

2009 HOSPITALITY LAW CONFERENCE

HOSPITALITY LAW AND THE PACIFIC RIM



**CONTRACT ISSUES, LIABILITY ISSUES
AND DISPUTE RESOLUTION IN
AUSTRALIA AND NEW ZEALAND**


Presenter











- **Barrie Goldsmith** of Australian Travel and Tourism Lawyers
- Barrie Goldsmith was admitted as a solicitor in England in 1975, where he was a partner in a very successful law firm. He migrated to Australia in 1982.
- In 1984 Barrie established his own law firm, **Goldsmiths Lawyers**.
- He has, virtually from the outset, acted for clients in the travel, tourism and hospitality industries and continues to be heavily involved in those industries. He has been the author of a regular legal column in *TravelTrade* magazine.

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Background Information



-  1770 – Discovery of Australia
-  1778 – Formally claimed on behalf of the British Crown
-  1901 – Federation
 - 6 States and 2 Territories with own Government and Commonwealth Government
-  **Constitution which gives specific powers to the Commonwealth. Residual power vests with the State and Territory Governments.**

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New Zealand

- 1642 – Discovery of New Zealand
- 1840 – New Zealand becomes its own dominion separate from Australia with an elected legislature and self-government
- 1852 – *New Zealand Constitution Act* was passed establishing Parliament.



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Doing Business


- Both countries have a legal system founded on:**
 - Westminster system and apply both common law and statute.
- 2 principal limitations include:**
 - The acquisition of some real estate.
 - Acquisition of commercial interests which may be contrary to the national interest.
- Otherwise, very few limitations.**

The Australia-United States Free Trade Agreement now permits acquisition to the amount of \$800 million by American corporations without Government approval.

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Contract Issues

- Substantially the same as in the USA
- Trade Practices Act (Cth) (1974)**
 - **Section 68** declares void any term of a contract which purports to exclude, restrict or modify the implied conditions, warranties and other provisions of the Division
 - **Section 74(2)** implies a warranty that services will be fit for the purpose.
 - **Section 68A** permits limitation of liability for breach of the implied conditions or warranties but is subject to restrictions.



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Liability Issues in Australia

- Substantially the same as in the USA
- In Australia, tort law reform was prompted by the collapse of HIH Insurance Group, impact of the 11 September 2001 attacks on the global insurance market and increasing awards of damages.
- The Federal Government established a committee to review the law of negligence and prepared the "IPP Report" which, amongst other things, recommended:
 1. That a risk be "not insignificant".
 2. An intoxicated person is deemed to have contributed to his/her injury.
 3. An injured person is deemed to have been aware of any obvious risk.



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Liability Issues in Australia

- The **Civil Liability Act 2002** (NSW) was passed as a result of the Ipp recommendations.
 - *Fallas v Murlas* [2006] was a test case for the Court to consider the meaning of "obvious risk" according to Section 5L of the *Civil Liability Act*.
 - Tourism and hospitality operators were no longer held liable for intoxicated patrons and injuries suffered after departing the premises.



The Australian Courts now imposes a greater obligation upon people to appreciate and accept risk.

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Liability Issues in New Zealand

- Tourism and hospitality are New Zealand's biggest "export" earner with 2 million tourists visiting per year.
- Voluntary safety codes that address key legal, safety, environmental and customer services principles have been implemented in such industries as extreme sports and adventure tourism



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Cultural issues and Hospitality

- A heightened duty of care to those vulnerable and unfamiliar with the language and cultural nuances of Australians and New Zealanders.
 - *Preti v Conservation Land Corporation and Ors* [2007] highlighted that 'obvious risk' may be culturally specific.
 - Increased vulnerability of tourists who are unable to read and understand warning signs and unfamiliar with the beach and bush environment.



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Dispute Resolution

- All States and Territories, and all legal profession associations, have or can arrange mediation and arbitration procedures
- 1986 – Australian Commercial Dispute Centre (“ACDC”) established by Justices Street and Sheahan
- *International Arbitration Act* (1974) (Cth) implements the New York and Washington Conventions.
- Free Trade Agreements also tend to bring with them dispute resolution provisions.



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