

IT BYTES

ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

CAN YOU EXCLUDE LIABILITY FOR PERSONAL INJURY OR DEATH?



WHEN DOES THIS QUESTION TEND TO ARISE?

You are engaging an IT consultant to do some work at your premises. It is not especially dangerous work, but accidents can always happen. The consultant's standard contract includes an exclusion for 'all liability for any personal injury or death' arising from the work carried out at your site. You know that exclusion clauses can have a significant impact on the remedies that may be available to you if something goes wrong. However, you are not sure whether it is possible for the consultant to simply wipe their hands of any responsibility for this type of liability. This issue can arise not only when dealing with exclusions of specific heads of liability, but also with general exclusion clauses that seek to disclaim all types of liability arising from particular conduct.

WHAT DOES THE LAW SAY?

At common law the parties to a contract are, in principle, free to allocate risk as they see fit. That freedom extends to the insertion of exclusion or limitation clauses seeking to absolve one party from responsibility for personal injury or death. Nevertheless, that contractual autonomy is circumscribed by public policy, by rules of construction that require the clearest possible language to deprive an injured party of a common-law remedy, and by overlapping statutory regimes that may render such clauses wholly or partly void.

Contract terms that purport to limit or exclude liability tend to be interpreted strictly against the party seeking to rely on the limitation or exclusion. Clauses cannot exclude liability for a party's fraud and may not be effective against deliberate wrongdoing or conduct outside the contractual allocation of risk. In addition, broad exclusions and limitations will not always be given contractual effect if not clearly incorporated into the relevant contract terms.

In terms of potential statutory overlay:

- The Australian Consumer Law (**ACL**) imposes certain non-excludable guarantees, including that services will be rendered with due care and skill and that goods will be safe and of acceptable quality. The ACL will be relevant to contracts where the price of goods or services is AU\$100k or less. Where goods or services are not of a kind ordinarily acquired for personal, domestic or household use, the ACL permits suppliers to limit remedies for breach to repair, replacement or re supply but only if the limitation is fair and reasonable. In the ordinary course of events, it will be challenging to establish that an exclusion of liability for personal injury or death arising from breach of the consumer guarantees is fair and reasonable. Separately, the ACL's product liability regime imposes strict liability for safety defects in goods and contractual terms purporting to exclude or limit that liability are ineffective.
- There are specific carve outs under the ACL and State and Territory civil liability legislation that allow contractual terms that exclude or limit liability for death or personal injury arising from the supply of recreational services, provided specific conditions are met. However, these carve outs are narrowly construed, generally do not extend to intentional or reckless conduct or safety defects in goods, and in any event are unlikely to be relevant to IT services contracts.
- In standard-form consumer and small business contracts, the ACL's unfair contract terms provisions render void terms that cause significant imbalance, are not reasonably necessary to protect legitimate interests, and would cause detriment if applied. Broad exclusions of liability for personal injury or death - especially in consumer-facing standard terms - are at high risk of being declared unfair and void. Recent reforms have also strengthened enforcement and penalties, increasing the compliance risk of overbroad exclusions.
- Work health and safety duties cannot be contracted out of. Clauses seeking to exclude liability for workplace injury or death are ineffective against statutory obligations and may attract regulatory enforcement. Other sector-specific statutes (e.g. passenger transport or medical services) may impose non-excludable duties or limit contractual waivers, though again this is unlikely to be of significance for IT services contracts.



WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

When drafting or reviewing contracts, it is critical to recognise that attempts to exclude or limit liability for personal injury or death may be ineffective in certain circumstances. At the drafting stage, parties should first consider whether the goods or services being supplied fall within the consumer guarantees regime under the ACL or any other statutory liability framework and, if so, whether exclusions or limitations are permitted under those laws. This will help to ensure that any contractual liability regime is drafted in a way that is likely to be legally effective.

Even where statutory protections apply, from a customer's perspective it is typically better to negotiate liability terms upfront rather than accept a sub-optimal position in the hope that the legality of overly broad limitations and exclusions could be successfully challenged should the need arise. It is generally reasonable to insist that liability for personal injury or death arising from a party's negligence or breach of contract should not be limited or excluded. This is a type of liability that a service provider should be able to obtain insurance for and in that case, it is not reasonable for a customer to bear any of the risk. If a service provider insists on including broad exclusions for this type of loss, they should be challenged to explain why the proposed allocation of risk is fair and reasonable.

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