Disclaimers, exclusion clauses and risk warnings

This information explains the difference between a disclaimer and an exclusion clause in a contract and the circumstances when a risk warning should be used. It explains when you should use them, what they mean and the effectiveness of such clauses or statements in limit liability for injury, loss or damage. This information sheet should be read in conjunction with our insurance and liability information sheet.

What are they?

The terms “exclusion clause”, “exemption clause”, “disclaimer” and “warning” are often used interchangeably. Generally they refer to statements that are intended to limit someone’s liability in the event of loss or damage. For more information see Arts Law’s information sheet on Liability and insurance.

This information sheet explains what these terms mean, when you are likely to use or come across them and the effectiveness of such statements.

Exclusion clauses, exemption clauses, disclaimers or risk warnings are not always effective in excluding liability of the person or entity relying on it.

Exclusion clauses and disclaimers

Purpose of exclusion clauses

Exclusion clauses are generally found in contracts. These types of clauses operate to exclude or restrict the rights of a party. For example, if a party to a contract wishes to limit its liability in the event that it breaches the contract, it will usually include an exclusion clause limiting the amount of damages that the other party can claim to a specified total. Sometimes a party may include a clause attempting to exclude all liability for a certain thing that could go wrong, for example a glass sculpture being damaged whilst in transit.

Exclusion clauses may also be called “exemption” or “exception” clauses. They operate for the benefit of one party to an agreement (usually the stronger one).

When are exclusion clauses effective?

Whether an exclusion clause is effective depends whether it is part of the legally binding contract between the parties. Generally, any term of a contract, including an exclusion clause, waiver or disclaimer, will be effective it the party relying on the contract can establish that the person has agreed to the terms of the contract.

Signing a document is not the only way a contract can be formed as an agreement can be implied from the circumstances in which the parties are dealing with each other. In circumstances where there is no formal signature of a contract the question may arise as to what are the contractual terms that the parties have agreed will apply to their relationship.

Contract law has established that a party must have notice of a contractual term, such as an exclusion clause, at the time the contract is formed. Therefore that person must be aware of the existence of the exclusion clause at the time the contract is formed. This can be done through “actual” or “constructive” notice.

- **Actual notice** occurs when the party relying on the clause actually brings the clause to the other party’s attention or the other party simply reads the contract;
- **Constructive notice** occurs when the party is not actually aware of the existence of the clause but the party relying on the clause has done all that is reasonably necessary to bring it to the other party’s attention.

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Where a person signs a contract, that person will be bound by the terms of a contract whether they choose to read the contract or not. While a signed contract provides the evidence of what are the terms agreed by the parties, where the agreement is to be implied from the circumstances, there can be arguments over where actual notice of the terms has been given or whether the party relying on the clause has done all that is reasonably necessary to bring it to the other party's attention.

However, the Australia Consumer Law (ACL) can limit the effectiveness of exclusion clause contained in a contract. The ACL has provisions that are directed to unfair, unconscionable, harsh or oppressive contractual terms. For example, the ACL provides protections for consumers who are presented with standard form consumer contracts, such as a contract for the supply of goods or services that a person agrees to by clicking an 'I agree' button on a web page. Exclusion clauses in online agreements are discussed in the next section. The protections against unfair, unconscionable, harsh or oppressive terms are discussed later in the section on the Australian Consumer Law (ACL) and the Contracts Review Act 1980 (NSW).

The web: waivers in 'browsewrap' & 'clickthru' agreements

Whether the user of a website is contractually bound by the terms of use (TOU) or terms of service (TOS) of the website is likely to depend whether a reasonable person would be considered to be on "notice" of those terms. TOU and TOS often state that no responsibility will be taken for losses caused by reliance on the information supplied. A term or condition disclaiming legal liability for losses caused by reliance on the information is likely to be effective where reasonable person would have notice of the disclaimer. A reader would be on notice (and bound) even though he or she had never read the disclaimer if a reasonable person would have seen it.

A 'browsewrap' agreement and a 'clickthru' agreement are names used to describe two different ways of setting up online contracts.

A browsewrap agreement describes the situation where TOU or TOS can be viewed on a linked page (such as via a button at the bottom of the home page) but the user of the website is not required to click a button to acknowledge that he or she is accepting those terms and conditions. It is unclear whether TOU/TOS that are presented in the form of a browsewrap agreement are legally enforceable as there can be questions as to whether the user had actual or constructive notice of the TOU/TOS (that is, whether the mythical reasonable person would have gone to the linked page and read all the terms before proceeding). Simply including a link at the bottom of the home page may not be sufficient to establish constructive notice of the TOU/TOS.

A clickthru agreement describes when a purchaser of software or a subscriber to an online service must click a button before the software installation is completed or the online service can be accessed by the subscriber. A clickthru agreement also describes the process of completing an ecommerce transaction (such as the purchase of some product from a website) where the purchaser must click a button before completing the transaction. The legal effect of the purchaser being required to click-through the button (where there is notice given that there are terms and conditions that are to be accepted or rejected) is that the purchaser is forced to acknowledge their acceptance of those terms and conditions before proceeding. The reasonable person arguably would not click-through without reading those terms. The user is likely to be on notice and bound by those TOU/TOS whether or not he or she chooses to read or ignore them.

The best practice for setting up online contracts is to require any user of the website to click an 'I agree' button on a web page to confirm the assent to the terms of use (TOU) or terms of service (TOS) of the use of a website. Actual notice of the TOS/TOU can be established where the user is forced to accept the TOS/TOU before proceeding to complete a transaction or to use the website.

It may not be feasible to design the website so that every user must click an 'I agree' button to accept the TOS/TOU. The test for constructive notice of the TOS/TOU, which is described above, requires the operator of the website to do all that is reasonably necessary to bring the TOS/TOU to the user's attention. An inconspicuous hyperlink to the TOS/TOU buried among a sea of links (such as a link at the bottom of the home page), could be argued as not providing constructive notice of

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the TOS/TOU.

Tickets, receipts

Sometimes an exclusion clause, waiver or disclaimer may appear on a document which does not appear to be a contract. For example, you might find an exclusion clause on a ticket or a receipt that you have not signed. Disclaimers can often be seen where information, products or services are supplied. The disclaimer and other terms and conditions should be available for viewing at the point in time that the contract is entered into, that is before the purchaser or user agreed to proceed. The effectiveness of such an exclusion clause is assessed by considering whether actual or constructive notice occurred prior to the contract forming. It is harder to prove notice was given in the case of unsigned disclaimers or disclaimers printed on receipts issued after payment. In such cases, a court considers whether a reasonable person would consider the receipt, voucher or ticket etc to be part of the contract and know that they should read it. The use of an asterisk and a note referring to the transaction being subject to terms and conditions is one way of drawing attention to the existence of an exclusion clause *.

*No responsibility for items not collected after the show.

Interpretation of exclusion clauses or disclaimers

If a dispute arises over whether an exclusion clause was part of a contract or what the exclusion clause relates to, the court will look to the intention of the parties. If there is any doubt as to the intention of the parties or if the clause is ambiguous, unclear or grossly unfair, courts will usually apply the following rules of interpretation to the clause:

- The exclusion clause will usually be interpreted against the party seeking to rely on it.
- If the exclusion clause goes to the essence or root or the agreement, it is less likely to be effective.
- If the thing that goes wrong which a person is claiming for is outside the scope of the agreement as contemplated by the parties, then the exclusion clause may not operate.
- If the exclusion clause is inconsistent with the main purpose of the contract, the exclusion clause may be ineffective.

Therefore any party attempting to use an exclusion clause to its benefit should be very clear when drafting the clauses and seek the assistance of a lawyer if possible.

Limitations on exclusion clauses and disclaimers

Consumer protection legislation

Generally, laws aimed at protecting consumers cannot be excluded by any type of exemption clause or disclaimer. For example, section 18 of the *Australian Consumer Law* (ACL), which is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), prohibits misleading or deceptive conduct when occurring in trade or commerce; and provides that certain specific conditions cannot be excluded in consumer transactions involving the sale of goods or the delivery of services. The rationale behind that legislation is that businesses should not be able to get around certain obligations to benefit consumers.

Even though a disclaimer may attempt to limit or exclude liability against loss for reliance on information given, the disclaimer will not be effective if the information is found to be purposely misleading or if it amounts to fraud. A simple example of this might be found in promoting a music festival. The promoters may state that a popular performer, e.g. Lady Gaga, will be performing and then have a disclaimer at the bottom of their poster stating; *"To the best of our knowledge, the information provided is accurate and current. We do not make any representation or warranty as to the accuracy or completeness of the information".* If the organisers of the event are found never to have secured Lady Gaga as a performer, and a Lady Gaga impersonator actually performs, the statement is either misleading and deceptive or fraudulent and the organisers will not be

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covered by their disclaimer.

The Australian Competition and Consumer Commission (ACCC) has taken legal action in the past against businesses which tell consumers the wrong information about their rights.. The ACL set out consumer guarantees that any supplier of goods or services and manufacturer of goods cannot limit, restrict or exclude, so that any waiver that is inconsistent with the consumer guarantee is unenforceable and the supplier or manufacturer that presents terms and conditions that contains such an unenforceable waiver may also mislead the consumer about their legal rights, with the supplier or manufacturer being exposed to penalties for providing false and misleading information. That is, consumers cannot waiver the rights protected by the consumer guarantees by agreeing that the consumer guarantees do not apply to the transaction. Further information as to the effect of the ACL is provided by the ACCC:

- **ACL protections in relation to standard form consumer contracts**: See 'A guide to unfair contract terms law' (ACCC);
- **ACL consumer guarantees**: See ACCC, 'Consumer guarantees: a guide for business and legal practitioners' (ACCC);
- **ACL prohibition in relation to unfair trading practices**: See 'The avoiding unfair business practices guide' (ACCC);
- **ACL prohibition of 'unconscionable' conduct**: The ACL prohibits a business from engaging in 'unconscionable conduct' in connection with the supply of goods or services. There are various factors listed in the ACL that are to be considered by courts as indicators of unconscionable conduct including the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer and the relative strengths of the bargaining positions of the acquirer and the supplier. Therefore it may be unconscionable conduct for a person to take advantage of a superior bargaining position to secure an onerous contract from a party at a disadvantage in the negotiation.

Risk warnings

The law of negligence imposes an obligation on every person to do, or refrain from doing, any act or omission where it is reasonably foreseeable that a particular other person (or class of persons) is likely to suffer damage or loss as a result of that act or omission. Basically it means you owe a duty of care to avoid causing harm to a person that you ought to know could suffer damage or loss if you do a particular thing or fail to do a particular thing.

Many Australian States have either passed or proposed legislation modifying the laws about liability for negligence in respect of a duty to warn about 'obvious risks' in relation to any 'dangerous recreational activities'. However the interpretation of the legislation establishes a high threshold to convince a court that a risk was so obvious that it did not require a warning. That is, the court cases considering 'obvious risk' and 'dangerous recreational activities' highlight the difficulty of establishing that a particular recreational activity is dangerous and the difficulty of establishing that a risk event that happens was so apparent as to be an 'obvious risk':

- NSW: this law is called the *Civil Liability Act 2002* (NSW) (the **NSW Act**). There is no proactive duty to warn another person of an 'obvious risk' (section 5H), nor is a person liable for harm suffered by another as a result of an inherent risk (section 5I) or an obvious risk in relation to a 'dangerous recreational activity' (section 5L).

    > Section 5I defines an 'inherent risk' as "a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill'. Section 5F defines an 'obvious risk' to a person is "a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

- Obvious risks include risks that are patent or a matter of common knowledge.
- A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable."

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Section 5K of the NSW Act defines a 'dangerous recreational activity' as meaning "a recreational activity that involves a significant risk of physical harm" and "recreational activity' is defined to include any sport (whether it not it is an organised activity); any pursuit or activity engaged in for enjoyment, relaxation or leisure; and any pursuit or activity engaged in at a place where people ordinarily engage in sport or activities for enjoyment, relaxation or leisure.

Section 5M of the NSW Act has a particular effect on people organising and participating in recreational activities as it allows them to limit potential liability for certain things going wrong by giving an oral or written risk warning (including by means of a sign or otherwise). For example you may go to a dance class and a sign will state that *"no responsibility will be taken for any injuries incurred".* Similarly a sign may state *"Please note that you will be exposed to loud music at the Event. Prolonged exposure to loud music may cause damage to your hearing"* as you enter a live music performance. These risk warnings don't need to be specific to particular risks and can be a general warning of the risks involved. The Act also provides that organisers will not be liable for harm suffered by participants from obvious risks of dangerous recreational activities.

See also section 5N of the NSW Act which allows a supplier of recreational activities to ask a person that want to take part in the recreational activities sign a waiver in which the person agrees to exclude, restrict or modify his or her liability for injury that results from breach of a warranty that the services will be provided with reasonable care and skill. However section 5N does not apply if there are laws that establish specific practices or procedures for the protection of personal safety.

- Queensland: Under sections 13, to 19 of the *Civil Liability Act 2003* (Qld), there is no proactive duty to warn of an obvious risk and no liability for harm resulting from an inherent risk or harm resulting from obvious risks of dangerous recreational activities. The definition of an obvious risk in the Queensland Act is similar to the NSW Act, although the Queensland Act qualifies what is an obvious risk in relation to any failure on the part of a person to properly operate, maintain, replace, prepare or care for the equipment or any other thing, unless the failure itself is an obvious risk.

- ACT: As at 1 December 2014, the ACT has not modified the common law duty to warn of obvious risks or in relation to limiting liability for suppliers of dangerous recreational activities. However section 43 of the *Civil Law (Wrongs) Act 2002* (ACT) has the effect that a reasonable person should take precautions against a risk of harm where the risk is foreseeable and is not insignificant.

- Tasmania: Under sections 15 to 20 of the *Civil Liability Act 2002* (Tas), there is no proactive duty to warn of obvious risks (unless the person has requested information about the risk or legislation requires a warning of risk); nor is there liability for harm resulting from obvious risks of dangerous recreational activities. The definition of an 'obvious risk' in the Tasmanian Act is similar to the NSW Act, although the Tasmanian Act qualifies what is an obvious risk by stating that a risk is not an obvious risk merely because a warning about the risk has been given.

- Victoria: There is no express provision removing the duty to warn of obvious risk although sections 53 to 56 of the *Wrongs Act 1958* (Vic) confirms there is no liability for harm suffered by another as a result of an inherent risk and an obvious risk as the person is presumed to have been aware of the risk of harm. The definition of an 'obvious risk' in the Victorian Act is similar to the Queensland Act. Under section 22 of the *Australian Consumer and Fair Trading Act 2012* (Vic), the organiser of recreational activities can also exclude, restrict or modify his or her liability for any personnel injury in an agreement. The terms of the contract must be in the prescribed form and have been brought to the attention of the person prior to the supply of the recreational activities.

- Northern Territory: In the NT, the provision restricting organiser's liability can be found in section 48 of the *Consumer Affairs and Fair Trading Act* (NT), which allow the organiser of recreational activities to exclude, restrict or modify his or her liability in an agreement. There are no express provisions under the *Personal Injuries (Liability and Damages) Act* (NT) removing the duty to warn of obvious risks.

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- South Australia: There is no duty to warn of obvious risk and no liability for materialisation of an inherent risk under sections 36 to 39 of the *Civil Liability Act 1936* (SA) as the person is presumed to have been aware of the risk of harm. In addition, under section 42 of the *Fair Trading Act 1987* (SA), the organiser of recreational activities can also exclude, restrict or modify his or her liability for any personal injury in an agreement.

- Western Australia: The provisions in Western Australia restricting organiser's liability can be found in the sections 5H to 5J and 5M to 5P of the *Civil Liability Act 2002* (WA). There is no duty to warn of obvious risk and no liability for materialisation of an inherent risk. The definition of an 'obvious risk' in the Western Australian Act is similar to the NSW Act. There is no liability for harm from obvious risks of dangerous recreational activities as the person is presumed to have been aware of the risk of harm. There is no liability where a risk warning has been given. The organiser of recreational activities can also exclude, restrict or modify his or her liability for any personnel injury in an agreement.

Negligence

Can negligence be excluded by way of exclusion clauses, disclaimers and risk warnings?

Because negligence often results in personal injury or damage to property rather than mere economic loss, the intention to exclude liability for negligence must be clearly expressed. An exclusion clause, warning or disclaimer will not be found to expressly exclude negligence unless it uses that word or a synonym.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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