

Legal Implementation of Waivers



The following is provided to give a brief overview of the changes in law that provide for the legal status of waivers through amendments to the Trade Practices Act and Tort Law reforms.

There are some significant points (highlighted in bold) that need to be understood and remembered when introducing a waiver to a consumer.

A national ministerial meeting was held on 30 May 2002 to discuss public liability insurance. At this meeting, ministers agreed to introduce any changes that were required to state and territory legislation to complement the Commonwealth government's commitment to amend the Trade Practices Act to allow for the self-assumption of risk by people who choose to participate in inherently risky activities.

The person entering into a contract for recreational services **should have a reasonable opportunity to consider** whether or not to enter into a contract on that basis (extent of known risk involved in the activity). This addition has been made having regard to the fact that the intention of the amendment of the act is not that of sanctioning the reckless provision of recreational services. Rather, the intention is to permit consumers and providers of recreational services to reach an agreement and understanding of the legal basis on which the services are being supplied. **It is very important that the consumer be aware of the risks and the potential consequences if things go wrong.**

The government remains committed to ensuring that the *Consumer Affairs and Fair Trading Act* continues to deliver appropriate protection to consumers, however the act also needs to promote an environment in which consumers have an informed choice.

In allowing people to voluntarily waive their right to sue, it is important to achieve a balance between protecting consumers and allowing them to take responsibility for themselves. Amendments to The Trade Practices Act seek to achieve that balance in a way that will benefit consumers and the many small businesses and other providers of recreational activities which involve a degree of risk.

Negligence is a tort, that is, a civil wrong. At common law, a person may be liable to pay damages for negligence if it can be shown that they owed the plaintiff a duty of care, the duty was breached and injury or damages was caused as a result.

One measure that has been endorsed by New South Wales, Victoria, Queensland and Western Australia is to legislate to give effect to waivers or disclaimers signed by people proposing to engage in an inherently hazardous activity. It has been proposed that a waiver signed in such circumstances would operate **as a good defence** against personal injury claims, including actions based in negligence, **where the supplier of such a service has complied with the relevant safety requirements.**

At common law people can sign waivers excusing service suppliers of negligence but the courts will carefully scrutinise them particularly in situations where there is an inequality in bargaining power. One text writer has written of a 'judicial bias against disclaimers'. This 'bias' manifests itself in a reluctance to find that adequate notice has been given to the party bound and by construing the terms strictly against the beneficiary of the waiver or disclaimer. **Courts have required evidence that suppliers have done everything reasonable to bring a waiver to a party's attention.**