

13 October 2009

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JG;rp

The Honourable Iain Evans MP
PO Box 445
BLACKWOOD SA 5051

Dear Mr Evans

Liquor Licensing (Producers, Responsible Service and Other Matters) Amendment Bill 2009

I refer to your letter of 11 September 2009, inviting the Society to consider the *Liquor Licensing (Producers, Responsible Service and Other Matters) Amendment Bill 2009*. Thank you for referring this Bill to the Society. It has been considered by a group of legal practitioners who are experienced in the legislation in this area of the law. We provide the following comments.

Amendment of Section 4 – Interpretation

We presume that the Regulations will contain a numeric reference to what constitutes a sample, in other words, “no more than xxx millilitres” or similar. We consider that an appropriate amendment as to sample has never been defined in the past and may be subject to abuse in the form of say glasses of wine in the sense of consumption rather than sampling cellar door style. The WA Regulations may be of assistance here.

Section 11a - Commissioner's Code of Practice

At present Section 42 of the *Liquor Licensing Act* deals with mandatory conditions prescribed in Codes of Practice provided for under the Regulations to the Act.

We note that the Bill provides that the Commissioner may publish Codes of Practice approved by the Minister by notice in the Gazette. The scope of matters the subject of such Codes of Practice is to be increased.

We are generally supportive of the proposal to increase the potential subject matter of such Codes of Practice on the basis that such improvements are likely to assist in harm minimisation and related.

We also note with some concern that a Code of Practice *"may be of general or limited application and may vary in operation according to practice stated in the Code"*.

We are concerned that such a Code of Practice might be targeted at certain venues as opposed to the current general application of the existing Code of Practice. Such a Code could be used to effectively impose conditions on a specific licence that the Commissioner, with the consent of the Minister, sees fit without any recourse by a Licensee.

At present the Licensing Authority (including the Commissioner and the Court) has the power to impose conditions on a Licence under Section 43 of the Act. Should the Commissioner impose such conditions on a Licence then it is our understanding that a Licensee currently has a right of review to the Licensing Court as to the imposition of such conditions.

The effect of the proposed amendment in the Bill is that such right of review appears to be lost. We are concerned by the apparent diminution of Licensees' rights.

In our view the current Code of Practice is a useful tool, in large part due to its universal application. We are concerned that the Bill might result in a number of Codes of Practice applying to specific Licences or Licence types. The Commissioner already has the power referred to above in Section 43 to seek to impose conditions on Licences and we consider that a more appropriate avenue rather than the proposal which deprives a Licensee of a right of review to the Licensing Court.

We see no good reason to increase the power in the Commissioner to effectively impose conditions on Licences without any right of review by a Licensee. The power is currently there under Section 43 and is rarely used to our knowledge. We would however support the increased subject matter of the Code of Practice proposed.

Producer's Licence

We are very conscious of the limitations of existing provisions of Section 39 and their application to holders of a Producer's Licence. This Licence type can apply to wineries with or without cellar doors, mainstream production cellar door outlets and even office premises with no direct connection to wine production.

We support the intent of the proposed changes to the Producer's Licence in general terms. We are conscious of the significant benefits to the tourism industry in this State which are provided by numerous wineries and cellar door outlets throughout the State.

We are somewhat concerned at the apparent complexity of the proposal to expand the rights of the holder of a Producer's Licence.

The proposal to allow liquor of any type to be sold by the holder of a Producer's Licence with or ancillary to a meal provided by the Licensee in a designated dining area is a very positive proposal. At present only liquor produced by the Licensee can be sold in such a designated dining area.

At present liquor of any type can be sampled in a designated sampling area in association with a Producer's Licence. We are not aware of that provision being abused although we note that the proposal is that only liquor "of the same type as the Licensee's product" produced by third parties can be sampled under the proposed changes. We wonder whether that is necessary or indeed desirable.

We do consider that there is some confusion at present as to what constitutes a sample. We note that the Bill does not spell out what measurements are proposed and that that will be dealt with in the Regulations. We do agree that that is a significant issue which does require careful attention and consultation with the industry as described by the Minister in the second reading speech.

There does appear to be a move towards a 2 tiered regime of Producer's Licences – those with "production premises" and those without. Those without such premises may only be comprised of a retail outlet whereas those with such production premises appear to have the advantage of having a licensed outlet at the site of production and also at a retail outlet elsewhere in the wine region (as defined in the Commonwealth Legislation).

Query the producer with a production outlet which is not located in a wine region. Is that producer precluded from a retail outlet? Is that fair?

There does appear to be a demand for such multiplicity of Licences. There appears to be nothing wrong with a Producer having a licensed outlet with a facility to taste at the winery "production premises" as well as at a more public "retail outlet" for example on the main street of the wine region in which it is located.

The Authority will need to take great care in order to ensure that these "new breed" of Producer's Licences do not become de facto bottle shops and/or Hotels especially in the case of the larger Producers with their very diverse range of liquors.

Collective Outlets

A number of these have sprung up across the State under the current umbrella of a Special Circumstances Licence. The proposal to allow for a collective outlet which is shared by 2 or more Licensees is novel. We wonder how that would work in practice in terms of responsible service of alcohol, profit share, staffing expenses and who is ultimately responsible for the operation of the licensed outlet. We also note that the Licensing Authority has a discretion to refuse such a proposal for a collective outlet if another Licence type is more suitable. From a Policy point of view and to avoid a proliferation of Licences we expect that it would be preferable to have a Retail Liquor Merchant's Licensee in a locality selling a complete range of liquor rather than numerous small collective outlets dotted throughout a wine region.

It is perhaps worth noting that for example in the case of the Adelaide Hills Wine Region, that region stretches from a point just east of Sellicks Beach in the south to a point just east of Elizabeth in the north. As a consequence care will need to be taken by the Authority when it approves genuine retail outlets in a part of the locality as well as collective outlets.

We note that it appears that the intention of the collective outlet is to effectively deem that a single Producer's Licence is held by the various Producers involved with a collective outlet so there may be joint and several liability and responsibility for activities on such licensed outlets. The proposal does appear perhaps more complicated than it might be.

Producer's Event Endorsement

We note that a Producer's Licence held by a Licensee with production premises is also to be able to be endorsed for events held on site. We wonder whether such an endorsement would be by way of condition on a Licence thereby involving an Application to vary conditions, full public advertising and notification and the like with additional expense, delay and possible objection. Would the endorsement be permanent or for a one-off event? If such endorsements are permanent then we would suggest that they should be subject to advertising and public scrutiny. If they are one-off then we see no need to change the current "Limited Licence" process referred to below.

We also are concerned by the potential for vagueness and lack of clarity of what is and is not part of the licensed premises during such events. Enforcement could well be an issue. In other situations Licences are clearly defined by way of an approved plan with coloured lines attaching to a Licence so that Licensees, Enforcement Authorities and the public are well aware of what is and is not part of a licensed area. We query whether plans would be required as part of an Application.

We note that there is provision for the Authority to deny such a request if a Limited Licence or some other Licence type is more appropriate. Traditionally such off premise activities are dealt with by way of Limited Licence which is a very flexible, efficient and inexpensive process. We wonder whether the proposed change would create more "red tape" than it attempts to resolve.

We note that a distinction is made between those Producers with production premises and those without. We do not see the need to make such a distinction and deprive producers without production premises of the right to seek such event endorsement.

Production Exemption

We understand and appreciate the intent behind the proposed exceptions to the usual requirement that liquor sold under a Producer's Licence must be produced by the Licensee and can see the merit of such exceptions in situations such as loss of crop following heat wave or similar. We support such proposal.

Amendment of Section 52 – Applications to be Advertised

We note the proposal that Application material is to be made available for inspection by the Commissioner. At present we understand that the Commissioner takes the view that only the plans themselves are required to be made available for public inspection. We support any proposal to make more material available for inspection by the public.

We note that Form 1 in Schedule 2 of the Regulations provides for the viewing of plans of Applications which are publicly advertised and we expect that the Form should also be amended to reflect the proposed changes to Section 52 of the Act dealing with advertising.

Confidentiality of Certain Documents and Material Relevant to Application – Section 52a

At present any person may inspect an Application during the public notification process as described above.

We now note that only persons who have a "genuine interest" are to be permitted to view such documents. We are not aware of any problem with allowing the public to inspect documents as at present. We query why any person should be deprived of the opportunity to inspect Application documents. We are often instructed to inspect an Application on behalf of a person who might wish to remain anonymous and we see no reason to stop that practice. We wonder what is meant by the term "genuine interest" as no definition is provided.

We note the Commissioner might also exclude certain material from public display "in his or her absolute discretion". We agree that the Commissioner should be able to deprive the public of such material although we are concerned with reference to "absolute discretion" and the implication that the Licensing Court Judge might not review such a decision of the Commissioner.

We are also concerned by the proposed Sections 52A (3) and (4) which provide for a penalty of up to \$10,000.00 for persons who inspect an Application, document or material and use it for some other purpose other than objecting to an Application or intervening in proceedings. We are not aware of any problem of such abuse of the opportunity to inspect material during the current public notification process. It appears open to interpretation that a solicitor acting on instructions from a client to inspect an application during the public notification process could be caught by that provision. We fail to see the need for such a provision to be enacted. In our view such Applications should be transparent and the public should be encouraged to inspect Applications without the fear of prosecution or criticism following inspecting such material. We strongly oppose that aspect of the Bill.

We are also concerned about the status of such documents once the objection is lodged. Is the suggestion that these documents might still be unavailable to an objector. This may be relevant at Conciliation stage and will be most relevant should there be a contested Hearing before the Commissioner, one of his Delegates or the Licensing Court. How is an objector to prepare his or her case properly without access to all documents which have been lodged with the Commissioner in support of the Application? For example, where an objector seeks to raise "fit and proper" type issues then we would expect that they should be provided with such private material giving rise to such issues.

Proposed Section 62a- Removal of Producer's Licence in Respect of Outlet

We are supportive of that proposal which gives the public the right to comment and if necessary object to such an Application, as removal applications are required to be publicly notified under Section 52(1)(c).

Expiation Fees

We do see some merit in the stated intent of reducing red tape and Court time by issuing such expiation fees.

We are concerned that the result might be that individuals who are issued with such expiation notices simply pay the fine without taking any advice or considering implications of an admission of guilt. We understand that once an expiation fee is paid there is no opportunity to either withdraw the payment or appeal against any allegation.

Matters may be resolved with a very swift outcome but we wonder whether the outcomes are just. We note for example a number of complaints issued by Police before the Licensing Court are withdrawn or go to trial and are found not proven. We wonder whether such matters would have ended up with the same result if the Police had simply issued an expiation notice.

We also have concerns that there might be a variety of implications for an employee who pays such a notice. For example they might be in breach of an employment contract resulting in their employment being terminated.

We also wonder whether an admission of guilt by an employee paying an expiation fee can bind an employer Licensee under the "Vicarious Liability" provisions of the Act.

The current mixture of Licensing Court and Magistrates Court prosecutions appears to work reasonably well. We would suggest that the Licensing Court as the specialist Tribunal would be the more appropriate forum rather than the Magistrates Court for such prosecutions.

Section 62b and C – Addition of Outlets to Producer's Licence

No comment - acceptable in our view.

Carry Off of BYO and Purchased Liquor Left Overs

We understand the logic of permitting the public to remove that liquor which has been brought onto the premises by them.

However in the case of liquor which has been purchased from the Licensee we consider that that initiative may be subject to abuse. A Restaurant for example could become a defacto bottle shop. With respect, it is hardly likely that at a late hour a patron is going to purchase a full bottle of wine and leave a substantial portion when at the same time he or she could purchase a glass or 2 which is a service provided by most if not all Licensees.

Entertainment on Licensed Premises - When Not Operating Under Licence Section 105

We are not entirely sure what the nuisance sought to be resolved is here.

Most licensed premises will provide entertainment when open for the consumption of liquor.

If the concern is with premises which for example may not trade beyond midnight which take on a new complexion at say 2.00am as an unlicensed entertainment venue then with respect that may have repercussions under the *Local Government Act* or the *Development Act* but to a limited degree the *Liquor Licensing Act* also.

The premises remain licensed for the purposes of the *Liquor Licensing Act* notwithstanding that they may not trade in for example the dispensing and consumption of liquor.

Section 68(1)(D)

We wonder whether the use of the word "remove" is appropriate as the word as "remove" is a term of the Act which is defined in the Act already and the more appropriate phrase might be "delete" rather than "remove".

Intoxicated Persons and Related – Section 108

We understood from press releases that what the Government were purporting to do was to define intoxication presumably on the basis of case law and experience identifying certain characteristics which alone or collectively might give rise to the conclusion that a person is affected by the consumption of liquor.

To that extent we expected that Section 4 of the Act might have been amended to include a definition of intoxication.

What appears to have happened is that the present Section 108 is amended to give two bases upon which a person might commit an offence: 1 that the person is intoxicated and 2 that certain physical characteristics coupled with the presumption of consumption of liquor give rise to the suggestion of intoxication. It appears open for an allegation to be made of breach of the Section where a patron might laugh, talk or sing loudly following consumption of liquor. There does not appear to be any definition of "noticeably impaired" and given the maximum penalty of \$20,000.00 we would suggest that a clear definition should be provided and more consideration might be given to what is exactly sought to be prevented here.

We are not entirely satisfied as to our conclusions.

If there is merit in our concern then perhaps Section 108(2) could be amended in such a way as to give a person serving or Licensee a defence to each basis for offence.

Section 124 – The Power to Refuse Entry or Remove Intoxicated Persons or Persons Guilty of Offensive Behaviour

We make the same comments in relation to this proposed amendment as we did in relation to the proposed amendment to Section 108.

In addition, it seems to us that a person suffering some physical disability for example speech impediment, who is consuming liquor may give the impression of intoxication, which could be entirely unfounded.

It does therefore trouble us that the draftsman could create unnecessary compliance issues to those involved in the hospitality industry by use of the method contained in the Bill.

From a public safety and responsible service point of view we query whether it is desirable to simply evict an intoxicated patron. Again, loud laughter, talking or singing could be grounds for such eviction under Section 124 (1)(b). There is already power to evict a person who is behaving in an offensive or disorderly manner. We query whether there is any need to extend that current provision and whether persons should be evicted where the behaviour is neither offensive nor disorderly nor are they intoxicated.

Section 131- Control or Consumption

The amendment seeks to reverse the onus of proof. We see no reason why that should be the case but perhaps the Minister has an explanation.

It would seem difficult for a patron who has lawfully carried liquor from premises by way of "BYO leftovers" to prove that the liquor was in fact carried off legally into a Dry Zone.

Section 131aa - Prohibition of Manufacture, Sale or Supply of Certain Liquor

We are not aware of the bases of concern here.

Words such as "special appeal to minors will be confused with confectionary or non alcoholic beverages" are the stuff of Full Court Appeal Judgements.

The intent appears sound.

Section 131a - Failing to Leave Licensed Premises on Request

We express the same concerns as to the reference to physical impairment, loud laughter, singing etc as we have expressed elsewhere.

Schedule 1 - Transitional Provisions for Certain Existing Special Circumstances Licences

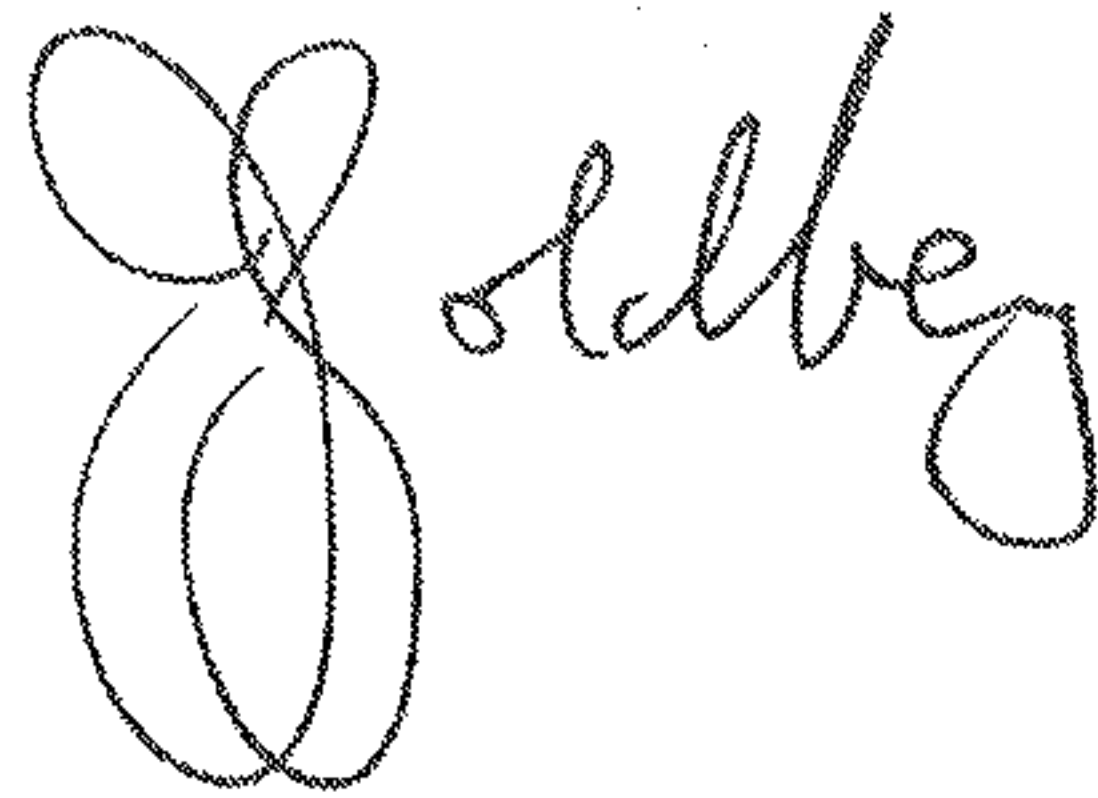
There has certainly been a history of Applications for Special Circumstances Licences who are those Producers with dining areas who want to provide liquor in addition to their own for example beer, champagne etc.

It occurs to the writer that no harm is done by those Licences continuing. Existing Licensees wanting to expand their product range will of course benefit from the amendment and be spared the cost of the new Licence. We note the transitional provisions which dealt with the conversion of former General Facility Licences to Special Circumstances Licence provided that a Licensee should not have their trading rights diminished upon conversion from a GFL to some other Licence type. That would appear to be the preferable course here.

Therefore we doubt the need for the transitional provisions in such circumstances.

Thank you for providing the Society with the opportunity to review this Bill.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Goldberg". The signature is written in a cursive style with a large, stylized initial "J".

John Goldberg
PRESIDENT