Running a risky business – preventing damage to your patrons, your brand and your bottom line

Read this if you want to know...

- *Why* managing liability risk is good business
- *Whether* your business is exposed to liability
- *What* you can do about it

Travel adventures are all about taking risks, nowhere more so than in South Australia with all it has to offer by way of tour experiences at sea and in rivers, across rugged terrain, underground and even in the sky. Rustic accommodation, bicycle and quad bike rides, helicopter rides, skydiving, jumping pillows, horse riding, swimming pools and even cooking classes all present foreseeable risks of injury to your visitors and participants.

Awareness and proactive management of risks to public safety is essential to protect you and your business from financial loss, statutory penalties and adverse publicity. As a bonus, robust risk management also builds strong and resilient business.

Better to be safe...

Benefits to business aside, no one wants to see their visitors or staff get injured (or worse) while they are working or paying to have fun, no matter how risky the activity might be.

All Australian states have mandatory work, health and safety and consumer law requirements which set minimum standards as a foundation for safe premises and practices.

Who's liable if something goes wrong?

It could be your business. If a person is injured due to a failure on the part of an occupier of premises or a provider of facilities, goods or services to take *reasonable steps* to alleviate, minimise or warn of *foreseeable* risks of harm then the person could succeed in a claim for damages against the provider.

A business will usually be liable for negligent acts or omissions of their staff.

Earlier this year the NSW Court of Appeal awarded a 12 year old girl damages against a recreational facility for injuries sustained by her when she fell from a quad bike during a supervised ride. The Court found that the instructor was riding faster than was safe and that that was <u>not</u> a risk which was inherent to quad biking or obvious in the circumstances*.

What about warnings?

Australian courts have long held that there is no duty to warn of an "obvious risk". Whether a risk is "obvious" or not in the circumstances can be difficult to assess (as demonstrated by the quad bike case above).

In another more recent example, the NSW Court of Appeal held that a sign warning pool users to use 10 metre diving platform at their own risk was sufficient in that the injuries sustained were simply the materialisation of an obvious risk of the dangerous recreational activity of platform diving**. If, for example, the platform had snapped due to a faulty component, this would likely *not* have been a risk which would have been 'obvious' to pool users.

The onus will be on the provider of the service or activity, to prove that a warning was clear and capable of conveying the risk to all foreseeable entrants. This can be difficult considering the

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range in ages, ethnicity, language and intellectual capability of tourists and even local visitors.

What about waivers?

The short answer is that they can *help* to minimise risk – by making your patrons *aware* of risks that are inherent to the activity – but they do not provide a 'watertight' defence to any claim.

The Australian Consumer Law says that services must be provided with due care and skill, and generally speaking this guarantee can't be restricted by agreement from the consumer.

However, in South Australia, "*recreational service*" providers (as defined in the legislation) can ask a consumer to agree to limit any liability arising from a failure to use due care and skill, but this is also subject to some important requirements and restrictions. For example, use of the prescribed form, timing of the form being brought to the attention of the consumer and strict signing and witnessing requirements.

The form, which can exclude, restrict or modify liability, cannot do so if you – or your staff - are "reckless" in providing the service. An example might be knowing that a horse is unwell or injured and incapable of carrying the weight of a rider but proceeding with the tour regardless. Or, being aware of a fault in a BBQ gas connection but allowing guests to use it anyway.

Children cannot agree to limits of liability and parents cannot legally do so on their behalf.

In the quad bike case mentioned above, the child's guardian had signed a standard 'waiver' contained in the application to undertake the activity. The Court did not accept that the warning had covered the risk which eventually materialised, and that there was no enforceable agreement limiting the operator's liability.

Transferring the risk...

Having complete public liability insurance will not address the safety risk to your patrons, the risk to the reputation and brand of your business or the potential exposure to statutory penalties.

What it will do is reduce your exposure to potentially devastating damages claims and the legal costs of defending and/or settling those claims.

Robust and tailored insurance cover is imperative.

The take home tips.....

- ✓ proactive risk identification & management is the first line of defence
- ✓ warning signs and notices should be clear and informative
- ✓ waivers are a tool not a shield and need to be used carefully
- ✓ insurance is crucial but it shouldn't stop there

Wallmans Lawyers have a dedicated liability and risk management team which can assist Tourism businesses in managing their risk profile including legal compliance audits, liability risk identification and guidance, staff awareness and training, and risk transfer via insurance options.

Wallmans provide all SATIC members with a free 15 minute call to discuss any legal issue. If you are interested in discussing how risk may affect your business, please call:

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