

NOTES

THE LEGALITIES OF OVERBOOKING, OVERCROWDING, DELAY AND DISAPPOINTMENT: LESSONS FOR THE SYDNEY 2000 OLYMPICS

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I. INTRODUCTION

With less than 12 months to run before the opening ceremony of the 2000 Olympics at Stadium Australia, Homebush Bay, there is still time for travel and hospitality operators to review and refine their commercial practices on tourist accommodation bookings, travel arrangements and ticketing to avoid the legal pitfalls associated with disappointed tourists stranded without a hotel room or delayed by transport congestion so that they are late for events or, worse still, miss them altogether.

This paper examines the legal pitfalls facing tourist operators whenever a complaint of overbooking, overcrowding, delay or disappointment is made and it also addresses some of the risk management strategies which deal with these problems.

II. OVERBOOKING

The most common problem tourists will face in coming to the Olympic Games is that of overbooking - either in their transport or accommodation arrangements.

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Since ticketing is being strictly monitored, patrons should be assured of their seats once inside the Olympic Park venue.

To understand why overbooking occurs, it is important to highlight the two key problems facing the tourism and travel industry. First, the travel or hospitality operator has a product with a fixed capacity - that is, a fixed number of seats on a plane, beds in a hotel or tables at a restaurant. Secondly, their product (seats, beds or tables) is perishable, that is, if not used on the day, it is lost forever.

This is true of most components in the tourism industry. For example:

- (i) transport: plane, ship, train, bus, hire car;
- (ii) accommodation: hotels, resorts, motels, condominiums, hostels, camping; and
- (iii) attractions: restaurants, theme parks, national parks, shows, events, conventions.

Sometimes, tourism and travel operators overbook accidentally, whether innocently or negligently. On other occasions, they overbook deliberately, taking a conscious management decision to sell more than they have to allow for late cancellations and 'no shows'. Inevitably, instances of overbooking will occur in both the transport and accommodation components during the Olympics, so what are the legal implications for airlines and hotels in particular?

Generally, a booking constitutes a reservation contract, and failure to honour it may amount to breach of contract. Failure to honour the booking may also amount to deceptive and misleading conduct¹ and if found to be deliberate or reckless, could expose the operator to a charge of fraud. Similarly, if the operator should attempt to 'bump' the tourist onto another airline or later flight or, in the case of a hotel operator, to another hotel, there is US authority to suggest that this conduct could amount to a 'bait and switch', which is also prohibited under domestic consumer protection legislation.² Since circumstances do vary from sector to sector, it may be helpful to analyse the particular legal ramifications of overbooking on the aviation and accommodation industries and the remedies available more closely.

A. Aviation

The threshold question is really whether an airline ticket amounts to a contract. It seems that a domestic ticket in Australia does not.³ However, international tickets may be viewed differently. Pursuant to Art 3.2 of the Hague Protocol (1955)⁴ to the Warsaw Convention (1929):

1 *Trade Practices Act* 1974 (Cth), s 52.

2 *Ibid*, s 56.

3 *MacRobertson Miller Airlines v Csr of Taxation WA* (1975) 133 CLR 125. Barwick CJ said ticket is mere receipt; Stephen J suggested ticket is an offer; and Jacobs J said ticket is a voucher.

4 Not applicable in US and other non-ratifying states.

The passenger ticket shall constitute prima facie evidence of the conclusion and the conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention [including this rule].

An examination of contemporary procedures assists little in determining when the contract is complete. For example, the contract could be complete at the point of:

- confirmation and reconfirmation; or
- when the ticket is presented for seat allocation, baggage checkin, boarding pass; or
- when the boarding pass is presented for the departure lounge; or
- when the passenger boards aircraft.

And what is the situation in the case of ticketless travel (the *e-ticket*)?

However, these difficulties in identifying when the contract is entered will not protect a carrier as there are several other bases of liability besides breach of contract. In the leading US case of *Nader v Allegheny Airlines*⁵ the airline confirmed a reservation for Ralph Nader but continued to take bookings and overbooked the flight. Nader was 'bumped' and so he was delayed one hour. Consequently, he missed his speaking engagement at the Connecticut Citizens Action Group (CCAG).

It was held (confirmed on appeal to US Supreme Court) that this was a case of fraudulent misrepresentation. The Court found that the airline had knowingly and intentionally misrepresented that Nader had a guaranteed reservation, that Nader and the CCAG had relied upon this misrepresentation to make their arrangements, and that the airline had deliberately not informed the public of its practice of overbooking and of the attendant risks.

The Court awarded Nader \$10 compensatory damages and US\$25 000 punitive damages. It also awarded CCAG \$51 nominal damages and US\$25 000 punitive damages in recognition of the fact that Nader's absence may have damaged their fund raising efforts.

The House of Lords reached a similar conclusion in *British Airways Board v Taylor*.⁶ In *Cameron v Qantas*,⁷ the Federal Court applied the consumer protection provisions of the *Trade Practices Act 1974* to hold Qantas liable for in effect overbooking the non-smoking section of the plane. Whether the overbooking is accidental or deliberate, the operator will be liable under consumer protection legislation, but if is deliberate, then very severe penalties may be imposed.⁸

On the other hand is the passenger liable for cancellation or "no show"? In theory, this is breach of contract and the passenger is therefore liable to

5 (1976) 426 US 290.

6 (1976) WLR 13.

7 (1995) 55 FCR 147.

8 For further discussion see "Consumer Protection", in TC and T Atherton, *Tourism, Travel & Hospitality Law* LBC (1998).

compensate the carrier for actual loss but not a penalty. The carrier has a duty to mitigate its losses but if it does not resell the seat, the passenger should pay full fare. In the event that the seat can be resold, if it is a full economy, business or first class fare, then the practice normally is to provide the passenger with a full refund. If it is an excursion or discounted fare, then normally some cost or charge is deducted from the refund.

So in practice an airline carrier usually has no guarantee of a sale until all passengers have presented themselves for boarding. This is compounded by late cancellations or 'no shows'. Equally, passengers have no guarantee of a seat and may be denied boarding up to the point when their reservation is confirmed. These principles apply similarly to other modes of transport.

B. Accommodation

Just like the airline ticket, the question must be asked whether possession of an accommodation voucher amounts to a contract binding the traveller and the hotel operator? It does appear on examination that a reservation is a contract exhibiting the classic elements of offer, acceptance, intention to form legal relations and consideration. Contemporary procedures usually require a deposit to confirm a booking.

The liability of the accommodation provider in these circumstances was considered in *Dold v Outrigger Hotel*.⁹ In that case, the Dolds had booked six nights accommodation at the Outrigger Hotel through the American Express travel agency. But when they arrived, they were refused accommodation at the hotel due to its deliberate overbooking policy and some unscheduled extensions by other guests. The Outrigger Hotel transferred the Dolds and other 'overflows' to the lesser quality Pagoda hotel. It argued that it had no obligation to honour the booking since the Dolds had not paid a cash deposit to confirm the reservation. However, American Express travel agency had guaranteed the Outrigger Hotel payment of the first night's accommodation if the Dolds did not show.

It was held that the hotel was liable for breach of contract. Further, because the overbooking had been deliberate, the Dolds were entitled to "tortious" damages for emotional distress and disappointment. Fortunately, there had been no breach of innkeepers duty to accommodate travellers as there was no vacancy at the hotel.¹⁰ It is interesting to see the proliferation of hotels under the Outrigger name in Honolulu these days and how this overcomes some of the 'overflow' problems.

What then is the liability of guests for unilateral cancellations or 'no shows'? Normally, they will forfeit their deposit. In theory, they should also be liable to compensate the accommodation provider for the full payment if the room cannot

9 501 P 2d 368 (Hawaii 1972).

10 For further discussion on innkeepers' liability see chapter 13, note 8 *supra*.

be relet, but not a penalty. Again, the hotelier is under a duty to mitigate its losses as best it can.¹¹

In practice then, hoteliers, like carriers, have no guarantee of a sale of a bed until the guests present themselves and there is often the expectation of late cancellations and 'no shows'. Similarly, even with a reservation, guests have no guarantee of a bed in the light of hotels' practice of overbooking. These problems are highlighted for transport and accommodation but they also apply to some extent to attractions.

C. Remedies

The usual remedy for irate, frustrated and disappointed passengers and guests is damages and in this type of case damages include a special head of damages for disappointment. As discussed below, damages for disappointment are a real worry for the industry because they can exceed the cost of the overbooked transport or accommodation or attraction component and can be a multiple of the cost of the whole holiday. Claims are usually made under state and federal consumer protection legislation.¹²

The Australian Competition and Consumer Commission (ACCC)¹³ which administers the *Trade Practices Act* 1974 has issued a media release¹⁴ in which it clearly identifies the practice of maintaining an overbooking policy as a prima facie breach of the *Trade Practices Act* 1974 which will risk criminal and civil sanctions in the absence of adequate notices and other steps to make passengers aware of the practices and its risks.¹⁵

In response to this, Qantas' ticket conditions include a "Denied Boarding Compensation" which states:

There is a very slight chance that a seat will not be available on Qantas flights for which a person has a confirmed reservation. This is due to planned overbooking of some flights. This is a common practice throughout the airline industry. In some countries persons denied boarding involuntarily are entitled to compensation. The rules governing the payment of compensation are available at all our airport ticket counters and boarding locations.

The view which the ACCC took to overbooking in the airline industry could apply equally to hotels and other components of the hospitality industry. Note however that the industry practice code between international hoteliers, travel agents and tour operators¹⁶ provides that a reservation is only a contract upon

11 For further discussion of these issues see *Building Corp (Marott Hotel) v Deutsch* 385 N E 2d 1189 (Ind, 1979).

12 Note 8 *supra*.

13 Previously Trade Practices Commission

14 Trade Practices Commission, Media Release MR 82/5, 9 July 1982.

15 In part it states that the Trade Practices Commission "understands and appreciates the commercial need for this policy...[and advises] airlines should make travellers aware that confirmed seats do not necessarily guarantee the holder of a seat on a particular flight".

16 That is, inter industry agreement between IHA and UFTAA, sponsored by UNIDROIT (IHA/UFTAA Hotel Convention)

hoteliers' written acceptance and confirmation of price.¹⁷ In response, airlines internationally have developed Denied Boarding Compensation Schemes to regulate the resolution of disputes over these matters.¹⁸

The accommodation industry has not advanced so far. The hoteliers' voluntary code of practice does not prescribe any form of contract¹⁹ and supports the view that the defaulting party must fully compensate the other and, further, that:

If he cannot perform the contract, the hotelkeeper should endeavour to find alternative accommodation of an equivalent or superior standard in the same locality. Any additional cost deriving therefrom must be met by the hotelkeeper. In case of default the hotelkeeper shall be liable to pay compensation.²⁰

In view of the legal pitfalls and consequences, the accommodation industry should consider developing a "Denied Bedding Compensation Scheme" modelled along the lines of the air carriers' schemes.

III. OVERCROWDING

Overcrowding is related to overbooking but it is more likely to occur in the context of a major festival or sporting event such as the Olympic Games. The event organiser's potential legal responsibilities include occupational, health and safety issues, consumer protection and exposure to claims in contract and tort.

A. Occupational, Health and Safety

Whether a public authority or private entity takes responsibility for the occupational, health and safety issues depends largely upon where the event occurs, either in a public²¹ or private area. Crowd control is always one of the greatest health and safety concerns at large events and police have overall responsibility²² in both public and private venues. Where the event takes place in a private area, the police can be authorised to recover their costs from the organisers²³ who may also engage their own crowd controllers.²⁴

Other health and safety issues in private areas include fire safety, patron amenity, patron conduct, capacity of the owners to control their premises and the conduct of their patrons and the ability of public inspectors to go about their

17 Art 10 IHA/UFTAA Hotel Convention, Other provisions include: Art 11, the hotelier has right to require advance payment or deposit; Art 12, if does not require payment per Art 11, obliged to accept a voucher; Art 26, if hotelier does not honour a confirmed and accepted reservation, must indemnify travel agent for actual loss and arrange superior accommodation and bear extra cost; Art 27, force majeure exoneration; and Art 42, 51, 55, which provide that travel agents are to compensate for late cancellation or 'no show'.

18 Under the IATA General Conditions of Carriage, Art IX states, for example: "if for reasons beyond control [accidentally] carrier fails to provide a confirmed seat, liability is restricted to: carrying passenger on another flight; rerouting at no extra charge; refunding unused ticket".

19 Hoteliers' Voluntary Code of practice, Art 2.

20 *Ibid*, Art 3.

21 For example, in public areas OHS issues dealt with by police, fire brigade, emergency services.

22 Supported by *Crowd Control* legislation.

23 For example, the James Hardy 12 hour race during Easter 1991, and the Toohey's 1000 car race 1991.

24 Regulated by *Security Industry Act* 1997.

business without undue inconvenience.²⁵ Where breaches occur, parties may be prosecuted under specific legislation.

B. Contract

If the customer has purchased a ticket to enter the private venue, a contract exists between the parties and principles similar to those already examined in overbooking apply. The US case of *Club Mediteranee SA v Stedry*²⁶ illustrates the point. In that case, Stedry booked a Club Med package holiday from LA to Club Med Papeete Tahiti. The brochure promised all inclusive travel arrangements, “carefree ambience”, “uncrowded white beaches”, “active sports”, “rent free equipment”, “discovering the true meaning of the Tahitian saying... ‘only happiness is important’”.

As it happened, the flights were not confirmed, and Stedry had to standby several days each way. There was a lengthy wait for a cottage and meals were slow. The sporting equipment was rarely available and everything was overcrowded and overbooked. Stedry was transferred to Bora Bora but this venue was no better. The plaintiff was then transferred to another hotel. Club Med claimed the brochure statements were mere puffery.

Shulman J in delivering judgment said:

To me this is fraud; the change in the travel arrangements and other material misrepresentations show a total disregard for the rightful expectations of the customer. The final result of what he received in exchange for his money was just the opposite of what [he] was led by [Club Med] to expect.

Consequently, the court upheld an award for punitive damages.

C. Torts

Overcrowding in extreme circumstances may result in tragedy. Who can forget the spectacle of 95 people being crushed to death and over 400 others being injured when the Hillsborough football stadium collapsed as a result of overcrowding during a soccer match that was broadcast live on television. Friends and relatives of the victims, who witnessed the disaster either from within other parts of the stadium or on television sued the defendant claiming nervous shock.²⁷

Unfortunately for the plaintiffs in that case, the House of Lords dismissed all claims. It seemed that those plaintiffs within the stadium were unable to show sufficient closeness of relationship with victims and those who saw the disaster on television could not be said to have seen and heard the event or its immediate aftermath.

Nevertheless, the principle was established that had each plaintiff been able to establish a relationship of love and affection (although not necessarily defined by reference to particular family relationships) and some physical proximity in

25 See *Civic Taverns Pty Ltd v Registrar of Liquor Licences* [1995] ACT AAT 128.

26 283 S E 2d 30 (Ga, 1981).

27 *Alcock v Chief Constable of South Yorkshire Police* (1992) 1AC 310.

time and space between the plaintiff and the accident or its immediate aftermath, their claims would most likely have succeeded.

This case is a pointer to the potentially far reaching liability of an event organiser in a society driven by demand for more and more 'live' broadcasts.

IV. DELAY

Delay is often a by product of overbooking and overcrowding and one of the most common problems experienced by travellers. It is often associated with a failure on the part of the carrier to adhere to the advertised departure and arrival times. The flow on effects include inconvenience, discomfort, annoyance, and a diminution in the value of the services contracted for. Consequently, carriers are liable for delay with potential liability in contract, tort and under consumer protection legislation. There is also an emerging view that tour organisers may be held liable as principal contractors.²⁸

A. Carriers' Liability

The general principle is illustrated by *Lopez v Eastern Airways*²⁹ where the court awarded compensatory damages for out-of-pocket expenses, loss of time, anxiety and frustration to the plaintiff who had missed the wedding she was travelling to because of delay caused by airline overbooking. In *Goranson v World Trans Airlines*,³⁰ the plaintiff was unable to join a tour package holiday until two days after it had started because the airline had delayed her departure due to overbooking. The court awarded compensatory damages which included airfare, transportation, hotel, meal and tour expenses and a nominal amount in actual damages for inconvenience against the defendant.

B. Tour Organisers' Liability

Where the delay means that the consumer will miss part or all of the event they have travelled to see, then there may be wider legal implications for those packaging the tour and/or event, that is the tour organiser or travel agent. In other words, the emerging international model is that the tour operator should be held responsible for the performance of the whole package. This is established in Europe by the EC Directive on package travel, package holidays and package tours³¹ and in the US under the Charter Tour Operator Regulations. It is also developing in case law.

28 See EC Directive and *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1995] 4 All ER 745.

29 677 F Supp 181.

30 121 Misc 2d, 688.

31 Council Directive, 13 June 1990. It makes the tour organiser strictly liable to the consumer. Further it prescribes information and procedures for package tours, requires insurance and permits limitation of liability. It applies to all travel promoted or sold in EU countries but because of the practice of seeking indemnities in travel contracts, it has broader applicability.

In *Wong Mee Wan v Kwan Kin Travel Services Ltd*,³² the facts were that the plaintiff's daughter took a package tour to a lake in China, organised and sold by the defendant, a tour operator/travel agent based in Hong Kong. The package included tour guide and transportation. The group was delayed and missed the ferry which had been organised to take the group across the lake. The tour guide improvised and organised a speed boat to take the group across in three trips. On the third trip, due to the negligence of the driver, the speedboat crashed into a junk and the plaintiff's daughter was drowned.

The plaintiff sued the guide company, speedboat operator (both based in China) and the tour operator. Default judgment was entered against the guide company and speedboat operator for HK\$575 050 but the plaintiff was unable to enforce this order in China. The plaintiff then pursued the Hong Kong based tour operator. The action was successful at trial but reversed by the Hong Kong Court of Appeal. From there, the case went on appeal to the Privy Council which held that under the contract between the plaintiff's daughter and the tour operator, the tour operator undertook to provide the transport services as principal rather than merely to arrange for them to be provided by others.

Thus there was an implied warranty in that contract that those services, namely the lake crossing, would be supplied with reasonable care and skill whether or not the tour operator chose to engage sub-contractors to perform them.

This view is highly persuasive in Australian courts and accords with current trends towards more comprehensive consumer protection. It is likely to result in regulation of the domestic travel industry along similar lines to those set out for travel agents and tour operators in the EC Directive and US Charter Tour Operators Regulations.³³

V. DISAPPOINTMENT

In tourism, travel, hospitality and entertainment, if the product delivered does not meet the customer's expectations, those involved may be held liable to pay the consumer a special type of damages called *damages for disappointment*. This is a peculiar head of damages developed through cases deciding claims against tourism and travel operators. Sometimes, the damages awarded may exceed the cost of the defective component only, and sometimes they may exceed the cost of the whole tour.

A. The Measure of Damage

A few key cases are informative in identifying the factors which courts regard as important in determining the quantum of a claim of this kind. The case of

32 [1995] 4 All ER 745.

33 For further discussion, see T Atherton, "Tour Operators' responsibility for package holidays: common law takes the RC Directive global" (1996) 3 *Travel Law Journal* 90-96.

*Jarvis v Swan Tours*³⁴ is pivotal in the development of damages for disappointment.³⁵ Mr Jarvis was a 35 year old bachelor, looking for company on his annual holiday consisting of a fortnight. He chose a little place in Switzerland, "Morialp", because he enjoyed skiing. The brochure promised a house party, yodelling, evening drinks in the bar, afternoon tea and cakes amongst other things.

What did he get? The skis were the wrong size and by the time the matter was fixed up he had sore feet and gave up. The house party which he believed would be 30-40 people turned out to be 13 people in the first week and none in the second. No-one spoke English in that second week. The cakes were potato crisps and little dry nut cakes and the yodelling evening turned out to be a local man in ordinary dungarees yodelling four or five quick songs before departing quickly! All in all a very inferior experience!

Lord Denning (Court of Appeal) compared damages for disappointment in contract with damages for nervous shock in tort. His Lordship reasoned that the right measure of damages was to compensate Jarvis for the loss of entertainment and enjoyment which he was promised and which he did not get. In other words, the Court recognised the special nature of the tourism and entertainment contract: that it is *experiential*. Jarvis was awarded damages, including for disappointment or loss of enjoyment amounting to approximately twice what he had outlayed for the original holiday.

If Mr Jarvis had too little yodelling on his holiday, it may be because he was in the wrong place. A German couple were awarded damages for disappointment amounting to nearly half the cost of their four day Caribbean cruise when it became apparent that 500 of the 600 passengers on board the cruise ship were practising members of the Swiss yodelling association. The relaxing and peaceful holiday they had looked forward to became a yodelling nightmare.³⁶

B. Australian Position

The leading Australian case is *Baltic Shipping Co v Dillon*.³⁷ The Russian cruise ship *Mikhail Lermontov* sank after striking a rock on the tenth day of a fourteen day cruise in the South Pacific. Mrs Dillon and other passengers were taken off the ship just before it sank late in the evening of 16 February 1986. Mrs Dillon subsequently sued the shipping company claiming, amongst other things, distress and disappointment. At trial, she was awarded the sum of \$5000

34 [1972] WLR 954.

35 Indeed these authors would argue that it is *The Donoghue v Stevenson* of Tourism Law.

36 Frankfurt District Court awarded AUD\$2223 each damages for disappointment. The original cost of the cruise was AUD\$6669 each. See also *Newell v Canadian Pacific Airlines* (1976) in which a court awarded \$500 in damages for disappointment to the owners of two pet dogs when one dog died and another was very sick following a flight in which they were carried in the cargo hold. At the time, their owners were talking them on a holiday which was immediately aborted on arrival. The freight charge to carry the two dogs was \$50 - a fraction of the final award.

37 (1993) 176 CLR 344.

compensation for disappointment and distress, more than twice the original cost of the cruise.³⁸

When the matter eventually came before the High Court, the Court took the opportunity to confirm that *Baltic* had impliedly promised to provide a pleasurable and enjoyable cruise for fourteen days. Its failure to do so meant that it must pay damages to Mrs Dillon for the distress and disappointment she suffered. Although refraining from interfering with the amount of compensation awarded to Mrs Dillon, the High Court did comment that in the absence of "some exceptional circumstances increasing the sting of the failure to provide the enjoyment and pleasure promised...no more than half the sum awarded in this case should be the norm for the ordinary passenger".

Since *Dillon* was a test case on this issue, other passengers then brought claims seeking damages for disappointment. In the light of the High Court's comments, each passenger was awarded approximately \$3000 damages for disappointment (in addition of course to other damages awarded).³⁹

C. Recent Developments

A recent UK Court of Appeal decision has revisited damages for disappointment and what the appropriate measure of damages should be in each situation.

In *P & O Steam Navigation Co & Ors v Youell & Ors*,⁴⁰ P & O operated luxury cruises on the cruise ships *Island Princess*, *Fairstar* and *Star Princess*. During the 1991/92 cruise season, the cruises on all three vessels had to be aborted for one reason or another. P & O negotiated and agreed an overall compensation with all passengers in full and final settlement of any claims against P & O. This was done by making refunds, issuing travel credits and by providing and incurring the expense of alternative accommodation and travel arrangements for the passengers.

P & O sought indemnity from the defendant insurer for these payments. The defendant denied liability on the basis that its policy with P & O was a 'liability policy' and that P & O was under *no legal obligation to pay damages for disappointment (distress, discomfort, delay)* as had occurred.

The court held:

It is quite clear from the cases such as *Jarvis v Swan Tours* that, in contracting to provide a cruise, P & O were not merely undertaking a contract of carriage and the provision of accommodation and food on route, but were agreeing to provide an enjoyable and relaxing holiday of the kind so lyrically described in the brochure...In assessing damages it may be that the Court...will first use the cost of the holiday as an indication of its value, and award an appropriate proportion in respect of the period ruined, before adding damages for the mental distress, inconvenience, upset and disappointment caused by the loss of the holiday.

In summary, the principle applies whenever a promise is made by a tour or event organiser, hotelier or transport carrier to provide the consumer with a

38 (1989) 21 NSWLR 614.

39 See *Baltic Shipping Co v Marchant & Ors 'Mikhail Lermontov'*.

40 [1997] 2 Lloyd's Rep 136.

service involving an element of pleasure, entertainment, relaxation or the like. If a consumer complains of overbooking, overcrowding or delay, then disappointment, anxiety, distress and frustration is probably lurking in the background and may soon ripen into a claim for damages for disappointment.

VI. RISK MANAGEMENT

Awareness of the potential legal liability for overbooking, overcrowding, delay and disappointment is the first step towards managing the risks. Then appropriate quality assurance systems can be developed to minimise, so far as is practical, the likelihood of these types of things going wrong.

It is important to disclose the risks to consumers and to clearly and fairly deal with the method of sharing the risk in brochures, contracts and other documentation. It is no longer possible to simply disclaim all responsibility or exclude liability.⁴¹

Industry associations have a useful role to play in developing codes and guidelines to deal with these issues. Some of these initiatives in the airline and hotel industries have been discussed above. The airlines are well advanced on this and hotel associations should consider developing an industry scheme incorporating dispute resolution mechanisms and guidelines for compensation.

Another useful risk management strategy is to try and shift responsibility to others by seeking indemnities from them for the cost of meeting claims. But clearly there will always be at least one party who cannot pass the buck any further.

That leaves the last resort in risk management: insurance. This spreads the risk across many transactions and among different operators. If the consumer insures, then the insurer may still pursue the operator under the principles of subrogation. So operators themselves should try to obtain coverage for this type of risk. However, this should be undertaken in conjunction with the other risk management strategies because ultimately the cost of the premium will reflect the operator's residual risk after these other strategies have been implemented.

And then, as the *P&O* case illustrates, insurers are often still reluctant to meet these claims!

41 For example see *Trade Practices Act 1974* (Cth), ss 68, 68A, 74.