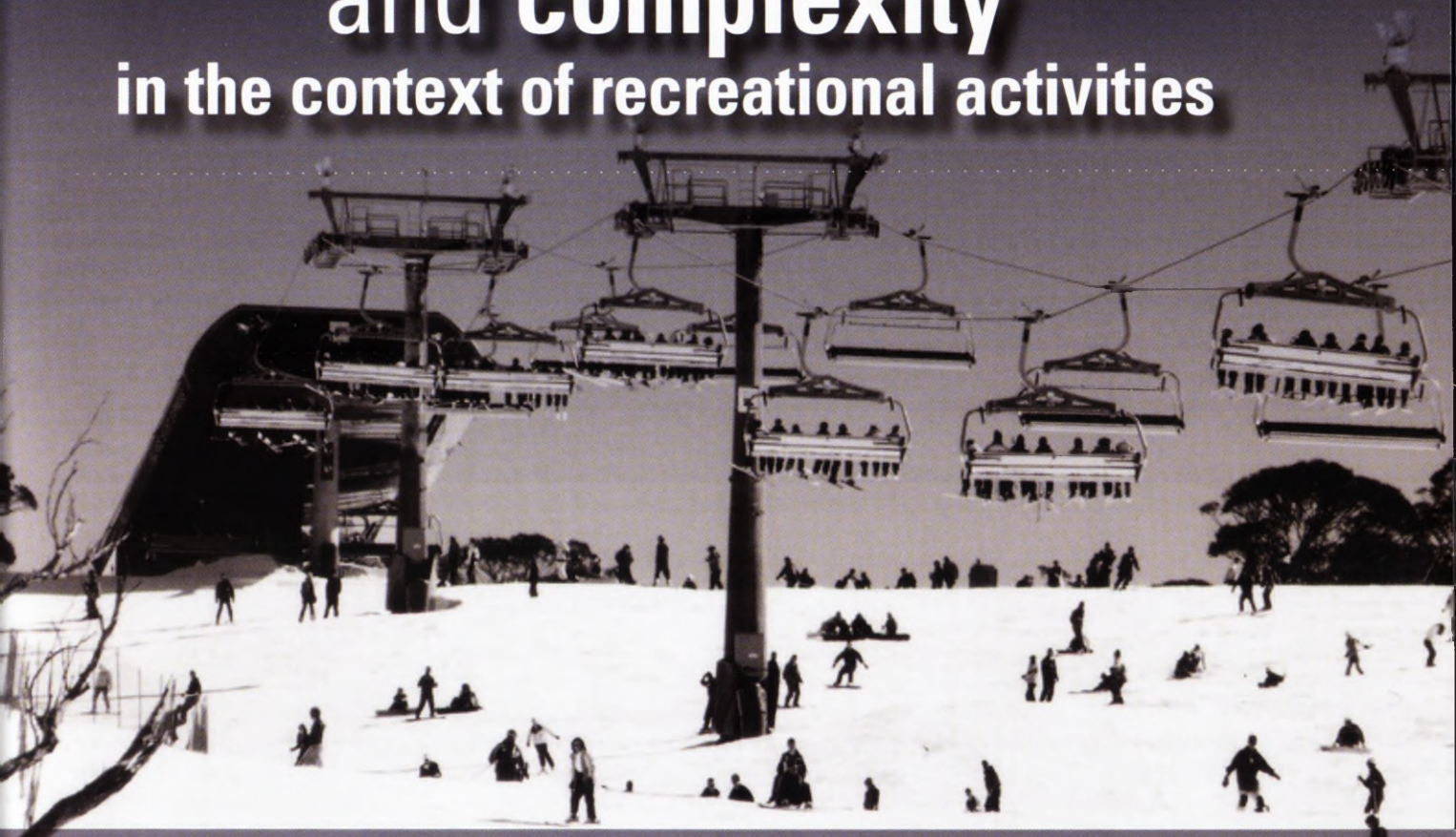
By Joachim Dietrich

Uncertainty, unfairness and complexity in the context of recreational activities



The law governing liability arising from personal injuries occurring in the course of recreational activities is exceedingly complex.[1] One of the complexities is that statutory guarantees that services be provided with due care and skill under the Australian Consumer Law (ACL) can be excluded via s139A *Competition and Consumer Act* 2010 (Cth) (CCA), limited in its application to Commonwealth jurisdiction. Importantly, therefore, the exclusion provision is not contained in the ACL itself, nor are there equivalent provisions in the State Fair Trading Acts or the CLAs.[2]

Under previous consumer protection laws, exclusion clauses were effectively invalid, which meant that someone injured in the course of recreational activities always had the option to sue for breach of consumer service guarantees.[3] Now, if an exclusion clause is successfully incorporated into a contract, such a clause will effectively preclude a negligence action. Therefore, recreational service providers can seek to minimise the risks of legal liability for injuries by means of contract terms that exclude or limit liability, that is, 'waivers' or 'disclaimers' as they are commonly called in the recreational sport and fitness industry (though the strict legal meanings of these terms differ to their more common usage and the most accurate *legal* descriptor of contract terms that exclude or limit liability is 'exemption' or 'exception' clauses). Given the significant number of injuries that occur in the context of recreational activities, and the widespread use of waivers, it is worth exploring when, precisely, such waivers are effective to deprive users of recreational services of their rights to sue. Unless carefully drafted and appropriately provided to a customer, such clauses may not in fact exclude, avoid or limit the legal liability, even where the law permits such exclusion clauses.

CONTRACT EXCLUSION ISSUES

Although the law of contract is critical if a recreational service >>

provider seeks to use an exclusion clause against a legal claim for a personal injury, it should be noted that the 'ordinary law of contract presents various significant obstacles' to the limitation or exclusion of liability[4] in general.

In this context, three issues arise:

(1) is the clause a part of the contract; that is, has it been incorporated as a term of the contract ('incorporation')?

(2) does it effectively exclude the liability that arises in the circumstance; that is, does the natural meaning of the clause cover the circumstances ('interpretation')?

(3) if the exclusion clause has been incorporated and excludes the liability in question, can an argument be made that the contract is, as a result, unfair, and hence able to be challenged under consumer protection laws dealing with 'unfair contracts'?

INCORPORATION

The law on the incorporation of exclusion clauses into contracts is not straightforward. Where an ostensibly contractual document has been signed, there is a presumption that its terms are binding, even where the parties have not read the terms and conditions.[5] For example, in *Totman v Pyramid Riding Stables Ltd*,[6] an exclusion clause was incorporated by the parties' signature in relation to a contract for horse-riding services.

Nonetheless, an exclusion clause might not be binding if the signed document is not, on its face and from its appearance, contractual in nature. For example, in *Lormine Pty Ltd & Anor v Xuereb*, a document containing an exclusion clause signed by the passenger of a cruise was held not to be contractual in intent.[7] The document had been represented as being about 'passenger numbers'. Further, an exclusion clause might not be binding, or might not take effect to the full extent of its terms, if there has been any misrepresentation as to its effect or meaning.[8]

Where a contract has not been signed or, if it has, the term that is sought to be relied on is not part of that signed document, then further difficulties in incorporation arise. Incorporation by notice may be difficult,[9] especially where the term is particularly harsh and oppressive.[10] This is illustrated by cases concerning terms on tickets, or on notices.

INTERPRETATION

Even if the clause is part of the contract, the courts have traditionally taken a cautious approach to interpreting exclusion clauses widely. In theory, a clause of a contract can exclude liability for almost any type of breach (except for reckless conduct under s139A CCA) as long as its natural meaning encompasses such breach or conduct.[11] As a practical matter, however, it would need to be well drafted and unambiguously expressed. This is all the more so where the contract is one entered into by a client or consumer and a business entity. Clauses are not effective to exclude liability for negligence, or for a serious breach of contract, unless the words unambiguously encompass such conduct.[12] Thus, in *Mouritz v Hegedus*,[13] a clause stating that a service provider would not be held 'responsible in any way' in case of accident, damage or any other mishap, was not sufficient to exempt the service provider for liability for the fundamental breach that had occurred.

Another example in which the defendants attempted to rely on a badly drafted exclusion clause is *Belna Pty Ltd v Irwin*.[14] In that case, Belna Pty Ltd (owner of Fernwood Fitness Centres) relied on a clause in the contract between Belna Pty Ltd and Ms Irwin, that stated:

> 'It is my expressed interest in signing this agreement, to release Fernwood Fitness Centre, its Directors, Franchises, Officers, Owners, Heirs and assigns from any and all claims for professional or general liability, which may arise as a result of my participation, whether fault may be atributed to myself or its employees. I understand that I am totally responsible for my own personal belongings whilst at the Centre. I also understand that each member or guest shall be liable for any property damage and/or personal injury while at the Centre.'[15]

The judgment of Ipp JA devoted little time to the interpretation of this clause, in part because it failed on so many fronts adequately to exclude liability. The use of the term 'release' was inappropriate: it is a technical legal term that generally applies to a plaintiff 'releasing' another for a liability that has already occurred, rather than one that applies to exclusion of future liability that may occur. In other words, the statements: 'I will *exclude* you from liability for any breaches of your contract *over the next two years*' or 'I am *releasing* you from your liability for the breach of your contract *that occurred* last week' are meaningful and clear statements; whereas a statement such as 'I *will release you* from any breaches of your contract in the future' is not. Other difficulties included the use of the phrase 'my expressed interest' which the court considered to be a concept of 'indeterminate meaning';[16] and the phrase 'claims for professional or general liability' did not necessarily encompass negligence.[17] The court agreed with the conclusion that '[t]he clause is not merely ambiguous, it is likely unintelligible' and that it was 'so vague as to be meaningless'.[18] What is evident here is that the court sought to interpret the terms in the clause in a technical way, giving them their legal, strict or narrow meanings, even though it may have been drafted (perhaps deliberately) using broad and loose language.

UNFAIR CONTRACT TERMS

As part of the ACL, all jurisdictions now have provisions that allow for remedies in relation to unfair contract terms (Part 2-3 ACL). Specifically, an 'unfair term of a consumer contract' is void under s23 and compensation for loss and other remedial orders can be sought (see, for example, s237 and s239 ACL). Such a term must be contained in a 'standard form contract' under s 27. Any contract that is alleged to be a standard form contract is presumed to be so (s27(1)). Given the sort of factors that are relevant to determining whether a contract is a standard form contract (s272)), the vast majority of recreational service contracts are likely to be standard form consumer contracts.

The question that thus arises is: even where an exclusion clause is permitted by s139A CCA, can an injured consumer argue that the clause is an 'unfair term' under Part 2-3 ACL?

Taking s24 first:

'24 Meaning of *unfair*

(1) A term of a consumer contract is ***unfair*** if:
  (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
  (a) the extent to which the term is transparent;
  (b) the contract as a whole.

(3) A term is ***transparent*** if the term is:
  (a) expressed in reasonably plain language; and
  (b) legible; and
  (c) presented clearly; and
  (d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.'

Critically, two relevant considerations listed in s25(1) ('Examples of unfair terms') could be used to support the view that a wide-ranging 'exclusion', of itself, is unfair:

'(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract; ...

(i) a term that limits, or has the effect of limiting, one party›s vicarious liability for its agents; ...

(k) a term that limits, or has the effect of limiting, one party's right to sue another party; ...'

Paragraph (a) is ambiguous. It could refer only to terms that avoid or limit a party's obligation to perform the contract and thus only preclude contracts of a type that allow a party a choice as to whether it performs its obligation or not.[19] Alternatively, it could also include contract terms that exclude or limit secondary obligations to *pay damages for breach*. If the courts were to adopt the latter interpretation, then exclusion clauses can clearly be challenged on this ground. Further, it is probably not uncommon for exclusion clauses to seek to limit one party's vicarious liability, within para 25(1)(i).

Alternatively, leaving aside challenges based on substantive unfairness, it may be possible to demonstrate procedural unfairness from the circumstances in which a contract is entered into. There is little case law on the topic in Australia dealing with exclusion clauses, though some cases have arisen under the *Contracts Review Act* 1980 (NSW). For example, in *John Dorahy's Fitness Centre Pty Ltd v Buchanan*,[20] the NSW Court of Appeal held that a wide-ranging exclusion clause in a fitness centre contract was 'unjust' in its width of operation when considered alongside the circumstances in which the contract had been entered. Mahoney P noted that the mere fact that a contract contains an exclusion clause does not render it 'unjust': 'there are legitimate commercial reasons' for including such a provision.[21] Nonetheless, Mahoney P focused both on the substantively unfair operation of the clause (its width) and factors such as that the document was tendered without explanation or expectation that the customer would read it.[22] Interestingly, the Court reached the conclusion that the exclusion clause was unjust even though relevant factors such as those in paras (a) and (i) of s25(1) ACL (set out above) were not in the *Contracts Review Act*.

That decision can be compared with *Gowan v Hardie*,[23] where the existence of a wide-ranging exclusion clause was not a factor that on its own rendered the contract 'unjust' in the circumstances (a trainee parachutist suffering injury from defendant's negligence). There was no procedural unfairness on entry into the contract and the term was clear and unambiguous.[24]

To summarise, the new 'unfair terms' part of the ACL is another source of uncertainty: novel legal arguments can be made seeking to strike down a contract or a clause of a contract because it purports to exclude, in wide-ranging circumstances, liability for breach of the contract or for torts. Such arguments would seek to overcome the effects of s139A CCA that permits exclusion clauses. It adds a further level of complexity and uncertainty to the legal position and could lead to litigation, but it could also prevent reliance on potentially harsh and oppressive exclusion clauses. >>

MINORS

One further issue arises even where an exclusion clause has been successfully incorporated into a contract and is sufficiently clearly worded to exclude liability for the type of negligent conduct engaged in by the supplier of the recreational services. The question that arises is: what if the injured party was a minor; that is, someone under 18 years old?

Minors do not have contractual capacity; that is, they are not bound by contracts. As a consequence of this fundamental common law principle, contracts entered into by minors, with some exceptions, are unenforceable against them. The precise legal position is complicated by varying statutory amendments to the common law in some jurisdictions,[25] and a wholesale legislative approach in NSW. For present purposes, it suffices to summarise the general common law principles that apply in all jurisdictions (since the statutory amendments have no impact on the issues under consideration here).[26]

Under general common law principles, a minor does not have capacity to contract unless the contract is one for *necessary* goods or (relevantly here) beneficial services. Further, even if the contract is for 'necessaries', such as a contract for transportation to and from work, the contract as a whole must be of benefit to the minor.[27] For example, in *Flower v London and North Western Railway Company,*[28] a contract for the necessary transportation of a minor to and from work was nonetheless not binding upon him as it was detrimental. Specifically, the contract had sought to exclude the liability of the railway company for any accident, injury or losses occasioned by the company, even by their negligence. Exceptionally, if a contract as a whole is of benefit, then an exclusion clause may be held to be binding against the minor, such as where common law liability is excluded alongside provisions for no-fault insurance cover in a contract of employment.[29]

In any case, it will be a rare situation where a contract for recreational services will be considered *necessary* at least where recreation is one reason for undertaking such activities unless, perhaps, the services relates to something like the provision of educational holiday camps, or sports training, or fitness classes engaged in for medical reasons. Even if such contracts were considered to be for necessaries, the presence of exclusion clauses almost certainly renders them not ones that as a whole are for the benefit of minors.

If a contract of service is not binding against the minor, the minor can sue in a *tort* claim in negligence by avoiding the contract containing the waiver clause.

It could be argued that one way around this difficulty is for the parent or guardian of a minor to sign a contract on their behalf. However, such a contract entered into by a service provider and a parent of a minor is not *prima facie* binding on the minor. Not being a party to the contract, the rules of privity of contract apply: generally speaking, the concept of privity of contract means that only those who have entered into the contract are bound by its terms.[30]

One way around the privity problem is to argue that parents are acting as agents for minors on whose behalf they contract. However, the mere *status* of parent (or guardian) does not carry with it any general power to act on the minor's behalf.[31] There appears to be little authority on the point, but Young J affirmed this position in *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd.*[32] Further, even though minors have power at common law[33] to appoint agents, the acts of such agents have no greater validity against the minor than they would have if the minor had acted on his or her own behalf.[34]

Ultimately, there is simply no legal basis on which parents can enter into contracts on behalf of minors that the minor could not enter into themselves. Further, it is the underlying basis for the incapacity rule itself, namely the protection of those who are otherwise vulnerable, that provides the strongest arguments against exclusion clauses being enforceable against minors, even when signed by competent adults on their behalf.

One way in which recreational service providers might seek to overcome these difficulties when dealing with minors is to require parents to sign an *indemnity* agreement. The terms of such an agreement would require the parents to indemnify the provider against any damages or losses arising from a claim by the minor against the provider. Obviously, if valid, such an indemnity could well significantly reduce the incidence of litigation against service providers by minors. Although I am not aware of any Australian authority on point, one must question the validity of any such indemnity, however. It can be argued that it is contrary to public policy to deprive minors, in effect and for most practical purposes, of their legal rights by such a backdoor means, and such a conclusion has been reached in some United States jurisdictions where the question has been litigated.[35] Conversely, at least one English authority has upheld the enforceability of an adult's contract to indemnify a finance company for any loss arising from a car hire-purchase agreement entered into with a minor.[36] Since that case involved losses arising from benefits conferred to the minor, it is distinguishable, however, from the situation of parents indemnifying service providers for liabilities incurred to minors from their negligent conduct. Needless to say, the question remains open. As far as I am aware, such indemnity agreements are not uncommonly used in the recreational context and, no doubt, litigation on their validity will be forthcoming.[37] ■

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Notes: **1** See J Dietrich, 'Personal Injuries and Recreational Activities', *Precedent* 115, March/April 2013, pp32–37. **2** See J Dietrich, 'Service guarantees and consequential loss under the ACL: The illusion of uniformity', (2012) 20 *Competition and Consumer Law Journal* 43. Sections 5N of the CLA (NSW), and 5J of the CLA (WA) are at present redundant since they only allow for the exclusion of contractual implied terms and not the statutory guarantee of due care and skill under s60 ACL. **3** The presence of s68 of the *Trade Practices Act* 1974 (Cth) precluding the exclusion of service guarantees no doubt indirectly facilitated tort claims; the absence of enforceable exclusion clauses in contracts of service also meant that tort claims in negligence could not be excluded. Interestingly, in some cases, plaintiffs do not seem to have raised arguments as to the invalidity of exclusion clauses (as a result of s68 TPA) despite their apparent relevance, eg *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200 though this did not affect the outcome in that case as the court interpreted the exclusion clause narrowly as not excluding liability for the accident that had occurred. **4** See Ipp Committee, *Review of the Law of Negligence Final Report,* para 5.52 (October 2002). The report can be accessed at <www.revofneg.treasury.gov.au>. **5** See *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165; 211 ALR 342; the case reaffirmed earlier statements of the rule in cases such as *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. See also E Peden and J W Carter, 'Incorporation of Terms by Signature: *L'Estrange* Rules!' (2005) 21 *Journal of Contract Law* 96. **6** (1992) 132 AR 332 (Alberta Court of Queen's Bench). **7** [2006] NSWCA 200, [11]-[23]. See also *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661. **8** See, for example, *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805. **9** See, however, *Bright v Sampson & Duncan Enterprises Pty Ltd* (1995) 1 NSWLR 346. **10** See, for example, *Interphoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] 2 QB 433, 443. **11** See, for example, *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500. **12** It should be noted that s5N(3) of the CLA (NSW), and s5J(3) of the CLA (WA), make it easier for service providers to exclude liability: stating that participants engage in an activity at their 'own risk' is deemed to be effective as a waiver. These sections are at present redundant, however, being applicable to implied terms only. **13** Unreported, Western Australia Full Court of the Supreme Court, Kennedy, Ipp and Owen JJ, 19 April 1999. The decision must be questioned, however, because of some of its reasoning, in particular, the reference to notions of 'fundamental breaches' of contract that do not form part of Australian law. See also the contrasting views of Mahoney P and Cole J as to the operation of the exclusion clause in *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (Unreported, Court of Appeal of New South Wales, Mahoney P, Cole JA and Cohen AJA, 18 December 1996); and compare *Neil v Fallon* (1995) Aust Torts Reports 81-321. **14** [2009] NSWCA 46. **15** See [2009] NSWCA 46, [38]. **16** *Ibid,* [39]. **17** *Ibid.* **18** *Ibid,* [40]. **19** cf *Macrobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125. The reference here is to what is legally called the primary obligation to perform, as compared to the secondary obligation to pay damages to compensate for losses incurred as a result of a failure to perform. **20** Unreported, Court of Appeal of New South Wales, Mahoney P and Cohen AJA, Cole JA dissenting, 18 December 1996. **21** *Ibid,* 14. **22** *Ibid,* 15. **23** [1991] NSWCA 126. **24** A fruitful source of arguments and relevant judicial decision-making might be found in cases under the English *Unfair Contract Terms Act 1977.* Under that Act, courts have in some circumstances deemed clauses excluding liability for negligence as 'unfair'. See, for example, Elizabeth Macdonald, *Exemption Clauses and Unfair Terms,* Butterworths, 1st ed, 1999, 198-9, 203-4. **25** See generally J W Carter, *Contract Law in Australia,* LexisNexis Butterworths, 6th ed, 2013, [1504] ff and [15-26] ff and NC Seddon, RA Bigwood & MP Ellinghaus, *Cheshire and Fifoot Law of Contract 10th Australian Edition,* LexisNexis Butterworths, Australia, 2012, [17.2] ff. **26** The position under the NSW legislation appears similar and will not be further noted. See *Minors (Property and Contracts) Act 1970* and generally, D Healey, 'Disclaimers, Exclusion Clauses, Waivers and Liability Release Forms in Sport: Can They Succeed in Limiting Liability?' in M Fewell (ed), *Sports Law A Practical Guide,* LBC Information Service, 1995, pp210-12. **27** See generally D J Harland, *The Law of Minors in Relation to Contract and Property* (Butterworths, 1974) Ch 2; Carter, n 26 above, [15-09] ff. **28** [1894] 2 QB 65. See also *Keays v Great Southern Railway Co* [1941] IR 534, and *Harnedy v National Greyhound Racing Company Ltd* [1944] IR 160. **29** See *Clements v London & North Western Railway Co* [1894] 2 QB 483. **30** Statutory exceptions to the privity rule, allowing third parties to enforce benefits promised under a contract, such as under s55 *Property Law Act* 1974 (Qld), are obviously not applicable in their terms in these circumstances: the service provider in seeking to rely on a waiver is imposing a burden on the minor by taking away common law rights (to sue in torts). **31** See Harland, above note 28, [201]. **32** (1996) 131 FLR 447 at 456. See also the comments of Bryson JA (Beazley JA agreeing) in *Ohlstein bht Ohlstein & 3 Ors v E & T Lloyd trading as Otford Farm Trail Rides* [2006] NSWCA 226 [170]. **33** See also s46 *Minors (Property and Contracts) Act* 1970 (NSW). **34** Harland, note 28 above, [508]-[509]. **35** See the summary of some of the competing authorities in J Dietrich, 'Minors and the exclusion of liability for negligence' (2007) 15 *Torts Law Journal* 87, 98-101. **36** See *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828 (CA). **37** See, for example, the parent/guardian approval clause in the terms of entry to the Coolangatta Gold Event: http://eventdesq.imgstg.com/index.cfm?fuseaction=RegisterAdd1&EventDesqID=560&OrgID=1366; and also the waiver and indemnity in respect of minors clause in the Declaration, Waiver and Indemnity Agreement for the South Australian City to Bay event: http://www.city-bay.org.au/pdf/Indemnity.pdf.

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