IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S273 of 2010

BETWEEN: **INSIGHT VACATIONS PTY LTD T/AS INSIGHT VACATIONS**

Appellant

and

STEPHANIE YOUNG

Respondent

HIGH COURT OF AUSTRALIA
FILED
22 FEB 2011
THE REGISTRY SYDNEY

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES

PART I: PUBLICATION ON THE INTERNET

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for New South Wales ("NSW Attorney") intervened in the proceedings below, before the New South Wales Court of Appeal (Insight Vacations Pty Ltd v Stephanie Young (2010) 268 ALR 570; [2010] NSWCA 137), pursuant to s. 78A(1) of the Judiciary Act 1903 (Cth) ("Judiciary Act").

3. In accordance with s. 78A(3) of the Judiciary Act, the NSW Attorney is taken to be a party to these proceedings.

4. The NSW Attorney supports the argument made by the appellant that there is no inconsistency between s. 5N of the Civil Liability Act 2002 (NSW) ("CL Act") and ss. 68 and 74 of the Trade Practices Act 1974 (Cth) ("TPA") for the purposes of s. 109 of the Commonwealth Constitution ("Constitution").

PART III: LEAVE TO INTERVENE

5. This Part is not applicable.

Date of document:	22 February 2011	DX 19 SYDNEY
Filed on behalf of:	Attorney General for NSW	Tel: (02) 9224 5000
Filed by:	I V Knight, Crown Solicitor	Fax: (02) 9224 5255
	Level 5, 60-70 Elizabeth Street	Ref: 201100096
	SYDNEY NSW 2000	T05 Paolo Buchberger

PART IV: APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

6. The NSW Attorney agrees with that appellant's statement of applicable constitutional provisions and statutes.

PART V: SUBMISSIONS

7. The NSW Attorney contends that:

   (i) section 74(2A) of the TPA picks up a State law, such as s. 5N of the CL Act, which provides statutory protection to a contractual term that limits or precludes liability for breach of the implied warranty in s. 74(1);

   (ii) therefore, there is no inconsistency between s. 5N of the CL Act and ss. 68(1) and s. 74(1) of the TPA for the purposes of s. 109 of the Constitution;

   (iii) the majority in the Court of Appeal erred in their conclusion that s. 74(2A) of the TPA does not pick up s. 5N of the CL Act because the latter does not, by its own terms, directly limit or preclude liability for breach of the implied warranty in s. 74(1).

8. The NSW Attorney does not make any submissions concerning the construction of the contractual provision relied on by the appellant. These submissions proceed on the basis that the contractual provision applies to exclude the appellant's liability for breach of the warranty implied by s. 74(1) of the TPA.

Section 109 inconsistency

9. As the respondent sought to rely on the implied statutory warranty in s. 74(1) of the TPA, the District Court was exercising federal jurisdiction within ss. 76(ii) and 77(iii) of the Constitution, which is conferred on that Court by s. 39(2) of the Judiciary Act: Agtrack (NT) Pty Limited v Hatfield (2005) 223 CLR 251, at [32], per Gleeson CJ and McHugh, Gummow, Hayne and Heydon JJ

10. Once the question of inconsistency between the CL Act and the TPA arose, the "threshold" issue to be determined by the Court was whether, on its proper construction, the State law was inconsistent with the federal law and, therefore, invalid to the extent of the inconsistency under s. 109 of the Constitution: Northern

Territory v GPAO (1999) 196 CLR 553, at [38] and [76], per Gleeson CJ and Gummow J; Agtrack (NT) Pty Limited v Hatfield, at [61]-[63].

General principles – s. 109

11. For the purposes of s. 109 of the Constitution, inconsistency has been taken to arise in one or both of two ways (see Victoria v The Commonwealth ("The Kakariki") (1937) 58 CLR 618, at 630, per Dixon J; also Dickson v R (2010) 270 ALR 1, at [13]-[17]):

    (a) where there is an "indirect inconsistency", ie, where an intention has been expressed, or where such an intention may be inferred, by the Commonwealth legislature to cover the field and the State law seeks to operate in that field: Ex parte McLean (1930) 43 CLR 472, at 483, per Dixon J. The Commonwealth Parliament may express an intention not to cover the field, although that in itself will not avoid any direct inconsistency: The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation (1977) 137 CLR 545, at 563-564, per Mason J; and

    (b) where there is "direct" inconsistency between the Commonwealth and State laws, ie, where a State law would alter, detract or impair the operation of the Commonwealth law: Telstra v Worthing (1999) 197 CLR 61, at [27]. Direct inconsistency can arise where a Commonwealth law permits the doing of things prohibited by State law or where it is impossible to obey both laws: Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466, at 490, per Isaacs J and 503, per Higgins J. It can also arise where it is possible to obey both laws, but one imposes a greater obligation: Telstra v Worthing, at [27]; Viskauskas v Niland (1983) 153 CLR 280, at 291.

12. The intention of the Commonwealth Parliament is central to the notions of "direct" and "indirect" inconsistency. Both notions require the Court to consider whether the Commonwealth law is intended to operate to the exclusion of the State law: Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237, at 260, per Mason J and at 280, per Aikin J; R v Winneke; ex parte Gallagher (1982) 152 CLR 211, at 233 and 235, per Wilson J and R v El Helou (2010) 267 ALR 734, at [24], per Allsop P.

No cover the field inconsistency

13. No "cover the field" inconsistency arises in this case. The terms of s. 75(1) of the TPA evince a clear legislative intention that Pt V of the TPA, which includes ss. 68 and 74, does not cover the field with respect to the topics dealt within under that Part: The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation, at 564, per Mason J.

14. Accordingly, the CL Act operates concurrently with the TPA, subject to any direct inconsistency.

There is no indirect inconsistency either

15. As the Court of Appeal rightly identified, the construction of the expression "the law of the State....applies to limit or preclude" in s. 74(2A) of the TPA is critical to determining whether there is a direct inconsistency between s. 5N of the CL Act and ss. 68(1) and 74(1) of the TPA.

16. Section 5N(1) of the CL Act, read together with s. 5N(2), preserves the validity and enforceability of a contractual term which excludes, restricts or modifies liability resulting from breach of an express or implied warranty that services will be rendered with reasonable care and skill:

    (i) in a claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise: s. 5A(1);

    (ii) only in respect of liability for negligence for harm to a person resulting from a "recreational activity" (as defined in s. 5K) engaged in by that person: s. 5J;

    (iii) where the contract is for the supply of "recreation services": s. 5N(4), that is, services supplied for the purposes of, in connection with or incidental to the pursuit of any recreational activity.

17. The State law does not give *carte blanche* to contracting parties to exclude contractual liability (*cf.* at [105] (**AB 195.30**), per Basten JA). Read together, ss. 5N(1) and 5N(2) operate in specific circumstances to provide statutory protection to a contractual provision which excludes or modifies liability resulting

from breach of a particular term in a contract, namely a warranty that services will be rendered with reasonable care and skill. The statutory protection does not apply in the circumstances specified by s. 5N(6).

18. Spigelman CJ was correct to construe the phrase "the law of the State.....applies to limit or preclude liability" in s. 74(2A), as including a State law, such as s. 5N, which gives statutory protection to a contractual provision that excludes or limits liability from breach of the implied warranty in s. 74(1).

19. Such a construction is consistent with the natural and ordinary meaning of the word "applies", having regard to the statutory context and the legislative purpose of s. 74(2A): see, for example, Minister for Immigration and Citizenship v SZJGV (2009) 238 CLR 642, at [5], per French CJ and Bell J. The verb "apply" has a broad meaning. It is defined in the Shorter Oxford Dictionary (5th ed., 2002) to include "having a practical bearing; have relevance; refer; be operative". Similarly, the term is defined in the Macquarie Dictionary (5th ed., 2009) to include "to bring to bear; put into practical operation, as a principle, law, rule, etc.".

20. Contrary to the view adopted by the majority, the legislative context does not require the word "applies" to be read down so as to restrict s. 74(2A) to picking up only a State or Territory law that, by its own terms, directly excludes or limits liability for breach of the warranty implied by s. 74(1).

21. It is evident from the terms of the legislation that s. 74(2A), read together with ss. 68 and 74(1), is intended to have a wide operation. The purpose of the provision is to roll back the operation of s. 74(1) by giving effect to State or Territory laws which permit contracting parties to exclude or limit liability for breach of the warranty implied by s. 74(1). The carve-out in s. 74(2A) is intended to apply across various jurisdictions and pick up multiple State and Territory laws which provide for such exclusion or limitation on liability. Section 74(2A) is not expressly restricted to picking up only State and Territory laws which directly limit or preclude liability.

22. In addition, s. 74(2A) has effect only where, *inter alia*, the implied warranty is inserted into the relevant contract by s. 74(1). The latter does not have direct effect. It creates an obligation which takes effect by a legal fiction, namely that the parties have made a contract which includes the implied term: Wallis v Downard-Pickford

(North Queensland) Pty Ltd (1994) 179 CLR 388, at 398, per Toohey and Gaudron JJ. As Spigelman CJ pointed out (at [33]-[34] (**AB 172.48-AB 172.62**)), it would be anomalous to construe the carve-out in s. 74(2A) as picking up only State and Territory laws which *directly* preclude or limit liability arising from breach of the implied warranty inserted by s. 74(1) in circumstances where s. 74(2A) only has effect if, *inter alia*, s. 74(1) (itself a provision which operates *indirectly*) applies.

23. Aside from these contextual considerations, the construction of s. 74(2A) contended for by the NSW Attorney is supported by the relevant legislative history (which is summarised in Spigelman CJ's judgment at [39]–[45] (**AB 173.60-AB 178.38**), leading to the insertion of subsection (2A) by cl. 8A of Sch. 1 to the Treasury Legislation Amendment (Professional Standards) Act 2004 (Cth) ("the Amending Act").

24. The Amending Act was passed following the decision in Wallis v Downard-Pickford. That case concerned the validity of s. 6(1) of the Carriage of Goods by Land (Carriers' Liabilities) Act 1967 (Qld), which applied to the contract of carriage in that case to directly limit the carrier's liability for damage to the goods to $200. The High Court held that, because s. 6(1) purported to limit the liability for breach of s. 74(1), there was a direct inconsistency between the two statutes. Section 109 of the Constitution rendered the State law invalid to the extent of that inconsistency.

25. Subsection 2A was inserted into s. 74 to overcome the effect of Wallis v Downard-Pickford. However, contrary to the suggestion in Basten JA's judgment (at [98], (**AB 192.58**)), the legislative history and extrinsic material indicate that s. 74(2A) is intended to apply beyond the facts of that case. The Parliamentary Secretary's Consideration in Detail Speech (at [44] (**AB 177.30**)) and the Supplementary Explanatory Memorandum (at [45] (**AB 178.16**)) confirm that, apart from the decision in Wallis v Downard-Pickford, the Commonwealth Parliament was concerned with ensuring that State and Territory reforms to the law of negligence, including the enactment of the CL Act, were not undermined by reliance on, *inter alia*, the implied warranty in s. 74(1) as an alternative to a claim in negligence.

26. Section 74(2A) was inserted to support State and Territory reforms of contract law and provide room for the operation of State laws which provide for the limitation or

exclusion of liability for breach of a condition that services be provided with due care and skill. Aside from the Parliamentary Secretary's Consideration in Detail Speech (at [44] (**AB 177.40**)) and the Supplementary Explanatory Memorandum (at [45] (**AB 178.36**)), that legislative intention was made clear in the Revised Explanatory Memorandum to the Treasury Legislation Amendment (Professional Standards) Bill 2004, at [1.14], [1.15] and [5.15]:

> 1.14 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.
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> 1.15 The amendments will seek to ensure that State and Territory reforms of the law of contract are not undermined.
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> .....
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> 5.15 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 provides that the proper law of the contract is a foreign law).

27. Similarly, in the Second Reading speech, Senator Ellison, Minister for Justice and Customs, said (Senate, Hansard (21 June 2004) at 24398):

> Amendments to the bill were moved in the debate in the House of Representatives. The amendments clarify the operation of the implied statutory warranty provisions in the Trade Practices Act 1974 and the Australian Securities and Investments Commission Act 2001. These amendments seek to ensure that state and territory reforms of the law of contract are not undermined.

28. The majority's conclusion that s. 74(2A) only picks up State and Territory laws which directly preclude or limit liability under a contract does not accord with the legislative history and extrinsic material.

Application of s. 5N in this case

29. In this case, the contract was for the supply for "recreation services" within s. 5N(4) of the CL Act (but not for the supply for "recreational services" within s. 68B of the TPA). Section 5N operates to preserve the validity and enforceability of the

contractual term relied on by the appellant to exclude its liability for breach of the warranty implied into the contract by s. 74(1).

30. If s. 74(2A) is construed in the manner contended for by the NSW Attorney, the provision applies to pick up s. 5N and itself excludes the appellant's liability for breach of the implied warranty in s. 74(1). Section 74(2A) thereby reduces the scope of s. 74(1) for the purposes of s. 68(1). The position is confirmed by s. 68(2): *cf.* Basten JA, at [103]-[104] (**AB 194.27-AB 195.21**). The State law does not, of itself, attempt to exclude or limit the operation of s. 74(1). Accordingly, there is no conflict between s. 5N of the CL Act, on the one side, and s. 68(1) and 74 of the TPA, on the other side.

31. It follows that no question of inconsistency arises for the purposes of s. 109 of the Constitution. As such, the State law applies in the proceedings as a surrogate Commonwealth law: s. 79 of the Judiciary Act; Solomons v District Court of New South Wales (2002) 211 CLR 119, at [20], per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ and at [74], per Kirby J.

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M G Sexton SC SG
Tel: 9231 9440
Fax: 9231 9444
Email: Michael_Sexton@agd.nsw.gov.au

Henry El Hage
Tel: 9232 8085
Fax: 8023 9547
Email: helhage@wentworthchambers.com.au