCLA* picked up the reference to that sum and indexation and borrowed by reference the monetary limit published from time to time in respect of the *MACA*. This shows the draftsman specifically referred to the form and content of s 125 *MACA* but then chose to adopt different language for the operative provision of s 9(2). The draftsman having specifically and consciously declined to follow other available legislative models, it would then be wrong to impute to the legislature the very choice of language that has been rejected (cf *Sons Of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 per Kirby J at 212-213).

40. An additional matter related to the development of the provisions is that s 8 *HCLA*, immediately preceding s 9, specifically referred to a "claimant" as a person "to" whom it was contemplated damages would be awarded. A relevantly identical provision (s 10) also closely preceded s 12 *Liability Act* until the reorganisation of the Act in December 2002 to introduce the substantive liability reforms and other matters. That is, the draftsman in either case intended that "the claimant" was the person claiming or receiving the award of damages. This is reinforced by the special definition of "claimant" that was originally enacted in s 3 *Liability Act*: while that definition extended the ordinary meaning of "claimant" to a person having a claim that had not yet been made, it would still not have been broad enough to include "the deceased" in respect of s 12(1)(c), even had it not been repealed.

How far is purpose carried through?

41. The majority assumes that a general statutory purpose of restraint of damages in the *Liability Act* was intended to be applied equally, among different awards of personal injury damages, and was intended to be carried through to the fullest possible extent.

42. But not every provision of Part 2, Division 2 of the *Liability Act* is intended to restrain damages, not every available technique of restraint has been applied and not every topic which might be thought suitable for restraint has been covered. For example, s 15B *Liability Act*, rather than limiting damages, creates a right to be compensated by economic loss damages for loss of the capacity to provide services to others which at common law was confined to a claim for non-economic loss which would be assessed much less generously than the new remedy provided by the *Liability Act* (*CSR v Eddy* (2005) 226 CLR 1). Further, unlike the *MACA*, the *Liability Act* does not abolish claims *per quod servitium amisit* and such claims are uncapped. Section 12 applies restraint only to unusual cases; by definition it restrains only awards of damages to which it applies that would otherwise be assessed by reference to earnings greater than three times the State average. Whether or not read with the modification the majority makes, s 12 would not restrain *Relatives Act* damages based on losses other than loss of expected benefits from *earnings* (this is addressed further as to the appellant's construction of s 12). Undoubtedly the choices made by the legislature involved public debate, even controversy, and required the balancing of rights and interests. The Second Reading speech refers to a concern to alleviate the financial burden of small, unmeritorious claims but better to compensate the most seriously injured (Mr Carr, Member for Maroubra, Premier, Minister for the Arts and Minister for Citizenship, Legislative Assembly Hansard Extract 28/5/02 re non-economic loss damages "the more seriously injured plaintiffs …the people who have suffered the most and they will get more…").

43. The expectation, implicit in the majority reasons that s 12(1)(c) must have been intended to restrain damages assessed by reference to the deceased's earnings, assumes that s 12 was intended to operate as harshly on relatives of the deceased as the *MACA* and *WCA* Acts. Statements of purpose made in this way are apt to mislead rather than inform construction.

> Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. ...

(*Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 87 ALJR 1009 [2013] HCA 36 at [40]-[41]; citing *Carr v Western Australia* (2007) 232 CLR 138 and *Rodriguez v United States* (1987) 480 US 522). As Basten JA observed at (CA[69]), it is to be borne in mind that claimants under the *Relatives Act* receive no damages by way of *solatium* and the legislature may well have considered that the benefits calculable as financial loss ought not be reduced in view of that fact. As submitted further in respect of the appellant's construction of s 12, it is wrong to assume that it is the purpose of s 12 to reach *all* of the awards of damages referred to in s 12(1): it is the intention of the section as given effect by the text to restrain only those awards under s 12(1) which also engage the proscription in s 12(2) (cf *Palgo Holdings Pty Ltd v Gowan* (2005) 221 CLR 249 at 262).

Ordinary principles of construction

44. The majority did not explicitly consider how the ordinary principles of construction bear on the meaning of s 12.

45. The appellant submits that the approach of the majority did not conform to the requirement that the task of construction be text-based and that it start and end with the text. If the meaning is clear and unambiguous then it must be given effect. (*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 97 ALJR 98; [2012] HCA 55 at [39]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]; *Certain Lloyds Underwriters Subscribing to Contract No IH00AAQS* (2012) 87 ALJR 131 [2012] HCA 56 per French CJ and Hayne J at [23] – [27]; *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 [2013] HCA 16 at [47]; *Cooper Brookes (Wollongong) Proprietary Ltd v The Commissioner of Taxation* (1981) 147 CLR 297 at 304; *Thompson v Byrne* (1999) 196 CLR 141 at 149 [19]).

46. It was an error to seek the purpose of the section outside the text and structure of the Act itself without considering the limits of the restraint intended to be applied to *Relatives Act* claims as indicated by the balance of Part 2, Division 2 of the *Liability Act*. (*Lacey v Attorney-General Queensland* (2011) 242 CLR 573 at [42]- [44] citing *Zheng v Cai* (2009) 239 CLR 446 at 455-456); *Legal Services Board v Gillespie Jones* (2013) 87 ALJR 985; [2013] HCA 35 at [50]). Consideration of Division 2 supports the view that the restraint intended to be applied to *Relatives Act* claims, if any, was of a very limited extent.

47. The majority decided that s 12(1)(c) is intended to signify claims under s 3(1) and s 4 *Relatives Act.* The exercise of construing s 12(2) with s 12(1)(c) involves the interaction of two statutes: the *Relatives Act* with the *Liability Act* (cf *Commissioner of Police v Eaton* (2013) 87 ALJR 267; [2013] HCA 2 per Crennan, Kiefel and Bell JJ at [45] – [48] Gageler J (diss. but not as to the principles) at [95]-[100]). To the extent

that s 12 operates to cut down the very broad remedy afforded relatives by the *Relatives Act*, that is an inconsistency with the operation of the earlier, specific Act. It is undoubted that the legislature may alter or impair such rights under its statutes as it pleases. The presumption that the legislature does not intend, except by clear words, to cut down valuable, longstanding rights and protections, such as those afforded by *Lord Campbell's Act* provisions since c 1846, may be of less force in respect of an act such as the *Liability Act*, but the principle does have some application still (*Saeed* v *Minister for Immigration* (2010) 241 CLR 252 at 259.15; *Electrolux Home Products v AWU* (2004) 221 CLR 309 at 329 cf *Lee v New South Wales Crime Commission* [2013] HCA 39 at [313] per Gageler and Keane JJ; cf *Momcilovic v The Queen* (2011) 245 CLR 1 per French CJ at [43]). More importantly, whether or not there is now a presumption *against* the intendment of interference without clear words, the reverse is not true. There is no warrant to *presume* an intention to further cut down the remedy under the *Relatives Act* in the absence of text in s 12 which provides for it and contrary to the express provision of that section (cf *Certain Lloyds Underwriters Subscribing to Contract No IH00AAQS* (2012) 87 ALJR 131; [2012] HCA 56 per Kiefel J at [89]). Even where the intention of parliament to interfere with common law rights (or rights of the nature of those under the *Relatives Act*) can be clearly seen, it will be presumed that the interference was only so far as was necessary to address the particular mischief with which the provision is concerned (*Thomson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513 at 526).

48. To the extent that the reasons of the majority sought to take some support for the assimilation of the purpose of s 125 *MACA* to s 12 *Liability Act* from the very brief excerpt of the Second Reading speech at (CA [31]), that statement was too general and inconclusive to provide such support and, in any event, ministerial statements of intention or effect cannot override the plain text of the Act (*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31]; *Re Bolton; Ex p. Beane* (1987) 162 CLR 514 at 518; *Parramore v Duggan* (1995) 183 CLR 633 at 649).

Appellant's submission as to relatives' lost earnings damages

49. The primary judge accepted the appellant's submission that, given its ordinary meaning, s 12(2) could apply to *Relatives Act* claims in which a relative was entitled to be compensated for the interference resulting from the death in the exercise of her or his own earning capacity (SC [58]; and see [55] referring to *Dwight v Bouchier* [2003] NSWCA 3 at [78])

50. The majority at (CA [8]) appear to accept the availability of such a claim. (The majority limited that acceptance to proceedings brought under s 6B of the *Relatives Act* by one of the entitled relatives, but whether the proceedings are brought by the executor or one of the relatives is irrelevant to the damages that may be assessed: the action is a representative one for the losses sustained by the relatives as individuals, albeit there is one judgment entered against the defendant (*Nguyen v Nguyen* (1990) 169 CLR 245 per Brennan CJ at 247, per Deane J at 252, 257, per Dawson, Toohey & McHugh JJ at 263-265; *Pym v The Great Northern Railway Co* (1863) 4 B& S 397,

407 (122 ER 508, 512); *McIntosh v Williams [No 2]* [1979] 2 NSWLR 543, 560-561 per Hutley JA).

51. The breadth of the *Relatives Act* remedy has been observed, for example, by Deane J in *Nguyen* (at 252) and the increasing importance in modern family life of the claim for lost services by otherwise financially independent or interdependent relatives was identified by Gleeson CJ in *De Sales v Ingrilli* (2002) 212 CLR 338 (at 348.1-14; cf *Nguyen* per Brennan CJ at 247, per Deane J at 252, 257, per Dawson, Toohey & McHugh JJ at 263-265). The availability on proper evidence of such damages under s 4 *Relatives Act* was not contested by the respondents either before the primary judge or in the court below (it was specifically conceded by the Sixth Respondent in oral argument in the court below at T21.13, the First to Fourth Respondents adopting the oral submissions at T22.41) and is supported by *obiter* of members of intermediate appellate courts (*Roads and Traffic Authority v Jelfs* [1999] NSWCA 179; (2000) Aust Torts Reports ¶81-583 per Handley JA at [67] – [68], [76] – [78], although apportionment of damages is not necessarily the same as the measure of damage applied to the defendant; *Dwight v Bouchier* (2003) 37 MVR 550; [2003] NSWCA 3 per Stein JA at [78]) and English trial court decisions (*Mehmet v Perry* [1977] 2 All ER 529 to which the majority in *Nguyen* (above) referred (at 264) in support of the injunction that

> "There is no reason why "services" ...should be given an unduly narrow construction, as if a wife were no more than a housekeeper".

Cresswell v Eton [1991] 1 All ER 484; [1991] 1 WLR 1113 per Simon Brown J (as his Lordship then was) at 1120 - 1122; *Watkins v Lovegrove* (unreported) 5 May 1982 per Robert Goff J (as his Lordship then was), referred to and followed in *Creswell* at 1121-1122).

52. The prime example submitted to the courts below of a relative being entitled under the *Relatives Act* to damages assessed on the expectation or chance of her or his own earnings lost as a result of the death, was of cases in which the death resulted in the relative having to forgo valuable work or opportunities for advancement to take over the provision of services previously provided by the deceased (*Mehmet* and *Jelfs* were examples of such cases). A second example was the death resulting in the relative having to forgo valuable work opportunities because of the loss of the services of the deceased or other assistance provided by the deceased on which the opportunities were dependent: such as the provision of transport or access to premises or equipment for the purpose of the work. Other examples were also given, such as reduction in the relatives' earnings from a family business by loss of the synergistic effect of the deceased's contribution, whose value to the family enterprise exceeded earnings derived from his or her own efforts alone (that is, where the partnership itself made the relative's earning capacity more valuable). A further example is the relative's loss of an advantageous business opportunity for the lack of financial support expected to have been provided by the deceased by way of loan or guarantee or other financial accommodation that is unrelated to any earnings of the deceased.

53. The primary judge considered that cases of such damages would be "rare". In the course of oral argument in the court below, Hoeben JA suggested that such cases would represent only 0.001% of all *Relatives Act* claims (T25.10). The appellant did not accept that quantification (T25.44-50, 26.1 cf 4.39-42). The majority does not further analyse the quantification, by inference, such claims are considered 'atypical' (CA[8]). The description of financial interests which may be affected by the death of a person given by Gleeson CJ in *De Sales* (at 346 par [10]) is indicative of the broader instances of claims that may be made by relatives.

54. The question of how frequently awards of damages in claims that satisfy s 12(1)(c) will in fact be reduced by the operation of s 12(2) does not arise relevantly to its construction (*Plaintiff M47-2012 v Director General of Security* (2012) ALJR 1372; [2012] HCA 46 per Hayne J at [193], [196], [197]; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 382 [71], citing *The Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405 at 414.) Whether such cases are "rare", "atypical" or more common is immaterial. In so far as the Second Reading speech (cited above) is relevant, it does not indicate awards to high earners attached by s 12(1)(a) or s 12(1)(b) were frequent or that frequency had any significance to the problem intended to be addressed by s 12.

55. Whether or not atypical or few in number, such damages are an award to which s 12(1)(c) and s 12(2) apply with operative effect.

56. When the words of s 12(2) are given their ordinary meaning neither s 12(1)(c) nor s 12(2) fail to operate and s 12(2) is effective to apply a restraint to those damages, consistent with both the general statutory purposes of the *Liability* Act and with the treatment of claims made by other high earners under s 12(1)(a) and s 12(1)(b) (*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*(2012) 87 ALJR 131 [2012] HCA 56; per Crennan and Bell JJ at [70], per Kiefel J at [94] – [95]). So understood, the restraint provided by the actual text of s 12(1)(c) and s 12(2) is not unreasonable or absurd or even inconvenient or improbable and the restraint so applied is a rational policy choice that was open to the legislature.

57. Giving "claimant" its ordinary meaning without 'reading in' additional words is a construction of s 12(2) that is open and does not render s 12(1)(c) "superfluous, void, or insignificant". The appellant submits that the section has operative effect, consistent with its purpose and not unreasonable or absurd; accordingly, the court may not (alternatively, should not) read in additional words (*Cooper Brookes (Wollongong) Proprietary Ltd v The Commissioner of Taxation* (1981) 147 CLR 297 at 304-305).

58. The majority did not expressly deal with this argument (made by oral argument at T5.31-50, 6.1-8, 8.40-9.1-48, 10.48-11.1, 11.44-50, 23.20-24 and written submission pars 21-22). Having apparently accepted at (CA [8]) that awards of such damages would give the section work to do, after discussion of the application of the principles of 'reading in', McColl JA stated at (CA [44]) the effect of the implication her Honour made was to give the parenthetical expression "(but for …the death)" in s 12(2) and the phrase in s 12(1)(c) 'work to do' (suggesting her Honour held it had no operation

otherwise). It is not clear from the reasons whether their Honours simply overlooked the effect of the finding at (CA [8]) as to the damages issue or intended to reject the appellant's submission that additional words could not (or should not) be read in if the section already had relevant operative effect without them.

Principles of statutory implication

59. The question arises on the majority reasons whether the court can supply an omitted case, that is "fill gaps" in legislation where the 'gap' is the consequence (assumed by the majority to be unintended) of intended choices of statutory language? If the court *can* do so, upon what principles and within what limits does the court act in construing a provision by implying words into it (or construing it if as those words appeared)?

60. There is authority that an omitted case cannot be supplied (*Marshall v Watson* (1972) 124 CLR 640 per Barwick CJ at 644 and Stephen J at 649; *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 per Gibbs J at 12 with whose reasons Barwick CJ, Menzies and Owens JJ relevantly agreed)

61. This view is not confined to a 'pre-modern era of narrow literalism' but has been held to be the case where remedying the perceived gap would require a rewriting of the statute in a way inconsistent with the limits of the exercise of construction (for example, *IW v City of Perth* (1997) 191 CLR 1 per Brennan CJ and McHugh at 12, 15, per Gummow J at 45-46).

62. In *Cooper Brookes (Wollongong) Proprietary Ltd v The Commissioner of Taxation* (1981) 147 CLR 297 the Court observed a defect in the legislation that, without doubt on the legislative history, arose from oversight on the incomplete amendment of a scheme of related provisions. The appellant in that case described the defect as a "gap" and submitted that the court had no right to fill it (Gibbs CJ refers at 304). However, in our submission that was a different class of case from the present because it was capable of resolution conformably with the text of the statute and ordinary tools of construction by reading down the definitional provision which had been left unamended (in error) and did not require the extension of the reach of the provision by the addition of words (eg see p 321).

63. Nevertheless the judgments of the Court in *Cooper Brookes* established principles of general assistance, albeit perhaps not in complete conformity with each other, which have frequently been cited including that if the meaning of the text when construed as part of the Act as a whole is clear and unambiguous, it must be given effect to unless the result of that ordinary meaning is so irrational that it must have been by mistake. If the language is clear and unambiguous and will admit of only one construction and is consistent with the other provisions of the act and can be applied intelligibly to the subject matter it must be given its ordinary grammatical meaning, even if the result may seem inconvenient or unjust (per Gibbs CJ at 304 – 305). This expression of principle was approved by Mason CJ and Toohey J with whom Brennan J agreed in *Mills v Meeking* (1990) 169 CLR 214 at 223-224. It appears that where Gibbs CJ was referring to mistake (at 307) his Honour meant a true mistake in the sense of an

unintended omission to act and not an act done (or word used) with an erroneous appreciation as to its consequences. Justice Stephen considered (at 310) that even an irrational meaning must stand if it is the only available meaning but where it would be improbable that it was intended to amend legislation by a side wind, the scope of the definition may be confined to avoid that effect (p 312). Justices Mason and Wilson (at 320) considered that departure from the ordinary meaning of the words of a provision was not confined to cases of absurdity or inconsistency, but that "an alternative construction which is reasonably open" may be preferred to the literal meaning if the result would otherwise be inconvenient or improbable. There may be no alternative to applying the ordinary meaning if that meaning is not such as to indicate it could not have been intended by the legislature or that the language is intractable (p 320 -321) but the literal meaning may be departed from where the operation of the statute otherwise would not conform to its intent as ascertained from the provisions and the policy inhering in them if (at 322) it is a necessary implication from the legislative scheme considered as a whole and in light of the mischief it was designed to prevent.

64. In *MacAlister v The Queen* (1990) 169 CLR 324 (at 330) a provision was said to be construed as though words were read in, but the effect was to read down a provision that, had it been read strictly, might have debarred a criminal appeal because the language in which the provision was cast assumed a right that otherwise did not exist and in such a way as would have prevented the right of appeal from in fact arising. The construction confined the provision and did not give the provision a greater scope of operation.

65. In *Parramore v Duggan* (1995) 183 CLR 633 at 644, Toohey J, with whose reasons the other members of the Court agreed, accepted the Court *may* construe statutes to "fill gaps" and to depart from the ordinary meaning of the text if the literal meaning would lead to an incongruous result, or would defeat the objects of the Act or would be capricious or irrational. However, his Honour in that case declined (at 650 - 651) to read in a word to the provision so as to create or preserve rights lost by reason of the provision. His Honour held the language actually used to be capable of understanding in its ordinary meaning, not to lead to an incongruous result, not to defeat the objects of the act and not to be capricious or irrational, accordingly, there was no warrant for "doing violence to" the text (pp 650 - 651).

66. In *Wentworth Securities v Jones* [1980] AC 74 at 105 – 106 Lord Diplock confided a three-step 'test' for statutory implication by construing a statute as if reading words in where the court first determines that giving effect to the ordinary meaning of the words will clearly defeat the purposes of the Act: firstly, that it must be possible to determine precisely what was the mischief that it was the purpose of the provision to remedy, secondly that it was apparent that the draftsman and parliament had by inadvertence overlooked an eventuality required to be dealt with if the purpose of the Act were to be achieved and thirdly that it is possible to state with certainty what would have been provided if the omission had come to notice (otherwise implication is unjustifiable judicial legislation). That test has been much referred to and has been

described as having been incrementally adopted in Australia at the intermediate appellate level. We have not identified any decision of the Court in which a majority specifically approves or adopts it. It has been referred to in a number of single judgments (particularly by their Honours Kirby and McHugh JJ) and in other single or plurality judgments. The judgment of McHugh JA, as his Honour then was, in *Kingston v Keprose* (1987) 11 NSWLR 404 at 421-424 discussed the 'modern approach' to statutory interpretation and, among other things, approved the Lord Diplock test. *Kingston v Keprose* was referred to with approval by the Court in *Bropho v State of Western Australia* (1990) 171 CLR 1 (at 20.30) as "the contemporary approach" but without explicit discussion of the Lord Diplock test.

67. In *R v Young* (1994) 46 NSWLR 681; [1999] NSWCCA 166 Spigelman CJ at 686 – 690 adopted, explained and qualified the Lord Diplock test. His Honour posited three qualifications: firstly, that satisfaction of the three stage test did not mean the court should proceed to make the statutory implication (satisfaction of those conditions was necessary but not sufficient), secondly, that any implication in fact be an available meaning (of a range of possible meanings) reasonably open on the text actually used read in context (if the words actually used are not reasonably capable of bearing the implication they will not be so construed) and the implication must be a result of a recognised process of ordinary statutory construction, such as reading down words or giving them an ambulatory operation. His Honour's explanation and qualifications have been much followed by judges of the Court of Appeal of NSW and in other states.

68. Lord Nicholls of Birkenhead in *Inco Europe v First Choice Distribution* [2000] WLR 586 at 592 restated the Lord Diplock test as, in cases of plain drafting mistake, the court may correct obvious drafting errors by construing the provision as if words are added, omitted or substituted, but only if the court is "abundantly sure" of three things: the intended purpose of the statute or provision, that the draftsman and parliament failed to give effect to that purpose by inadvertence and the substance of the provision that would have been made had the error been noticed. Even if these conditions be met, the implication will not be made if the alteration in language is too far-reaching or another principle of statutory construction tends against it and, importantly, the court must "abstain from any course which might have the appearance of judicial legislation".

69. In *R v PLV* (2001) 51 NSWLR 736; [2001] NSWCCA 282 Spigelman CJ at 743 adopted the restatement in *Inco* but added a further explanation or qualification at 743 to 744 that the implication by reading a provision as though words were added or deleted cannot be done so as to have the effect of expanding the sphere of operation of the text: that is, the ordinary meaning of provisions may be confined or 'read down' but not 'read up'. As with *R v Young*, *R v PLV* has been followed by many intermediate appellate judges (see for example *Rail Corporation New South Wales v Brown* (2012) NSWLR 318 at 331-332 [45] – [48] per Bathurst CJ and the cases cited in *Leys* at [93]).

70. In *Carr v Western Australia* (2007) 232 CLR 138 Gleeson CJ said (at 144) that if, by implication, an exclusion effected by the provision there under consideration was wider than it appears from its express terms, it is necessary for the party contending for the implication to identify its terms and explain why it should be made "bearing in mind that what is involved is an exercise in construction not legislation". His Honour referred with approval to *Wentworth Securities* and *Inco* (at 144 note 21) and (at 147 notes 26 and 27) and to *R v Young* (at 144 note 21). It appears that his Honour approved the qualifications proposed by Spigelman CJ, perhaps other than the limitation to 'reading down'.

71. In *Minister for Immigration v Citizenship v SZJGV* (2009) 238 CLR 642 French CJ and Bell J (at 651-652) referred to *Cooper Brookes* and approved the restatement in *Inco*, specifically drawing attention to the limits of judicial implication that the courts "must abstain from any course which might have the appearance of judicial legislation". In that case Hayne J referred to *Cooper Brookes* and Crennan and Kiefel JJ did not find it necessary to refer to either line of authority to hold the provision in question may be read down. In *Momcilovic v The Queen* (2011) 245 CLR 1 French CJ explained (at [39] – [40]) that the meaning given to a statute must be a meaning which the words can reasonably bear and, even in the exceptional case, where the court may give a strained meaning if the ordinary meaning would contradict the purpose of the enactment, the court may still not go as far as to legislate.

72. In *DPP v Leys* (2012) 296 ALR 96; [2012] VCSA 304 the Victorian Court of Appeal expressed, in plain terms, disagreement with the qualifications and explanations of statutory implication given by Spigelman CJ. At [92]-[98] their Honours disagree that it is a process of construction of the words actually used and disagree that provisions may only be confined and not expanded in scope. At [97] their Honours posit a different formulation of a test for statutory implication than stated by previous authority: firstly, whether the words actually used in the text can "accommodate" the words to be read in without giving the provision an unnatural, incongruous or unreasonable construction and, secondly, that "the provision *as modified* must conform with the *statutory scheme*" (emphasis added).

73. *Leys* was handed down after the argument in the court below (in which the appellant had relied on the observations of and qualifications applied by Spigelman CJ). The majority reasons at (CA [38], [40] and [44]) cite both the *Leys* and Spigelman CJ lines of authority. However, they are not reconcilable. On the critical questions of whether the implication could and should be made in this case, the appellant submits the majority in fact followed the approach enunciated in *Leys*. The majority reasons also refer to the dissenting judgment of Dawson J in *Mills v Meeking* (1990) 169 CLR 214 at 235 (to an approach that was rejected by the majority in that case and again in *Thompson v Byrne* (1999) 196 CLR 141). The reasoning of the majority in the court below, and the formulation of the limits of statutory implication in *Leys,* go beyond the proper scope of construction. The court must construe the words actually contained in the text. Permitting substitution or insertion of *any* words merely

consistent with the court's intuitive view of the purpose of the statute overall is not permissible.

Failure to apply principles of statutory implication

74. If statutory "gap-filling" by implication is permissible, it was not appropriate in this case. Firstly, it is not a case of drafting error but of drafting choice, as submitted above. Secondly, as also submitted above, any implication is unnecessary as the provision has operative effect even without such implication. Even if, contrary to our primary submission, s 12 does not have operative effect in respect of s 12(1)(c), that does not mean the statutory purpose has been thwarted or that the ordinary meaning of the section is an absurd, capricious or an unreasonable result of application of the ordinary rules of construction. Thirdly, the meaning given to s 12(2) by the primary judge and the majority in the court below was not open because it is not a meaning the words actually used could reasonably bear. Further, for the reasons given by Basten JA in the court below (CA[69] and [95]), it is only a matter of speculation and not certainty what the legislature might do if the matter were drawn to its attention. Finally, even if otherwise available, the implication sought to be drawn in this case is too far-reaching, its language too different from that actually used in the provision and its effect in expanding the scope of the provision too substantial an alteration to be a safe or preferable construction. The majority in the court below should have applied the fourth step described by Lord Nicholls in *Inco* and determined the implication should not be made.

APPELLANT'S CONSTRUCTION OF SECTION 12

75. The purpose of s 12 primarily appears through its text. Its purpose is to restrain the awards of damages referred to in s 12(1) by the operation of s 12(2), but only to the extent the text of s 12(2) actually provides. The mechanism of restraint is a "direction to disregard". Implicit in selecting that mechanism (instead of a flat cap, threshold or deductible) is a legislative choice that, if the direction is irrelevant to the assessment actually required to be undertaken, the provision will not work any change in the common law position.

76. Section 12 does not apply restraint to all types of personal injury damages for economic loss: it does not apply to claims *per quod servitium amisit* at all (s 12(1) *Chaina v Presbyterian Church (NSW) Property Trust* (2007) 69 NSWLR 533 per Howie J at [49] and [50]). Section 12 does not apply the same restraint to all *claims* to which it applies (it does not cap *claims*) rather it limits claims *by* or *awards to* high – earners. A high-earner cannot recover a partial loss that is less than the prescribed amount if she or he is earning more than that amount.

77. "Earnings" in s 12(2) means earnings from personal exertion (the exercise of earning capacity) not merely passively received income (Macquarie Dictionary online edition 14/10/13 "earn" senses 1-4, "earn" v. sense 1; Oxford English Dictionary online edition 14/10/13 "earning" sense 1, "earning" v. sense 1; *Fkiaras v Fkiaras* (2010) 77 NSWLR 468, [2010] NSWCA 116 [46], [38] – [43]); Tuohe*y v Freemasons Hospital*

[2012] VSCA 80). This is consistent with the measure of the prescribed amount being average weekly earnings of employees in New South Wales.

78. Section 12 does not restrain damages assessed on a basis other than earnings: it does not restrain *Relatives Act* damages assessed by the loss of use of the deceased's unearned capital assets, private rights and privileges or the financial support and services the deceased would have provided from sources other than earnings.

79. As discussed by Basten JA at (CA[92]-[94]), the balance of the provisions in Division 2 do not restrain *Relatives Act* damages.

Part VII: Legislative materials: s 12 Civil Liability Act 2002 (NSW)

80. **12 Damages for past or future economic loss—maximum for loss of earnings etc**

(1) This section applies to an award of damages:
(a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
(b) for future economic loss due to the deprivation or impairment of earning capacity, or
(c) for the loss of expectation of financial support.

(2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.

(3) For the purposes of this section, the amount of average weekly earnings at the date of an award is:
(a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and that is, at that date, available to the court making the award, or
(b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

81. Section 12 *Civil Liability Act 2002* (NSW) is still in force, in this form, at the date of making the submissions.

Part VIII: Orders sought

1. Appeal allowed.
2. Set aside the orders of the Court of Appeal made on 18 March 2013, as varied on 5 June 2013, and, in their place, order that:
   (1) Leave to appeal granted;
   (2) Appeal allowed;
   (3) Set aside the orders of Garling J made on 27 July 2012 and, in their place, order that:
      (i) The separate question:

"Insofar as the plaintiffs claim damages pursuant to ss 3 and 4 of the Compensation to

Relatives Act 1897 (NSW), is any award of damages limited by the operation of s 12(2) of the Civil Liability Act 2002 (NSW)?"

be answered:

"No, the operation of section 12(2) Civil Liability Act 2002 (NSW) does not relevantly limit the First Plaintiff's claim for damages pursuant to ss 3 and 4 of the Compensation to Relatives Act 1897 (NSW) as pleaded on behalf of herself and any other entitled relatives of the late Mr Craig Taylor in that it does not require the Court to disregard the amount by which the gross weekly earnings of Mr Craig Taylor would but for his death have exceeded an amount that is 3 times the average weekly earnings at the date of the award."

(ii) The first to fourth, fifth and sixth defendants pay the first and second plaintiffs' costs of the separate question.

(4) The first to fourth and sixth respondents pay the appellant's costs of the appeal.

3. The first to fourth and sixth respondents pay the appellant's costs of the appeal including the application for leave to appeal.

4. Special Order
If the appeal is dismissed, the Appellant seeks a special order for costs that

(i) there be no order for costs of the seventh, eighth and ninth respondents, being parties in the same interest as the appellant and

(ii) the costs of the first to fourth, fifth and sixth respondents (if any be ordered) be limited to one set of costs being parties in the same interest as each other on the issue.

Part IX: Oral argument

The appellant estimates 2 hours is required for oral argument.

Dated:

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