

Liquor licensing update

Compliance issues – trends and upcoming changes

November, 09

This Alert discusses issues and trends in enforcement of South Australian liquor licensing laws. It covers “lessons learnt” from recent decisions of the Licensing Court, and imminent changes to the *Liquor Licensing Act 1997* regarding offences and enforcement.

This Alert has a particular focus on issues from the wine industry’s perspective, but covers matters that will be of interest to all licensees.

Changes to the Act

The *Liquor Licensing (Producers, Responsible Service and Other Matters) Amendment Bill 2009* was introduced to State Parliament on 9 September 2009. The Bill has passed the South Australian Legislative Council, and is shortly to be debated in the House of Assembly. A “commencement date” for the changes should be known soon.

The Bill contains significant amendments to the requirements regarding service of alcohol, and also to the manner in which penalties which can be imposed for breaches of the Act.

“Intoxicated” will include “noticeably impaired”

Currently, if liquor is sold or supplied on licensed premises to an “intoxicated person”, each of the licensee, the on-duty “responsible person”, and the person supplying the liquor, are guilty of an offence.

The person supplying the liquor can escape liability if they can prove that they had a belief “on reasonable grounds” that the person supplied with liquor was not intoxicated. The licensee can avoid liability if they prove that they “exercised proper care” to prevent sale or supply to intoxicated persons.

The proposed amendments now before Parliament will extend the offence so that it will include any supply of liquor to:

“a person in circumstances in which the person’s speech, balance, co-ordination or behaviour is noticeably impaired and it is reasonable to believe that the impairment is the result of the consumption of liquor”.

This Alert provides general information only. It does not purport to be a comprehensive advice. Readers should seek professional advice before acting in relation to these matters.

Liquor licensing update

Compliance issues – trends and upcoming changes

November, 09

The power to remove or refuse entry to patrons will also be extended to allow removal or refusal of entry to any persons who it is reasonable to suspect have supplied, or are about to supply, liquor to an intoxicated person.

The proposed changes have been described by the State Government as “making it easier for licensees, bar staff and those enforcing the Act” to assess whether a person should or should not be served. It has been suggested that up until now the concept of “intoxicated” has proved too difficult for licensees, the Police, and the licensing authorities to interpret (and there has never been a successful prosecution for serving liquor to an “intoxicated person”).

While supporting the Bill generally, the Opposition has offered criticism of the proposed changes, in particular regarding the uncertainty in the concept of “noticeably impaired” (including making observations to the effect that depending on one’s interpretation, it could be said that the majority of patrons in hotel bars on most evenings are “noticeably impaired”).

While it is a matter for speculation, there is in our view a good chance that these changes to the Act will be accompanied by an increased level of scrutiny on the actions of licensees and their staff, and on any instances of (allegedly) “noticeably impaired” patrons being supplied alcohol.

Particularly in the case of large functions and special events, there will be an increased focus on whether licensees have implemented appropriate policies to prevent patrons from providing liquor to other patrons who are intoxicated or “noticeably impaired”. This will be significant, for example, at “gourmet weekend” or similar events, where there are groups of patrons consuming wine on the premises, and where full bottles of wine are available for purchase.

Licensees will need to ensure that they update, maintain and enforce their policies and procedures as the changes come into effect (and should pay close attention to the guidelines and information that will be distributed by the licensing authorities as part of this process).

“On the spot” fines for breaches of the Act

The proposed changes to the Act include the introduction of “expiation fees” for certain offences.

Liquor licensing update

Compliance issues – trends and upcoming changes

November, 09

The Police (or licensing authority) will be able to impose “on the spot” fines for certain offences. The offences which might attract these fines will include certain breaches of licence conditions (trading hours, licensed capacities, entertainment hours etc), and failures to comply with statutory requirements (display of licence, mandatory signage, etc). The fines can be imposed without the need for a formal prosecution before the Commissioner or in the Licensing Court.

The “upside” for licensees may be that some breaches or offences can be dealt with by way of a fine, rather than the costly and time consuming process of having to attend at the Licensing Court for disciplinary proceedings.

The “downside” is that minor breaches which previously might have been met with a friendly warning, are now likely to be met with a fine (which may range from \$160 to \$1,200).

Compliance issues and trends

There is significant political, media and community focus at present on issues around liquor service, alcohol consumption, and intoxication.

Against this backdrop, given the high profile of the South Australia Police Licensing Branch in recent years, and given the imminent changes to the Act, licensees can expect that the focus on compliance (and prosecution for breaches) will only continue to grow.

- *Licence conditions will be enforced strictly*

Recent Licensing Court judgments have made it clear that licence conditions cannot be interpreted “flexibly” – they must be complied with on a strict and literal basis.

A nightclub licensee was prosecuted for a breach of a condition which required security guards to be present for certain hours. The licensee had on a particular occasion sent the guard home, as there was only a small, quiet group of patrons left on the premises. In another matter, a hotel licensee was prosecuted for breach of conditions regarding venue capacity, even though an application had been lodged, but not yet processed, for a change in capacity (which was subsequently allowed). In each case,

Liquor licensing update

Compliance issues – trends and upcoming changes

November, 09

penalties were imposed, despite the licensees' arguments that no real harm was caused.

Licensees should be careful to ensure that they comply with the exact conditions set out in their licences. If licence conditions are unclear or ambiguous, licensees should seek clarification from the licensing authority, and if necessary, apply to vary the conditions.

- *Limited licences – special events, festivals*

The Licensing Court's recent cases have included prosecutions for breaches of conditions of licences issued for special events (including wine festivals). The Court's judgments emphasise that "responsible service" requirements, and the "black letter" conditions of temporary Limited Licences (including any requirements for security, prevention of the removal of liquor from designated areas, etc), will be strictly enforced.

This highlights the importance of ensuring that the conditions of any Limited Licence for a special event are appropriate, clear and unambiguous, and ensuring that staff (both serving staff and security staff) of appropriate numbers and with suitable training are engaged for the event.

- *Producer's Licence - "own product" compliance*

The licensing authority's periodic audit of individual Producer's Licences from time to time identifies breaches of the "own product" restrictions, where licensees have sold wine (often, fortified wine) which is not their "own product" (as defined by the Act). In the past, breaches by licensees of the "own product" requirements have led to disciplinary action and issues with incorrectly claimed Wine Equalisation Tax rebates or subsidies, and have also left licensees holding product which cannot be sold pursuant to their Producer's Licence.

With the imminent introduction of a range of changes to the Producer's Licence category (discussed in a separate Alert), licensees can expect renewed scrutiny on compliance with the "own product" requirements. Licensees should ensure that all of their wine product is produced in a manner that satisfies the requirements of the Act, and that they keep full

Liquor licensing update

Compliance issues – trends and upcoming changes

November, 09

records of the purchase or production of grapes, and of the winemaking process, for each vintage of each of their products.

- *“Nut and bolt” compliance*

Examples of “standard” requirements which apply to all licensees include the requirement to display a copy of the licence on the premises, maintaining approvals of “responsible persons” and other persons in a “position of authority”, displaying the required notices regarding minors, and maintaining policies and undertaking training of staff in accordance with the Code of Practice. These ongoing compliance issues can be overlooked by busy licensees.

“Direct sales” activities will increasingly attract the attention of the authorities. A major supermarket chain has had recent, well-publicised difficulties in Victoria, when it “home delivered” cases of beer to a person under the age of 18. The Victorian licensing authorities have subsequently declared that they intend to inspect for compliance all licensees in that State who use “home delivery” sales mechanisms. This case underlines the need for careful management and active supervision of ordering and delivery procedures for “direct” sales.

A regular “housekeeping” review by licensees of their licence conditions, the currency of approvals (for directors, shareholders, “responsible persons”, etc), staff training records, and their general obligations under the Act, will help them minimise the risk of falling foul of liquor licensing requirements.

Contacts:

For further information or advice, please contact:

Andrew Williams

Partner

andrew.williams@finlaysons.com.au

+618 8235 7775