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

APPELLANT'S REPLY SUBMISSIONS

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

2. Contrary to the Respondent's submissions at [10(e)], [10(f)] and [17(b)] (but cf [19] and [20]), neither the text of s74(2A) nor the Supplementary Explanatory Memorandum provide support for the contention that s74(2A) was "essentially intended [by parliament] to support professional standards laws such as the *Professional Standards Act 1994 (NSW)*".

3. Whilst the extract quoted at [10(e)(i)] from the Second Reading Speeches may identify the original legislative purpose for the *Treasury Legislation Amendment (Professional Standards) Bill 2003*, which initially did not include the draft for s74(2A), the extract quoted at [10(e)(ii)] from the Supplementary Explanatory Memorandum makes it clear that the proposed amendments to the Bill, including the draft s74(2A), were intended to be of much broader application, namely, all contracts into which the *Trade Practices Act 1974* and the *Australian Securities and Investments Commission Act 2001* imply "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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4. The Respondent's submission at [10(h)] assumes, incorrectly, that section 68B TPA and section 5N CLA address the same subject matter. They do not. That is because s68B can only ever operate after a State or Territory law has already, by the operation of s74(2A), excised some aspect of liability for a breach of the warranty implied by s74(1). For the purposes of s68, a 'term of a contract' authorised by s74(2A) is one which is not 'inconsistent with' s74(2A) and is therefore, by virtue of s68(2), not a 'term of a contract' to which s68(1) applies. Accordingly, it is also not 'a term of a contract' to which s68B applies. There is no "collision" between s74(2A) and s68B. There is no need to amend s68B, which reflects the extent of Federal Parliament's limitation on liability in cases in which there is not already a relevant limitation by a State or Territory, in order "to make it consistent with the scope of s5N". There is nothing in the text of s74(2A) or any of the extrinsic materials which suggests a Federal legislative intention that "State and Territory reforms of the law of contract" be identical throughout Australia or that they be consistent with Federal reforms.

5. Contrary to the Respondent's submission at [11], the Appellant does not submit that, for the purposes of s74(2A), the expression "the law of a State" includes "a term of a contract". The Appellant's submission is that the expression means not only an individual statutory provision but also includes 'common law' contractual principles which operate in the context of relevant statutory provisions (for example, those identified in the Respondent's submissions at [18]) or which bear on the application of those statutory provisions within the particular State or Territory. That is what is meant by the words "in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract".

6. Accordingly, contrary to the Respondent's submission at [8(b)] and [14], s74(2A) provides that the whole bundle of statutory provisions and common law principles of the particular State or Territory, which are relevant to liability for breach of contract, apply to the warranty implied by s74(1) in the same way as they apply to liability for a breach of any other express or implied term of the particular contract.

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