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Crown Solicitor
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SYDNEY

Attention: Ms Haider

Dear Sir

RE: STATE OF NEW SOUTH WALES ats BILES

I refer to the above matter and enclose a draft letter to the plaintiff's solicitor.

It seems to me that an offer can be made in accordance with the terms of the draft letter without detriment to the defendant.

If the plaintiff, Kathleen Biles does not accept the proposal contained therein, the defendant will still be in a position to make the relevant concession in relation to the withdrawal of its limitation defence.

If, however, the plaintiff, Kathleen Biles, were to accept the proposal the defendant would be, at least potentially, spared costs in relation to the Notice of Motion concerning the setting aside the Subpoenas, it would also avoid the potential for that argument for that issue to be determined adversely to the defendants' interests.

I look forward to discussing this matter with you in due course.

Yours Faithfully,

Steven Woods

- (e) Part VA (which concerns liability for defective products) particularly ss 75AD and 75AE.

5.6 Under the Fair Trading Acts, potential bases for claims for personal injury and death are found in unconscionable and misleading or deceptive conduct provisions that are equivalent to or mirror provisions of the TPA. There are other Commonwealth statutes that contain similar provisions relating to unconscionable and misleading or deceptive conduct. These include the *Australian Securities and Investment Commission Act 2001 (Cwth)* and the *Corporations Act 2001 (Cwth)*. There are also certain State and Territory Acts that contain provisions that are equivalent to or mirror certain provisions of Part V Div 1A and Part V Div 2A of the TPA.

5.7 For the sake of clarity and simplicity, the discussion and recommendations in this Chapter generally will refer only to relevant provisions of the TPA. However, references to provisions of the TPA should be read (subject to any necessary adjustments) as incorporating references to State and Territory provisions that are equivalent to or mirror what seem to the Panel to be the most relevant provisions of the TPA. The appendix to this chapter contains tables of such equivalent or mirror provisions. References in this Chapter to the Australian Competition and Consumer Commission (ACCC) should be read as incorporating a reference to enforcement authorities in the States and Territories to the extent that they perform similar functions under the relevant local legislation. The appendix to this Chapter contains a list of such authorities.

5.8 Plainly, if it is thought necessary that legislative changes be made to limit potential use of these various bases for claims (as the Panel recommends), the changes should be made nationally in a uniform and consistent way. All jurisdictions will need to act co-operatively to ensure that this occurs.

5.9 Parliament intended the provisions that relate to product safety and product information, claims against manufacturers and importers of goods, and product liability (that is the relevant provisions in Part V Div IA, Part V Div 2A and Part VA) to provide causes of action to individuals who suffer personal injury and death.

5.10 On the other hand, it is open to serious question whether Parliament intended those provisions that relate to unconscionable and misleading or deceptive conduct (ie the relevant provisions in Part IVA and Part V Div I) to provide causes of action to individuals who suffer personal injury and death. We deal with this more fully below.

**DRAFT LETTER
PLAINTIFF'S SOLICITOR**

"Without Prejudice"

RE KATHLEEN BILES v STATE OF NEW SOUTH WALES

I refer to the above matter, and in particular to the plaintiff's Notice of Motion seeking, inter alia, striking out parts of my client's Defence.

My client, in accordance with the proposal set out below, offers to amend its Defence in the matter of Kathleen Biles so as to delete its reliance upon the *Limitation Act*. A draft Amended Defence is enclosed.

My client's Motion seeking a stay due to the abuse of process issue, based upon *Batistatos v Roads and Traffic Authority of New South Wales*, would remain, requiring determination.

I have sought my client's instructions in relation to the plaintiff's Offer of Settlement and hope to obtain instructions well prior to the commencement of next term.

In the premises, my client proposes the following orders:

1. Leave be granted to the defendant to file an Amended Defence, in accordance with the draft attached hereto;
2. Defendant to pay the plaintiff, Kathleen Biles, costs of the hearing of her Motion seeking the striking out of the defendant's limitation defence;
3. The plaintiffs' Subpoena to Produce and the defendants' Notice of Motion to set aside Subpoenas to be stood over to the new year to a date to be fixed;
4. Matter be listed before His Honour, District Court Judge Curtis for directions in the new year on a date to be fixed;
5. Costs, other than as set out in Order 2 herein, to be costs in the cause.

I look forward to receipt of your advice as to the acceptability of this proposal for your client.

Yours faithfully

The Interaction between the Trade Practices Act and the law of negligence

5.2 In considering the interaction between the TPA and common law principles of negligence relating to claims for personal injury and death, it is first necessary to identify the potential bases for such claims under the TPA. It is also necessary to bear in mind that each State and Territory has legislation that is equivalent to or mirrors some of the relevant provisions of the TPA (most importantly, the 'Fair Trading Acts').

5.3 The TPA applies generally to the business and commercial activities of:

- (a) most corporations;
- (b) sole traders or partnerships whose activities:
 - i) cross State boundaries; or
 - ii) take place within a Territory; or
 - iii) are conducted by telephone or post, or use radio or television (Parts IVA and V only).

It also applies to commercial activities of the Commonwealth.

5.4 The Fair Trading Acts apply generally to business and commercial activities of any person.

5.5 Under the TPA the potential bases of claims for personal injury and death are:

- (a) Part IVA (which concerns unconscionable conduct) particularly ss 51AA, 51AB and 51AC;
- (b) Part V Div 1 (which concerns misleading or deceptive conduct) particularly ss 52 and 53;
- (c) Part V Div 1A (which concerns product safety and product information) particularly ss 65C and 65D;
- (d) Part V Div 2A (which concerns liability of manufacturers and importers of goods) particularly ss 74B, 74C and 74D; and