
Sub-Bailment On Terms and the Australian Consumer

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Issue: Volume 9, Number 3 (September 2002)

Paper presented at the Australasian Law Teachers' Association annual conference hosted by Murdoch University School of Law, Perth, Western Australia September 29 - October 2 2002

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[Introduction](#)

1. Bailment has been described as an "amorphous hybrid" of the law of voluntary and involuntary obligations, and a law with "its own trajectory".^[1] Before the decision of the Privy Council of "Pioneer Container"(KH Enterprise (cargo owners) v Pioneer Container (owners)(Pioneer Container),^[2] both the basis and the trajectory were unclear. That decision clarified that it was the bailee's consent that was the keystone to the formation of a bailment relationship. More significantly for the purpose of this article, the judgement outlined the circumstances when a sub-bailee will be entitled to rely on its terms and conditions against the owner of the goods - the bailor.
2. There has been much said about the Pioneer Container case, regarding the significance of the judgement in bailment and the doctrine of sub-bailment on terms. ^[3] However there seems to have been little consideration of the effect of the doctrine on consumers. In a sense this is ironic, as one of the founding cases of sub-bailment on terms could be termed a consumer case.^[4] This article examines whether the safeguards in the doctrine, as incorporated by the Privy Council, compares with protection afforded to a consumer in contract.

[Sub-bailment on terms - an overview](#)

3. Bailment arises when one party accepts possession of goods knowing that they belong to another. As a consequence of bailment, the bailee assumes a duty to care for the goods and is liable to the bailor if damage results. When the bailee in the original bailment then bails the goods to another - called the sub-bailee- this creates a sub-bailment. By voluntarily taking the goods into its possession knowing they belong to someone other

than the bailee, the sub-bailee assumes responsibility for them.[5]

4. Sub-bailment on terms occurs when the sub-bailee accepts the goods from the bailee on the basis of its terms and conditions. Most commonly, those terms and conditions contain a limitation or exclusion of liability for damage or loss of the goods. When the goods are lost or damaged, it is usually the bailor who seeks recompense from the sub-bailee. The courts have had to grapple with the question - should the bailor be bound by terms of a contract to which it is not a party? If so, in what circumstances?
5. In the Pioneer Container case, the Privy Council answered this question with the following propositions:
 - * That once a sub-bailee voluntarily accepts possession of the goods knowing that they belong to someone other than the bailee, then the sub-bailee assumes the duties and obligations of a bailee[6]
 - * The sub-bailee's right to rely on the terms and conditions upon which it accepted the goods from the bailee is dependent upon whether the bailor consented to the sub-bailment on those terms. The consent could be express, implied or constructive.[7]
6. In that case the plaintiff cargo owners' goods had been accepted for carriage by a carrier who then subcontracted part of the voyage to the defendant shipowner. The goods had been lost and the plaintiffs had commenced proceedings against the defendant elsewhere than in the exclusive jurisdiction provided in the defendant's contract of carriage with the carrier. The defendant clearly had the sympathy of the Privy Council in seeking to bind the cargo owners to the exclusive jurisdiction clause for reasons of commercial convenience. For example, in the judgement it was said:

"(their Lordships) think it right to observe, at the outset, that in commercial terms it would be most inconvenient if these two groups of plaintiffs were not so bound....Common sense and practical convenience combine to demand that all of these claims should be dealt with in one jurisdiction, in accordance with one system of law. If this cannot be achieved, there may be chaos... Within reason (an exclusive jurisdiction clause) must be regarded with a considerable degree of sympathy and understanding." [8]

7. The Pioneer Container case was significant. It recognised bailment as sui generis, and clarified the circumstances when bailment and sub-bailment would operate. Importantly, it supported the imposition of a contractual term on a person not privy to that contract when the bailor had consented.[9] Whilst the Pioneer Container case itself involved the highly commercial sphere of international transport, the ramifications can be significant even for everyday transactions. This could hardly have escaped their Lordships, as choosing bailors consent as the foundation stone for sub-bailment on terms their judgement affirmed that of Denning LJ in *Morris v Martin*. [10]

Sub-bailment on terms in Australia

8. Pioneer Container is yet to be considered by the High Court of Australia. However it has been cited, with tacit approval at least, in several Australian cases.[11] applied in at least two[12] and has been the subject of much academic commentary.[13] Only two of those Australian cases have considered the specific doctrine of sub-bailment on terms in some detail.[14]
9. The first was a New South Wales Supreme Court case of *Westpac Banking Corporation v Royal Tongan Airlines & Ors*[15] decided by Giles CJ (Commercial Division) in September 1996 ('Westpac'). In that case the plaintiffs accepted the doctrine of sub-bailment of terms without contest.[16] Thus it only fell to the judge to apply it and further develop how the doctrine might work in practice. In the course of so doing, his Honour has made a valuable contribution to jurisprudence concerning the circumstances in which one might imply consent to a sub-bailment on terms.[17]
10. The second was a Western Australian case, *WMC Engineering v Brambles Holdings Ltd t/as Oilfield and General Transport Co*[18] decided by Wheeler J in October 1997 ('WMC'). In contrast to the Westpac case, in WMC the parties debated the merit of the doctrine of sub-bailment on terms and whether it should be adopted in Australia at

all.[19]

11. Ultimately, Wheeler J. held that the doctrine did not apply on the facts because the terms the sub-bailee sought to rely upon were not incorporated in the contract between it and the bailee. However, having been invited to do so, it is no surprise that the judge turned her mind to the broader implications of the Pioneer Container decision, particularly in domestic/consumer type situation. Her Honour did this in 2 main ways. The first was in her discussion of the principle of sub-bailment on terms. Whilst the incorporation issue meant that she did not need to decide whether to apply the doctrine, Wheeler J. was clearly wary of it. Her Honour's view was that the rule conflicts with the principles outlined by Fullager J in *Wilson v Darling Island Stevedoring and Lighterage Co*[20] where it was held that a third party to a contract could not claim the protection of exclusion clauses in the contract. Her Honour said that it was difficult to see why it would make any difference when possession of goods was involved.[21]
12. She also defended the view of Nettlefold J of the Tasmanian Supreme Court in *Phillip Morris (Australia) Ltd v The Transport Commission*[22] in which he declined to apply the (then) fledgling doctrine of sub-bailment on terms. Wheeler J. said that she had "considerable sympathy" with his approach. The second opportunity to consider the doctrine came when Wheeler J. considered what the result should be if her decision on incorporation of terms was incorrect.[23] In other words, if the defendant had overcome the first of the 2 hurdles, what would have been the result if the doctrine of sub-bailment had applied to this case?
13. Her Honour made some general comments about the requirement of the bailor's consent, particularly in the context of the *Morris v Martin* case.[24] In that case, Mrs Morris left her fur for cleaning, and the furrier sent it on to a specialist cleaner with her consent. Wheeler J. said that it was not clear to her why Lord Denning had taken the view that Mrs Morris had consented to the sub-bailment on the "terms usual in the trade". Her Honour said there was no evidence that Mrs Morris had any idea what the terms usual in the trade might have been or even if they were usual terms. She felt that there may well be implied consent to a sub-bailment where the bailor was in the same trade as the sub-bailee, but a broader rule would give rise to certain anomalies, namely:
 - * that if Mrs Morris had taken the fur to the cleaners herself and made a contract directly with them, under the rules of contract she would have been bound only by exclusion clauses of which she had notice. Her Honour said it was hard to see why she should be in a worse position because she acted through an intermediary; and
 - * that where work on goods is contracted out to a third party, the application of the doctrine is limited to situations where the goods are taken away and it will not apply if the goods are repaired in situ.
14. On the facts of the case before her, Wheeler J. decided that the plaintiff had not consented to sub-bailment on the defendant's terms. There was no express consent. The only possible basis for implied consent was of "usual terms of the trade". The judge found that the plaintiff was not a participant in the defendant's trade and did not know of any "usual terms" (even if there were such a thing.). As such, even if the doctrine had applied, Her Honour found that the defendant was unable to exclude liability based on its terms.[25]

Applying sub-bailment on terms in a consumer context

15. The doctrine of sub-bailment on terms is most often litigated in a commercial shipping or transport context. The nature of these industries means that sub-bailments are extremely common. Goods involved are often valuable, so any loss or damage suffered to them is worthy of litigation to the highest level. As one would expect, the law has developed in the context of those situations.[26] In the world of international transport and trade, the parties dance a complex routine familiar only to insiders. Rarely is it disputed that the terms of a bill of lading are indeed the terms of the contract.[27]
16. There is certainly no lack of limitation devices used in the transport and shipping trades. In that framework, courts are eager to ensure the law gives effect to commercial reality. As a result the courts have enforced highly complex devices used to offset or limit liability. One of the more popular devices is the Himalaya clause.[28] In common with sub-bailment on terms, it seeks to entitle a stranger to the contract to limit its liability to one of the

contractual parties. With sub-bailment on terms, the sub-bailee usually seeks to rely on its own terms.[\[29\]](#)

17. With a Himalaya clause, the stranger seeks to rely on its 'protector's' terms. However, unlike the Himalaya clause or other limitation devices used in transport and trade, sub-bailment is also common in a consumer setting. Sub-bailment on terms is as likely to arise in your local drycleaners as in the highly technical and cutthroat world of commercial transport. Sub-bailment is, for example, widespread in domestic transport and "everyday" transactions. Disputes arising from these situations are less likely to come before the superior courts because the quantum of the claim is usually small.[\[30\]](#)
18. The questions that arise are: what happens when one applies the principles outlined in Pioneer Container to everyday, consumer transactions? In particular, is a consumer bailor more likely to be bound exclusion clauses in a sub-bailment on terms when compared to the protection received by consumers in a contractual context? Will the principles currently being developed in the highly commercial realms of transport and trade be able to produce a fair result if applied more generally - for instance, where a panel beater sends a car to a specialist repairer, or a domestic furniture removalist arranges a specialist carrier to transport a customer's piano?
19. It does not strain the principles espoused in Pioneer Container to apply them to a consumer transaction. The case most commonly regarded as the foundation of the principle of sub-bailment on terms, *Morris v CW Martin & Sons Ltd*[\[31\]](#) is a shining example of a transaction that, in today's parlance, would be described as a "consumer" transaction.[\[32\]](#) In that case, Mrs Morris left her fur for cleaning, and the furrier sent it on to a specialist cleaner. The fur was stolen whilst at the cleaner. When Mrs Morris sued the cleaner, it relied on its exclusion clause to exculpate it from a breach of its duty to care for the goods. However, the development of the doctrine since *Morris v CW Martin* has been focussed on the commercial world and commercial relationships, with virtually all the significant cases in the area being of that kind. One could ask - will the doctrine be available to any sub-bailee if the facts are right, or will it be confined and explained as 'the very special and peculiar relationships which are created when goods are consigned to be carried on board a... ship'?[\[33\]](#)
20. It would seem that none of the reported cases so limit the scope of the doctrine. Further, it would undercut the basis of the doctrine if it were only to apply to commercial transactions. Overwhelmingly, one would think that the doctrine will either be adopted or rejected for both types of case - commercial and consumer.
21. Assuming then that the sub-bailment on terms doctrine will extend to situations concerning consumers, there are issues of consumer protection to consider. The law of contract has developed strong safeguards to ensure that those who seek to rely on terms limiting or excluding liability can do so only in certain circumstances.[\[34\]](#) These safeguards are further strengthened by legislation designed for the protection of consumers, in particular the Trade Practices Act 1974 (Cth) and its state based equivalents.[\[35\]](#)
22. But is a bailor in the position of Mrs Morris worse off under sub-bailment than she would be in contract? In other words, is it easier for a sub-bailee to impose terms in bailment than it would be if those terms were to be contractually incorporated? Certainly this was a concern of Wheeler J in the WMC case in which she said:

'Had Mrs Morris herself taken the fur directly to a firm of cleaners and made the contract directly with them, she would have been bound only by an exclusion clause of which she had notice: *MacRobertson Miller Airline Services* (1975) 133 CLR 125 at 137-9 per Stephen J. It is hard to see why she should be in a worse position because she acted through an intermediary. If household goods are repaired by a repairer who finds it necessary to engage, for example, a specialist electrician to look at some components, then it would appear to be an odd result that the specialist could rely upon an exclusion clause where the goods were taken into the custody of the repairer as bailee, notwithstanding that the owner had no knowledge of the clause, but that a different result might be reached where the goods were able to be repaired in situ and no question of bailment arose.'[\[36\]](#)

23. But, with one reservation, it would seem that the doctrine of sub-bailment on terms can and does protect the consumer in much the same way as the common law doctrines of contract. The reason is that the sub-bailment on terms does require the consent of the bailor. It would seem, from the Westpac judgement at least, that the courts will be looking for a different quality of consent depending upon the facts. No doubt there is a world of difference

between a commercial trader that uses air waybills and sea carriage documents daily, and the consumer with his or her car that requires specialist repair work. It is necessary for the internal workings of the doctrine that the test of sub-bailment remains the same- that the bailor must have consented, expressly or impliedly, to the sub-bailment on those terms. However the courts would and should closely examine the "consent" allegedly given when the sub-bailee is seeking to enforce terms against a consumer, or a person unfamiliar with the nature of the business concerned. This is only logical - for the question of consent to the sub-bailment on terms is to be assessed based on the bailor's own knowledge -or at least from the viewpoint of a reasonable person in their position.

24. This was what occurred in the WMC case. WMC was a corporation well versed in commercial transactions but not in transport contracts. The judge found that WMC did not have the required level of knowledge about the transport arrangements of its filter for the judge to find express or implied consent to the actual, let alone usual, terms.[\[37\]](#)

25. In contrast, in the Westpac case the judge was of the view that the bailor must have known that the postal service would not undertake all aspects of delivery personally.[\[38\]](#) In any event, it is likely to be more difficult for the sub-bailee to be successful in alleging sub-bailment on terms as against a consumer bailor. For instance:

* As stressed in WMC, the domestic sub-bailee will need to establish that the terms have been incorporated into the bailee/sub-bailee contract. This is a step often unnecessary in international trade.[\[39\]](#) It is a stage at which many contractual defences fail, and which could similarly affect sub-bailment on terms defences. Most likely to satisfy this criteria are those situations where there are certain "terms of the trade" or there has been a course of dealings incorporating the terms.

* In Pioneer Container, one of the primary motivations for allowing the sub-bailee to rely on its terms was the commercial convenience of the exclusive jurisdiction clause the sub-bailee was attempting to enforce.[\[40\]](#) In a domestic setting, where it is most likely reliance on an exclusion or limitation clause, the sub-bailee is unlikely to enjoy that same "considerable degree of sympathy and understanding".[\[41\]](#) Instead, one would imagine the interpretation of any clause would follow the general rules of construction of exclusion clauses. Therefore it is likely that such a clause will be given its "natural and ordinary meaning" with any ambiguity resolved against the party who seeks to rely on it [\[42\]](#) - in other words, analogous to the interpretation given to contractual terms.

* The extent to which the bailor gives its consent will no doubt be closely examined. As discussed above, one would expect that the commercial experience or naivete (as the case may be) of the bailor would be taken into account. In particular, a court is likely to need a deal of persuading before concluding that a bailor/consumer has given consent to a sub-bailment on terms that are markedly disadvantageous when compared with the head bailment.

26. In a practical sense then, it seems the effect of the two causes of action (contract and sub-bailment on terms) are closer than one might think. Admittedly, the terminology is different: terms brought to attention prior to contract vs. consent to sub-bailment on terms. However, surely the aim is a similar result: that the bailor is only bound if it agrees to the terms that seek to limit the sub-bailee's/contractor's liability in the event of loss or damage.

27. It seems then that, comparing contract and sub-bailment, the common law's treatment of those who seek to impose terms on others is not too dissimilar. However the same cannot be said of the statutory protection given to consumers. Where there is a direct contract between the consumer and the specialist contractor, then subject to threshold questions,[\[43\]](#) the resultant contract will attract the protection of s74 Trade Practices Act (Cth).[\[44\]](#)

"s74(1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill..."

Importantly, any attempt to exclude this duty is void.[\[45\]](#)

28. This section provides significant protection to a consumer in a contractual scenario. It increases the prospect of

recovery from the contractor for damage sustained to the goods, by diminishing the contractor's ability to rely on any exclusion of liability within its own terms and conditions if there has been a failure to render services with due care and skill.

29. If the person holding the goods and doing the work does so without any direct contract between it and the head bailor, as in a sub-bailment situation, then it would seem on the face of it that s 74 does not apply. The section is expressly applicable to contracts only: "In every contract for the supply...of services...." (emphasis added) So if the relationship is founded in bailment and not contract, the subbailee seems to have a prospect of relying on its own terms that exclude the duty to exercise due care and skill - a prospect it would not have if the relationship was contractual.
30. Thus, in a domestic scenario, the specialist would much prefer a finding that it was sub-bailee to one that finds that a contract existed between it and the owner of the goods.^[46] In the writer's view at least, this is an unwelcome gap in the statutory protection offered to consumers. The rationale of sub-bailment on terms is to provide the sub-bailee with a valid means of relying on its usual terms even though it did not have a contract with the bailor. However the corollary should be that the sub-bailee is not put in a better position than it would be if a direct contract had been formed. The wording of s74, limited as it is only to contract, appears to give a sub-bailee the advantage of being able to exclude liability in bailment that it would be prohibited from excluding in contract. Rather than force consumers and courts to look for a circuitous way to give a consumer/ bailor the benefit of s74, better that the Trade Practices Act be amended to apply to a consumer/bailor in a sub-bailment scenario.

Conclusion

31. When the High Court has cause to examine the doctrine of sub-bailment on terms, one would expect the doctrine to be considered in 2 main fields of operation - first in its maritime and transport context, and secondly in more general application.
32. There would seem little doubt that the High Court of Australia will indeed adopt the doctrine of sub-bailment on terms. It is of importance that Australia supports uniformity of international commercial law such as this. However some reflection on the broader impact of the doctrine is also necessary, not only by the judiciary but also by those responsible for the updating of the Trade Practices Act and its equivalents. It is important to ensure that the doctrine of sub-bailment on terms does not work an injustice amongst those whom, in every other respect, the law is at pains to protect.

Notes

^[1] Simon Fisher Commercial and Personal Property Law (1997), p 152

^[2] [1994] 2 All ER 250.

^[3] See articles listed at fn 13.

^[4] *Morris v CW Martin & Sons Ltd (Morris v Martin)*[1966] 1 QB 716, [1965] All ER 726.

^[5] *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825 per Lord Pearson at 832, *KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 All ER 250 at p261, 262.

^[6] At 261, 262

^[7] At 261, 262. In so finding, the Privy Council adopted the test set out by Denning in *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] All ER 726 (see text accompanying fn 24) and specifically rejected the alternative test espoused by Donaldson J in *Johnson Matthey & Co v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215. The view of

Donaldson J was that if the bailor chose to sue on the bailment then the bailor had to accept all the terms of the sub-bailment.

[8] [1994] 2 All ER 250 at 255

[9] In the United Kingdom, the importance of Pioneer Container has lessened since the enactment of the Contracts (Rights of Third Parties) Act 1999 (UK). Australia does not have an equivalent Act.

[10] At fn4. See discussion accompanying fn 24.

[11] Cited in *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] VICSC 104 Batt J (dissenting), *Westrac Equipment Pty Ltd v "Assets Venture"* [2002] FCA 440 (Federal Court). Mentioned in *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd and Anor* [2001] NSWCA 281; *Crayford Freight Services Ltd v Coral Seatel Navigation Co & Ors* [1998] 263 FCA; *WD & HO Wills (Australia) Limited v State Rail Authority of New South Wales* [1998] NSWSC 81; *Skin Plex Laboratories Pty Ltd v Baker* [1999] WASC 81

[12] *Westpac Banking Corporation & Anor v Royal Tongan Airlines & Ors* (1996) Aust Torts Reports 81-403; *Followmont Transport P/L v Premier Group P/L* [1999] QCA 232. In *Followmont*, the Court said it was not necessary to canvas the problems posed by problems raised by *The Pioneer Container* with regard to exemption clauses and sub-bailment on terms (fn 26).

[13] See for example: N Bankes and N Rafferty, "privity of Bailment - Liability of Sub- bailee to Owner of Goods: The Pioneer Container" [1997] 28 Canadian Business Law Journal 245; G Bristow "Sub-bailment on Terms: Circumventing Privity of Contract" (1999) National Law Review 2; P Bugden "sub-bailment on terms: implications of the decision in the Pioneer Container and its application to recent cases"[1997] 4 ICCLR 141; B Coote "Exception clauses, Deliberate Acts and the Onus of Proof in Bailment cases" [1997] JCL 169, M Davies "sub bailment on terms: A Case Note on The KH Enterprise (aka The Pioneer Container)(1994) 10 MLAANZ Journal 51; P Devonshire "Sub-bailment on Terms and the Efficacy of Contractual defences against a non contractual bailor" [1996] JBL 329; S Fisher "Carriage of goods and sub-bailment on terms - the Pioneer Container Case" [1994] Vol 8 No 4 CLQ 9

[14] The cases are *Westpac Banking Corporation & Anor v Royal Tongan Airlines & Ors* (1996) Aust Torts Reports 81-403 and *WMC Engineering Services Pty Ltd v Brambles Holdings Ltd t/as Oilfield and General Transport Co* (unreported, Supreme Court of Western Australia, Wheeler J, 31 October 1997).

[15] (1996) Aust Torts Reports 81 -403

[16] At p 63,660.

[17] See p 63,661.

[18] Unreported, Supreme Court of Western Australia, (Wheeler J) 31 October 1997

[19] The Judge in *WMC* made no reference to the *Westpac* case in her judgement.

[20] (1955) 95 CLR 43

[21] p 7.

[22] [1975] Tas SR 128. Another Australian case considering sub-bailment on terms predating *Pioneer Container* was a decision of the NSW Supreme Court Commercial Division: *Carrington Slipways Pty Ltd v Pacific Austral Pty Ltd* unreported, Supreme Court of New South Wales Rogers CJ (2 February 1989). In that case it was held that the doctrine did not apply and that a stevedore third party was entitled to protection under a Himalaya clause. That decision was affirmed on appeal: (1991) 24 NSWLR 745

[23] Unreported, Supreme Court of Western Australia, (Wheeler J) 31 October 1997 p 14

[24] *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] All ER 726.

[25] The defendant's appeal to the Court of Appeal and an application for leave to appeal to the High Court were unsuccessful.

[26] With the exception of *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] All ER 7

[26]

[27] As usually the plaintiff is taken to have impliedly consented to them as being in a "known and contemplated form" - *Elder Dempster and Co v Paterson, Zachonis and Co Ltd* [1924] AC 522. See also *JF Wilson "Carriage of Goods by Sea" 1988* at p 140

[28] So named as being an attempt to avoid the outcome of the case *Adler v Dickson ("The Himalaya")* (1955) 1 QB 158

[29] Note *The Mahkutai* [1996] 3 All ER 502 where the sub-bailee sought to rely on the terms of the bailee.

[30] Contra *WMC v Brambles* where the filter involved was worth approximately \$500,000 and in *Westpac*, the currency lost had a value of \$248,000.00.

[31] [1965] All ER 726, [1966] 1 QB 716. See discussion at fn 24.

[32] See for instance the definition of "consumer" in Trade Practices Act 1974, s4B - person will be a consumer if goods or services cost less than prescribed amount (at time of writing, \$40,000) or, if more than the prescribed amount, then were of a kind ordinarily acquired for personal, domestic or household use. s74(3) qualifies the definition of consumer when the contract is for transportation or storage of goods. See fn 44.

[33] Fullagar J in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1955) 95 CLR 43 at 77, as cited by Wheeler J in *WMC* case (unreported, Supreme Court of Western Australia, Wheeler J 31 October 1997).

[34] In particular, the requirement that there be reasonable notice of the terms prior to or at entry of contract.

[35] Each State has an equivalent section under its mirroring Fair Trading Act.

[36] At 14

[37] at p 15-18.

[38] At p 63,661

[39] As parties are taken to have notice of usual terms in bills of lading: *Pyrene v Scindia* (1954) 2 QB 402, *Wilson v Compagnie des Messageries Maritimes* (1954) 54 SR NSW 258

[40] See [1994] 2 All ER 250 at 255

[41] *Supra* at 255

[42] *Darlington Futures v Delco (Australia) Pty Ltd* (1986) 161 CLR 500

[43] Must satisfy the definition of consumer in s4 TPA, and services must not relate to a contract of insurance, or a contract to transport or store goods for the purpose of the consumer's business, trade or profession s74(3) TPA.

[44] In other words, that it did not involve a contract of insurance or a contract for transportation or storage of goods for the purpose of a business, trade, profession or occupation carried on or engaged in by the consumer - s74 (3) TPA. Note also the equivalent sections in the Fair Trading Acts in each state.

[\[45\]](#) S68 TPA

[\[46\]](#) Technically, the consumer/bailor faced with damaged or lost goods caused by a lack of due diligence on the part of the sub-bailee may elect to sue the bailee instead. As a contracting party, the bailee would be bound by s74. The bailee would then join the sub-bailee as a third party. Depending on the facts, the contract between bailee and subbailee may or may not be subject to s74. However, this solution is less than satisfactory. In many situations ss74 would not apply to the contract between bailee and sub-bailee because the bailee is not "a consumer". It could be argued that the words "consumer" in s74 should be read to refer to the bailor. Even overcoming that hurdle, the exclusion in ss3 will often apply.

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