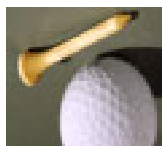


issue 3: waivers - new victorian regulations

On 15 April 2003 the Victorian Government adopted the *Goods (Recreational Services) Regulations 2003* ("the Regulations") under the Goods Act 1958 (Vic) ("the Act"). The objective of the Regulations is to give effect to the purposes of new section 97A of the Act, which was introduced late in 2002 to allow providers of recreational services to limit their liability for death or personal injury arising from the sale of such services.

Prior to the introduction of s.97A, providers of recreational services (which includes sporting activities or similar leisure time pursuits) were unable to "waive" liability for injuries or death suffered as a result of the breach of terms implied into contracts of service under the Act. Briefly, the implied terms require that:

- services will be rendered with due care and skill (section 91); and
- services are fit for their purpose (section 92).

The introduction of legislation allowing providers of recreational services (which includes sporting or similar leisure time pursuits) to contract out of these implied terms by use of a waiver was generally met with cautious support from amongst the sport and recreation sector late in 2002. The release of the Regulations suggests that a cautious reception was well-placed.

The Regulations stipulate that in order for a provider of recreational services to enjoy the benefits of s.97A, the waiver used by the provider organisation must be in the specific form and contain the specific particulars as set-out in the Regulations.¹

In order to attract the protection contemplated by s.97A of the Act, a waiver must:

- include a description of the specific recreational services sold;
- state the steps which have been taken by the seller of the services to avoid the danger of death or personal injury;
- include a declaration by the purchaser that their waiver cannot be enforced if the law regarding the form is not complied with;
- note the potential impact of the declaration on relevant insurance policies and invite the purchaser to seek legal advice as to such effect;
- conform with specifications as to the font size of wording and appearance of headings;
- not be attached or physically incorporated with any other document provided to the purchaser of the services at the time of signing.

¹ Please note however that the seller of such services cannot rely on a waiver where the seller has done an act or omitted to do something and that act or omission was done with reckless disregard for the consequences of the act or omission.

Whilst the certainty afforded by the provision of such specific forms and directions in this often confusing area of the law is a positive, the extent to which the Regulations prescribe the waiver to be used may pose a number of operational difficulties for sport and recreation organisations.

Many sporting organisations already have well drafted waiver and indemnity clauses in place which are included in their membership, program or event registration forms. Such clauses, no matter how carefully drafted, will be of no use in limiting the liability of the organisation under the Act. This is despite the fact that the same clauses may well be enforceable against those who sign them outside of the scope of the Victorian legislation, and in particular, fall within the scope of similar protection now afforded to sport and recreation organisations under the Commonwealth Trade Practices Act (1974).

Furthermore, if a sporting organisation chooses to implement a waiver in accordance with the Regulations, it will be required to do so physically separate to any registration or entry form it may issue. In the case of organisations with national registration schemes, new administrative arrangements will have to be introduced in Victoria in order to achieve protection in this particular jurisdiction. Undoubtedly this will amount to some considerable administrative hardship in compiling, sending and tracking receipt of the prescribed forms.

It should be noted that other states throughout Australia have introduced or intend to introduce similar legislative amendments providing increased opportunities for sport and recreation organisations to limit liability for personal injuries suffered by their participants. One can only imagine the administrative

consequences if each state also sought to introduce their own prescribed forms as is the case in Victoria.

The new Regulations and section 97A come into operation on 1 May 2003.

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