

Recreational Services - Limiting your liability

The Australian Consumer Law automatically provides consumers with guarantees on certain goods and services. These are called consumer guarantees. This means that services must be:

- Provided with due care and skill;
- Fit for the intended purpose; and
- Provided within a reasonable time (if no time has been set).

You must not modify or restrict a consumer's right to these guarantees.

However, in South Australia, there is an exception available only to recreational service providers. Under section 42 of the *Fair Trading Act 1987*, you are entitled to ask a consumer to agree to exclude, restrict or modify some of your liability for failing to provide services with due care and skill. This is subject to some requirements and restrictions.

Limiting your liability is optional. If you choose not to limit your liability you can still legally operate your business, with your other insurance arrangements in place.

Requirements for limiting your liability

You can only limit your liability if:

- You use the prescribed form, and the form includes a statement about limiting your liability for any personal injury suffered by the consumer or a relevant third party. For example, the captain of a volleyball team may book a venue, but the limitation of liability will also extend to the team players.
- The term is brought to the attention of the consumer and any third party consumer before the services are supplied.
- The consumer signs and dates the completed form.

- The form is also signed by a witness. The witness can be any person other than the consumer (e.g. one of your employees, or a friend or relative of the consumer).

Reckless conduct

You cannot limit your liability if a consumer (or any third party consumer) suffers a significant injury as a result of reckless conduct by you or your staff.

Conduct is considered to be reckless if you or your staff:

- Are aware, or should reasonably have been aware, that the conduct places your customers at significant risk of injury; and
- Continue to act despite the risk and without adequate justification.

For example, if you knew the bungee cord was frayed but you still let people jump using that particular cord, then a court may consider that to be reckless.

If you knew that your dodgem-cars were faulty and never arranged for the cars to be serviced or maintained, but still let people use the cars, then a court may consider that to be reckless.

Children under 18 years of age

You should not ask a child under the age of 18 to sign a form to limit your liability. Even if you did, it would not be enforceable as a child cannot legally agree to exclude, restrict or modify his or her rights.

A parent or guardian of a child who acquires recreational services for the child cannot legally agree to exclude, restrict or modify the child's rights. This means that you should not ask the parent or guardian to sign a form on the child's behalf either.

Prescribed form

If you wish to limit your liability you must use the prescribed form. The form must include the exact wording as it appears in Schedule 1 of the *Fair Trading Regulations 2010*. A copy is provided on the following page.

The form does not need to be a stand-alone document. It can be part of a bigger document that outlines other terms and conditions for your customers. You may add any design elements (such as a logo or image) or more words before or after the form, as long as the additional words do not conflict with your legal obligations.

If a consumer requests a copy of the signed and completed form, you must provide a copy within 7 days.

Choosing one of three options

For the form to be effective, you must choose only one of three options: exclude; restrict; or modify the consumer's rights. These are marked as options (a), (b) or (c) on the form. You must also strike out the two options that will not apply.

If you choose to restrict or modify the consumer's rights, you must specify the nature or the restriction or modification, as indicated on the form.

If a person does not sign a form

If a consumer does not agree to sign the form you may choose to still provide the service, or you may decide to refuse the service. This is made clear to consumers in the prescribed form under the section headed "Important".

Ongoing or one-off

The form is part of your contract with your customers. If the contract is for a one-off event then the form for limiting your liability applies to that one-off event.

If the contract is for a longer period, such as a winter or summer season, then the form can apply for the same period of time as the contract.

Checklist

Requirement	✓
Use the prescribed form	
Make sure the form is brought to the attention of the consumer and any third party consumer	
Select only one option for excluding, restricting or modifying the consumer's rights. <ul style="list-style-type: none">• Strike out the other two options.• Give the detail required if asking the consumer to restrict or modify their rights.	
Ask the consumer to sign and date the form	
Have the form signed by a witness	
Give a copy of the signed form to the consumer (if requested) within 7 days	

For more information:

Phone: 8204 9777

Country callers: 131 882 (local call cost)

www.ocba.sa.gov.au



**Government
of South Australia**

Office of Consumer
and Business Affairs

This is the exact wording from Schedule 1 of the *Fair Trading Regulations 2010* which must be used in your form if you wish to limit your liability.

Form 1—Recreational services— Exclusion, restriction or modification of rights under the Australian Consumer Law (SA)

Your rights:

Under sections 60 and 61 of the *Australian Consumer Law (SA)*, if a person in trade or commerce supplies you with services (including recreational services¹), there is -

- a statutory guarantee that those services will be rendered with due care and skill; and
- a statutory guarantee that those services, and any product resulting from those services, will be reasonably fit for the purpose for which the services are being acquired (as long as that purpose is made known to the supplier); and
- a statutory guarantee that those services, and any product resulting from those services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve the result that the consumer wishes to achieve (as long as that wish is made known to the supplier or a person with whom negotiations have been conducted in relation to the acquisition of the services).

Excluding, restricting or modifying your rights:

Under section 42 of the *Fair Trading Act 1987*, the supplier of recreational services is entitled to ask you to agree to exclude, restrict or modify his or her liability for any personal injury suffered by you or another person for whom or on whose behalf you are acquiring the services (a **third party consumer**).

If you sign this form, you will be agreeing to exclude, restrict or modify the supplier's liability with the result that compensation may not be payable if you or the third party consumer suffer personal injury².

Important

You do not have to agree to exclude, restrict or modify your rights by signing this form.

The supplier may refuse to provide you with the services if you do not agree to exclude, restrict or modify your rights by signing this form.

Even if you sign this form, you may still have further legal rights against the supplier.

A child under the age of 18 cannot legally agree to exclude, restrict or modify his or her rights.

A parent or guardian of a child who acquires recreational services for the child cannot legally agree to exclude, restrict or modify the child's rights.

Agreement to exclude, restrict or modify your rights:

I agree that the liability of
[*the supplier of recreational services*] for any personal injury that may result from the supply of the recreational services that may be suffered by me (or a person for whom or on whose behalf I am acquiring the services) is -

(a) excluded;

(b) restricted as set out below:
[*specify the nature of the restriction*]

(c) modified as set out below:
[*specify the nature of the modification*]

**Strike out whichever of (a), (b) or (c) do not apply and specify the nature of the restriction or modification, as is relevant.*

Signature:

Date:

Signature of witness:

Name and address of witness:

Definitions

- 1 **Recreational services** are services that consist of participation in—
 - a sporting activity or similar leisure-time pursuit; or
 - any other activity that involves a significant degree of physical exertion or risk and is undertaken for the purposes of recreation, enjoyment or leisure.
- 2 **Personal injury** is bodily injury and includes mental and nervous shock and death.

Further information:

Further information about your rights can be found at www.ocba.sa.gov.au