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Minors and the exclusion of liability for negligence

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Are minors bound by contractual waivers excluding liability for negligently inflicted personal injury? As a result of changes to Australian law, the use of waivers and indemnities, seeking to shield recreational services providers and others from their liabilities for negligence in contract or tort, will become increasingly widespread. This article addresses the question of whether minors can be bound by contractual waivers or indemnities. Given the contractual incapacity of minors, such waivers are (most likely) unenforceable against minors, as are (more arguably) indemnity agreements obtained against their parents. Hence, minors injured as a result of the service providers' negligence can continue to seek legal redress for damages suffered.

1 Introduction

Are minors bound by contractual waivers that exclude liability for negligently inflicted personal injury? An answer to this seemingly narrow, contractual, question is now critical in some circumstances to the determination of negligence claims for compensation for personal injury as a result of recent changes to Australian law. These changes, in response to the perceived torts and public liability insurance 'crisis', include amendments to consumer protection provisions of the Trade Practices Act 1974 (Cth) (TPA) as well as statutory changes to tort law effected by state legislation under the various state 'Civil Liability Acts'.[1] In essence, the effect of these changes is to allow (and, indeed, positively encourage) contractual provisions excluding (or limiting) the liability of service providers[2] in the context of recreational

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1 This shorthand term will be used for convenience, though the titles of the various Acts, like their content, are not uniform. The relevant acts in each jurisdiction are as follows: Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (NSW); Personal Injuries (Liabilities and Damages) Act 2003 (NT); Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA); Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic); and Civil Liability Act 2002 (WA).

2 I am assuming that contracts are entered into between service providers and persons seeking services either for themselves or on behalf of minors. Presumably, if such a contract sought to extend the protection of a waiver clause to persons other than the service providers (eg, their employees), privity of contract would prevent such extension unless those parties were also parties to the contract or unless statutory or other exceptions to the privity doctrine applied. One exception arises in the context of exclusion clauses that protect third parties to shipping contracts. See *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Ltd; The New York Star* (1980) 144 CLR 300; 30 ALR 588; [1980] 3 All ER 257 (PC); reversing the decision of the High Court of Australia at (1978) 139 CLR 231; 18 ALR

services. If binding, such waivers may effectively prevent a claim (in tort or for breach of contract) by a party suffering personal injury as a result of the service provider's negligent provision of such services. Importantly, anecdotal[3] and other evidence[4] suggests that there is a widespread use of exclusion or exemption clauses, disclaimers or waivers, as they are variously known, in contracts for the provision of sports and recreation services generally, including to minors (persons under the age of 18). Perhaps because of the often high risk nature of the activities,[5] schools, sports and recreation clubs, and private (for profit) service providers in the large sport, recreation and children's entertainment market, frequently require parents or guardians[6] of child participants under their care or, less frequently, the child participants themselves, to enter into contracts waiving any rights of the children to sue for personal injuries sustained, even negligently.[7]

For convenience, I will label terms that seeks to exclude, restrict or modify liability for breach of an express or implied term of 'due care', or for negligence generally, 'waiver' or 'exclusion' clauses. The common feature of such clauses is that they exempt a party from liability, wholly or in part, that they would otherwise have borne but for the existence of the clause. The terms 'waiver' and 'exclusion' clauses also include clauses under which parties assume the risks of certain conduct, such that no liability arises at all, (1) in tort, if the terms successfully establish a voluntary assumption of risk or preclude a duty of care arising or being breached, or (2) in contract, if the terms preclude there being a breach of contract.[8]

This article addresses the question of whether minors can be bound by

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333. See, generally, N C Seddon and M P Ellinghaus, *Cheshire & Fifoot's Law of Contract*, 8th Aust ed, Butterworths, Sydney, 2002, at [7.37]–[7.41]. On the even more problematic issue of the burden of exclusion clauses being imposed on third parties, see Seddon and Ellinghaus, at [7.42].

3 This means that I have asked friends and colleagues.

4 See, eg, *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200 (unreported, 25 July 2006, BC200605761). Numerous websites contain samples of waiver and indemnity agreements, many specifically aimed at parents. See, eg, the waiver and indemnity agreement for the 'Cole Classic' surf swimming carnival, <www.coleclassic.com/2006/1kchallenge/conditions> (accessed 8 January 2007).

5 See, eg, L Flood and J E Harrison, *Hospitalised Sports Injury, Australia 2002–03* (AIHW cat no INJCAT 79), AIHW, Adelaide, 2006, p 6, Table 3.1. Nearly one third of all sport and recreation-related hospitalisations in the 2002–03 financial year were in the 0–14 age group; and nearly 30% were in the 15–24 age group. In total there were more than 45,000 hospitalisations in that year. See also the statistics cited by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; 186 ALR 145 at [62], that in 1995, 228,800 persons had sport or recreational activity-related injuries in the month immediately prior to a health survey.

6 For convenience, 'parents' will be used throughout to include guardians and other adults taking care of children.

7 Probably, such exclusion clauses and waivers were widely in use even before these changes to the law, but they were of more limited utility and legal effect, though they may well have had the practical consequence of deterring potential litigants who assumed such waivers to be legally effective. On attempts to limit liability in the context of sports and recreation generally, see 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 Services, Sydney, 1995, Ch 6.

8 See Civil Liability Act 2002 (NSW) s 5N, discussed below, in relation to the use of the language of 'assumption of risk'. Although it might be argued that a contract implies the

contractual waivers and related issues, such as whether there are alternative ways in which service providers might protect themselves against liability, for example, by seeking contractual indemnities from parents. Although the context in which the question arises is thus an Australian one, driven by recent changes to Australian law, nonetheless it is answered by resort to common law contract principles and is thus of relevance to all common law jurisdictions.[9] Presumably, the same considerations arising in relation to minors would also apply to other persons under a legal incapacity; but this article will deal only with minors.

There is little recent authority on the legal effect of contracts (whether entered into by children or their parents) containing potentially oppressive clauses limiting minors' rights to sue in negligence. In light of recent changes to the law, it is important that the issue now be addressed. Despite the widespread use of contractual waivers, it will be concluded that such waivers are ineffective in excluding liability for personal injury claims by minors. Further, despite the absence of authority in point, I contend that contracts requiring parents to indemnify negligent parties for liabilities incurred to minors are unenforceable as contrary to public policy.

The article proceeds by setting out in section 2 the recent changes to the law that have altered the legal landscape to a more 'exclusion clause'-friendly environment. Section 3 briefly discusses how exclusion clauses may be incorporated into a contract and when they are binding. Section 4 considers the effect of exclusion clauses incorporated into contracts entered into by the minors themselves, on their own behalf. Section 5 considers the effect of exclusion clauses incorporated into contracts entered into by parents on behalf of minors. Section 6 examines contracts of indemnity entered into with parents, and considers, with reference to United States authorities, whether such indemnity contracts are contrary to public policy and hence unenforceable. Finally, section 7 briefly considers whether attempts to exclude liability for the negligent provision of services to minors amount to misleading or deceptive conduct.

2 Statutory background

A person injured in the course of activities engaged in under a contractual provision for services may be able to sue the defendant service provider in the tort of negligence, or for breach of either an express[10] or implied term of the contract. In particular, where a plaintiff 'consumer' (as defined in TPA s 4B) enters into a contract for the provision of services with a defendant who is a 'corporation' (as defined in s 4, or whose conduct otherwise falls within the more extended operation of the TPA under s 6), then s 74 implies a term that the services will be 'rendered with due care and skill' and that any materials supplied in connection with the service be 'reasonably fit for the purpose'.

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acceptance of certain risks, such an argument would be difficult to sustain, and all the more so against a minor: see *Australian Racing Drivers Club Ltd v Metcalf* (1960) 106 CLR 177 at 184–5; [1962] ALR 217.

9 The discussion of US authorities below demonstrates this.

10 See, eg, *Mouritz v Hegedus* [1999] WASCA 1061 (unreported, 19 April 1999, BC9901806), affirming *Hegedus v Mouritz* (1997) 18 SR (WA) 327.

(For present purposes, it is assumed that a 'consumer' has entered into a contract with a provider caught by the TPA.) As a result of s 68,[11] and prior to the insertion of s 68B into the TPA, there were no exceptions to the non-excludability of s 74. Perhaps surprisingly, although suppliers of services, in theory, could have contractually excluded liability in tort for negligence, while only having a limited capacity to restrict their liability for breach of s 74, most claims for personal injury in the past generally appear to have been brought in negligence, rather than in contract for breach of s 74.[12] Nonetheless, the presence of s 68 no doubt indirectly facilitates such tort claims: the absence of enforceable waiver clauses in contracts also means that claims in the tort of negligence are generally not excluded. Equivalent provisions to those in the TPA (not limited in their application to 'corporations') exist in four states.[13] In all jurisdictions service providers can, of course, exclude their liability to adults in tort.

Trade Practices amendments: s 68B

As part of the Federal Government's response to the perceived insurance and torts law 'crisis', s 68B was inserted into the TPA in December 2002. The stated purpose of s 68B is to 'permit self-assumption of risk by individuals who choose to participate in inherently risky activities, and [to] allow them to waive their rights under the' TPA.[14] The section provides:

Limitation of liability in relation to supply of recreational services

11 This provides that any term of a contract that seeks to exclude, restrict or modify the application of s 74 is void. See, however, s 68A, which allows for terms of contracts limiting liability, in relation to services *other than those* ordinarily acquired for personal, domestic or household use. If such services are performed in breach of contract, liability can be limited to the resupply of the services or the costs of such resupply (s 68A(1)(b)), unless it is not 'fair or reasonable' for a corporation to rely on such term (subs (2)). Where a plaintiff suffers personal injury as a result of the negligent performance of services in most recreational and sporting contexts, such services would ordinarily be for personal or domestic 'use' and hence s 68A could not be relied on to exclude liability. In relation to other sections of the TPA, and other legislation, the phrase 'personal, domestic or household use' has been broadly construed. See, eg, *Bunnings Group Ltd v Laminex Group Ltd* (2006) 153 FCR 479; 230 ALR 269. Further, I suggest that it would not be fair or reasonable to rely on such a limitation clause where personal injury has been suffered.

12 See, eg, the very small number of cases listed under s 74 in R V Miller, *Miller's Annotated Trade Practices Act*, 27th ed, Lawbook Co, Sydney, 2006.

13 The equivalent sections to ss 74 and 68 are, respectively: Fair Trading Act 1987 (NSW) ss 40S and 40M; Consumer Transactions Act 1972 (SA) ss 7 and 8; Fair Trading Act 1999 (Vic) ss 32J, 32JA, 32L and 32LA (as a result of the Fair Trading Act Amendment Act 2003 (Vic), these provisions have been incorporated into the Fair Trading Act and repealed from the Goods Act 1958 (Vic)); Fair Trading Act 1987 (WA) ss 40 and 34. In New South Wales, a plaintiff may also seek to overcome the effects of a waiver clause by relying on the Contracts Review Act 1980 (NSW), as in *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (unreported, NSW CA, 18 December 1996, BC9606183), discussed below. Since the amendments discussed below are not retrospective, many children's claims still to be pursued will be determined by the law prior to the insertion of s 68B (and s 82(1AAA) and s 82(1AA), discussed in n 31 below) and equivalent state legislative amendments.

14 Explanatory Memorandum provided with the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (Cth). For a more detailed consideration of the background to the legislative changes, see A Haly, 'The Trade Practices Amendment (Liability for Recreational Services) Act 2002: Complete solution or deficient response?' (2003) 11 *CCLJ* 1.

(1) A term of a contract for the supply by a corporation of recreational services is not void under section 68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:

(a) the application of section 74 to the supply of the recreational services under the contract; or

(b) the exercise of a right conferred by section 74 in relation to the supply of the recreational services under the contract; or

(c) any liability of the corporation for a breach of a warranty implied by section 74 in relation to the supply of the recreational services under the contract;

so long as:

(d) the exclusion, restriction or modification is limited to liability for death or personal injury; and

(e) the contract was entered into after the commencement of this section.

Section 68B(2) widely defines 'recreational services' as meaning:

services that consist of participation in:

(a) a sporting activity or a similar leisure-time pursuit; or

(b) any other activity that:

(i) involves a significant degree of physical exertion or physical risk; and

(ii) is undertaken for the purposes of recreation, enjoyment or leisure.

The effect of s 68B is to allow for contractual waivers of liability for breaches of s 74.[15] Clearly, s 68B envisages that defendant corporations may thus exclude liability for the negligent performance of services (or the supply of unfit materials in connection with the service). If such a waiver successfully excludes liability for conduct amounting to a breach of s 74, in most cases it will also exclude liability for breach of a duty of care in tort.[16] If a waiver is not effective in excluding liability for breach of s 74, either because it has not been validly incorporated into a contract, or is not interpreted to extend to an exclusion of liability for negligent conduct, then a claim for breach of the contract will be available against a corporate service provider. In such a case, even if the waiver operates to exclude tort liability (with knowledge of the waiver providing evidence of a voluntary assumption of risk, for example),[17] such operation is irrelevant given the plaintiff's right to sue for breach of contract. This is so on the assumption that a failure to act with 'due care and skill' equates with a breach of duty of care in torts.

In some states, legislation replicates, perhaps even expands upon, these

15 Importantly, however, s 68B does not allow for an exclusion of liability for breach of s 52, even in relation to personal injuries, so that this could have been argued as an alternative claim, as was done unsuccessfully in *Palmer (t/as Byron Bay Skydiving Centre) v Griffin* (unreported, NSW CA, 18 April 2002, BC200201800). But see now TPA s 82(1AAA), discussed in n 31 below.

16 Note, however, *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (unreported, NSW CA, 18 December 1996, BC9606183), in which Mahoney P considered that a waiver clause successfully excluded liability in tort, but not for breach of an implied term of a contract to use reasonable care and skill to provide safe premises and equipment.

17 It has been held that non-contractual 'waivers' may nonetheless give rise to a voluntary assumption of risk. See, eg, *Buckpitt v Oates* [1968] 1 All ER 1145 and *Bennett v Tugwell* [1971] 2 QB 267; [1971] 2 All ER 284.

changes to the TPA. For example, the Civil Liability Act 2002 (NSW) s 5N provides:[18]

> **5N Waiver of contractual duty of care for recreational activities**
>
> (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 New South Wales 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.
>
> (3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude 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.

As a result of the Fair Trading Act 1987 (NSW) s 40M(3), this also effectively permits exclusion of liability for breach of the 'due care and skill' terms implied under s 40S of the NSW Fair Trading Act. Section 32N of the Fair Trading Act 1999 (Vic) is to like effect, but a waiver must have been signed by the purchaser of the services in order to be binding (and reckless conduct cannot be exculpated).[19] Interestingly, although the New South Wales section is contained in an Act concerned with negligence more generally, it does not expressly state that liability in tort can also effectively be excluded. This, however, is in any case the general law position.

Outside of the context of recreational activities engaged in under contracts for services, the TPA provisions would not apply. An example would be where activities are gratuitously provided by a party who negligently injures the minor, such as during a youth or school[20] sports carnival or other recreational activities. Are waiver notices that are not binding as contracts effective against

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18 See, similarly, the Civil Liability Act 2002 (WA) s 5K, especially subs (6). The position in South Australia is more complex. Section 6(1) of the Recreational Services (Limitation of Liability) Act 2002 provides that a 'registered provider may enter into a contract with a consumer modifying the duty of care owed by the provider to the consumer so that the duty of care is governed by the registered code'. For criticism of the NSW provision, see J Carter and E Peden, 'A contract law perspective of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW)' (2002) 54 *Plaintiff* 19.

19 As an aside, if the service provider is caught by the TPA, and liability for breach of s 74 has not been waived (or cannot be waived because it is not in the course of recreational services), then this means that any state legislative provisions which seek to limit the liability in negligence (in tort or contract) of service providers will also be ineffective. This follows from the inconsistency between state and federal statutory rights. The High Court in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388; 120 ALR 440 has taken a broad approach to the question of inconsistency between the TPA and state legislation, such that any limitation of liability in state legislation will be inconsistent with the full contractual liability for breach created by s 74. The point is discussed more fully in J Dietrich, 'Liability for personal injuries arising from recreational services: The interaction of contract, tort, state legislation and the Trade Practices Act and the resultant mess' (2003) 11 *TLJ* 244.

20 If the activities were engaged in at a private school, then arguably, the contract to provide educational services for money is one 'in trade or commerce', such that the TPA provisions apply even to activities for which no extra charge applies.

such minors, if signed by, or brought to the attention of, the minors? Certainly, it is possible to waive tort liability outside of contract. Non-contractual waivers and notices limiting liability have, in some circumstances, been held to be effective.[21] Arguments of voluntary assumption of risk are also available. A minor may be held to have voluntarily assumed a risk, despite not having legal capacity.[22] The scope of tort defences is adequately considered elsewhere and will not be addressed here. It suffices to say that such arguments would only exceptionally succeed: presumably, most minors would not be held to be sufficiently aware of or conscious of a risk to have accepted it (and the minor's age is a relevant consideration to be included in making this assessment).[23] In any case, if a *parent* has merely signed the waiver, as would be the more common situation, it is difficult to see how any such waiver can have any effect on the minor. It is difficult to sustain the view that a parent can voluntarily assume a risk on a minor's behalf.[24]

That, at least, is the position at common law. Of relevance, however, are provisions in the various Civil Liability Acts that deny a duty of care in relation to risks that were the subject of a risk warning: see, eg, Civil Liability Act 2002 (NSW) s 5M and Civil Liability Act 2002 (WA) s 5I. Importantly, under both s 5M(2) and s 5I(2) and (3), such warnings are effective against minors if they are given to the parents of the minor or to an adult accompanying, or in control of, the minor.[25] If such a warning is effectively

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21 See, eg, *Buckpitt v Oates* [1968] 1 All ER 1145 and *Bennett v Tugwell* [1971] 2 QB 267; [1971] 2 All ER 284.

22 See, eg, *Smerkinich v Newport Corporation* (1912) 76 Justice of the Peace Reports 454 (KBD).

23 See *Doubleday v Kelly* [2005] NSWCA 151 (unreported, 12 May 2005, BC200503089), in relation to provisions under the Civil Liability Act 2002 (NSW) concerning 'obvious risks' and contributory negligence.

24 See the comments of Bryson JA (Beazley JA agreeing) in *Ohlstein bht Ohlstein v E & T Lloyd (t/as Otford Farm Trail Rides)* [2006] NSWCA 226 (unreported, 15 December 2006, BC200610593) at [170], in relation to a successful claim in negligence by a five-year-old plaintiff injured while horseriding (emphasis added):

> The terms and the circumstances of the contractual relationship between the child's mother and the respondents do not in my opinion have any significant bearing on either the existence or on the breach of the duty of care owed to [the child plaintiff]. The child's mother was not in a position to alter, by contract *or by any other arrangement*, the considerations affecting whatever it was reasonable for the respondents to do with respect to risk of injury to [the child]. Warnings given to [the mother], by the display of signs at the respondents' premises or in other ways, *could not in principle have any impact on the duty of care owed to [the child]*; nor could knowledge of risks involved in the activity which was given to [the mother] in any other way, or should otherwise have been obvious to her. There is no reason in principle why what [the mother] accepted in the exercise of her parental responsibility should alter what was required by the respondents' duty of care to [the child]; the respondents could not depute any part of their duty to [the mother]. The display of a sign disclaiming responsibility . . . can in a similar way have no effect on their duty of care to [the child], who cannot have had any understanding of the sign.

Contrast, however, *Murray v Haringay Arena Ltd* [1951] 2 KB 529. Perhaps an agent can assume a risk on his or her principal's behalf, but as discussed below, the status of parent does not give rise to a general agency to act on behalf of a child.

25 In his second reading speech introducing the Bill, the Premier of New South Wales, Bob Carr, justified this potentially oppressive change to the law in the following terms: 'You cannot expect potential defendants to take better care of a child than the child's own parents would take': New South Wales, *Legislative Assembly Hansard*, 23 October 2002, p 5764.

given, perhaps in the form of a contractual document setting out the relevant risks, then there is no need to rely on a contractual waiver clause, as there is a statutory defence precluding a claim both in tort and for breach of contract. In the latter case, this will be so at least for breach of a general express or implied term to act with due care and skill; if, however, the service provider has made express contractual promises, then a claim for breach of those promises could still be brought.[26]

The next issue that arises for brief consideration is how waivers can effectively be included in contracts.

3 How exclusion clauses can be incorporated into contracts

Although the law of contract has thus been thrust centre stage in the context of personal injuries during recreational activities, it should be noted that the 'ordinary law of contract presents various significant obstacles' to the limitation or exclusion of liability[27] in general. These 'obstacles' must normally be addressed in relation to contracts entered by adults. However, these issues are peripheral to our discussion and can be considered briefly, since the point is adequately discussed in standard contract law sources on clauses limiting liability and, more importantly, even if part of a contract, such clauses may not bind minors. Two issues arise: is the clause a part of the contract (incorporation) and does it effectively exclude the liability that arises in the circumstances (interpretation).

The law on the incorporation of exclusion clauses into contracts is not straightforward. Incorporation by notice (the 'ticket' cases) may be difficult,[28] especially where the term is particularly harsh and oppressive.[29] Even where an ostensibly contractual document has been signed and there is a presumption that the terms thereof are binding,[30] an exclusion clause may not be binding,

26 See, eg, Civil Liability Act 2002 (NSW) ss 5A and 3A(2). Similarly, where an injury occurs through a materialisation of an 'obvious risk' in the course of 'dangerous recreational activities', then there will be no need to rely on contractual waivers, given that statutory defences may apply. See Civil Liability Act 2002 (NSW) s 5L; Civil Liability Act 2003 (Qld) s 19; Civil Liability Act 2002 (Tas) s 20; Civil Liability Act 2002 (WA) s 5H. For a discussion of the scope and meaning of these provisions, see *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17 (unreported, 2 March 2006, BC200600917); *Fallas v Mourlas* (2006) Aust Torts Reps 81-835 (NSW CA); *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200 (unreported, 25 July 2006, BC200605761); and Dietrich, above n 19. However, these provisions may be inconsistent with the rights created under s 74 of the TPA if that section applies to the dangerous recreational activities and no waiver has been included in the contract, and the materialisation of the obvious risk occurs partly as a result of the service provider's negligence. See above n 19.

27 See Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, Canberra, 2002, para 5.52. The report can be accessed at <www.revofneg.treasury.gov.au>.

28 See, eg, *Macleay Pty Ltd (t/as Wobbies World) v Moore* [1992] Aust Torts Reports 81-151 (Vic AD). Compare *Bright v Sampson & Duncan Enterprises Pty Ltd* (1985) 1 NSWLR 346 (CA).

29 See, eg, *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] 2 QB 433 at 443; [1988] 1 All ER 348.

30 *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, the principle of which was affirmed recently by the High Court of Australia in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; 211 ALR 342. See also E Peden and J W Carter, 'Incorporation of Terms by

or may not take effect to the full extent of its terms, if there has been any misrepresentation as to its effect or meaning, as evidenced by the case of *Curtis v Chemical Cleaning & Dyeing Co*.[31]

Even if the clause is part of the contract, the courts have traditionally taken a cautious approach to interpreting exclusion clauses widely. Clauses are not effective to exclude liability for negligence, or for a serious breach of contract, unless the words unambiguously encompass such conduct. Thus, in *Mouritz v Hegedus*,[32] 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 from liability for the fundamental breach that had occurred. It should be added, however, that the Civil Liability Act 2002 (NSW) s 5N(3) and the Civil Liability Act 2002 (WA) s 5J(3) 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. Oddly, these operate to exclude any liability for breach of both implied and express warranties of reasonable care and skill.

The discussion that follows is predicated on the assumption that a waiver clause has been successfully incorporated into a contract for recreational services and that it is sufficiently clearly worded to exclude liability for the type of negligent conduct engaged in by the defendant. In such cases, at least adult parties who suffer personal injury as a result of negligent conduct will not be able to bring a claim, in tort or for breach of contract, in relation to such injury. The question that next arises is: what if the injured party was a minor?

Signature: *L'Estrange* Rules!' (2005) 21 *JCL* 96. This is so even where the parties have not read the terms and conditions: *Totman v Pyramid Riding Stables Ltd* (1992) 132 AR 332 (Alberta Court of Queen's Bench), in relation to a horse-riding services. See also *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661 (CA), in which the signed document was not, ostensibly, contractual in nature.

31 [1951] 1 KB 805; [1951] 1 All ER 631. See also *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200 (unreported, 25 July 2006, BC200605761) at [11]–[23], in which a document containing a waiver signed by the passenger of a cruise was held not to be contractual in intent. The document had been represented as being about 'passenger numbers'. Further, a party misrepresenting the effect of a term may be estopped from relying on it; but no longer faces a claim for damages for breach of s 52 of the TPA (engaging in misleading or deceptive conduct) for losses arising from such conduct (effectively circumventing the contract provisions altogether; presumably, such damages would have equated to the personal injury damages suffered by the party). The Trade Practices Amendment (Personal Injuries and Death) Act 2006 (Cth) came into force on 20 April 2006. It inserts s 82(1AAA) and s 87(1AA) to preclude this type of claim for personal injuries. This change could have startlingly harsh consequences: for example, arguably it might prevent a s 52 claim where a defendant misleads the plaintiff as to the extent, meaning, or effect of a waiver clause in a contract. See further on this, Dietrich, above n 19, at 255–6.

32 Unreported, WA FC, 19 April 1999, BC9901806. The decision must be questioned, however, because of its reference to notions of 'fundamental breaches' of contract (see the discussion in J Davis, 'Protecting the Providers of Recreational Services', unpublished paper delivered to the 'Insurance Law and Liability 2003' Conference, Sydney, March 2003, pp 11–13). See also the contrasting views of Mahoney P and of Cole J as to the operation of the exclusion clause in *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (unreported, NSW CA, 18 December 1996, BC9606183); and compare *Neil v Fallon* (1995) Aust Torts Reps 81-321 (Qld CA).

4 Contracts entered into by minors

Minors do not have contractual capacity. 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,[33] and a wholesale legislative approach in New South Wales. For present purposes, it suffices to summarise the general common law principles that apply in all jurisdictions (statutory amendments having no impact on the issues here under consideration) and briefly to note the NSW position.

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.[34] For example, in *Flower v London and North Western Railway Company*,[35] a contract for the necessary transportation of an infant 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.[36]

In any case, it will be a rare situation where a contract for recreational services will be considered necessary unless, perhaps, it relates to something like the provision of educational holiday camps, or sports training. Even if such contracts were considered to be for necessaries, the presence of exclusion clauses of the type now permitted by the TPA almost certainly renders them not ones that as a whole are for the benefit of minors. In New South Wales, the position under the Minors (Property and Contracts) Act 1970 (NSW) would not appear to be different: although contracts generally beneficial to a minor are binding,[37] it is doubtful whether a contract for services containing a wide-ranging exclusion clause would be so, especially where the services are of a recreational nature.[38]

If a contract for services is not binding against the minor, such a contract is nonetheless binding against the provider and the minor may sue for breach of

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33 See, generally, J W Carter and D J Harland, *Contract Law in Australia*, 4th ed, Butterworths, Sydney, 2002, at [804]ff.

34 See, generally, D J Harland, *The Law of Minors in Relation to Contract and Property*, Butterworths, Sydney, 1974, Ch 2 and [603]–[614]; Carter and Harland, above n 33, at [809]–[816], and Seddon and Ellinghaus, above n 2, at [17.13]–[17.16].

35 [1894] 2 QB 65. See also *Keays v Great Southern Railway Co* [1941] IR 534; *Harnedy v National Greyhound Racing Company Ltd* [1944] IR 160. In a case not dealing with exclusion clauses, *Fawcett v Smethurst* (1914) 84 LJKB 473, a term of a contract imposing strict liability for loss of a car in a (necessary) car hire contract rendered the contract too onerous and hence unenforceable.

36 See *Clements v London & North Western Railway Co* [1894] 2 QB 483.

37 See Carter and Harland, above n 33, at [829]; Seddon and Ellinghaus, above n 2, at [17.43]–[17.50].

38 See, generally, Healey, above n 7, pp 210–12, and cases discussed there.

such contract.[39] Whether this means that a minor can also sue for breach of implied terms and continue to enjoy the protection of s 74, despite the presence of a waiver clause, is, however, a doubtful proposition. It is likely that the minor must either avoid the contract as a whole, or enforce it as whole.[40] Irrespective of whether a contract claim can be brought, however, a minor should be able to proceed with a tort claim in negligence by avoiding the contract containing the waiver clause.[41]

5 Contracts entered into by parents

A contract entered into by a service provider and a parent of a minor (to whom the services are provided) is not prima facie binding on the minor. Since the minor is not a party to the contract, the rules of privity apply; only those who have entered into the contract are bound by its terms. Statutory exceptions to the privity rule, allowing third parties to enforce benefits promised under a contract,[42] are obviously not applicable 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). Whatever the flaws in the privity principle, that burdens cannot be imposed on third parties is not one of them.

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 does not carry with it any general power to act on the minor's behalf.[43] 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*.[44] Further, even though minors have power at common law (and under the Minors (Property and Contracts) Act 1970 (NSW) s 46) 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.[45]

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. Indeed, even in jurisdictions which accept parents as having a general capacity

39 Carter and Harland, above n 33, at [808]; Seddon and Ellinghaus, above n 2, at [17.34].

40 See Harland, above n 34, at [612]–[613].

41 Such a claim may be subject to state legislation limiting liability for recreational services, as well as arguments based on voluntary assumption of risk arising from the (non-contractually binding) waiver clause: see the discussion of Civil Liability Act 2002 (NSW) s 5M above. In relation to the state legislation, however, some of the provisions limiting liability may not have as onerous an operation in relation to minors as with adults. For example, in a number of states plaintiffs are presumed to be aware of obvious risks (and thus defendants have no duty to warn of such risks) unless they can prove that they were not aware of the existence of the risk (eg, Civil Liability Act 2002 (NSW) s 5G(1)). Such a subjective test would make it much easier for minors to overcome the presumption: see *Doubleday v Kelly* [2005] NSWCA 151 (unreported, 12 May 2005, BC200503089).

42 See, eg, Property Law Act 1974 (Qld) s 55, the terms of which are clearly inapplicable to the circumstances under consideration.

43 See Harland, above n 34, at [201].

44 (1996) 131 FLR 447 at 456; 20 ACSR 67. See also the comments of Bryson JA (Beazley JA agreeing) in *Ohlstein bht Ohlstein v E & T Lloyd (t/as Otford Farm Trail Rides)* [2006] NSWCA 226 (unreported, 15 December 2006, BC200610593) at [170], quoted above n 24.

45 Harland, above n 34, at [508]–[509].

to enter into contracts on their children's behalf, the majority view is that waiver clauses are not binding as contrary to public policy. As the Supreme Court of Colorado has said:

> To allow a parent or guardian to execute exculpatory provisions on his minor child's behalf would render meaningless for all practical purposes the special protection historically accorded minors.[46]

Thus, apart from arguments based on the lack of privity or authority, 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 waivers being enforceable against minors, even when signed by competent adults on their behalf.

As an aside, even if it were to be held that a contract is prima facie binding on the minor at common law, a further hurdle confronting the enforcement of any exclusion clause in New South Wales is that it could be argued that such a contract is harsh and oppressive under the Contracts Review Act 1980 (NSW).[47] In *John Dorahy's Fitness Centre Pty Ltd v Buchanan*,[48] for example, a wide-ranging exclusion clause excluding liability for personal injury sustained at a gymnasium was held to be 'unjust' in its width of operation when considered alongside the circumstances in which the contract had been entered into.

6 Contracts of indemnity entered into by parents

One way in which recreational service providers seek to overcome these difficulties when dealing with minors is to require parents to sign an indemnity agreement. Problems of the lack of capacity of a minor, or of lack of privity or authority, where a contract is entered into by a parent on the minor's behalf, do not arise where parents enter into a contract with the service provider to supply the minor with certain services, since the contract is enforceable against the parents. 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 significantly reduce the incidence of litigation against service providers by minors. Although there does not appear to be any Australian authority on the point, one must question the validity of any such indemnity, however. I suggest that it is contrary to public policy to deprive minors, in effect and for

46 *Cooper v Aspen Skiing Co* 48 P 3d 1229 (2002) at 1234. The legal position in Colorado has since been changed as a result of legislation: section 13-22-107 CRS 2005 'legislatively overruling' that case.

47 See, generally, Carter and Harland, above n 33, at [1517]ff. It might also be argued that a contract containing a waiver is 'unconscionable' under the TPA s 51AB (or perhaps, s 51AA), but such argument is unlikely to succeed. As far as I am aware, there has not previously been a successful use of 'unconscionability' to strike down contractual waivers.

48 Unreported, NSW CA, 18 December 1996, BC9606183. Contrast *Gowan v Hardie* (unreported, NSW CA, 18 November 1991, BC9102718), where the existence of a wide-ranging exclusion clause was not a factor that on its own rendered the contract 'unjust' in the circumstances (trainee parachutist suffering injury from defendants' negligence). See also the Unfair Contract Terms Act 1977 (UK), under which clauses excluding liability for negligence have been deemed 'unfair': E Macdonald, *Exclusion Clauses and Unfair Terms*, Butterworths, London, 1999, pp 198–9, 203–4.

most practical purposes, of their legal rights by such a backdoor means. As far as I am aware, such indemnity agreements are not uncommonly used by recreational service providers and, no doubt, litigation on their validity will be forthcoming.[49]

In the United States, the issue of parental waivers and indemnities has arisen not infrequently and has been the subject of conflicting judicial opinions and commentary.[50] This debate is of interest for our purpose as the issue is a live and pressing one that needs to be addressed in this country. The rules developed by US courts as to when 'exculpatory provisions' (as they are often called) in general are invalid (as contrary to public policy) are complex but not relevant for our purposes. The majority of US jurisdictions have held that exculpatory provisions that are otherwise valid, as not infringing public policy in general, are nonetheless not enforceable when sought to be enforced against minors, as they are contrary to public policy.[51] In the United States, the debate centres not on parents' capacity to enter into contracts on their children's behalf (this seems to be assumed as long as the contracts are not detrimental), but on the policies for and against enforcing waiver clauses against minors.

According to the Supreme Court of Colorado, the 'vast majority of courts [in different state jurisdictions] that have decided the issue [of parental waivers] agree'[52] that such waivers are contrary to public policy. They infringe the long established protection to be accorded to minors. This majority view has been reaffirmed in numerous recent decisions in states such as Washington[53] and Utah.[54] A contrary decision in California[55] has not been

49 See the example of the 'Coles Classic' referred to above n 4. A contract to indemnify a service provider for liabilities incurred to a third party would not offend TPA s 68, even if the service is one in relation to which the s 74 implied term cannot be excluded under s 68B: cf *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43; 136 ALR 510.

50 See, eg, R S Nelson, 'The Theory Of the Waiver Scale: An Argument Why Parents should be Able to Waive their Children's Tort Liability Claims' (2002) 36 *Uni of San Francisco L Rev* 535; A M Foley, 'We, the Parent and Participants, Promise not to Sue . . . Until there is an Accident' (2004) 37 *Suffolk Uni L Rev* 439; M A Connell and F G Savage, 'On Releases: Is there still a Place for their Use by Colleges and Universities' (2003) 29 *Jnl of College and University Law* 579; and R B Malamud and J E Karayan, 'Contractual Waivers for Minors in Sports-Related Activities' (1992) 2 *Marquette Sports LJ* 151.

51 It should be noted, however, that as a result of the general principles on waivers, some activity providers are unable to waive liability in any circumstance and not just against minors. It has been held, for example, that some school activities may be in the nature of a 'public necessity' and that this prevents schools from seeking releases from liability generally (and thus even against an 18-year-old participant). See, eg, *Wagenblast v Odessa Sch Dist* 758 P 2d 968 (Wash 1998).

52 See *Cooper v Aspen Skiing Co* 48 P 3d 1229 (Col 2002) at 1235, though note the decision has been 'legislatively overruled': section 13-22-107 CRS 2005. In part, the court based its decision on the analogy with the policy precluding parents from foreclosing minors' rights to recover after injury (at 1234).

53 See, eg, *Scott v Pacific West Mountain Resort* 834 P 2d 6 (Wash 1992).

54 *Hawkins v Peart* 37 P 3d 1062 (Utah 2001); for criticisms, see B A Dominic, 'The Children Must [and the Timorous May] Stay at Home: *Hawkins v Peart*' [2002] *Utah L Rev* 601.

55 *Hohe v San Diego Unified School District* 274 Cal Rptr 647 (Ct App 4th Dist 1990).

well received in that state, having not been followed in at least one case[56] and distinguished in another.[57]

In some states, however, the contrary view has been adopted, namely that parents are in a position to make informed choices about the risks of engaging in certain activities and are entitled to make a conscious choice to waive any liability for negligence arising from that activity. This is the position in Connecticut[58] and Massachusetts,[59] for example. In other states, more limited exceptions to the invalidity of parental waivers have been created. For example, waivers entered into in the context of youth recreational activities provided by non-profit organisations and volunteers are valid in Ohio.[60] And the Supreme Court of Florida has upheld the validity of an arbitration clause forming part of a waiver of liability signed by a mother on her son's behalf prior to a safari tour to Africa (where the son was killed after being mauled by hyenas).[61]

One argument that has been used in the United States, but that is of no relevance in Australia, is that the Due Process Clause of the Fourteenth Amendment of the US Constitution, which protects the 'fundamental right of parents to make decisions concerning the care, custody, and control of their children',[62] ought to encompass the right of parents to enter into valid exculpatory agreements on their children's behalf.[63] Although this argument was accepted in at least one case,[64] that decision was overturned on appeal.[65]

Importantly, for our purposes, those jurisdictions that have disallowed parental waivers have also generally held that indemnity agreements signed by parents are not enforceable. (The reverse is also the case.) The effect of such indemnity agreements would be to shift the source of compensation from the tortfeasor to the parents. In the view of the Supreme Court of Colorado in *Cooper v Aspen Skiing Co*, this 'creates an unacceptable conflict of interest' between parents and minors and violates public policy.[66] As was pointed out

56 *Abbassi v Regents, University of California* (unreported, Cal Ct App 2nd Dist, 28 February 2003, 2003 WL 657355).

57 *McGowan v West End YMCA* (unreported, Cal Ct App 4th Dist, 15 March 2002, 2002 WL 414341).

58 See *Saccente v LaFlamme* 35 Conn L Rptr 174 (Conn Super 2003). The case concerned a child injured during a hypnotism show at school as a result of slipping off a chair a number of times. The court considered that decisions in other states disallowing parental waivers were in part relying on state legislative provisions providing procedural protection to minors (eg, disallowing settlements of minors' legal claims without court approval). This is not the emphasis in the decisions themselves, however, which focus on the historical protection given to minors generally.

59 See *Sharon v City of Newton* 769 NE 2d 738 (Mass 2002).

60 See *Zivich v Mentor Soccer Club* 696 NE 2d 201 (Ohio 1998), affirmed in *Mohney v USA Hockey, Inc* 77 F Supp 2d 859 (ND Ohio 1999) (affirmed in part, reversed in part on other grounds, 5 Fed App 450 (6th Cir 2001)).

61 *Global Travel Marketing Inc v Shea* 908 So 2d 392 (Fla 2005).

62 *Troxel v Granville* 530 US 57 (2000) at 66.

63 See Nelson, above n 50, at 560–8.

64 *Cooper v United States Ski Ass'n* 32 P 3d 502 (Col Ct App 2000).

65 *Cooper v Aspen Skiing Co* 48 P 3d 1229 (Col 2002). The court denied that the parents' care and control of their children encompassed the decision to disclaim possible future recovery (at 1235).

66 Ibid, at 1231.

in *Childress v Madison County*,[67] parents who have executed indemnities in favour of the tortfeasors are unable to adequately pursue their children's interests and rights. The decision was based on the common law policy of allowing minors to disaffirm contracts.[68] It seems incontrovertible that service providers ought not to be able to achieve indirectly, in a way that clearly undermines the policy of protecting minors, what cannot be achieved directly.

However, it must be recognised that disallowing both parental waivers and indemnities, though clearly justifiable, does not come without some social cost. Certainly, the sports and recreation industry may simply ban children from participating in all but the most low-risk activities, or restrict their participation, should third party liability insurance for children become prohibitively expensive. Alternatively, such service providers may require minor participants to take out (presumably expensive) first party indemnity insurance to cover any injuries that they may suffer (if, indeed, such insurance is available).[69] Ultimately, this could prevent minors from participating in activities essential for children's growth and development.[70] Schools may be unable to offer basic sports and recreation activities because of the cost of insurance.[71] As a result of such consequences, it has been argued that:

> instead of violating public policy, waivers actually promote public policy. Without such releases, it is unlikely that some schools could afford to offer sports in light of the financial risk that a large verdict, settlement or lengthy trial could bring. School sports are voluntary and are never without risk. Parents, who are routinely charged with making many important decisions for their children, should be allowed to decide for themselves whether to accept the risks associated with the activity.[72]

But that argument is impossible to sustain. To allow parents to compromise the potential legal rights of their children to seek compensation, for possibly catastrophic injuries, is surely one of the most detrimental of all possible contractual burdens. If contractual incapacity as a mechanism to protect the vulnerable in society from exploitation and detrimental decision-making is to have any continuing role to play, then it is paramount that both parental waivers and parental indemnities be unenforceable.

7 Misleading or deceptive conduct?

If the above arguments are accepted, then the final issue needing to be addressed is whether a service provider who prominently uses and displays waivers in relation to services to minors is thereby engaging in misleading or deceptive conduct. The display of such waivers may lead readers to believe that no legal liability will attach to the negligent provision of services by

67 777 SW 2d 1 (Tenn Ct App 1989) at 7. See also *Hawkins v Peart* 37 P 3d 1062 (Utah 2001).
68 See Malamud and Karayan, above n 50, at 170–1.
69 Insurers' rights of subrogation may, in any case, prevent such measures from protecting service providers.
70 See Nelson, above n 50, at 564. For a discussion of the beneficial effects of school recreational activities in the context of the assessment of a breach of duty of care, see *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (unreported, 24 September 2001, BC200105805) at [69]–[72].
71 See A Murr, 'Sports Waivers: An Exercise in Futility?' (2002) 31 *J of Law and Education* 114.
72 Ibid, at 117.

service providers and that injured parties are without legal remedy. (This point applies generally, and is not limited to 'recreational services'.)

Clearly, the existence of waiver clauses can dissuade parents from commencing legal action, on the assumption that such waivers are effective against them. One US commentator has positively encouraged the use of waivers, despite their unenforceability, urging schools that 'it is still prudent for the school to have the child sign the form. The child's signature may lead the parents to believe that the waiver is enforceable and they may choose not to sue the school.'[73] Undeniably, therefore, the existence of the waiver clause may mislead parties as to their legal rights.[74]

It is a breach of the TPA s 52 to engage in conduct that misleads or deceives, or is likely to mislead or deceive, in the course of trade or commerce. It is also a breach of s 53(g) 'to make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy'. Various remedies are available: damages resulting from such breach (s 82), other ancillary remedies (s 87) and injunctions to prevent continuing breaches (s 80). It is outside the scope of this article to consider the voluminous case law on s 52. It suffices to say, however, that one would assume a breach could be readily established, given that there need not be any intention to mislead, that there may not be any obligation on the parties to whom the conduct is directed to check the accuracy of the information conveyed,[75] and that persons must merely be 'led into error'.[76] Any conduct that can have a chilling effect on parties, deterring them from exercising their legal rights, is serious (and can lead to significant detrimental consequences). Presumably, the damages resulting from such conduct would include the loss suffered by the child in not bringing a timely claim in tort, or by the parent[77] in not bringing a timely action in tort or for breach of contract, in reliance on the misleading conduct. The difficulty that arises is that s 82(1AAA) of the TPA precludes a direct claim for personal injury damages for breach of s 52.[78] One could argue, however, that the damages that arise from a *failure* to pursue a legal claim are not 'loss or damage [that] is, or results from, death or personal injury', but rather in the nature of 'pure' economic loss; much like a claim against a negligent solicitor for failure to pursue timely legal action (say) for personal injury is a claim for economic loss.[79] Service providers may

73 Ibid. See also at 118: 'The parents or child may also feel a moral responsibility not to sue because they gave their word that they would not.'

74 See Healey, above n 7, pp 218–20.

75 See, eg, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546; 79 ALR 83, but compare now s 82(1B). In this situation, the relevant information is the express or (more likely) implied statement that the waiver is legally effective against minors.

76 See, generally, Carter and Harland, above n 33, at [1105]; Seddon and Ellinghaus, above n 2, at [11.120]–[11.123]. See also Carter and Peden, above n 18, at 21.

77 Parents suffer economic loss in discharging their legal duty to care for a child, by incurring medical and other expenses. Such losses are recoverable in tort: cf *Lloyd v Lewis* [1963] VR 277.

78 See above n 31. As pointed out in n 13, the amendments to the TPA are not retrospective.

79 Failing this argument, alternatively one may be able to bring a claim for breach of corresponding sections of state Fair Trading Acts, where there are no sections corresponding to s 82(1AAA).

have to reconsider their conduct in relation to the use of exclusion clauses against minors.

8 Conclusion

As a result of changes to Australian law, the use of waivers and indemnities, seeking to shield recreational service providers and others from their liabilities for negligence in contract or tort, will no doubt become increasingly widespread. It has been argued in this article, however, that such waivers are unenforceable against minors, as are indemnity agreements obtained against their parents. Hence, minors injured as a result of the service providers' negligence can continue to seek legal redress for damages suffered as a result. This conclusion, though having some downsides in potentially jeopardising the continuing provision of more high risk activities to children, nonetheless is necessary in order to protect the vulnerable from detrimental decisions. The alternative of enforcing such contracts would deprive minors of fundamental legal rights to redress.