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A contract law perspective of the *Civil Liability Amendment (Personal Responsibility) Bill* 2002 (NSW)

The 'insurance crisis' coined by the media has led to some rushed and ill-conceived proposed amendments to the law in NSW.[1] The focus of this paper is on contractual issues, rather than the issues concerning the reformulation of duties of care in tort. The particular issue here is the proposed waivers of contractual duties of care for recreational activities in the *Civil Liability Amendment (Personal Responsibility) Bill* 2002 (NSW). These proposals are similar to the amendments proposed in the *Trade Practices Act (Liability for Recreational Services) Bill* 2002 (Cth).

Effect of Proposed Section 5N Civil Liability Act 2002

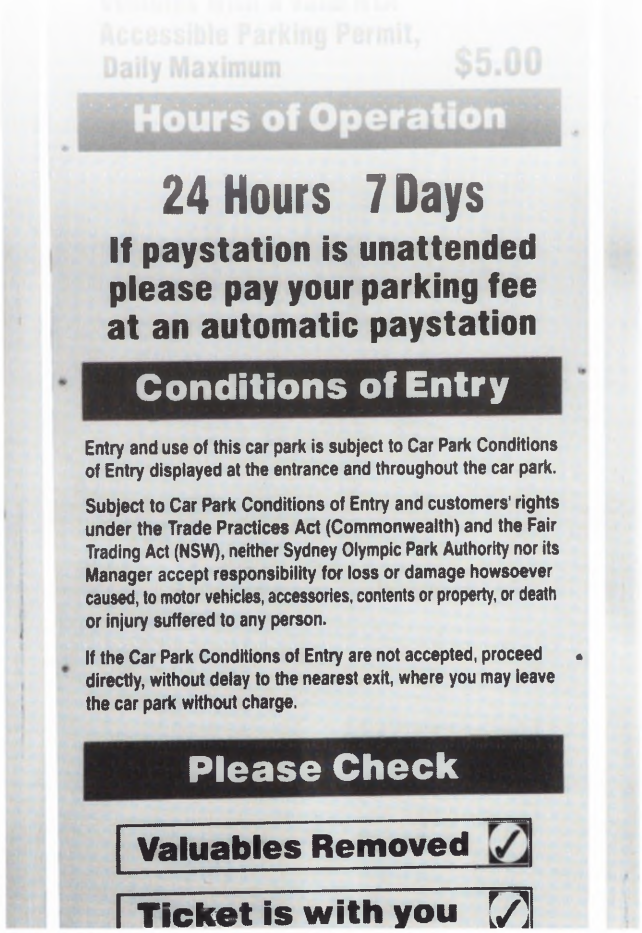
The NSW legislation seeks to reallocate the risk involved in 'recreational activities', with its wide definition, from the recreational service provider back to the consumer. In particular, this is to be achieved by allowing the consumer to waive his or her right to sue the service provider for a breach of a duty of care. 'The Bill provides that a contractual waiver will displace any implied condition or warranty that recreational services will be provided with due care and skill.'[2]

The proposed section 5N(1) and (2) provide:

'(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(2) Nothing in the written law of NSW renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.'

Section 5K defines 'recreational activity' as including: '(a) any sport (whether or not the sport is an organised activity); and (b) ▶



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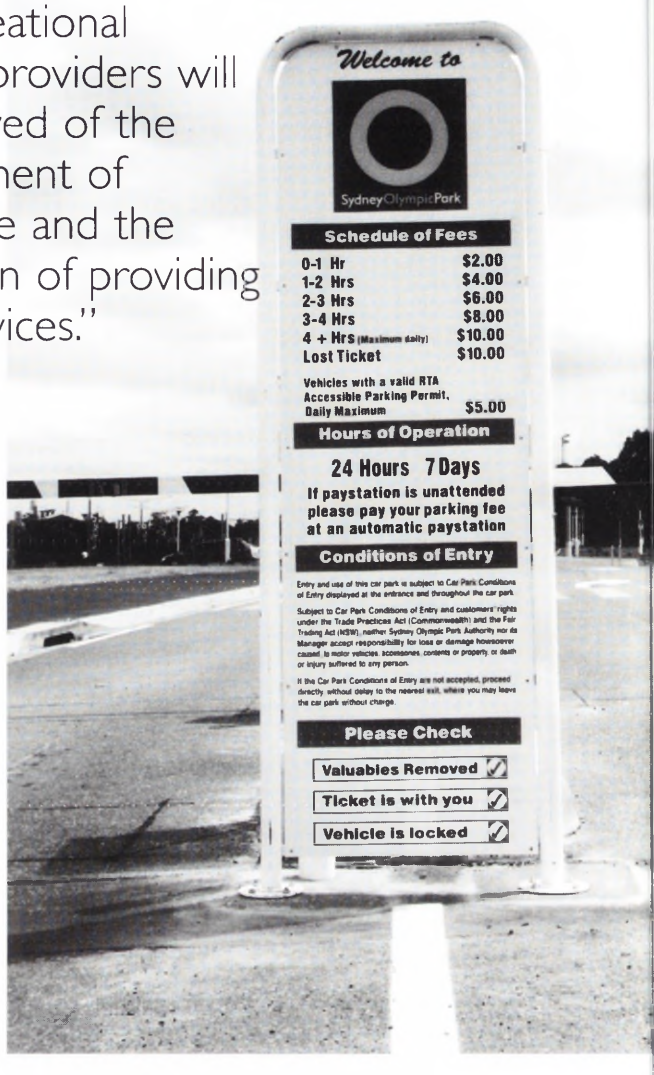
any pursuit or activity engaged in for enjoyment, relaxation or leisure, and (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure'. Section 5K(c) seems particularly wide as it would cover activities that are not ordinarily 'recreational activities', but happen to be carried out in a public environment. Furthermore, section 5N(4) provides that 'recreation services means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity', extending the reach of the exclusion of liability even further than just recreational activities.

> "... recreational service providers will be relieved of the requirement of insurance and the obligation of providing safe services."



Inconsistency with the Trade Practices Act

This proposed section is inconsistent with s68 *Trade Practices Act* 1974 (Cth), as it is currently enacted. Section 68(1) of the Trade Practices Act prohibits and renders void any term of a contract which purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:

(1) the application in relation to a contract of Div 2 of Pt V of the Act (the implied term provisions);

(2) the exercise of a right conferred by the implied term provisions;

(3) any liability of the seller for breach of a condition or warranty implied under Div 2; or

(4) the application of the section which confers and regulates the right of 'rescission' for breach of an implied term (s75A).

The effect of s68 can be seen in the following example. Assume that a corporation purports to exclude its liability for breach of the warranty (contained in s74) that services provided by it will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. A consumer who has contracted with a scuba diving school to provide instruction and equipment, and who suffers loss as a consequence of the breach of that implied term, will not be defeated in a claim for damages by the exclusion clause because s68 renders it void. It is, however, a question of construction whether the clause does have the effect of excluding,

restricting or modifying.

Another feature of the statutory prohibition on certain exclusion clauses is that the mere presence of the clause in the contract may, at least under the Trade Practices Act and fair trading legislation, give rise to a civil and criminal liability. It is therefore important, when drafting exclusionary provisions, not to make a 'false or misleading' representation concerning or about the 'existence, exclusion or effect of any condition, warranty, guarantee, right or remedy'.[3] Moreover, even if there is no express exclusion clause, a party who engages in conduct, such as the display of a notice, which would lead the reasonable person (consumer) to conclude that a statutory right is not available may also be engaging in prohibited conduct.

Nothing should be done in relation to contracts for the provision of recreational services in NSW, which would conflict with the Trade Practices Act.

Policy Concerns With Proposed Legislation

The Trade Practices Act provisions were the result of 20 years of negotiations to achieve minimum standards for consumers. What is proposed is a return to the 'bad old days' when the success of a consumer's claim depended on technical arguments made by lawyers and accepted by the courts out of sympathy for consumers who suffered from corporations who effectively said 'I promise to exercise care but I am not liable if I do not'.

The Ipp Report on the 'Review of the Law of Negligence' claims that changes to the law will not significantly reduce consumer protection, since ordinary rules of contract law are 'stringent'.[4] However, cases decided before the introduction of the Trade Practices Act show how the courts had to manipulate the rules on incorporation and construction of exclusion clauses to assist consumers. The advent of the Trade Practices Act and Contracts Review Act provided better mechanisms of consumer protection than the common law, and these will now be eroded. It would be a retrograde step to remove protection in the area of 'recreation'.

Where is the benefit in the proposal? There will be a reduction in the quality of service for those enjoying recreational services. Where is the *quid pro quo*? There is no guaranteed reduction in price even though suppliers are relieved not only of their responsibility to insure but also of their responsibility to supervise employees, keep their equipment in repair etc. There are major issues of fairness and exploitation that ought to be considered. For example, exclusion clauses cannot be challenged under the *Contracts Review Act* 1980 (NSW), which is acknowledged as the keystone of consumer protection structures in New South Wales. Consumers of recreational services would pay the same but receive less both in terms of quality of service and protection from unjust contracts. Effectively, recreational service providers will be relieved of the requirement of insurance and the obligation of providing safe services.

How Would The Legislation Work?

A practical example of the effect of the legislation reveals the naivety of the proposal. Assume two people who park in a parking station are injured. One is on the way to the theatre, the other to a business meeting. Parking in a car park in order to attend the theatre would seem to come within the meaning of the legislation, since the provision of parking services would be 'services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity'[5]. Do we really think that it is right and proper for the person who is on the way to the theatre to have no claim, when that of the business person is not affected, when both have agreed to be bound by terms containing an exclusion of the type which it is proposed to allow? Such a 'reform' could only be described as 'arbitrary' in the extreme. PL

Footnotes:

1 There have been legislative steps taken in other jurisdictions also. See for example, *Personal Injuries Proceedings Act* 2002 (Qld); *Civil Law (Wrongs) Bill* 2002 (ACT). Similar reforms are being discussed in Victoria, Northern Territory, South Australia and Tasmania.

2 The NSW Attorney-General's Department's September 2002 Position Paper on the *Civil Liability (Personal Responsibility) Bill* 2002 (NSW), p. 34.

3 See *Trade Practices Act 1974* (Cth), ss 53(g), 75AZC(k).

4 Report at 5.51.

5 s5N(4).