BEACH SAFETY AND THE LAW NATIONAL SUMMIT 2007
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LEGAL CONSIDERATIONS FOR BEACH SAFETY
In Defence of the Reasonableness of the Law

Australian Beach Culture

2007 may be the Chinese Year of the Pig. But here in Australia it is the year of the surf lifesaver. This Beach Safety and the Law National Summit provides a fitting way for the legal profession to express its gratitude to our volunteer lifesavers and the inclusive organisation that nurtures them for their century of service to the Australian community. My research has revealed manifold reasons for the community to thank our red and yellow Aussie heroes. Take mid-winter 1955. Surf lifesaving boat crews from the Newcastle area rescued 1,800 residents engulfed by floodwaters in Maitland. Things became especially critical when the lifesavers came upon a hotel with beer taps just one inch above flood level. It required all the lifesavers' skill and training to manage to fill a glass![1] Some of us have more personal reasons to thank the surf lifesavers. I do. Thirty-five years ago when I was 19, my mother, like me a keen body surfer, was rescued by them off Point Lookout's Main Beach on Stradbroke Island and resuscitated. I hear she is but one of half a million successful rescues over the past 100 years. There can be no suggestion of any breach of legal duty in my mum's case. She is now 93! Her only complaint was that the newspaper report of the incident described her as "an elderly woman aged 58"! I could not understand her indignation then, but as 58 looms ever nearer, I certainly do now!

Australians' close connection with the beach and the surf pre-dates even the surf life saving movement. I acknowledge the indigenous Australians and the elders of the Kombumerri people on whose land we meet today. For thousands of years before British settlement their ancestors lived on these shores and swam and fished in these waters. No doubt they were deeply cognisant of beach safety issues touching on their way of life. They almost certainly had meetings, not so very different to this summit, to discuss improvements to beach safety for their people.

In more recent history, body surfing first became popular on Australian beaches in the 1880s. Arthur Lowe, doyen of the early surf life saving movement, recalled in his book *Surfing, Surf Shooting and Surf Lifesaving Pioneering*[2] the thrill of his first body surf experience in 1886. But the popularity of surfing was at first hampered by laws forbidding the exposure of any part of the body to the opposite sex in public. Sydney's Manly Council led the way in 1903 when, following a spirited press campaign, it boldly rescinded by-laws preventing public bathing in daylight hours.[3] The rest of Australia soon followed Manly's lead and Australians were flocking to their favourite beaches to bathe in the sea and to body surf. Before long, volunteer lifesavers formed clubs to make the experience safer for beach visitors.

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1 Galton, *Gladiators of the Surf* 1984, p 107; Cashman Headon Kinross-Smith, *Oxford Book of Australian Sporting Anecdotes*, 1993, p 171-172.

2 Lowe, *Surfing, Surf-shooting, and Surf Life Saving Pioneering*, (1958) p 24; Headon Kinross-Smith, *Oxford Book of Australian Sporting Anecdotes*, 1993, pp 41-42.

3 Wilson, *Australian Surfing and Surf Life Saving*, (1979) pp 22-3; Headon Kinross-Smith, *Oxford Book of Australian Sporting Anecdotes*, 1993, pp 67-8.

Surf board riding was introduced to Australia a few years later in 1915 by the Hawaiian Olympian, Duke Kahanamoku, when he brought his nine foot long sugar pine board to Sydney's Freshwater beach. Admiring Aussie onlookers had no idea how he could get this floating hunk of timber out to sea. The Duke declined their offer of a boat and crew to tow his board beyond the wave-break. He entertained onlookers first with his spectacular solo surf board riding and then surfed tandem with local 16 year old, Isabel Letham.[4]

Australia's beach culture of surf, sand and sun was launched. It quickly became an iconic symbol of 20th and 21st century Australian life. The surf life saving movement was there from those early beginnings. Its own iconic status was recognised this year on Queensland Day when Surf Life Saving Queensland became the first institution ever to be named a "Queensland Great"!

Today's program records that my task is to provide a legal framework for this summit, giving an overview of stakeholders' roles and responsibilities under legislation and common law, discussing emerging legal issues related to coastal management and opportunities to further enhance beach safety. And all in 25 minutes!

Stakeholders

Once, Aussies might have thought the word "stakeholder" had something to do with barbeque food. In the context of this summit, it refers to

- interested members of the public and beach users;
- volunteers and organisations like SLSA;
- local government;
- police and emergency services personnel;
- tourism operators and resort owners;
- lawyers;
- and those involved in the insurance industry.

Beach safety

The meaning of the concept "beach safety" is potentially as wide as the oceans with as many aspects as there are grains of sand on the beach. De Nardi and Wilks have attempted a comprehensive definition which is appended to this paper. In essence it is: "… the limitation or mitigation of risks and hazards that expose the public to danger or harm while in a beach environment, including the extended environment of the surf … ."

A legal overview and framework

For me, the words of Australian poet, Judith Wright, in *The Surfer*, stirringly articulate the tension that is at the heart of this summit. On the one hand we experience joy from the beach and sea. On the other hand there are inherent dangers in any thrilling outdoor activity involving the unpredictable. On the one hand, the pleasure of surfing:

"He thrust his joy against the weight of the sea,
climbed through, slid under those long banks of foam –
(hawthorn hedges in spring, thorns in the face stinging).

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[4] Galton, *Gladiators of the Surf*, 1984, p 25; Headon Kinross-Smith, *Oxford Book of Australian Sporting Anecdotes*, 1993, p 96.

How his brown strength drove through the hollow and coil
of green-through weirs of water!
Muscle of arm thrust down long muscle of water."

On the other hand, the dread of the dangerous sea:
"For on the sand the grey-wolf sea lies snarling;
cold twilight wind splits the waves' hair and shows
the bones they worry in their wolf-teeth. O, wind blows
and sea crouches on sand, fawning and mouthing;
drops there and snatches again, drops and again snatches
its broken toys, its whitened pebbles and shells." [5]

The poet eloquently reminds us that surfing is fantastic but not risk-free. To enjoy the exhilaration of raw nature at the beach requires taking responsibility for personal safety.

Others will speak during the course of the summit in more detail on particular stakeholders' roles and legal responsibilities and of emerging legal issues concerning beach safety. The following observations provide, in accordance with my brief, a mere overview.

During the past decade especially, public controversy, fanned by the media and the insurance lobby, has periodically arisen over court awards to claimants for injuries, including those suffered in outdoor recreational activities like surfing. Steeply rising insurance premiums caused hardship to many voluntary organisations, including Surf Life Saving Australia. But I apprehend that the common law has often been unfairly criticised in this controversy.

In the 75 years since the death of the snail in the opaque ginger beer bottle and Lord Atkins' seminal statement in *Donohue v Stevenson*:[6] "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour," the common law of the tort of negligence has incrementally developed and gradually widened in its scope. But the common law has never departed from a requirement that duties of care must be discharged by the exercise of *reasonable* care, not by absolute prevention of injury. The duty of care, then, is to conform to the legal standard of reasonable conduct in light of the apparent risk. Since the 1980 decision of *Council of the Shire of Wyong v Shirt*,[7] the law in Australia has required a court determining these questions to adopt the following approach. Decide whether a reasonable person in a defendant's position would have foreseen that their conduct might pose a risk of injury to a claimant or to a class of persons including the claimant. If so, determine what the reasonable person would have done by way of response to the reasonably foreseeable risk. The answer to this question involves balancing the magnitude of the risk and the degree of the probability of it occurring with the expense, difficulty and inconvenience of taking action to alleviate or avoid the risk and any other conflicting responsibilities which the defendant may have.

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5 Judith Wright, "The Surfer", *Five Senses Selected Poems by Judith Wright*, Angus & Robertson, 1970, p 16.

6 [1932] AC 562, 580.

7 (1980) 146 CLR 40, Mason J 47-48.

These long-established principles were re-affirmed by the High Court of Australia as recently as 30 August this year in *Roads and Traffic Authority of New South Wales v Dederer*.[8]

In Queensland for many years these issues have generally been determined by judges alone, the legislative concern being that jurors are more likely than judges to be swayed by sentimentality and emotion over the plight of injured claimants.

The common law also recognises the Latin maxim *volenti non fit injuria*: a claimant may voluntarily accept the risk involved in an activity so that a defendant is not liable in negligence. With apportionment statutes providing for contributory negligence this is no longer necessarily a complete defence to the tort of negligence.[9]

In *Rootes v Shelton*[10] in 1967 the High Court noted that claimants engaging in a sport or pastime can be considered to have accepted inherent risks.

But that does not completely eliminate a defendant's duty of care. Whether or not a duty arises and its extent will depend on the circumstances in each case. Very often the cases that come before the courts at appellate level are so finely balanced that differing but reasonable minds can properly reach different conclusions as to whether or not conduct was reasonable in the circumstances.

For example, in *Nagle v Rottnest Island Authority*[11] Mr Nagle was injured and became a quadriplegic when he dived into water and hit submerged rocks at a reserve. The reserve was promoted for swimming and related recreational purposes and managed by the defendant. Mr Nagle brought an action against the defendant claiming that it breached its duty to him in not providing signs warning of the presence of submerged rocks. He was unsuccessful both at trial and on appeal in a 2-1 decision of the Full Court of the Supreme Court of Western Australia. In 1993, the High Court majority of four,[12] with only Brennan J dissenting, overturned the Full Court's decision and found the following. Mr Nagle's injuries were caused by the defendant's failure to warn of the presence of submerged rocks in breach of its duty of care to him. The risk of injury to him was reasonably foreseeable even though diving at the site may have been foolhardy or unlikely. An appropriate warning sign would probably have deterred Mr Nagle from diving. From trial to High Court appeal, four judges found in the defendant's favour and five for the ultimately successful plaintiff.

Compare *Romeo v Conservation Commission (NT)*[13] and *Prast v Town of Cottesloe*[14] to *Nagle's case*. Ms Romeo suffered serious injuries when she fell 6.5 metres from the top of a cliff at night onto a beach in a scenic nature reserve managed by the defendant. The cliff edge was obvious. She was intoxicated. The trial judge and the

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8 [2007] HCA 42, [49]-[56].

9 See *Civil Liability Act 2003* (Qld), ss 23 and 24 and *Law Reform Act 1995* (Qld), Pt 3, ss 4A-11.

10 (1967) 116 CLR 383, 386-387.

11 (1993) 177 CLR 423.

12 Mason CJ, Deane, Dawson and Gaudron JJ, Brennan J dissenting.

13 (1998) 192 CLR 431.

14 (2000) 22 WAR 474, paras 32-33.

Northern Territory Court of Appeal refused Ms Romeo's claim against the defendant. In 1998 all members of the High Court found the defendant was under a duty to those entering the reserve to take reasonable care to avoid reasonably foreseeable risks of injury and that the risk of someone falling off the cliff was reasonably foreseeable. But the majority, in a 3-2 decision, like the trial judge and the intermediate appellate judges, found that the defendant was not in breach of its duty of care in failing to erect a fence or barrier at the edge of the cliff.

In *Prast* the Western Australian Full Court in 2000 rejected Mr Prast's claim that the trial judge should have found that the defendant was required to erect signs on Cottesloe beach reading "persons body surfing run the risk of serious spinal injury by reason of the condition of the surf and the seabed". Mr Prast was dumped by a wave whilst body surfing and suffered tetraplegia. The court accepted that the defendant owed him a duty of care but considered that the risks of being dumped by surf and thereby sustaining serious bodily injury were endemic to and part and parcel of the recreation of body surfing. The risks were obvious and should have been known to him. The dangers which resulted in his injuries were not hidden dangers as in *Nagle* but obvious risks facing all body surfers. The High Court refused Mr Prast's application for special leave to appeal.

By contrast, in *Swain v Waverley Municipal Council*[15] Mr Swain became a paraplegic when he hit a sandbar whilst body surfing between the flags at Bondi beach. He claimed the Council was negligent in its placement and maintenance of the flags. The High Court in 2005 in a 3-2 decision overturned the New South Wales Court of Appeal's 2-1 decision and restored the jury verdict finding the Council negligent. The Council did not meet its evidentiary onus of showing it was not reasonably practicable to have responded to the risk by moving the flags to an alternative area. The jury's findings were reasonably open on the evidence, even though others may have reached a different result. In the end, the jury and four appellate judges found for the ultimately successful Mr Swain and four appellate judges found for the defendant.

Swain and *Prast* at first appear to reach quite different results on reasonably similar facts. But a closer review shows the reasoning in both cases is entirely reconcilable on legal principle. In both, the appellate courts found that the findings of fact at trial were open on the evidence, not that these factual findings were inevitable on the evidence. Mr Prast was not swimming in a flagged area and so can be taken to have assumed the ordinary risks inherent in body surfing, including being dumped by the surf into the sand. Mr Swain was swimming between the flags without any warning of the presence of a sandbar which then became a disguised danger; the Council could have placed the flags elsewhere.

The High Court's most recent decision in this field is *Dederer*, a case to which I have already referred. There the New South Wales Traffic Authority had prohibited jumping or diving from the Forster-Tuncurry Bridge. This did not deter the 14 year old claimant from diving from the bridge with resulting partial paraplegia. The trial judge found the following. The defendant knew the bridge was regularly used by young people for jumping and diving. It had breached its duty in that it should have provided additional signage and information (pictorial or written) explaining the

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15 (2005) 220 CLR 517.

prohibition, in particular that the shifting sands below made entering the water from the bridge dangerous, especially by diving. The trial judge's conclusions were upheld by the New South Wales Court of Appeal in a 2-1 decision. The High Court overturned the Court of Appeal decision 3-2, concluding instead that the defendant had responded in a reasonable way to a foreseeable risk in providing warning signs of the dangers of jumping and diving; it was unreasonable to require more. The trial judge, two intermediate appellate judges and two High Court judges (in total five judges) found in favour of Mr Dederer. One intermediate appellate judge and three High Court judges (in total four) found in favour of the defendant. The majority High Court view of course prevailed, but more judges found for the unsuccessful claimant than against him. *Dederer*, *Swain* and *Nagel* are especially telling illustrations of how finely balanced and difficult to decide these cases are.

In Queensland today, actions brought against volunteers, public authorities, resort owners, tourism operators or other stakeholders represented at this summit are governed not only by the common law but also by the modification to it by statutes like the *Civil Liability Act 2003* (Qld). That Act, along with broadly similar statutes in other Australian jurisdictions was introduced in response to Justice Ipp's 2002 recommendations in his *Review of the Law of Negligence Final Report*.[16] The provisions of Queensland's *Civil Liability Act*, like the common law, focus not only on the duty of care owed to claimants (beach users for today's purposes) but also on the beach user's personal responsibility to take reasonable care in respect of obvious risks. In the Act's second reading speech, Queensland's then Attorney-General, the Hon R J Welford, made the following observations. Duties and entitlements under the common law remain intact unless specifically excluded or modified by the Act. The Act modified the law relating to the duty to warn others of obvious risks, confirming that no person has a duty to warn another of an obvious risk unless specifically asked to provide information on the risk. A person will not be liable for injury to another as a result of an obvious risk in a dangerous recreational activity. The Attorney described the Bill as "a comprehensive response to the problems raised by the insurance crisis. It affects every area of the law of negligence and puts some commonsense and personal responsibility back into the law. If the insurance industry behaves honestly and accountably, they will respond positively to this legislation. …. if the federal government cares about the welfare of the sporting, recreational and cultural communities and professional organisations who are suffering under crippling insurance premium increases, they will give the ACCC the power to bring the insurance industry into line and hold it accountable for the changes that our government and others are making around the country."[17]

The *Civil Liability Act* gives a not particularly helpful definition of "obvious risk".[18] It stipulates the absence of any proactive duty to warn against an obvious risk.[19] No liability will be incurred for the materialisation of an inherent risk, that is, a risk that could be avoided by the exercise of reasonable care and skill.[20] The Act also states

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16 See *Civil Liability Act 2002* (NSW), *Civil Liability Act 2002* (Tas), *Civil Liability Act 2002* (WA), *Recreational Services Limitation of Liability Act 2002* (SA), *Volunteers Protections Act 2002* (SA), *Law Reform Ipp Recommendations) Act 2004* (SA).

17 Hansard, 11 March 2003, 367-369.

18 *Civil Liability Act*, s 13.

19 Above, ss 14-15.

20 Above, s 16.

that no liability will be incurred for personal injuries suffered from obvious risks arising from dangerous recreational activities.[21] Intoxication is not relevant to the duty and standard of care.[22] An intoxicated claimant is presumed to have been contributorily negligent and the onus is on the claimant to rebut that presumption.[23] Claims for personal injury damages are determined by a court without a jury.[24] Special provision is made for the duty of care owed by professionals.[25] Civil liability does not generally attach when assisting a person in distress.[26]

Claims against the Crown in the right of the State of Queensland, a local government or a statutory public authority are governed by principles set out in Part 4 of the Act and require the consideration of the entities' relevant financial and other resources and responsibilities.[27] A claim for breach of statutory duty against these entities requires proof that the conduct was so unreasonable that no comparable entity could have conducted itself in that way.[28]

Excluding motor vehicle accidents,[29] the Act excuses volunteers from personal civil liability for acts done in good faith when doing community work.[30] There are limitations. The protection applies only to those who are sober,[31] not committing criminal acts,[32] not acting outside the scope of the community organisation's activities or contrary to its instructions[33] and where there is no statutory obligation to insure.[34]

I am unconvinced the legislative reaction in Queensland and throughout Australia to Justice Ipp's recommendations has simplified, clarified or improved the common law or that it will significantly affect outcomes on liability. With great trepidation before the present audience, who may know of Mr Welford's commendably close connections to SLSQ, I respectfully differ from the Minister's observations insofar as they state that prior to 2003 the common law lacked commonsense and did not require the taking of personal responsibility. The common law has consistently recognised that to establish negligence a claimant must show fault; those who participate in pleasurable but inherently risky pastimes (such as surfing) must assume appropriate personal responsibility for risks like being dumped when body surfing outside a flagged area: see *Prast*. On the other hand, that does not necessarily absolve stakeholders from all responsibility as the High Court's decision in *Swain* demonstrates.

Emerging legal issues related to coastal management and opportunities to enhance beach safety

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21 Above, s 17-19.
22 Above, s 46.
23 Above, s 47.
24 Above, s 73, but see s 77 for transitional provisions.
25 Above, ss 20-22.
26 Above, ss 26-27.
27 Above, s 35.
28 Above, s 36.
29 Above, s 44.
30 Above, ss 38-39.
31 Above, s 41.
32 Above, s 40.
33 Above, s 42.
34 Above, s 43.

Australians, at least we water babies who have grown up along the coastal fringe and are familiar with beach mantras like "only swim between the flags", know the inherent risks involved in surfing: drowning, rips, sharks, stingers, spinal and head injuries and so on. We also know that tunnelling into fragile, high sand dunes and failing to slip, slop, slap carry their own risks. International tourists are unlikely to be so familiar with these risks. Overseas visitors accounted for 40 per cent of beach-related deaths and 50 per cent of coastal drownings in Queensland in the 2006-2007 season.[35] In December 2006 there were three separate incidents of drowning here on the Gold Coast. These deaths suggest, not necessarily breach of legal duty of care, but at least the opportunity for better risk management to improve beach safety. For example, one of those deceased visitors was taken to the beach out of patrolled hours by a commercial tourism operator.[36] Relevant stakeholders need to work cooperatively to develop, refine and regularly review procedures to ensure they inform tourists of the dangers as well as the joys of our beaches. From a legal perspective, this involves the application of the common law commonsense principles set out earlier. Think about your field of responsibility, identify if there is a risk of injury. If there is, what can reasonably be done in response to it, balancing the size of the risk, the probability of the risk materialising, the expense, difficulty and inconvenience of alleviating or avoiding the risk and other conflicting responsibilities.

The case of *Enright v Coolum Resort Pty Ltd*[37] in 2002 is a useful example. There, Mr Enright, a US citizen, drowned whilst surfing on the unpatrolled Yaroomba beach. He was staying at the resort and attending a conference there. His widow was unsuccessful in recovering damages against either the resort or the local Council. The resort was pro-active in considering its guests' beach safety. It provided a fully patrolled beach, a shuttle service to and from the patrolled area, a shelter with a direct phone line to the resort and brochures relating to beach services and swimming safety in each room. The Council had erected signs at a number of beach entrances (but not the entrance used by Mr Enright) warning of the dangers of beach swimming such as "tragedies occur at unpatrolled beaches – please swim only between the flags". The judge found, however, that Mr Enright was determined to surf after the conference finished when the beach was no longer patrolled. Mr Enright knew, or ought to have known, because of his past experience, that in the circumstances surfing as and where he did involved inherent risks. The judge was satisfied that Mr Enright would probably have gone surfing despite any warning signs from the Council or information from the resort. The judge nevertheless cautioned that "… there may be circumstances in which it is foreseeable that potential surfers do not have the experience to be aware of and to make judgments about the inherent risks. This might well give rise to obligations to warn them or even to safeguard against their entering the surf unsupervised." There was no appeal from the judge's findings.

Dr Jeff Wilks has suggested that sanctions could be imposed on tourism providers under the *Tourism Services Act 2003* (Qld) if they acted inappropriately.[38] That Act seems primarily aimed at the prevention of financial misconduct by tourism operators. But some of its provisions could arguably apply to tour operators who are cavalier

35 SLSQ Annual Report 2006-07, p 8

36 Wilkes, J, "Tourists and Water Safety", *International Travel Law Journal*, 2007, vol 1 p 35.

37 [2002] QSC 394

38 Wilkes, J, "Tourists and Water Safety", *International Travel Law Journal*, 2007, vol 1 p 35.

with their clients' safety. The Act requires tour operators not to act unconscionably.[39] Unconscionable conduct relevantly includes unreasonably failing to tell tourists about any apparent risk from intended conduct[40] and whether tourists' ability to protect their interests was affected by cultural, language or religious characteristics.[41] An apparent risk is one that the service provider could reasonably foresee but may not be apparent to the tourist.[42] The *Tourism Services (Code of Conduct for Inbound Tour Operators) Regulation 2003* requires an inbound tour operator to act honestly, fairly and professionally[43] and to exercise reasonable skill, care and diligence in carrying on business.[44] This may be a developing area of regulation aimed at beach safety.

Literature informing tourists of the dangers as well as the joys of the Australian beach, whoever produces it, must take into account language and relevant cultural nuances. For example, some, like early 20th century Australians, are uncomfortable swimming between the flags in close proximity to scantily clad members of the opposite sex. [45] This is hardly surprising when you think about it. Some of us might feel uncomfortable in places like Japan or Russia in the mixed nude steam baths so commonplace there. Many international visitors will not appreciate the difference between swimming in the predictable environment of a pool and swimming in big surf with rips, tows, dumping waves and moving sand. Signage and other information must communicate effectively with all beach users. Those of us who have been foreign tourists have probably chuckled over badly translated, incomprehensible warning signs in distant climes. Consulting communication experts and qualified linguists is probably advisable. A picture may be worth a thousand words and transcends language differences when developing signage for both locals and tourists. The web and audio-visual material in hotel rooms or units could also be used to effectively warn of the inherent risks encountered at the beach.

The nature of the duty of care may fluctuate according to the circumstances. For example, without taking away from parental responsibility, it may be greater in respect of children. I commend the recent initiative by SLSA and Telstra to educate our kids from the bush, an identified risk group, on beach safety. "Schoolies" is nearly upon us again. Young people will be paying premium rates for a beach holiday. They will be attending the beaches in large numbers whilst sleep-deprived, often intoxicated by alcohol or drugs and probably showing-off to their peers, sometimes in the presence of older predatory opportunists. The duty of care owed to them by stakeholders may require a more heightened pro-active response than ordinarily. I also commend the recent Queensland Police Service initiative to be alert to intoxicated nightclub leavers entering the unpatrolled surf in the wee hours.

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39 Section 35.

40 Section 36(1)(c)(ii).

41 Section 36(1)(e).

42 Section 36(2).

43 Schedule, s 5.

44 Schedule, s 6.

45 Ballantyne, R, Carr, N and Hughes, K, Between the Flags: An Assessment of Domestic and International University Students' Knowledge of Beach Safety in Australia, *Centre of Innovation in Education*, Queensland University of Technology, 2003, in: Wilkes et al, "Tourists and Beach Safety in Queensland, Australia" *Tourism in Marine Environments* vol 1 no 2 p 126.

Sadly, crime remains an issue on Australian beaches. Sometimes it is opportunistic. On occasions it is fuelled by alcohol, drugs or both. Most beach-related crimes involve property but sexual offences and physical assaults are not uncommon. Crime prevention must be factored into any beach safety program. The future will almost certainly involve video surveillance at major beaches and more crime awareness programs aimed at the community and tourists generally, and international visitors in particular. Systems will have to be developed and refined to ensure that privacy issues are appropriately managed.

Medical issues are also relevant. Smoking, including the health risks arising from passive smoking on crowded beaches, may need to be monitored. "Slip, slop, slap" has been effective in educating locals of the danger of skin cancer but does it get the message across to sun-starved visitors from the northern hemisphere? Insect bites and sea stingers can cause holiday-wrecking allergic reactions from visitors.

A warning about warnings. They must themselves be balanced: we do not want to so terrorise our tourists that we deter them from visiting our special part of the world and enjoying our magnificent beaches. Many tourists come here to experience adventure and the great outdoors: we need to ensure they do so aware of inherent risks so that they can make informed decisions in taking personal responsibility for their safety. Australians have a healthy disdain for unnecessary authority and rules, no doubt borne out of its convict and rebellious Irish heritage and the associated Ned Kelly mythology. Australians rid themselves of council by-laws preventing public bathing early in the 20th century. They will not willingly accede to being fined, or worse, for by-law breaches like swimming outside the flags early in the 21st century – even if it is for their own good. Care must be taken not to over-regulate beach users so that a trip to the beach becomes a stressful experience overseen by Big Brother. The aim is to make beach users aware of dangers so that they can take informed personal responsibility for their own safety, whilst not impinging on the safety of others.

Conclusion

You stakeholders represented here today, by attending and supporting this summit, have taken a significant step towards meeting your responsibilities of enhancing beach safety under any duties of care you may have to beach users. The law does not and has never required local governments, volunteers and the organisations that foster them, tourism operators, resort managers or police and emergency service personnel to protect beach users from all risk. Any obligation when it exists is only to take *reasonable* care for beach users. What is reasonable care will depend on the unique facts of each case. Usually this is clear cut. The cases which reach appellate courts, some of which I have mentioned and others to which later speakers will refer, are those that tend to be finely balanced as to whether a duty of care has been reasonably discharged. Fair minded jurors and judges will form different but reasonable views of whether a defendant's conduct has been a reasonable response to a risk in all the circumstances. You will not go far wrong if you do the following. Regularly review your obligations and any systems you have relating to beach safety. Respond reasonably to potential risks. Take into account the size of the risk, the degree of the probability of it occurring and the expense, difficulty and inconvenience of taking alleviating action. Weigh those matters against your conflicting responsibilities. Regular monitoring and refinement of obligations and systems, taking into account all the ever-changing circumstances, is essential. I do not mean just the transitory beach

and surf conditions, or even those dramatic changes predicted as a result of climate change and global warming. Factors such as origin, culture, language and needs of beach tourists are relevant. So, too, are changing patterns in criminal behaviour at the beach and new information on medical and health issues. Knowing how to most effectively communicate safety information to beach users so that they can enjoy the beach is essential. Stakeholders must make beach users aware of inherent dangers so that they can take informed personal responsibility for their own safety without endangering others.

This summit will facilitate that process by exposing you to a range of cutting-edge expert views on various aspects of how best to provide a reasonable standard of beach safety. The generous allocated question time will value-add with the audience's experience and knowledge. Importantly the summit will draw to a close with forward-looking sessions focussed on how stakeholders can develop best practices to manage future challenges such as those caused by global warming-induced climate change, a growing multicultural population and increased international tourism. Attending and actively participating in this summit and then using the acquired wisdom in your various roles as stakeholders to review and refine your systems relating to beach safety is an excellent start to ensure you are meeting your duty of care to beach users.

Much as I am enjoying your company, it should also make it reasonably unlikely that we shall meet again – at least in court!

APPENDIX 1

"Beach safety is the limitation or mitigation of risks and hazards that expose the public to danger or harm while in a beach environment, including the extended environment of the surf and adjacent water. Beach safety requires a combination of common sense, swimming ability and beach/surf knowledge that will vary according to location and personal experience. Besides the major physical beach hazards – water depth and temperature, waves, surf zone and tidal currents, winds, rocks (or reef) and headlands – marine life, personal health and individual behaviour can also affect safety. The main examples of hazards and potential injury in a beach environment can be summarized as follows: water (immersion – drowning), marine animal (bites and stings – jellyfish), litter (cuts – broken glass), wave action (broken bones – collarbone from dumping), equipment (head injury – hit by surfboard), cliffs (fall – trip on cliff edge), water pollution (infection – gastroenteritis from faecal contamination), underwater object (spinal cord injury – diving into sandbar), criminal activity (assault – robbery), sun (sun stroke – sun exposure). Specialist water safety organizations, such as the International Lifesaving Federation (ILS) seek to reduce accidental deaths and injuries in beach environments by limiting the preventable risks and hazards and by identifying 'at risk' target groups such as children, males, young people between 15-35, and tourists. Many causal risk factors can be deduced from safety tips provided by lifeguards and lifesavers, such as: never swim alone; never run and dive in the water; read and obey signs; float with a current or undertow, do not swim against it; do not swim under the influence of drugs and alcohol or directly after a meal and swim on patrolled beaches (see Surf Life Saving Australia)."[46]

[46] De Nardi, M. & Wilks, J. (2007). 'Beach safety', in: Lück, M. (Ed.), **Encyclopedia of Tourism and Recreation in Marine Environments**. London: Routledge, in press.