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Submission

When considering the merits of regulation or benchmarking its performance several key factors are often overlooked including:

1. The basic economic conception of whether regulation is an efficient cure of market failure is far too simplistic and narrow.
2. Account needs to be taken of the wide spectrum of regulatory alternatives including prohibition, zoning, licensing, accreditation, self regulation etc and the wide range of options within each of these. The benchmark should not just be a comparison with no regulation but a comparison with other regulatory options. The regulation of holiday letting referred to below is a good case study example.
3. The cost of compliance is always underestimated. It should include the cost of informing industry of the regulation and the private and public cost of training and achieving a satisfactory level of understanding and compliance.
4. It should also include the cost to industry of non-compliance (including civil and criminal liability) where, as so often happens, 3. has failed.
5. Account should also be taken of the needless costs imposed on industry of state government failure to achieve national uniformity of regulation where there are no substantial differences between circumstances. Laws on innkeepers liability referred to below are a good example.
6. Account also needs to be taken of the incredibly voluminous, prescriptive, complex and detailed approach to legislation taken in so many instances in Australia compared with other countries. Examples include laws on Native Title, GST, Corporations and most recently Industrial Relations.
7. Account also needs to be taken of the costs which continual regulatory changes impose on business.

The substance of this submission is relevant for all industries.

However, our particular interest is in regulatory compliance for the tourism, travel and hospitality industry. See eg

- Atherton, T.C. (1991) **The Regulation of Tourism Destination Planning, Development and Management**. University of Surrey MSc thesis (Distinction) 178 pages 1991.
- Atherton TC&TA, (1998) **Tourism, Travel & Hospitality Law**, Law Book Co, Sydney (534 pages)
- Atherton T.C. & T.A. (2003) **Review of International Law on Innkeepers Liability** including review of UNIDROIT, European Community and G7 initiatives and recommendations for reform in Australia **for the Inter-governmental Committee on National Innkeepers legislation** convened by the Australian Standing Committee on Tourism (ASCOT)
- Atherton TC, (2006) **The Legality of Holiday Letting**, publication pending in the International Travel Law Journal.
- Atherton TC, (2006) **Current Issues in Tourism Travel & Hospitality Law (A review of the current issues including the challenges of regulatory compliance)**, Reform Vol 83, Australian Law Reform Commission.

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Travel and tourism law in Australia

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Travel and tourism affects, and is affected by, almost every economic, social, cultural and environmental consideration and, accordingly, is subject to, and dependent upon, the laws governing all these matters. In addition, there is a host of specific laws that regulate each aspect of this industry. Success for all stakeholders depends upon maintaining an efficient, effective, and responsive regulatory and compliance system.

Introduction

Travel and tourism is one of the world's largest and fastest growing industries which, the World Travel & Tourism Council reports, is expected to generate globally, in 2006, US\$6,477.2 billion of economic activity, 10.3% of total GDP and 8.7% of total employment.¹ The industry is highly competitive, dynamic and interconnected with almost every other economic activity. Properly managed, it offers some of the best prospects for sustainable development across economic, social, cultural and ecological dimensions, both in Australia and internationally.

If the industry is to continue to deliver upon the expectations of its many stakeholders, it is essential that it be properly managed. In travel and tourism, this responsibility is shared between the public and private sectors. On the public side, it requires an efficient, effective, and responsive regulatory system. On the private side it requires, as a minimum, compliance with the black letter laws and regulations governing the industry. Through the 1990s, this has been extended to wider responsibilities for the environment. In the 2000s, it is extending further to include a range of social responsibilities.

This paper will examine, in each of the travel and tourism industry, some of the current issues² where there is a need for reform, simplification, and uniformity and will then, briefly, consider the challenges of compliance.

Distribution

Travel and tourism have traditionally relied upon a range of intermediaries to connect, and make transactions between, consumers and providers of the accommodation, transportation, activity and attraction services which make up the tourism product.

Traditionally, the key intermediaries have been travel agents and tour operators and, over time, a uniform national system has been developed to regulate the traditional methods of distribution in Australia. This comprises:

- a state based, but uniform, travel agents licensing system;
- a compulsory, industry-sponsored, travel compensation insurance scheme; and
- strong industry associations with well accepted standards and codes of conduct.³

However, distribution has been revolutionised by the World Wide Web, so that providers are increasingly supplying their services directly to consumers and bypassing the traditional intermediaries. Problems are emerging and the regulatory system designed for the old ways is struggling to adapt. Some of the key challenges include:

- declining commissions and viability of traditional intermediaries, and the need to restructure and convert to a customer-paid fee-for-service system;
- emergence of major online travel agent style distribution portals, raising interstate and

international regulatory and licensing issues;

- emergence of major accommodation distribution portals, which fall outside the travel agent licensing system because they deal in only one component of the tourism product;
- proliferation of individual provider web sites dealing directly with consumers;
- complex conflicts and problems over domain names, business names, company names, place names, and trademarks, and their interrelationships; and
- the need for newly emerging industry sectors to establish trade associations to deal with the issues, raise standards and self regulate.

Passenger Transport

Carriers are one of the two common callings which, from ancient Roman times, have attracted special rights and duties in order to improve the safety and security of travel. However, passenger transportation has been one of the most dynamic parts of travel and tourism and the common law has been unable to keep up with the developments—from horse and carriage through to sailing ships, steam trains, motor vehicles, jet airplanes and now the prospect of space tourism. This part of the travel and tourism industry is now largely governed by international conventions and legislation, combined with privately imposed contractual *conditions of carriage*, which vary from one mode, and one operator, to another.⁴

There are a number of key current challenges in passenger transport.

- The need to reform the anachronistic common carriers legislation, which varies from state to state in Australia but, generally, comprises a patchwork of provisions that purport to enable certain carriers (mostly road transport) to limit certain types of liability.
- Sea transport has enjoyed a revival through pleasure cruising, which provides a popular combination of transportation, accommodation, activities, and attractions, often without the restrictions and regulations passengers are used to at home. However, as highlighted in the recent coronial inquest into the death of a passenger on board P&O's *Pacific Sky*, this creates its own problems, especially in international waters.⁵ Under the *United Nations Convention on the Law of the Sea*, the applicable law in international waters is that of the ship's flag

state, often a third world country where the standards and rule of law are weak by passengers' home country standards. Ships' captains have strong powers to regulate activities on board but in practice these are diminished by an equally strong conflict of interest. A better regulatory system is required urgently at national and international level if this segment is to continue to grow and prosper.

- Air transport, in its relatively short history, has proven to be one of the most dynamic forms of passenger transport, both in technological and legal developments. Virtually, from the outset of aviation in the 1920s, the Warsaw Convention system provided a uniform regulatory system, balancing the rights and duties of carriers and passengers, while facilitating the growth and development of this new mode of transport. The basic objectives of the system are to standardise documentation and impose strict, though limited, liability upon carriers for the safety

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and security of passengers. However, the cumbersome international treaty making procedures have been unable to keep up with developments in the industry, and the uniform international regulatory system deteriorated into a complex mosaic of out-of-date regulations, under which the rules governing each flight, and even each passenger, depend upon which amendments have been accepted by the origin and destination country. Frustrated with the lack of progress, the International Air Transport Association sponsored a carrier based, self-regulatory, solution but this is also defective for various reasons.⁶ Fortunately, a major overhaul and update of the regulatory system, under the 1999 Montreal Convention,⁷ has gained wide international support among developed and developing countries including all of Australia's main aviation partners. Unfortunately, Australia has still not acceded to this convention. Part of the problem is that, impatient with international progress, Australia tried to deal with some of the problems unilaterally under amendments to the *Civil Aviation (Carriers Liability) Act 1959* (Cth). However, this is inefficient and ineffective and no substitute for the potential benefits of the international clarity and uniformity now offered under the Montreal Convention.

Traveller Accommodation

Innkeepers are the other common calling which attracted special rights and duties from ancient Roman times, in order to improve the safety and security of travel. The classic inn is now a historical relic and, today, hotels, motels, hostels, timeshare, resorts, serviced apartments, and holiday houses are the main forms of traveller accommodation. Although the common law has extended the innkeepers' doctrine to embrace some of the modern forms of accommodation, particularly hotels, motels and serviced apartments, there have been too few decided cases for the doctrine to evolve and develop into a sufficient regulatory system. In most jurisdictions, the doctrine has been amended by special legislation, but much of this is also now well out-of-date and inappropriate for current circumstances.⁸ National uniform legislation in Australia remains a wish, rather than a reality.⁹ At operator level, contractual *booking or occupancy conditions* vary greatly from one firm to another and although some uniformity has been achieved

internationally, among hotels, even this is out of date.¹⁰ Unlike passenger transport, there has been little success in developing an international convention¹¹ despite a marathon 60 year effort by UNIDROIT.¹²

There are a number of key current challenges in traveller accommodation.

- Innkeeper laws need to be reviewed to accord with current practices and conditions and to achieve national uniformity. Queensland reviewed and updated its law in 2001 and this would provide a useful model.¹³
- Issues needing attention include extension of the innkeeper's doctrine to include all modern forms of accommodation, clarification on who is the innkeeper in strata title establishments, clarification of the *infra hospitium* (precincts of the inn) principle in resort and mixed use developments, clarification of rights and responsibilities for guests' means of transport, clarification of the power of sale under the innkeeper's lien, and updated and uniform limits on innkeepers' strict liability.
- Concerted action is required from operators to improve standards and self regulation by developing codes of conduct and uniform booking and occupancy conditions, subject to competition laws.
- Rules of the House are a long recognised, but currently under utilised, tool for risk management.
- Holiday letting of houses and apartments in residential areas across Australia is a long established practice, which has grown substantially in recent years because of seachange and other trends facilitated by advances in communications technology, including the web. In some destinations, conflict has arisen with permanent residents and some councils have sought to regulate the practice. Byron Bay Council has taken the most radical approach by recent endeavours to prohibit it altogether. Regulation is required to achieve a balance between the rights and interests of all the stakeholders involved, and this is better dealt with at state, rather than local, level or in accordance with state guidelines. It is also preferable to use a uniform approach, researched and agreed upon, among the states. A national industry association and code of conduct is also required to complement state efforts.

Activities & Attractions

Activities and attractions provide the main motivations for leisure travel. In the widest sense they are often an integral part of the passenger transport or traveller accommodation involved (eg, cruises, luxury train journeys, scenic coach tours, resorts, historic hotels). Food and beverages are also an important part of the overall experience.¹⁴ Because they are so diverse, it is not possible to deal with the vast range of specific regulatory issues involved.¹⁵ Some of the more general and important current issues are as follows:

- risk management is a key issue for operators of activities and attractions;¹⁶
- occupational health and safety laws often have special and challenging applications to providers of activities and attractions because these services are usually consumed or enjoyed by the guest at the factory, or workplace, where they are produced and, so, a new and unexpected party is involved in these laws—the customer;
- until recently, s74 of the *Trade Practices Act 1974* (Cth) prevented Australian tourism operators from limiting, or excluding, liability in contract or tort, even for adventure activities where customers were knowingly, and willingly, seeking risk;¹⁷
- amendments to the *Trade Practices Act*, in conjunction with tort law reform legislation in each state, have revived the use of warnings, limitation and exclusion clauses as legitimate and practical tools for risk management. However, significant challenges and traps remain for operators under the ticket cases, and other tricky legal principles, and these are often misunderstood, or overlooked, by the industry; and
- the tort law reform legislation in each state has also removed, or limited, some of the serious risks previously faced by operators of activities and attractions. However, the provisions vary from state to state and complex issues remain untested.¹⁸ Because the legislation dramatically shifts the balance in favour of defendants and insurers, case law may well interpret the provisions in a narrow manner and strictly against their interests.

Compliance

One of the major challenges now facing the travel and tourism industry is not so much reforming the imperfections in particular laws, but the wider challenge of achieving compliance with the whole regulatory system.

The old adage that everyone is presumed to know the law—and the corollary that ignorance of the law is no defence—is taking on a new significance for corporations, medium and small businesses in this industry. A number of legal developments are converging to make this a top of mind issue for management:

- legislation imposing criminal sanctions and fines upon corporations and persons responsible or involved in breach of laws affecting all businesses including legislation on tax, corporations, competition, consumers, discrimination, privacy, insolvency, environment, employment, occupational health & safety;
- common law developments 'lifting the corporate veil' to expose directors and senior management of corporations to personal responsibility;
- compliance programs in probation orders, and in determining penalties for corporations and persons involved in consumer and competition law breaches under the *Trade Practices Act*;¹⁹
- compliance program and reporting requirements under ASIC and ASX²⁰ corporate governance rules;
- elevation of the status of the industry's own 'voluntary' codes of conduct to standards for compliance in civil and criminal liability;²¹ and
- wider management responsibilities for due diligence, risk management, triple bottom line (performance against financial, social and environmental criteria).²²

The challenge is especially daunting in Australia where, despite the efforts of the Office of Regulatory Review²³ and similar agencies, the sheer volume, complexity and growth of regulation is overwhelming, even for the enforcement authorities themselves.²⁴ In the circumstances, to expect or demand perfect knowledge and compliance from citizens is unrealistic and unfair. Fortunately, Australia has taken a leading role in addressing this problem by producing the world's first Risk Management

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Standard in 1995²⁵ and regulatory Compliance Program Standard in 1998.²⁶

In addition to the general laws and regulations, travel and tourism must also comply with an extensive range of special, and often onerous, laws, regulations, codes and standards which apply to this industry. These include:

- conventions, statutes, regulations governing each segment of the industry;
- special common law doctrines on carriers and innkeepers (as previously mentioned);
- strict licensing guidelines and conditions;
- private sector institutions and extensive, self regulatory, codes and standards; and
- high expectations from intermediaries, partners, customers, host communities and other stakeholders.

As this paper has illustrated, in many respects these laws and regulations require urgent reform, simplification and uniformity. Given the extent and detail of the regulatory requirements and the harsh consequences of breach, it is now difficult to survive and prosper in the travel and tourism industry without an effective regulatory compliance program. For many firms the black letter laws and regulations are challenging enough, let alone the wider environmental and emerging social responsibilities.

Endnotes

1. *Tourism Satellite Accounting* at <<http://www.wttc.org/frameset2.htm>> at 30 April 2006.
2. For an international perspective see, 'Current Issues in Tourism and Travel Law' in T Atherton and T Atherton, *Managing Tourist Health and Safety in the New Millennium* (2003). It is also interesting to compare an earlier Australian assessment in T Atherton, 'Top 10 Legal Challenges for Tourism', (1998) *Travel Australia* 12–13.
3. See generally, 'Travel Agency' in T Atherton and T Atherton, *Tourism, Travel & Hospitality Law* (1998).
4. See generally, 'Passenger Transport' in T Atherton and T Atherton, *Tourism, Travel & Hospitality Law* (1998).
5. D Passmore, 'Missing on the High Seas', *Sunday Mail*, 2 April 2006.
6. See T Atherton, 'Unlimited Liability for Air Passengers: The Position of Carriers, Passengers, Travel Agents and Tour Operators under the IATA Passenger Liability Agreement Scheme' (1997) 63(2) *Journal of Air Law and Commerce* 405.
7. *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999 (Montreal Convention), [1999] ATSD 4713.
8. See generally, 'Traveller Accommodation' in T Atherton and T Atherton, *Tourism, Travel & Hospitality Law* (1998).
9. Atherton Advisory Pty Ltd, *Review of International Law on Innkeepers Liability* for the Inter-governmental Committee on National Innkeepers Legislation convened by the Australian

Standing Committee on Tourism (ASCOT) Sydney 2003.

10. The two main instruments sponsored by the International Hotel & Restaurant Association sponsors are: *International Hotel Regulations*, Kathmandu 1981, which provides a code of international trade practices on the contract between hoteliers and their guests (first version published in 1921) and the *Code of Practice on Hotel/Travel Agency Relations IHA/UFTAA*, 1987, which provides a code of international trade practices on transactions between hoteliers and travel agents.
11. The 1962 European Convention adopted the early work of UNIDROIT but thwarted the efforts to achieve wider international uniformity. See *Convention on the Liability of Hotel Keepers concerning the Property of their Guests* Council of Europe (Treaty ETS No. 041).
12. The 1988 UNIDROIT Draft Convention was the final proposal on international uniformity on the regulation of hotel/guest contracts and the effort was abandoned in 1992.
13. *Traveller Accommodation Providers (Liability) Act 2001* (Qld).
14. See generally, 'Food & Beverage' in T Atherton and T Atherton, *Tourism, Travel & Hospitality Law* (1998).
15. See generally, 'Activities & Attractions' in T Atherton and T Atherton, *Tourism, Travel & Hospitality Law* (1998).
16. T Atherton, 'Risk Management: The Rocky Road of Liability', (Paper presented at the World Adventure Travel & Ecotourism Congress, Hobart, November 1994).
17. T Atherton, 'Supplier Beware! Product Liability under s74 Trade Practices Act', Inn Laws column for *Check-Inn*, the official journal for the Hotel, Motel and Accommodation Association of Australia 1999.
18. For an interesting discussion on the impact on alcohol servers' liability see C Barry, 'Hoteliers' Liability to Patrons', (2006) 44(2) *Law Society Journal* 47.
19. Sections 86C, 87.
20. ASX Corporate Governance Council Principles particularly numbers 3, 7 and 10.
21. See for example, *Trade Practices Act 1974* (Cth) pt IVB, *Civil Liability Act 2003* (Qld) s 35 and case law.
22. See for example, World Travel and Tourism Council, *Corporate Social Leadership in Travel & Tourism* (2002) <<http://www.wttc.org/publications/pdf/CSLREPORT.pdf>> at 30 April 2006.
23. <<http://www.pc.gov.au/ort/index.html>> at 30 April 2006.
24. Consider, for example, Australia's legislation on core subjects such as tax, GST, employment and native title each of which is widely regarded as the most voluminous and most complex of its type in the world.
25. AS/NZS 4360 *Risk Management*.
26. AS 3806 *Compliance Programs*.

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