

Sleep Soundly... Minimise Potential Litigation



Left: Tony O'Connor, partner-litigation division from Short Punch & Greatorix Lawyers.

Right: John Mahoney, from Mahoney Lawyers Brisbane.

In the perfect world, it would be easier not to worry about litigation, or would it? Complacency takes hold, mistakes happen and the blame game starts when there are no established quality management standards.

Tony O'Connor, partner-litigation division from Short Punch & Greatorix Lawyers, said, "There can't be a blanket approach to litigation avoidance. Managers, bodies corporate and accommodation resorts have to proactively prepare themselves individually to suit their business purposes."

It would be more proactive to identify methods for improving your chance of prevailing in litigation than only focusing on steps to avoid litigation. Unfavourable litigation would not only have a devastating effect on your business's reputation within the tourism industry but also on potential investors, consumers and employees.

John Mahoney, from Mahoney Lawyers Brisbane, stressed that it is critical to have appropriate insurances in place: "First, managers should make absolutely certain that they have cover in place, not just for their company, but also for themselves as directors. There are firms

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that specialise in onsite manager professional indemnity and personal liability insurance.

"The important thing to remember is the insurance policy these managers have is a claims based policy, so that you only have coverage if you have insurance in place at the time of the claim (not incident) is made. If you sell management rights and cancel insurance and a claim is made a year later you won't be covered."

"Managers can obtain run-off cover. It is advisable to take out a cover for three to four years after you have sold or moved onto somewhere else. You pay a reduced premium and are still covered for that period of time, for example, if someone is injured today it may take another one to three years before the claim is made.

"Next, the manager should ensure that the owner or body corporate, has had a recent (within two years) and current workplace health and safety audit done of the

whole complex. Then ensure the body corporate implements the changes the report suggests to be done or states ought to be done. Although there is no requirement to have a workplace and safety audit done, it is good management practice to have it done," Mr Mahoney said.

"Thirdly, ensure all staff, including the manager/operator, have a documented prescriptive checklist of what their duties entail. Any staff unsure about their duties need to have them clearly clarified. It is good practice to check the complex daily and direct staff to report anything requiring attention."

"Know what you have to do and if unsure, question it and document everything so you have some recourse if you have to stand up in a court of law," concluded Mr Mahoney.

Sound risk management does not mean excessive documentation. Whether the tourist accomoda-

tion is outback or coastal, the quality management and workplace safety principles remain the same.

Quality management systems and continuous quality improvement are terms often used today in all areas of business. The benefits of a QMS allows an organisation to identify and meet the needs and expectations of its customers and all interested parties, such as owners, suppliers, staff and the general public.

Tony O'Connor mentioned the landmark case *Enright v Coolum Resort PIL (2002) QSC 394*, where the plaintiff unsuccessfully sued the resort and the former Maroochy Shire Council, for \$120 million, when her American husband, Robert Steven Enright, drowned at Yaroomba Beach, Queensland in 1993.

"In many ways it was one of the guiding cases for managers and resorts of what potential liability might be. The case was won by the Hyatt Coolum because the judge found they had developed a range of risk management programs that guided guests in relation to swimming and surfing safety issues, such as information brochures, adequate signage and a shuttle service to the beach. It showed they had done



everything they needed to do to avoid liability," Mr O'Connor said.

A manager/owner operator has a duty of care. The duty of care may suggest tourism organisations are responsible for protecting consumers against any fraud, misrepresentation or unethical practices by recommending only reputable tourism products.

"Most of the common law in Australia has been framed by high court decisions. Essentially these laws cover anybody who is an occupier or operator of premises. There is nothing particularly difficult about the concept of it.

Where the difficulty comes is the application of it. Generally speaking the occupier of premises, such as the manager and body corporate have a duty of care at common law to take reasonable care for the safety and surround of people that come onto the prop-

erty. That duty of care is unquestionable.

"Before entering into management rights or caretaking agreements, a manager needs to fully read and understand or take advice about what their duties are contractually to the body corporate," said Mr O'Connor.

"Sometimes busy managers forget to renew their insurance. This is where a reputable insurance broker can be valuable. It may be a little more expensive but it is in both the manager and the broker's interest to keep the insurance policy valid and current. It has happened where an uninsured manager has had to wear most of the liability even when there has been a body corporate involved," Mr O'Connor said. The second beach summit held on the Gold Coast in April 2010 raised the issues about the legal responsibilities of accommo-

dation providers educating their guest about surf and swimming dangers.

Surf Life Saving Australia has general beach safety and dangerous marine creature fact sheets available to download from their website at www.lifesaving.com.au

The website www.australia.com provides information, in several languages, for international visitors about Australia's travel hazards.

"Have some simple and sensible systems in place, think it through and be guided by experts in the fields, (for example, insurance, liability and workplace safety) and there is no reason why you shouldn't be able to sleep well at night," concluded Tony O'Connor. **m**

By Marie-Clare De Vere - Industry Reporter



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