

23 November 2009

C62, 68.16
JM; rp

The Honourable M J Atkinson MP
Attorney-General
DX 336
ADELAIDE SA

Dear Mr Attorney

Second-hand Goods Bill 2009

The proposed Second-hand Goods Bill 2009 was drawn to the Society's attention by the Honourable David Winderlich MLC.

As we were not originally consulted on the Bill, we have not had an opportunity to thoroughly consider it as we would have wished. However, the Criminal Law Committee and Community Relations Committees have considered the Bill and we raise the following concerns for your attention

1. S7 – Criminal Intelligence. Second-hand dealers and pawnbrokers must apply for, and hold a Licence. The application for a licence must be lodged with the Commissioner of Consumer Affairs who, in turn, must supply details of the application to the Commissioner of Police for consideration. It is then the responsibility of the Police Commissioner to provide the Consumer Affairs Commissioner with information about criminal history of the applicant, together with any objection to the application.

Should the Police Commissioner object to an application, the objection must state the grounds. However if the grounds rely upon 'criminal intelligence' then the only reason required to be given is that the decision was made in the public interest.

An appeal can be lodged to the court (Administrative and Disciplinary Division of the District Court) against a decision to refuse a license or approval, but the court must, on application by the Police Commissioner, take steps to maintain the confidentiality of information classified as "criminal intelligence" including to receive evidence and hear argument in private and in the absence of the parties and their representatives.

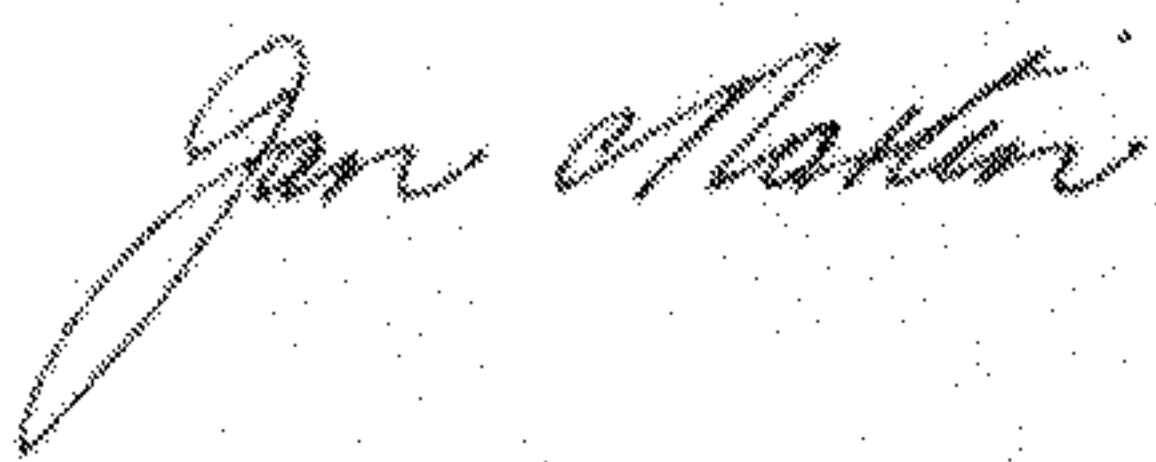
The decision by the Commissioner of Police to classify information as criminal intelligence should have to be confirmed by a Court. The consequences of classifying information in this way are major. It leads to rejection of licences/approvals (someone's livelihood) – in a situation where the individual cannot comment on it (ie, is denied procedural fairness / natural justice). If someone is to

be denied procedural fairness, at the very least it should be after a Court has made an independent assessment of the information and rules that it is "criminal intelligence".

2. S30(8): This section must be amended. It can only be referring to sub-ss (3) & (5). Sub-s(2) is already an offence & sub-s(4) already has a consequence of failure to comply with. S30(8) cannot, therefore be referring to the latter two provisions. It must be expressed, to avoid any doubt, to apply only to sub-ss(3) & (5).
3. S42(1)(e), (f) & (g) – These sections are far too wide. The problem is the definition in s41 of licensee to include past & present dealers etc. Read literally, these provisions can give rise to disciplinary proceedings against someone who is totally out of the industry. It's inappropriate that someone who was a licensee should be subject to proceedings when they are out of the industry. At the very least, it should be limited to any of their conduct or behaviour whilst holding a licence.
4. S53(2): This section should be deleted. There is no proper basis to proceed against a person without that person having the opportunity to respond BEFORE an order is made. This would constitute a total failure of procedural fairness at great consequence. At the very least, it should be limited to occasions where there is a sense of major urgency & that, therefore, only an interim order can be made without the person knowing about it. but that order can only endure for a limited period.
5. S31(1): This section should be reworded to focus on the person taking reasonable steps to obtain the best possible price. The term "manner conducive" is vague and uncertain and arguably will not achieve Parliament's intention.
6. S31(2): The reference to "proceedings" must be specified to be in proceedings against the person under s31 (ie, a prosecution for breaching s31(1)). Otherwise, it's inappropriately too open ended.
7. S66: This section should be deleted in so far as it creates liability for an offence for the director – just because the company is found guilty. This goes against the fundamental criminal law principles of liability. It's a very serious departure. It goes against the legal position that the company is a different legal entity to a natural person.
8. S31(5): The surplus proceeds should be payable to the entitled person regardless of a request being made. The legislation shouldn't make it payable dependent on a request.
9. S54(3)(b): When does the two hours commence after arrest? Does it re-set after arrest? Arrest could take place 90 minutes after the person was asked to stay put. This aspect should be defined/fixed.
10. S57(2): This section should be deleted. A general comment by the police that "notices might be on a website" shouldn't be sufficient to cause the person to monitor it often just in case a notice is to refer to him.

11. S57(4)(a) & (b) & s57(6): "Immediately" would be practically impossible to comply with and should be deleted. It could be replaced with something like "as soon as reasonably practical or possible".
12. S7(6)(a): The application of the word "must" to the Court appears to be an inappropriate fettering with a judicial power.
13. Sub-ss8(4)-(7): Most of these subsections outline unnecessary regulation. It should say that a recent photo (to be approved by the Commissioner) is compulsory, without which the licence/approval won't issue. However it goes much further than that -further than it should. It sets out a power in the Commissioner to require something by notice in writing. It is not usual to grant such a power for an incidental requirement (eg, photo). Normally, that power is granted in relation to a substantive requirement imposed by Parliament. Non-compliance with such is usually an offence. That's not the case here.
14. S12(1)(c) & s63(3)(b): The term "similar occupation" should be clarified. It should be expressed in a way to remove all doubt that it applies to an occupation similar to the business the subject of the specific licence/approval the person has/had applied for.
15. S13(1)(a): How will this be taken into account? Also, this provision needs more information as to how it's to be determined whether someone is a fit & proper person.
16. S13(1)(b) & s45(2): There is no definition of association or associates. It's also very wide, in that it doesn't limit the extent of the association or how far back.....bearing in mind it applies to past & present. This is very unfair as it stands.
17. S13(3): "Public interest" should be defined / have a meaning outlined by the legislation.
18. S14(2): This section should consider loss or suspension of licence as a consequence of breach....at least in addition to making it an offence.....ORin lieu of it being an offence.
19. S16(a): It is unclear why the Commissioner has this power. It does not seem necessary. There does not appear to be a proper basis for it. Also, no consequences are outlined for non-compliance. If it is a serious requirement, there should be consequences. The Society recommends that this section be deleted.
20. S16(b): Similar to above, is it necessary given other provisions in the Bill? Also, it seems far too wide – particularly the phrase "*about any other specified matters*".
21. S19(2), s21(3), s35(2) & s38(2): It seems unnecessary to give the information to the police.

Yours sincerely



Jan Martin
EXECUTIVE DIRECTOR