

# PUBLIC LIABILITY IN THE AUSTRALIAN TOURISM INDUSTRY

risk exposure profile and legal responsibilities



*Nick Parfitt, Christopher Arup, Damian Morgan and Jeff Wilks*

SUSTAINABLE  
TOURISM



CRC

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## **ABSTRACT**

Tourism operators are required to manage client and employees safety. Safe tourism operations have financial benefits as reduced public liability exposure can improve access to cost effective insurance premiums. The premise of the project reported here is that safety will be improved where risk exposure profiles are available for tourism industry sectors in conjunction with readily available knowledge of industry best practice and legal requirements.

Hence, the purpose of the project was to identify relevant risk exposure related data and legal frameworks applicable to health and safety for the tourism industry in the states of Queensland and Victoria. Following an overview of the public liability burden carried by the tourism industry in Chapter 1, Chapter 2 presents a range of injury, incident and claims data sourced from government agencies and the private sector. From this data, the most frequent locations for injury or claims are aquatic-based activities and other activity presenting the risk of slips and falls (e.g. horse riding). It is also clear from the data that patterns of injury and claims differ between tourist and employees, indicating diverging risk exposure profiles. Limitations of the data's utility for developing risk management strategies (in the form in which it is currently collected) are discussed.

The report concludes with a summary of two tourism industry forums, held in Queensland and Victoria. Tourism stakeholders endorsed the project concept and expressed their support of new initiative building on the preliminary findings presented here. Based on this, three related projects are outlined:

1. A national tourism operator survey on risk exposure and management.
2. A review of industry risk profile data requirements.
3. A review and synthesis of tourism industry risk management best practice.

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Monash University  
Queensland Tourism Industry Council  
Tourism Alliance Victoria  
The University of Queensland  
Victoria University

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Janet McMartin	Workcover Victoria
Daniel Musson	Insurance Australia Group
Marcus Robertson	ZIB Insurance Brokers Limited
Sandra Venn-Brown	QLD Workplace Health and Safety
Jodie Wilmer	Tourism Alliance Victoria

The authors are also in debt to industry stakeholders attending project forums in Brisbane and Melbourne.

## SUMMARY

### Objective of Study

The objective of this study was to identify and assess relevant data and legal frameworks applicable to health and safety for the tourism industry in the states of Queensland and Victoria. The study had an additional objective to identify current public liability related initiatives and issues across tourism industry sectors.

### Methodology

The study was conducted over three phases:

1. Identification and review of data sources relevant to tourism industry risk exposure. This information was provided by government agencies and insurance organisations. The data was used to develop a preliminary risk exposure profile for the tourism industry.
2. Review of the legal framework applicable to tourism industry health and safety. This review included recent initiatives of government in response to rises in public liability premiums.
3. Tourism industry consultation. Tourism industry stakeholders in Queensland and Victoria were consulted for input to the project. Stakeholders were asked to indicate future research directions intended to provide ongoing tourism industry benefits.

### Key Findings

**Data identification and analysis:** A range of data relating to tourism operators risk exposure was sourced for this project. From this data, it is possible to identify tourism sectors and activities that generate relatively more frequent injury and incident claims. This data suggest research directions on risk management that may prove most beneficial to the industry in the short term.

**Coordination and the need for tailored data:** Conversely, the project identified gaps in the available data and the limited ability to compare data bases among collecting agencies. Methods of collecting and categorising injury and claims data better tailored to tourism industry would have clear benefits in identifying relevant risk exposure and hazards.

**Willingness of industry to move forwards on risk management:** Stakeholder forums indicated a willingness of industry to improve risk management practices within their overarching business strategies. To achieve this, the need for dedicated research, identification of best practice, and mechanisms to promote industry coordination was recognised.

### Future Action

This project has provided an insight into the scope and quality of health and safety related data relevant to the tourism industry in Queensland and Victoria. Future projects are required to build on this study. Based on the study findings, reviews of the professional literature and tourism industry member recommendations, the following three Sustainable Tourism CRC program areas are proposed:

#### 1. Tourism Operator Survey

Information on incidents, risks, and injuries should be collected from tourism operator across Australia. Similar work has been carried in New Zealand and Scotland (e.g. Bentley & Page 2001; Page, Bentley & Walker 2005). This information would assist to identify operator risk exposure and communicate effective strategies used *in situ*.

#### 2. Review of Claim, Incident and Injury Data Collections and Tourism Industry Requirements

In-depth reviews of available data sets and the method of collection and categorisation are required. This review should assess current and potential uses for the data as well as the feasibility for better matching data to tourism industry needs. This would require consultation and genuine partnerships with the industry.

**3. Review of Risk Management Industry Best Practice**

Building on the above two projects, current best practice and improvements in data collection would be combined to develop a *warehouse* of risk management best practice. This would include guides on legal responsibility, industry best practice, risk exposure reports, and practical documents for industry use. The system may be integrated within a national standard or accreditation framework. The Federal Minister for Small Business and Tourism (the Hon. Fran Bailey MP) had announced the government's commitment to the development of a national tourism accreditation program (Bailey 2005) to which this warehouse of risk management tools and knowledge could be a significant contributor.

## **Chapter 1**

# **THE PUBLIC LIABILITY ENVIRONMENT**

Recent global events and financial trends have intensified the tourism industry's need to recognise and manage three interrelated business elements: client and employee safety; risk exposure; and financial outlays for public liability (PL) insurance. In response to the need to better manage risk exposure and liability, the tourism industry has undertaken a range of positive and valuable initiatives. However, these initiatives have been isolated to specific states (e.g. Victoria) or industry sectors (e.g. the scuba diving industry). This *piecemeal* approach to risk management means that beneficial programs and relevant risk profile data has not been effectively communicated to all industry stakeholders. Using existing strengths and expertise in risk management research and knowledge, the Sustainable Tourism CRC is suitably placed to initiate studies that will improve tourism industry coordination and knowledge through research and information dissemination. A study reported here is the first step towards the goal of improving risk management across all sectors of the tourism industry.

## **Study Objectives**

The objective of this study was to identify and assess relevant data and legal frameworks applicable to health and safety for the tourism industry in the states of Queensland and Victoria. The study had an additional objective to identify current PL related initiatives and issues across tourism industry sectors.

The study was conducted over three phases:

1. Identification and review of data sources relevant to tourism industry risk exposure. This information was provided by government agencies and insurance organisations. The data was used to develop a preliminary risk exposure profile for the tourism industry.
2. Review of the legal framework applicable to tourism industry health and safety. This review included recent initiatives of government in response to rises in public liability premiums.
3. Tourism industry consultation. Tourism industry stakeholders in Queensland and Victoria were consulted for input to the project. Stakeholders were asked to indicate future research directions intended to provide ongoing tourism industry benefits.

## **Data Sources**

Information collected and reported was derived from the following sources:

### **Published Research, Industry Reports, and Relevant Legislation**

Previous research and industry reports were identified by internet search and consultation with industry stakeholders. Relevant legislation was reviewed and synthesised for the states of Queensland and Victoria (see Appendix A).

### **Government Agencies**

Data providing workplace health and safety profiles for tourism operators over the previous five years (2000 to 2004) were requested from Queensland Workplace Health and Safety and Worksafe Victoria. Following discussion with both agencies, ten categories (listed by the Australian and New Zealand Standard Industrial Classification (ANSIC)) were included to provide an industry profile:

- Accommodation.
- Coastal Water Transport.
- Travel Agency Services.
- Transport (not elsewhere classified).
- Museums.
- Zoological & Botanic Gardens.
- Recreational Parks & Gardens.
- Sports & Services to Sports.
- Casinos.
- Other recreation services.

## **Insurers / Brokers**

Following consultations with the Queensland Tourism Industry Council and Tourism Alliance Victoria, requests were made to the Insurance Australia Group and ZIB Insurance Brokers to provide claims data for tourism operators over the previous five years (2000 to 2004).

## **Industry Consultation**

Industry stakeholders, as identified by the project partners, were requested to attend industry forums held in Queensland and Victoria. Discussion points and outcomes from the two forums were recorded and synthesised.

In this report, all data provided by agencies or previously published research remained in original form. Limitations and utility of this data to meet the study aims are discussed in Chapter 3.

## **The Role of Public Liability in the Tourism Industry**

PL insurance belongs to the class of insurance that includes workers compensation, professional indemnity, medical indemnity, third party motor vehicle, and products or defects liability. Although these forms of insurance are relevant to different situations and parties, all are characterised by the need for an organisation to protect itself against claims made by the public.

PL encapsulates a range of insurance industry products and resultant definitions. Examples of PL definitions are listed below:

Public liability insurance is used by owners and operators of commercial and non-commercial activities, including use of property, to protect them against the risk that a member of the public suffers injury or loss that is attributable to these owners and operators (Trowbridge Consulting 2002, p.1), and

Public liability insurance provides protection for claims brought by third parties (persons injured or suffering a loss) as a result of some action or inaction by the insured (Queensland Government 2002a, p.4).

Clearly, definitions of public liability differ according to need and purpose. Nevertheless, a common element remains at the core of the concept; that is, managing the legal and moral responsibility towards the public (third parties) carried by tourism operators. The potential financial costs of public liability claims against operators necessitates that this element of risk is managed by transferring it to specialised PL insurers.

## **Increasing Public Liability Burden?**

Although tourism operations successfully carried PL insurance for many years, the pairing of 'public liability' and 'crisis' became a common occurrence in the media early in this decade. The following quotations were recorded in the midst of the crisis, indicating its wide recognition among tourism industry stakeholders (Parfitt 2002, p.6):

Businesses have no other option than to make the public pay. If small businesses feel they can't do this then they will go to the wall or take the risk of not having adequate cover. This is a very scary situation. 50% of small business will vanish if the rising insurance spiral doesn't stop.

Change to contractors for cleaning services [are] not cost effective as they will raise their costs in taking into account increases in insurance costs. Investors want to maximise their return not minimise it. As owners of ... we're on duty 24/7 but would consider performing cleaning duties ourselves. Then five casual staff would be unemployed. With the increase in super guarantee next financial year, work cover & insurance we will have no option.

Similar concerns were reflected in government reports at this time. For example:

Our public liability cover has risen over 500% and we are seriously thinking of not only cancelling our event but also closing the association (Queensland Government 2002a, p.i).

Responding to industry concern over rising insurance premiums, governments across Australia took steps to address perceived causes. For example, the Victorian government provided the following response:

The Government has acted to ensure the continued availability and affordability of insurance as it underpins Victoria's economic and social fabric (The Premier of Victoria 2002).

In Queensland the response was:

Our problem is we're facing a crisis and unless there are some reforms, the system will collapse and nobody will get anything. We've got doctors who are reluctant to operate, we've got not-for-profit organisations which can't hold fetes, and the whole social fabric in a number of country and provincial cities is starting to be put at risk (Queensland Government 2002b).

A report by Trowbridge Consulting (2002, p.1) summarised the situation:

There is a crisis today in public liability insurance. The crisis is that there are too many people seeking insurance who can find it only at very high prices (compared to prices during the last five years) or cannot find it at all.

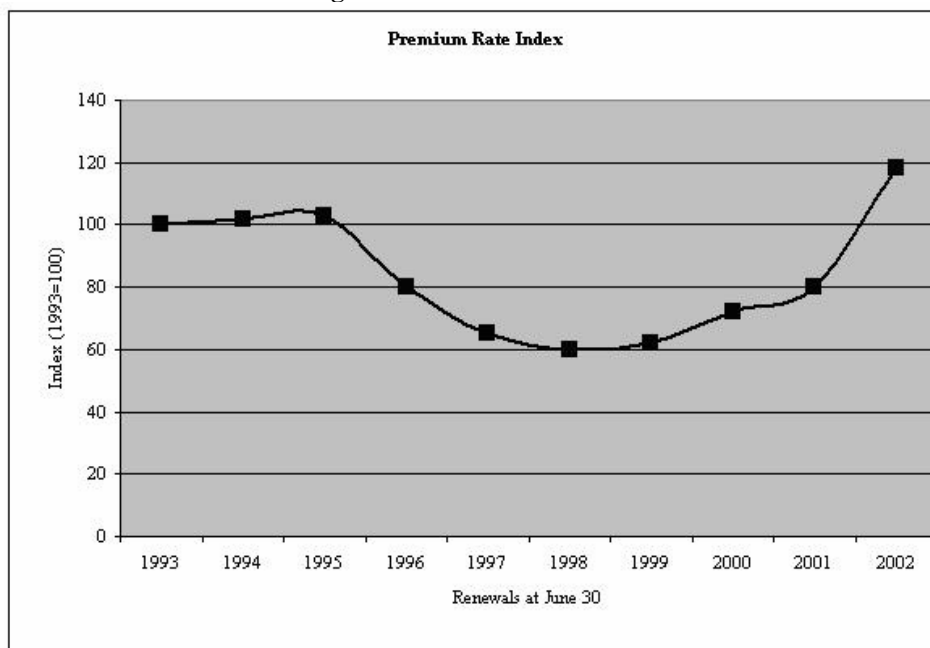
A ‘crisis’ can be defined as ‘any situation that has the potential to affect long-term confidence in an organisation or a product, or which may interfere with its ability to continue operating normally’ (Pacific Asia Travel Association 2003). The weight of evidence submitted to Government and industry taskforces, surveys, and statistical evidence, indicated the key characteristics of the public liability crisis included:

- The difficulty for tourism operators to obtain public liability insurance cover.
- Prohibitive costs of purchase public liability insurance for tourism operators.
- The implications of carrying the higher cost for tourism businesses.

As a result of the public liability crisis, some businesses were forced to reduce staff, cut back on services or raise prices for customers. As was reported in newspapers at the time, many tourism businesses and operations simply ceased to operate (e.g. Barker 2002).

Broad statistical indicators from this period confirm the characteristics of the situation. For example, indicative data in Figure 1 was provided by Insurance Statistics Australia (Trowbridge Consulting 2002). This data is derived from estimated premium changes sourced from the annual Morgan/Deloitte/Trowbridge survey of insurers and brokers. Premium forecasts are indexed to 1993 premium rates to allow comparison from 1993 to 2002. This trend line shows a fall in the premium rate index through the latter half of the 1990s followed by a sharp increase in the year 2001/02. It can be seen that a business paying the average price faced a premium twice as high in 2002 as it had three years earlier.

**Figure 1: Premium rate index**



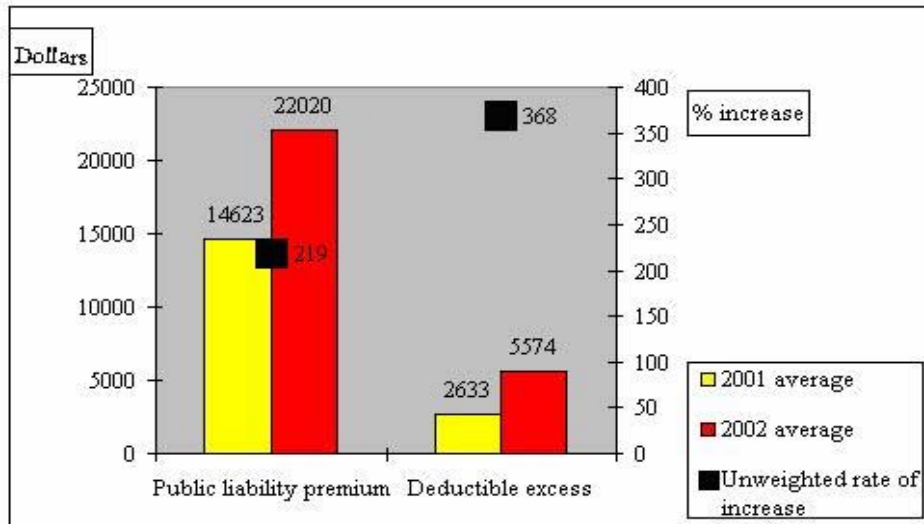
Source: Trowbridge Consulting (2002)

## **Factors Contributing the Public Liability Crisis**

The factors leading to the public liability crisis were complex. Nevertheless, some key trends and circumstances can be identified as major causes. Firstly, premiums were evidently at unsustainably low levels. From Figure 1, it is postulated that that some companies were charging premiums at a level below that financially sustainable before 2000. Around this time, the demise of insurers HIH and United Medical Protection effectively removed 50% of the capacity in the local market for small and intermediate risk insurance. Underpricing may have created unrealistic expectations across the tourism industry of the long term price of public liability insurance (Trowbridge Consulting 2002). Effects of terrorist attacks, notably those of September 11, 2001, compounded the ramifications produced by the insurance market *shakeout*. The result was a decline in the numbers of major multi-line insurers in Australia offering public liability insurance, from over 20 in the early 1990s to fewer than 10 by 2003.

Evidence of sharp insurance premium rises was provided by the March 2002 Queensland Tourism Industry Council project (Parfitt 2002). Results from 269 self-report surveys from the membership database indicated the average increase in the public liability premium faced by individual operators was in the order of 219% (see Figure 2).

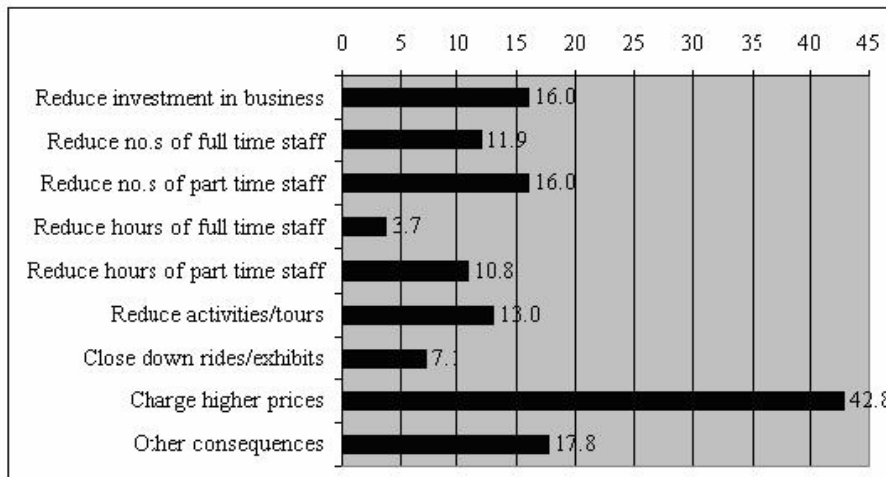
**Figure 2: Queensland tourism operator reported premium changes**



Source: Parfitt (2002)

The survey (Figure 3) also revealed the key projected impacts from increases in public liability premiums to be higher prices passed to consumers (stated by four operators in 10); reduced investment (stated by one operators in six) and reduction in the numbers of casual or part time staff (stated by one operators in six) and reduction in the numbers of casual or part time staff (stated by one operators in six).

**Figure 3: Reported implications of premium rises**



Source: Parfitt (2002)

### Tourism Industry Response to the Public Liability Crisis

The key economic response to the public liability crisis was a more stringent focus by the insurance industry on the risks presented by public liability exposure. The results were raised premiums for sectors presenting a higher risk profiles and a more discerning approach to the levels and type of risk PL insurers were prepared to accommodate. In addition, the Federal and State Governments, in conjunction with peak industry bodies, became more actively involved to reduce negative effects of PL premium rises on the tourism industry.

At the Federal level, the government responded by establishing a committee, chaired by the Honourable David Ipp, with the purpose to review the law of negligence (Ipp, Cane, Sheldon & Macintosh 2002). The Committee report (known as the Ipp report) made sixty recommendations relating to reform of tort law, under the general principles of bringing back the precepts to those of a reasonable person and away from definitions

based on strict liability (see Appendix A). The desired output of the recommendations was to stem the flow of claims and compensation for general damages.

Since Australia does not have an overriding national approach to matters of public liability, each State Government has made their own legislative response to the crisis and to the Ipp report.

In Queensland, limits have been placed on the costs lawyers can charge on *small quantum* matters, and on advertising based on *no win, no fee*. The intention of this initiative was to discourage the pursuit of small and *vexatious* claims. Moreover, the Queensland's Civil Liability Act 2003 seeks to modify the negligence and causation principles which underpin public liability. In summary, the Act sets down that:

- The precept that a risk of harm could have been avoided by doing something in a different way does not of itself prove negligence.
- Subsequent action taken to prevent a similar occurrence happening in the future is not of itself evidence of negligence or as an admission of negligence.
- There is no necessary duty to warn of an obvious risk.
- The replacement of 'joint and several' liability with the principle of proportionate liability (as recommended by the Ipp report).

The Queensland approach has been based on education as well as legislation. Government publications have been targeted to specific industry sectors, such as hotel owners and hotel staff, to alert these operators to their risk management responsibilities.

In Victoria, the Wrongs and Other Acts (Public Liability Insurance Reform) Act of 2002 included caps on payouts, waivers and protection for volunteers, and an increased emphasis on the culpability of the injured through criminal activity or the use of drugs or alcohol. Additionally, an insurance scheme to assist community groups was established in conjunction with the Municipal Association of Victoria (MAV) and Jardine Lloyd Thompson, with a \$330,000 grant to the MAV for 'risk mitigation activities'. A grant of \$100,000 was also made to adventure tourism operators to assist them prepare risk management plans and audits. The (then) Victorian Tourism Operators Association commissioned Marsh Pty Ltd to undertake detailed risk audits of operators in the horse riding, water activity and rope activity categories. The subsequent report offers very useful method for establishing an individual operator's risk profile and the actions required to reduce risk.

Since the peak in 2001/2, available evidence indicates that premiums have continued to rise, albeit at a lower rate than before, while claims appear to be falling (although the 'long tail' nature of personal injury claims means this pattern is acknowledged with caution). Industry observers have indicated that, although there have been legislative response to the earlier crisis, the greatest latitude for improving the situation may lie with individual businesses and operators or clusters of operators.

## **Current Initiatives in Risk Management**

This report indicates that a number of steps need to be taken in order to develop an occupational health and safety approach to visitor management. A range of initiatives have been implemented in Australia. These include:

- The Outdoor Recreation Industry Council of NSW Risk Management Document – check lists.
- Marsh Risk Management Guidance Material – risk evaluation criteria.
- No More Risky Business [Queensland Government] – signage and staff protocol.
- Victorian Adventure Activity Standards – accreditation process.
- Emergency Risk Management – Applications Guide: Emergency Management Australia.

There have been calls for the standardisation of risk management policies, procedures and incident protocol on a national level. The Ipp Report recommended that all actions for personal injury be subject to a single legal regime (Ipp et al. 2002). To take one area of common State Government responsibility – national parks – indicates similar intent between different States and Territories but differing interpretations and policies. To quote Buckley, Witting and Guest (2001):

All Australian park agencies refer to written policies on risk management but there are considerable differences between the types of policies and frameworks referred to by the various park agencies, and the level of detail they contain ....

The basis for the approach taken in this study is underpinned by the need for individual operators and clusters of operators to reduce their public liability exposure through adopting workplace health and safety principles in their business. These principles should apply equally to employees as well as guests.

*Chapter 2*

## **RISK EXPOSURE PROFILES FOR THE TOURISM INDUSTRY**

### **Health and Safety Framework**

Approaching public liability using an occupational health and safety framework is a useful starting point to assess the current risk exposure profile for the tourism industry. All commentators indicate that the role for financial measures – whether capping, insurance market direction or some form of Government subsidy – is limited, and that legislative changes should be complemented by greater attention to risk management and risk prevention strategies. Wilks and Davis (2003, p. 11) provide an example of this process in action:

Many injury prevention initiatives can be linked directly to the case of American scuba divers Thomas and Eileen Lonergan. The Lonergans were abandoned at sea at the end of a charter diving trip to the outer edge of the Great Barrier Reef off Port Douglas on 25 November 1998. The charter operator did not report their disappearance until two and a half days later, a delay that proved fatal when the subsequent search found no trace of their bodies. At the inquest into the Lonergan deaths the coroner committed the master of the charter vessel to stand trial for manslaughter – a charge of which he was subsequently cleared - and made a number of recommendations intended to prevent this sort of accident happening in the future. However, the predominance of diving incidents reported below, including a handful of ‘missing or misplaced’ diver incidents indicates that advice is still not translating into preventative action.

In *Enright v Coolum Resort Pty Ltd & Anors*, the court dismissed a \$120 million civil action for compensation claimed by the widow of an American tourist who drowned on a Queensland beach during 1993. Maureen Enright sued the Hyatt Coolum Resort where her husband were staying and the Maroochy Shire Council which controlled the beach where he drowned. As noted by Moynihan J, the defendants were under an obligation to exercise reasonable care to protect the deceased from the reasonably foreseeable consequences of the risks of water-based recreational activities in general, and of surfing at Yaroomba Beach in particular. In this case, the deceased had a background of participation in water sports. The Hyatt Coolum had developed a range of risk management initiatives to guide and assist their customers in relation to swimming and surfing, including brochures, the provision of a private beach patrolled by a lifeguard and accessed by a shuttle service. The deceased had not accessed any of the available services or information.

### **The Patterns of Staff and Visitor Injury and Related Data**

A range of data can be used to provide a profile of health and safety risk exposure facing tourism operators. For the present study, data was sourced from insurers and government agencies. This data was compared and contrasted to injury statistics previously published in academic literature.

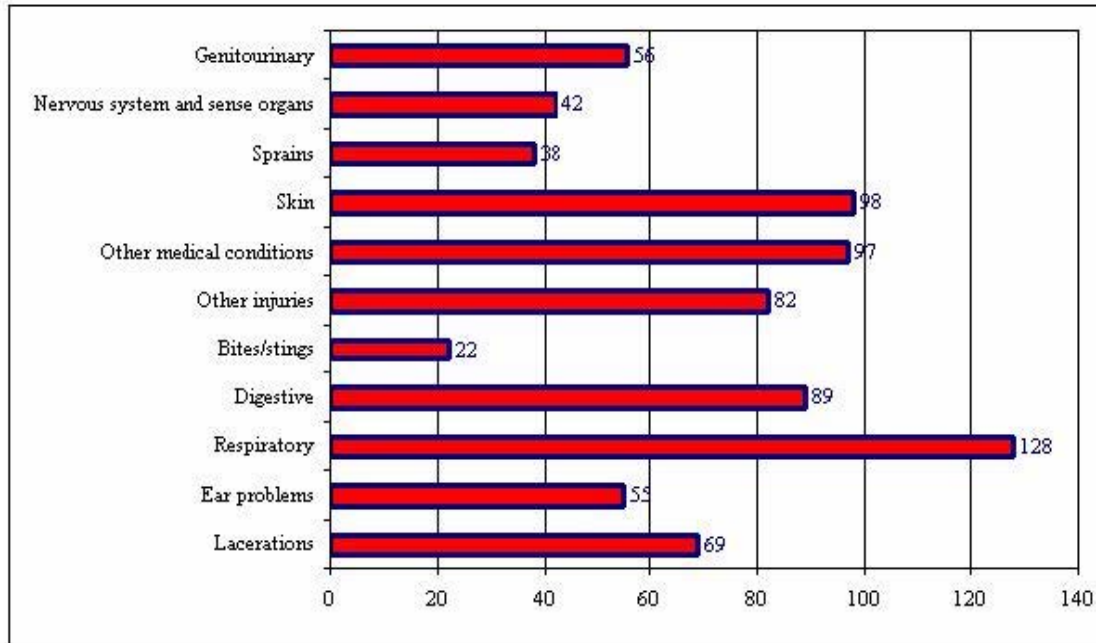
### **Injury Statistics Published in Academic Literature**

Very few studies examining tourism employee injury have been published in the academic literature. One such study was conducted by Wilks, Walker, Wood, Nicol and Oldenburg (1996). This study profiled the health services provided for staff at three tropical island resorts. The project analysed 1,123 clinic visits during the period January to June 1994. The data is reported in Figure 4.

The main reasons found for presentation to a clinic were respiratory related problems including sore throats, tonsillitis, chest infections and colds (128 cases), skin complaints such as rashes, bathers’ itch and skin infections (98 cases) and other medical conditions (fever, infections and fainting) (97 cases). In Figure 4, follow up consultations (358 in number) have been excluded.

The authors concluded that the resorts exhibited a relatively low rate of injury and so the provision of health services to staff appeared adequate, usually provided through a resident nurse.

Figure 4: Injury profile to workers at three tropical island resorts

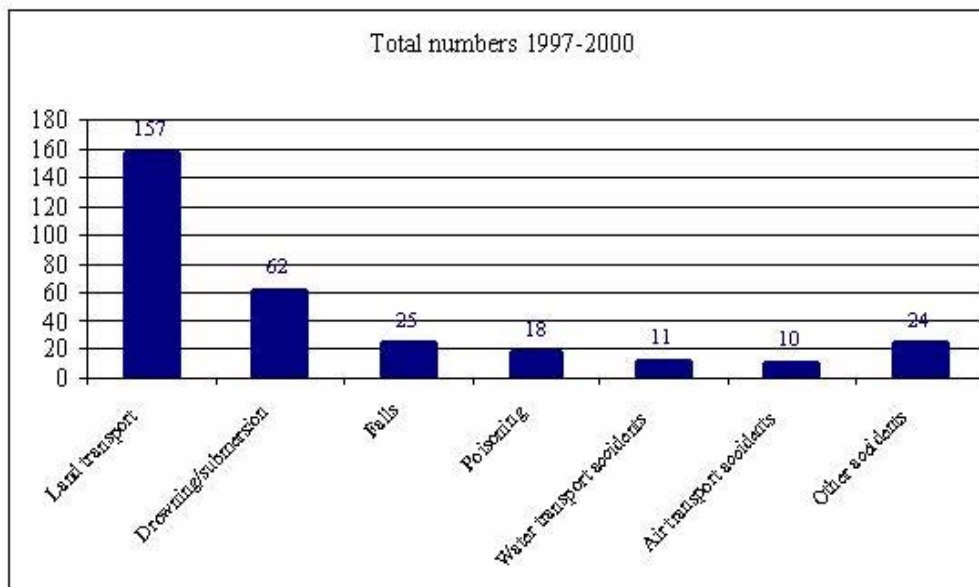


Source: Wilks et al. (1996)

Common types of circumstance leading to death among international tourists have been reported by Wilks, Pendergast and Wood (2002) (Figure 5). Land transport and water-related activities were the most frequent circumstances for deaths. It can be surmised from this data that the majority of these deaths occurred during self-organised tourism activities (i.e. not during supervised commercial tourist activities).

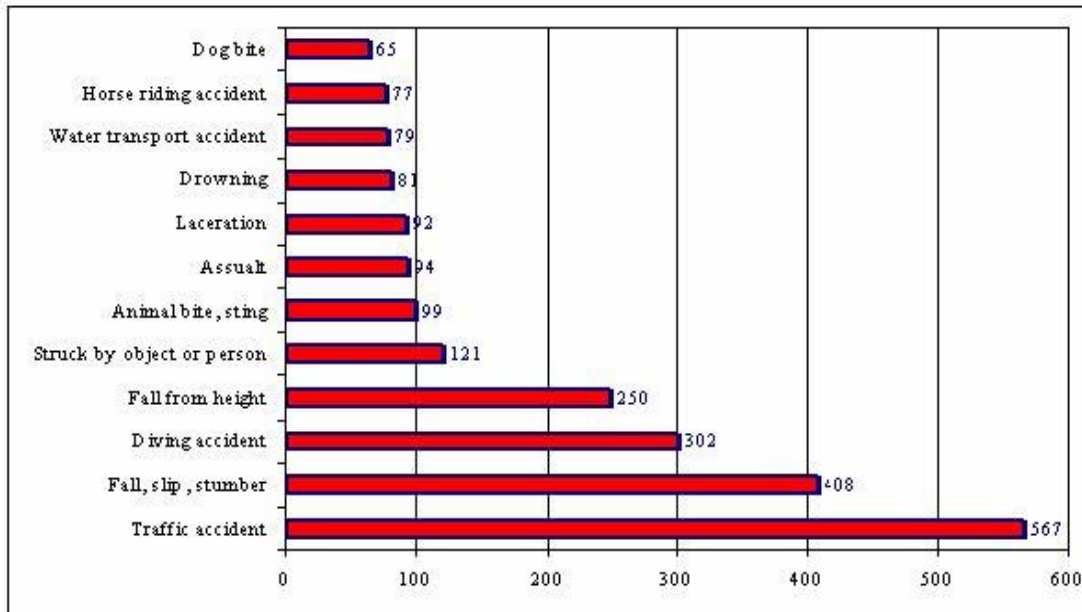
Wilks and Corry's (2002) report of incident locations for injuries to overseas tourists admitted to Queensland hospitals reflect the death statistics (Figure 6). Injuries related to transport were the most frequent, with water-related injury also prominent. Falls from level ground or height also accounted for a large portion of injury. As with deaths, Figures 4, 5 and 6 provide an indication of common mechanisms and locations leading to tourist injury. However, to determine the risk exposure for tourism operators, data specific to tourism operations is required. This data is presented in the following section.

Figure 5: Overseas visitor deaths by type of accident 1997 to 2000



Adapted from Wilks et al. (2002)

**Figure 6: Injury profile for tourist admissions to Queensland hospitals 1995 to 2000**

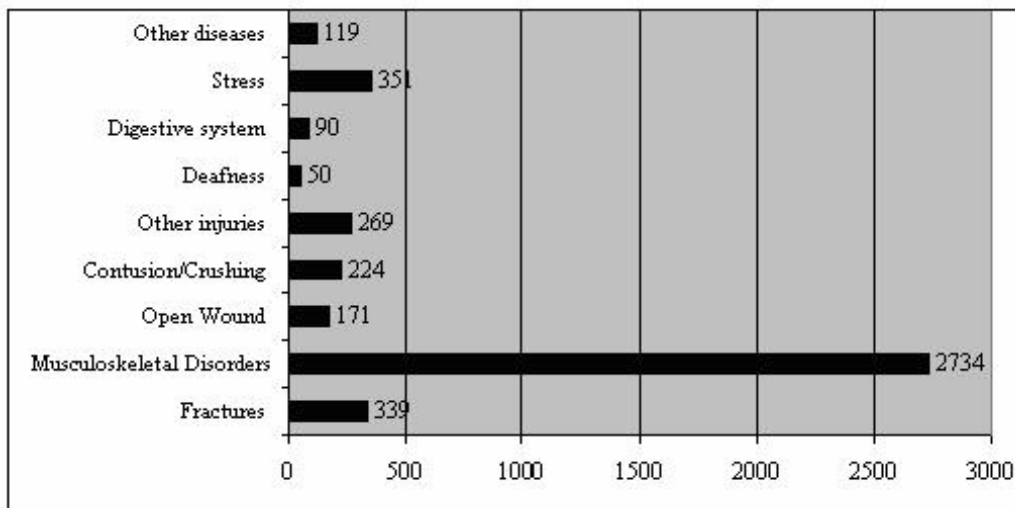


Adapted from Wilks & Corry 2002

### Other Industry Data Sources

Differences in data collection methods between agencies and States complicate data comparison. Data supplied by Worksafe Victoria (Figure 7) for this project indicated that between 1999 and 2004 there were 4,349 tourism employee incidents where the staff required over 10 days leave from work. Approximately 62% of reported injuries to staff were musculoskeletal disorders. Interestingly, the second most frequent category was stress-related claims.

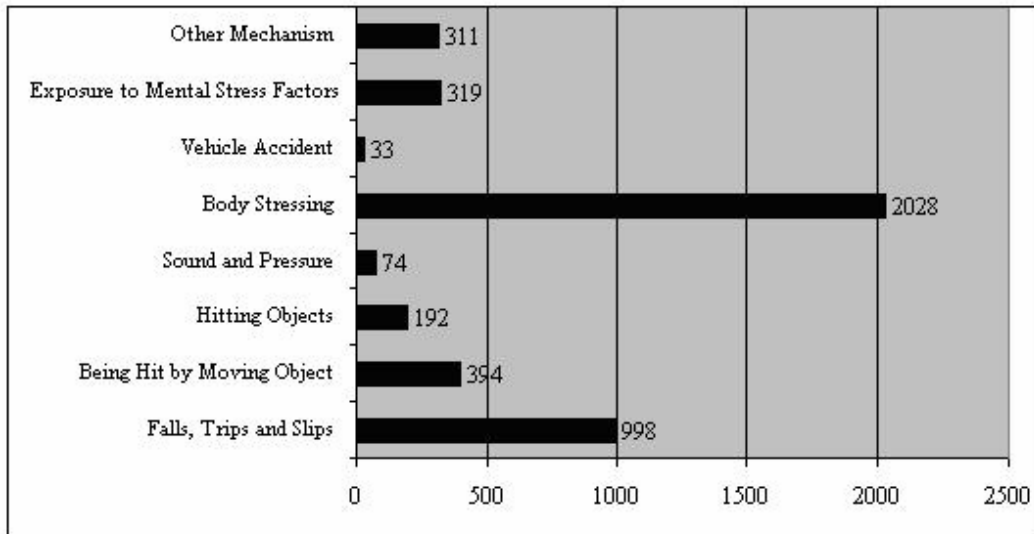
**Figure 7: Tourism employee incident cause - claims reported 1 July 1999 to 30 June 2004**



Source: Worksafe Victoria

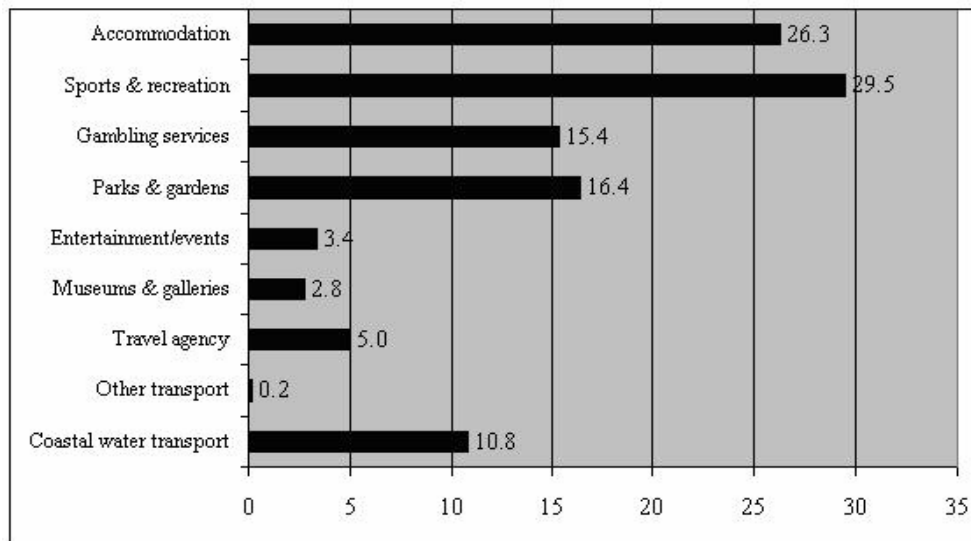
Figure 7 indicates that the most common general causes of incidents to tourism employees in Victoria are body stressing (that is, subjecting the body to a weight or contortion that it cannot bear) followed by falls, trips and slips. This data reflects the mechanism patterns found in Figure 8. Falls, slips and trips is also a common cause of Workcover claims.

Figure 8: Tourism employee incident mechanism - claims reported 1 July 1999 to 30 June 2004



Source: Worksafe Victoria

Figure 9: Tourism employees injury by location - claims reported 1 July 1999 to 30 June 2004

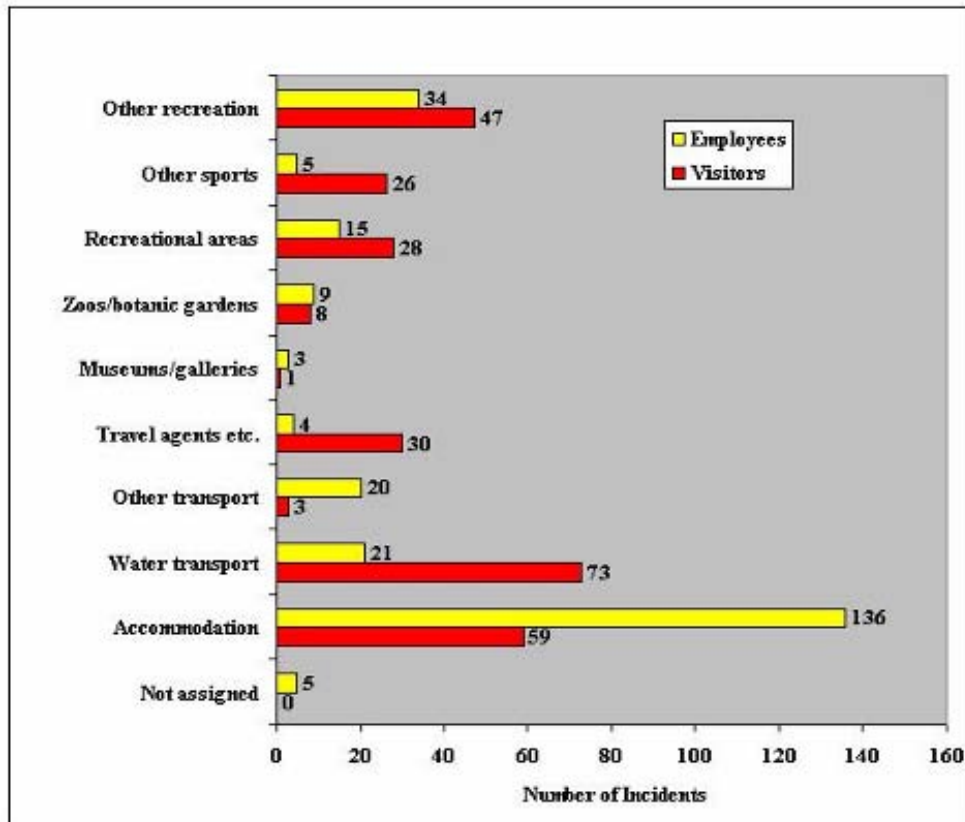


Source: Worksafe Victoria

Figure 9 presents the 4,349 tourism employee claims standardised by location. Sports and recreation locations are the most common sites for injury, followed by accommodation and parks and gardens.

Data provided by Queensland Workplace Health and Safety provides comparisons of employees and visitors. Based on ANZSIC categories, Figure 10 shows the most frequent visitor/tourist incidents are water transport, accommodation and other recreational sectors. The majority of employee incidents have occurred in the accommodation sector, followed by other recreation and transport.

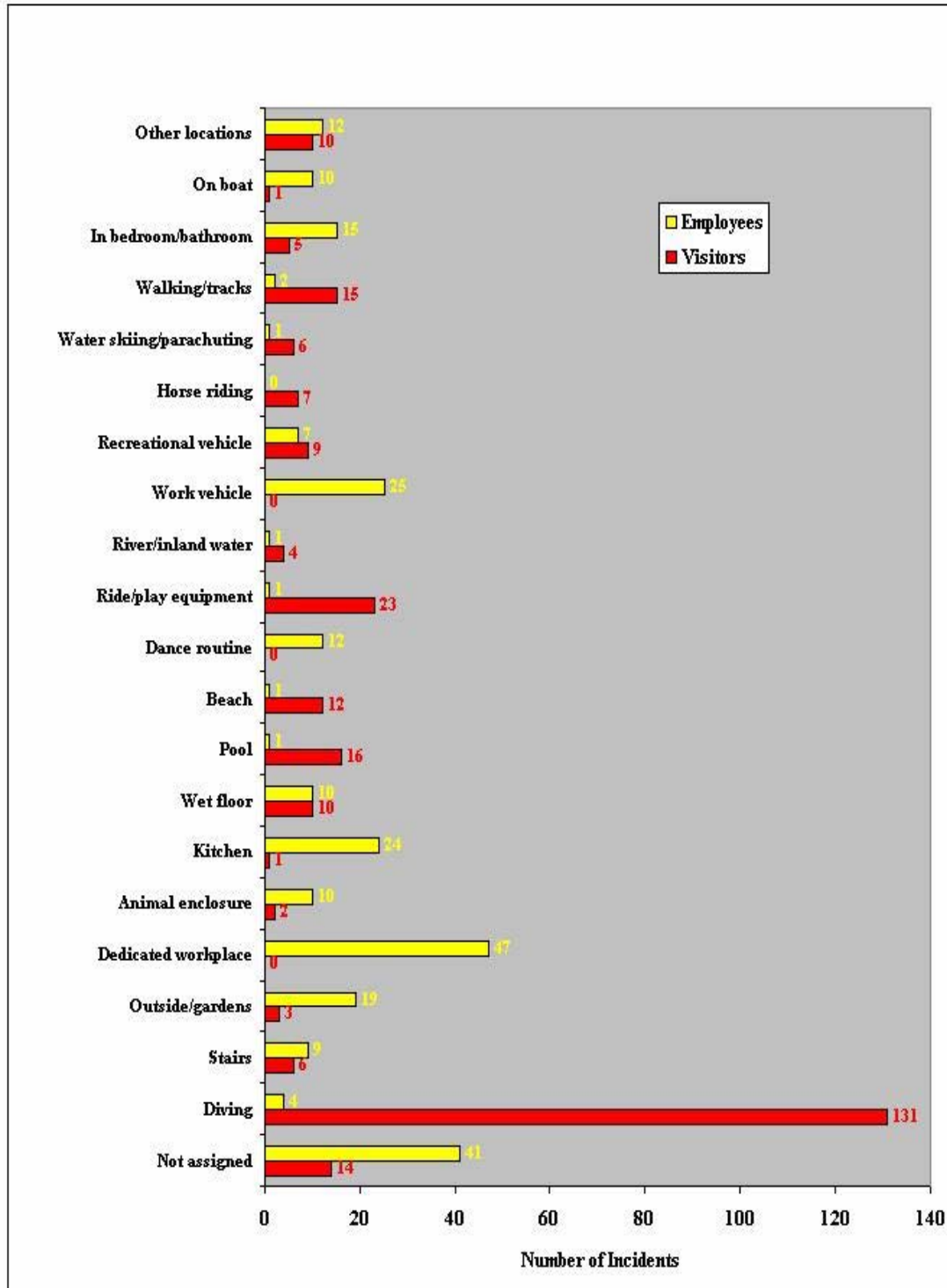
**Figure 10: Queensland workplaces reported incidents 1999 to 2004 by tourism sector**



Source: Queensland Workplace Health & Safety

Figure 11 reports incidents by location or activity. The data indicates that visitor/tourist incidents occur most frequently during diving (scuba diving or snorkelling) activities. Other aquatic locations record incidents relatively frequently as do ride/play equipment and walking tracks. In contrast, employee situations occur most frequently in dedicated inside work locations (such as plant rooms and warehouses), in work kitchens and accidents with work vehicles.

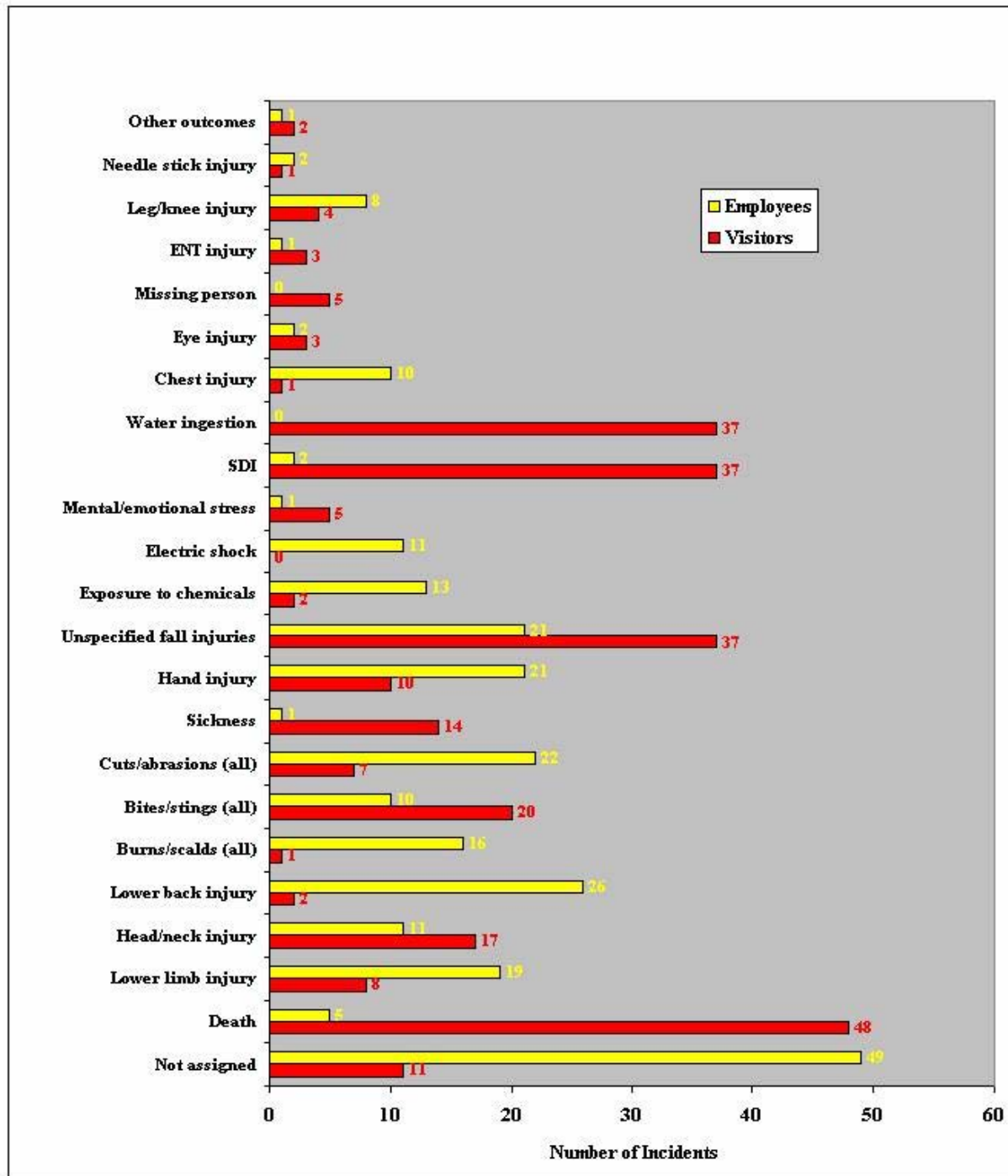
Figure 11: Queensland workplaces reported incidents 1999 to 2004 by activity / location



Source: Queensland Workplace Health & Safety

Figure 12 shows that 48 visitor deaths were reported to Queensland Workplace Health and Safety. Other common incident included water ingestion and falls. Among employees, the most common results include lower back injuries, cuts/abrasions, hand injuries and unspecified injury associated with a fall.

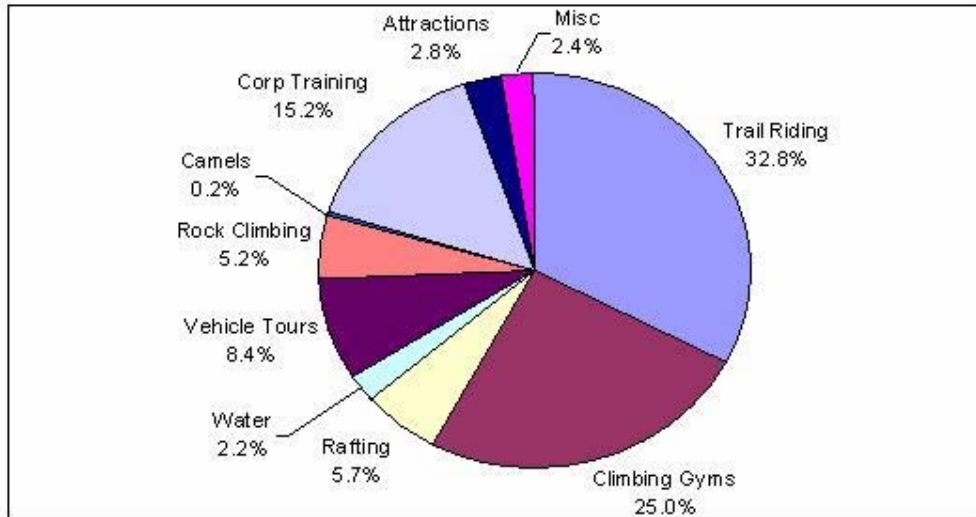
Figure 12: Injury/ incident reported in Queensland workplaces 1999 to 2004



Source: Queensland Workplace Health & Safety

Insurance data reported in Figure 13 indicates the pattern of claims by tourism sector. Trail riding and climbing gyms account for the largest proportion of claims. It is not, however, clear from this data the proportion of claims made by tourists relative to recreationists participating in the activities.

**Figure 13: Insurer claims profile 1996-2001**



Source: ZIB Insurance Brokers

### **Risk Profile Analysis**

It is clear from the range of data presented that a number of useful sources exists to determine tourism operators risk profiles. However, the comparisons of the data sets are problematic due to different methods used to collect and categorise claims, and different populations recorded for claims.

Nevertheless, it can be surmised from this data that specific risk exposures lead to relatively frequent injuries and/ or claims. First, accommodation and transport is a frequent injury location for tourists and employees. This finding may be explained by the relatively longer risk exposure to these sites, and perhaps the presence of specific hazards. Two areas where claims and injuries to tourist appear common are in aquatic activities and those presenting and inherent risk of fall injury (e.g. trail riding).

The data is not sufficient to draw detailed conclusions about the nature of risk in tourism operations, but it does indicate areas where the greatest benefits may be made through risk reduction.

### *Chapter 3*

## **STAKEHOLDER CONSULTATION AND FUTURE DIRECTIONS**

### **The Presentations to Stakeholders**

Forums were held in Melbourne and Brisbane to present the study findings to industry stakeholders. The Melbourne forum was held in partnership with the Tourism Alliance Victoria. The forum was attended by fourteen invitees at Monash University's City facility on 25 November 2004.

The project results were considered by the group to be an informative and thus a valuable initiative. The sources of data identified and industry partnerships developed in the project have provided a basis for further initiatives addressing PL commitments.

Several options for further projects were discussed. These included:

- Intensive study of statistical information to identify, compare and contrast the role of hazards and physical risk exposure across tourism industry sectors.
- Drafting nationally recognised minimum PL standards applicable to tourism industry sectors.
- Designing industry training packages that promote PL best practice.
- Provision of accreditation and audit processes to encourage compliance with PL best practice.

It was recognised by the group that PL initiatives require dedicated and ongoing project funding. Further, PL initiatives should draw from and build upon, rather than replicate, extensive previous works across tourism industry sectors.

It was agreed that PL initiatives are best implemented as components within a program of good business practice. This endeavour requires further development of working partnerships, initiated in this project, among the tourism industry, insurers, and government.

The second forum involved 28 invitees in Brisbane under the auspices of the Queensland Tourism Industry Council on 29 November 2004. Responses to the project and to its continuation were similarly positive in Brisbane. It was decided that the QTIC would act as the broker for industry input into the continuation of the project.

Specific future tasks that were nominated for the continuation of the project included:

- Changing industry attitudes so that tourism operators are equally cognisant of staff safety and visitor safety.
- The need to establish some standard frameworks for PL initiatives such as accreditation, auditing and training.
- The need to gauge the attitude of the insurance industry to positive risk management steps being taken, such as whether or not there positive financial results ensue.
- Consideration of how the insurance 'pooling' system can increase its viability.

Much of the Brisbane discussion represented the opportunity for sharing knowledge and experience of these issues. With respect to this, the concept of partnerships between the insurance, legal and workplace health and safety industries was discussed.

### **Project Outcomes**

This project has delivered three important outcomes:

#### **Data Identification and Analysis**

A range of data relating to tourism operators risk exposure was sourced for this project. From this data, it is possible to identify tourism sectors and activities that generate relatively more frequent injury and incident claims. This data suggest research directions on risk management that may prove most beneficial to the industry in the short term.

#### **Coordination and the Need for Tailored Data**

Conversely, the project identified gaps in the available data and the limited ability to compare data bases among collecting agencies. Methods of collecting and categorising injury and claims data better tailored to tourism industry would have clear benefits in identifying relevant risk exposure and hazards.

## **Willingness of Industry to Move Forwards on Risk Management**

Stakeholder forums indicated a willingness of industry to improve risk management practices within their overarching business strategies. To achieve this, the need for dedicated research, identification of best practice, and mechanisms to promote industry coordination was recognised.

## **Future Directions**

This project has provided an insight into the scope and quality of health and safety related data relevant to the tourism industry in Queensland and Victoria. Future projects are required to build on this study. Based on the study findings, reviews of the professional literature and tourism industry member recommendations, the following program areas are proposed:

### **Tourism Operator Survey**

Information on incidents, risks, and injuries should be collected from tourism operator across Australia. Similar work has been carried out by Bentley, Page and colleagues in New Zealand and Scotland (e.g. Bentley & Page 2001; Page et al. 2005). This information would assist to identify operator risk exposure and communicate effective strategies used in situ.

### **Review of Claim, Incident and Injury Data Collections and Tourism Industry Requirements**

In-depth reviews of available data sets and the method of collection and categorisation are required. This review should assess current and potential uses for the data as well as the feasibility for better matching data to tourism industry needs. This project would require consultation and genuine partnerships with the industry.

### **Review of Risk Management Industry Best Practice**

Building on the above two projects, current best practice and improvements in data collection would be combined to develop a warehouse of risk management best practice. This would include guides on legal responsibility, industry best practice, risk exposure reports, and practical documents for industry use. The system may be integrated within a national standard or accreditation framework. The Federal Minister for Small Business and Tourism (the Hon. Fran Bailey MP) has recently announced the government's commitment to the development of a national tourism accreditation program (Bailey 2005) to which this warehouse of risk management tools and knowledge could be a significant contributor.

## **Conclusion**

From this project report, it is recognised that a range of data is available to inform the tourism industry on risk exposure. Further, the project identified areas where improvements can be made in nation-wide industry coordination, dissemination of knowledge, and improvements in data collection methods. Completing future projects in risk management and PL exposure will benefit the tourism industry through greater protection of both staff and customers.

As recent 'shocks' to the tourism industry have shown (September 11, SARS, the Asian Tsunami) tourist safety and risk management are critical issues for destinations, governments and operators (Wilks & Moore 2004). PL insurance will remain a business impediment unless risk management tools and processes are developed for the tourism industry based on reliable research and analyses.

Industry members attending the two state forums for this study overwhelmingly endorsed and expanded investigation of their risk exposure in the area of public liability through the program areas outlined previously.

## **APPENDIX A: LEGAL RESPONSIBILITY IN THE TOURISM INDUSTRY**

### **Multiple Sources of Law**

A review of the legal framework applying in Queensland and Victoria indicates that the tourism and leisure industry operators face a number of legal responsibilities.

The tourist operator first has obligations arising out of the common law - which is to say the law made by the judges through their decisions rather than legislation enacted by Parliament. Fundamentally the operator attracts a set of duties that require the exercise of care and skill for the safety of his employees, customers and others.

The duty to take reasonable care arises out of the law of 'tort'. It is in the nature of a public duty. It is separate from a duty the operator is likely to have in contract law to those with which he contracts (for work, for services, etc.).

The duty in contract depends on what operators are promising to do. Where there is no express undertaking, the contract has an underlying duty (an 'implied term') to avoid negligence, to exercise due care and skill. An operator could undertake expressly to do more than avoid being negligent. He could give a client or customer a guarantee of safety.

Legislation, the statutes of your State Parliament, and the Commonwealth Parliament, set standards too.

Fair trading acts include versions of the common law implied terms. They also include obligations not to engage in misleading or deceptive conduct.

Occupational health and safety acts impose their own duties. These duties include general duties to avoid risks to health and safety so far as is practicable. These duties extend beyond employers and employees. Health and safety law also includes regulations and codes of practice that are made for specific industries and activities.

Some activities need licences or permits from government authorities before they can be undertaken. The operator must meet the conditions attached to these licences and permits. Tourist operators will be subject to building regulations, transport regulations, hazardous substances regulations and so on. The tourist operator will attract responsibilities in a variety of capacities: service provider, employer, owner, occupier, contractor, carrier and so on.

### **The Duty of Care**

This duty applies to anyone who should see that their activity exposes people to a risk of harm. Those classes of people are not confined to employees or customers, though they are the most likely to be affected.

The risk must be a real risk, but it does not need to be an immediate or large risk.

The standard to be observed is one of reasonable care. Usually the issue is whether the precautions were reasonable in all the circumstances. This must be determined case by case. However previous cases indicate that the judges will take several factors into account in determining what is reasonable.

On the one hand, the judges consider the risk of injury, which is a measure both how probable an injury is to occur and the gravity of the consequences if the risk eventuates. The greater the risk the more precautions are justified. On the other hand, the judges consider the burden of precautions, which takes into account the expense, difficulty and inconvenience of the precautions. So the standard is not an absolute guarantee of safety. But it is still exacting.

When educating the layperson about the law, it may be necessary to displace certain assumptions. For instance, the standard is objective not subjective. It is not necessarily what the operator thought was reasonable, but what a reasonable person would have done in the circumstances. The operator cannot simply plead that he was not aware of the risk. It may be he should have known about the risk or taken steps to inform yourself.

It is also not enough for the operator to say that he did not create the risk. Negligence may lie in not responding to a risk, indeed not making preparations for the materialisation of a risk, such as an emergency plan. Nor can the operator simply plead that he could not afford to take the precautions. It may be you should not have engaged in the activity if you could not resource the precautions.

When someone is injured, it may well be that others were to blame for what occurred, at least in part. The court may be prepared to find that a third party is partly to blame – a manufacturer, supplier, carrier, inspector, or a stranger. However, it may well be part of the operator's duty to guard against stupid or careless conduct by others, his employees, the customers or the independent contractors he hires such as maintenance people or the bus company. Likewise, he may have a responsibility for faulty plant and equipment, even if it was supplied by another person.

Sometimes the court will find that the injured person was at fault in contributing to his own harm. This is called contributory negligence. If so, the injured person will have to bear some proportion of the loss himself and

the operator's liability will be reduced. Again, however, it is part of the operator's duty to anticipate that inexperienced, immature or excited people may not always do the sensible thing.

Recent legislation has provided some clarification of the general principles governing the duty of care. One objective is to confirm that the standard is reasonable care, not an absolute guarantee of safety. The Wrongs Act 1958 (Vic) states that, in a proceeding relating to liability for negligence, the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was (actually) done. Furthermore, the subsequent taking of action that would (had the action been taken earlier) have avoided the risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

The Wrongs Act also states that a person who owes a duty of care to another person to give a warning or other information in respect of a risk or other matter, satisfies that duty if they take reasonable care in giving that warning or other information.

The Civil Liability Act 2003 (Qld) carries counterpart provisions.

## **The Status of Obvious Risks**

In the news recently have been some court decisions about recreational activities (swimming and diving, participating in sport). They suggest there are limits to the responsibility that local municipal councils, and perhaps some private operators, should have to take to protect people against risks inherent in the activity and obvious to the participants.

It is difficult however to generalise from these decisions. They do not free operators of a duty of care but rather go to what precautions were reasonable.

Concerning private operators, the decisions include: Macarthur Districts Motor Cycle Sportsmen Inc and Ors v Ardizzone (2004) NSWCA 145; Moore v Woodforth (2003) NSWCA 9; Enright v Coolum Resorts Pty Ltd (2002) QSC 394; and Woods v Multi-Sport Holdings (2002) 208 CLR 460.

At common law, the defendant may argue that the plaintiff voluntarily assumed the risk. For this to apply, it must be shown:

- The plaintiff knew of the danger.
- He fully appreciated the risk of injury created by the danger.
- He voluntarily agreed to accept the risk and its consequences.

Some further guidance is provided by the recent legislation that limits civil liability.

Provisions of the Civil Liability Act 2003 (Qld) give defendants some assistance. The focus is 'obvious risks'. Categorisation as an obvious risk means that, if the defendant raises a defence that the plaintiff voluntarily assumed the risk, the plaintiff can be taken to have been aware of the risk. It is then up to the plaintiff to prove he was unaware of the risk. This 'presumption' of awareness operates in an action for damages for breach of duty causing harm.

In the Queensland Act, an obvious risk is defined as a risk that in the circumstances would have been obvious to a reasonable person. It includes a risk that is patent or of common knowledge. A risk can be obvious even if it has a low probability of occurring or if it is not prominent, conspicuous or physically observable.

But a risk, from a thing, is not an obvious risk, if the risk is created because of a failure on the part of a person to properly operate maintain replace or care for a thing - unless the failure itself is an obvious risk.

The Victorian Wrongs Act 1958 contains a counterpart provision. It applies to actions for damages for negligence, though not in respect of risks associated with work. A further provision spells out how the plaintiff may be aware of the risk.

In the Queensland Act, a further section states that there is no duty to warn of an obvious risk, unless the plaintiff required advice or information about the risk from the defendant (and in some other circumstances). There is no Victorian counterpart for this section.

Under the Queensland Act, in addition, a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk. An inherent risk is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill. This has a Victorian counterpart.

In the Queensland Act, furthermore, a person is not liable in negligence for harm suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity. This section has no Victorian counterpart.

A dangerous recreational activity is an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person. The person suffering the harm must be engaging in the recreational activity. It applies whether or not the person was aware of the risk.

We should note that both the Queensland and Victorian Acts provide direction to the courts in other respects too.

## **Misleading or Deceptive Conduct**

Under the Trade Practices Act 1974 (Cth), a corporation may be liable in damages for misleading or deceptive conduct.

The misleading or deceptive conduct may be a positive statement that there are no dangers. In circumstances where a warning would be expected, it can arise out of a failure to give a warning.

This section 52 has counterparts in the Queensland and Victorian Fair Trading Acts. These apply, if the Trade Practices Act does not, which is essentially if the defendant is not a 'corporation'.

There has been a Bill before Commonwealth Parliament to exclude liability for personal injuries and death from the operation of section 52. So far, it has not gone forward.

## **Liability in Contract**

Operators have contracts with their employees, customers and others which give rise to duties too.

These begin with the express terms of the particular contract, that is, what the operator is undertaking to the other party to the contract about their safety. For example, the customer may solicit undertakings when the contract is being made for supply of a service.

Operators need to plan and to monitor what they and their 'agents', such as their managers, sales people and operational staff, are saying to workers and customers. An example would be the literature they are putting out to describe their services.

The contract too has 'implied terms'. These begin with the terms the courts read into contracts for the protection of employees and consumers.

The contract of employment involves an obligation on the part of the employer to take reasonable care for the safety of the employees. This is the contractual counterpart to the public duty in the law of tort.

We shall see below that legislation has added much both to the general duties of employees and the standards they must meet for dealing with particular hazards.

In the case of consumers, the implied terms include reasonable care but also more specifically an obligation to ensure that the services are 'fit for the purpose' for which they are required by the consumer. This purpose may be the ordinary purpose of the services or a special purpose if the consumer makes that known to the supplier. Safety may be among the purposes for which the consumer wants the services supplied.

These terms may also be part of legislation now, with their own particular wording and force of law.

## **Damages**

If a person is injured as a result of common law negligence, they are entitled to full compensation. Damages cover economic loss (such as loss of earning capacity) and non-economic loss (such as pain and suffering and loss of enjoyment of life).

The damages payable for breach of contract depend first on what has been provided in the contract. In the absence of such a provision, the courts observe principles, which may also lead to the victim being awarded full compensation.

Legislation has now placed thresholds and ceilings on damages payable as a result of civil liability. It has restricted recovery of damages in other ways too. The limitations vary according to whether it is a work-related injury, transport injury, or otherwise.

Proportionate liability has been introduced, so now, in principle, one wrongdoer, or 'tortfeasor', is only liable to the extent he is to blame for the injury. This applies even if the other wrongdoer cannot be traced or is without sufficient funds or cover to meet its share of the liability. However, we wait to see how exactly the courts will apply these new provisions.

## **Excluding Liability?**

According to the common law, a contract may exclude liability for negligence and/or liability arising out of the implied terms of the contract itself.

Generally liability is not excluded in the case of employment contracts. It is in contracts between independent contractors. The operator may a sub-contractor providing services as part of your operation. The general rule is that the exclusion only applies to those who are party to the contract. This is called privity of contract. It does not cover liability to third persons, who might even include employees of the sub-contractor. In such a case, the operator might seek an indemnity from the sub-contractor for his liability to the others. Such a strategy would require expert legal assistance.

Children present a real challenge for some operators. They especially may require health and safety measures. People under age cannot make contracts to exclude liability, as the operator's services are not for 'necessaries'. Their parents cannot make such contracts on their behalf.

Another difficult situation for operators is the group booking. A real issue is the extent, if any, of the secretary of the club, for example, to make contracts for each of the individuals who will be participating.

Furthermore, the courts say that an exclusion clause must be properly built into the contract. Because the other party is giving up rights, the courts tend to be demanding about the steps the operator must take to obtain agreement to a clause excluding or limiting liability.

The operator must take reasonable steps to bring the clause to the notice of the other party. This must be at the time the contract was being made and not later.

If the customer does not actually read the exclusion or limitation clause, it must be shown they understood they were being referred to something which was part of the contract. Indeed, when it works against the customer, that it contained exclusions or limitations.

Operators may try to do so with a sign for instance at the entrance or writing on the ticket. The best way is to get the customer to sign an acknowledgement that they are bound by the clause.

In addition, the clause has to be properly worded. It will be construed against the party relying on it. If it is not drawn widely and clearly enough, it might only exclude liability in contract and not in tort, say, or strict liability but not negligence.

The recent legislation has provisions for facilitating the 'waiver' of liability.

For example, both the Trade Practices Act and the Victorian Fair Trading Act say that such clause cannot be used to exclude or modify their implied terms – if it is a consumer contract. But recent amendments have provided a means to do so - if the contract is for recreational services.

In the case of recreational services, the Fair Trading Act 1999 (Vic) permits a term excluding restricting or modifying the terms implied by sections 32J or 32JKA. Recreational services are defined in the Act.

Generally, the term must satisfy the common law requirements for incorporation in the contract (see above). The Fair Trading (Recreational Services) Regulations 2004 (Vic) sets out further conditions. If the term is contained in a sign displayed at the place at which the services are being supplied, a notice given to the purchaser, or a form to be signed by the purchaser, it must include the warning and note specified in the Regulations.

The warning includes the wording: 'if you participate in these activities your rights to sue the supplier under the Fair Trading Act if you are killed or injured because the activities were not supplied with due care and skill or were not reasonably fit for their purpose are excluded, restricted or modified'.

Under the Fair Trading Act, such a change to the purchaser's rights does not apply if the death or injury is due to gross negligence on the part of the supplier. Gross negligence is an act or omission done with reckless disregard with or without consciousness of the consequences.

The Trade Practices Act 1974 (Cth) permits such a term to operate in relation to the terms implied by section 74. It does not set conditions, but the common law requirements still apply. Recreational services are defined as: services that consist of participation in a sporting activity or a similar leisure-time pursuit; or any other activity that involves a significant degree of physical exertion or physical risk and is undertaken for the purposes of recreation, enjoyment or leisure.

It remains to be seen what use operators will make of these procedures for excluding liability and whether the courts will uphold their efforts.

## **Occupational Health and Safety Legislation**

Occupational health and safety legislation now adds general duties to the duties at common law.

According to the Occupational Health and Safety Act 1985 (Vic), section 21, an employer must provide and maintain so far as is practicable for employees a working environment that is safe and without risks. It is important to note that a working environment is a broader concept than a workplace.

It is only not practicable to do so, if a reasonable person, weighing the risk of an injury against the measures necessary to eliminate it, considers the risk insignificant compared to the burden of taking the precautions (including their technological feasibility and cost).

We should note that the Victorian Attorney-General has recently foreshadowed amendments strengthening the responsibility under the Act and stiffening penalties.

Queensland's Workplace Health and Safety Act 1995, section 28, takes a slightly different approach to Victoria. An employer has an obligation to ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking.

A person satisfies the duties first by demonstrating observance of regulations and ministerial notices, or an advisory standard or industry code of practice (see below); otherwise by taking reasonable precautions and exercising proper diligence.

In both States, duties are owed to persons other than employees and workers.

In the Victorian Act, section 22, such persons are not to be exposed to risks to health and safety arising out of the conduct of an undertaking by an employer or a self-employed person.

We can think here of a contractor, transporter, visitor, coming on to the employer's worksite. But the conduct of an undertaking has no geographical limit like this. In the Victorian case of *Whittaker v Delmina* (1998) 87 IR 268, the defendant ran a business hiring out horses to be ridden off site on public land. It was argued the business was exposing the customers to risk in not providing any supervision on the ride and no helmets for riding. The court held that, even though it was off-site, the risk still arose out of the conduct of the undertaking of the business.

The Queensland counterpart provides that an employer has an obligation to ensure that other persons are not exposed to risks to their health and safety arising out of conduct of employer's business or undertaking. A similar duty is placed upon self-employed persons.

These Acts carry duties for occupiers, designers, erectors, installers of equipment and other categories as well.

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STCRC uses its research network, spin-off companies and partnerships to extend knowledge and deliver innovation to the tourism industry. STCRC endeavours to secure investment in the development of its research into new services, technologies and commercial operations.



## Australia's CRC Program

The Cooperative Research Centres (CRC) Program brings together researchers and research users. The program maximises the benefits of research through an enhanced process of utilisation, commercialisation and technology transfer. It also has a strong education component producing graduates with skills relevant to industry needs.

# Sustainable Tourism Cooperative Research Centre

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**NATIONAL NETWORK**

## INDUSTRY PARTNERS



## UNIVERSITY PARTNERS



## SPIN-OFF COMPANIES



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