

SPORTS UPDATE

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Waivers / Releases and Indemnities

Introduction

At present there is clear evidence that that the sporting industry is experiencing the following:

- Courts are awarding significant financial damages against sporting organisations and personnel involved in sporting activities;
- Insurance premiums are increasing and becoming unaffordable; and
- Insurance is unattainable for certain high risk sporting activities.

If this continues, it is not unreasonable to expect sporting organisations to either cease operating, or at the very least, reduce the type of activities they offer.

This Update considers the use of waivers / releases and indemnities by sporting organisations as a protective measure against potential legal claims for negligence.

How to reduce potential litigation

So how can sporting organisation offer their services to participants without fear of potential litigation, which may cause an ultimate demise in the organisation?

One way is to seek to transfer the risk to an insurer by buying financial protection through insurance policies (refer to Sports Update 3, 2002).

Whilst insurance is still regarded as essential, sporting organisations are also implementing risk management plans to address risks inherent in their activities and to reduce the possibility of those risks arising (refer to Sports Update 4, 2002).

An additional tool a sporting organisation can use is a waiver / release and / or indemnity. These legal documents seek the agreement of the participant to accept the risks involved in participating in their sporting endeavours.

Waiver / Release

A waiver / release is a contractual document which seeks to exclude the sporting organisation from potential liability towards participants. That is, the participant waives or releases the sporting organisation from any right they may have otherwise had to make a claim against the sporting organisation in the event of injury, loss or damage.

A waiver / release is frequently found on a membership or entry form for a sporting activity, where the participant, in consideration for being allowed to participate in an activity, agrees to waive any right they may have against the organiser in exchange for the opportunity to participate.

Indemnity

An indemnity is a contractual document whereby the participant promises to reimburse (indemnify) the sporting organisation for particular losses that the sporting organisation may incur as a result of agreeing to allow the participant to partake in their activities.

A well drafted document can effectively negate liability.

However, these documents are not litigation proof and their limitations must be acknowledged. Gross negligence cannot be excluded by contractual agreement. In addition, the Trade Practices Act Cth (or state equivalent Fair Trading Act) imposes statutory obligations which cannot be waived by agreement.

Recent Example

A recent case which exemplified the effectiveness of a properly drafted waiver is a case involving an injured parachutist.¹

A student parachutist was injured as a result of high winds during a jump. The parachutist alleged negligence and breaches of the Fair Trading Act against the Skydiving Centre (Centre) conducting the jump. The injury occurred after the radio communications failed, which meant that attempts to communicate the high wind speeds being experienced at ground level to the airplane were unsuccessful.

The trial judge found that the Centre was guilty of negligence however, the terms of the contract between the parties contained a waiver that effectively absolved the Centre of any liability.

However, the parachutist had also made allegations regarding misleading and deceptive conduct under the Fair Trading Act, which the trial judge found were established. Accordingly, judgment was entered in favour of the parachutist in the sum of around \$1.1 million, on the basis that the waiver could not operate to avoid statutory obligations.

The Court of Appeal however, found that the Fair Trading Act claims of misleading and deceptive conduct had not been successfully made out and the waiver was effective to absolve the Centre of liability for negligence.

In this case the waiver formed part of the membership form. The form required the student to consent to, acknowledge and accept the inherent risks involved in skydiving.

The student argued that in signing the exclusion clause she was only consenting to the general risks, not the specific risk that she would board a plane without an adequate system in place to cancel the jump in the event of strong winds. Despite this argument the Court stated that the waiver could not be construed in such a manner and was effective to afford complete protection against the finding of negligence.

This case shows that in certain circumstances an appropriately drafted waiver / indemnity can effectively protect sporting organisations from potential liability that may arise from conducting their activities.

All sporting organisations should consider implementing waivers / releases and indemnities in their contractual documents. This can be considered in the context of a risk management plan. However, whilst it is essential to consider developing and implementing these legal documents, it is also essential to acknowledge their potential limitations.

Drafting a Waiver /Release or Indemnity

A waiver / release or indemnity is a contractual document. It may be a stand alone document or be contained in some other form of document, for example an entry or membership form.

In drafting a waiver / release or indemnity the document must comply with the general principles of contract formation. The following tips should be kept in mind:

1. There must be an offer. The offer will usually be in the form of an invitation to the participant to take part in the activities, or obtain membership services of the sporting organisation.
2. The participant must accept the offer. That is, agree to participate in the activities or take on membership of the sporting organisation.
3. Consideration must flow from the transaction. Consideration will normally be in the form of an entry or membership fee.
4. The participant and sporting organisation must intend to enter into a legal relationship. This will be evidenced by the terms of the entry form or membership application.
5. There are always queries regarding the minor participant. A participant under the age of 18 years has no contractual capacity and accordingly cannot enter into a valid legally binding contract with the sporting organisation. However, having a minor sign a waiver / release or indemnity (as well as the parent or legal guardian) may be useful to show the attempts of the sporting organisation to bring the risks involved in the activity to the attention of the minor.

For further information or advice please contact Selina Ross at Rigby Cooke on (03) 9321 7887.

¹ Palmer and Jamieson t/as Byron Bay Skydiving Centre v Griffin [2002] NSWCA 100.