



22 November 2010

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The Honourable Stephen Wade MP
Shadow Attorney-General
Parliament House
North Terrace
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Dear Mr Shadow Attorney

Statutes Amendment (Criminal Intelligence) Amendment Bill 2010

I refer to an email from your Adviser, Mr Biar, of 29 October 2010 and thank you for referring the above Bill to the Society for consideration.

The Bill has been considered by the Society's Criminal Law Committee. We provide the following comments, which relate to two groups of amendments proposed by the Bill. The first concerns clauses 4, 7, 9(1) and 12. In this regard we recommend that the legislation be drafted so that it is clear, on its terms, that

- (a) the classification of information as criminal intelligence is to be objectively tested by the court/tribunal;
- (b) the court/tribunal may disclose the criminal intelligence to the aggrieved party; and
- (c) procedural fairness may be afforded to the aggrieved party.

The second concerns the provisions relating to the Police Commissioner's power to delegate: clauses 5 and 9(2). We recommend the preservation of the existing provisions on the basis that the status quo maintains clarity of expression and meaning.

Clauses 4, 7, 9(1) and 12

The amendments are made to conform with the provisions ruled to be valid by the High Court in *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501. Integral to the validity of the legislation (s28A *Liquor Licensing Act 1997*) was the fact that the Courts (Licensing and Supreme) could determine (1) whether the Police Commissioner's classification of information as criminal intelligence fell within the statutory definition of *criminal intelligence*; (2) what weight to attach to the criminal intelligence; (3) the necessary steps to maintain confidentiality, including the ability to disclose to whomever it considered appropriate the whole, a part or a summary of the criminal intelligence with appropriate conditions; and (4) whether it will afford an opportunity to the aggrieved party to be heard in relation to the criminal intelligence.

The High Court arrived at such a view after interpreting the legislation by a well established and conservative principle of interpretation that statutes are construed so that they do not encroach upon fundamental rights and freedoms at common law (see, for example, [47], [65]-[67]). Specifically, the legislation was interpreted to give effect to the rule of law that courts sit in public and accord procedural fairness (see, for example, [48]).

It was by no means clear on the face of the relevant provisions of the *Liquor Licensing Act* that the safeguards (1) to (4) mentioned above were contained in the Act. Even less so to a lay person. That much was obvious by the three separate judgments of the Court and the variety of submissions by the parties and the interveners. It was also obvious by the manner in which *K-Generation's* legal representative conducted his/her client's case at first instance.

By way of example, the provision in *K-Generation* which indicates that the Court/tribunal must test the Commissioner's classification is the definition of "criminal intelligence" as follows:

- *criminal intelligence means information relating to actual or suspected criminal activity....the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement (emphasis added)*

The underlined phrase "*could reasonably be expected*" was considered by the High Court to be significant because it was interpreted to mean that whether information was criminal intelligence was to be determined by a court by reference to the criteria outlined in the definitional provision (see, for example, [136]). Neither the Licensing Court at first instance nor any party before it so interpreted this provision.

Another example concerns confidentiality and procedural fairness. The provision in *K-Generation* which indicates the existence of the safeguards (3) and (4) above relevantly provides as follows:

- *....the Commissioner, the Court or the Supreme Court musttake steps to maintain the confidentiality ofcriminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives... (emphasis added)*

The High Court considered that this provision, *properly construed*, gave the Licensing Court (and Supreme Court) a degree of flexibility in the steps to be taken to maintain confidentiality. The legislation did not direct the Licensing Court as to the particular steps to be taken nor did it deny the Court the assistance of submissions by the aggrieved party(s) as to what those steps should be. Importantly, the underlined phrase "*including steps...*" does not mandate the taking of steps to hear argument in private in the absence of the aggrieved parties. That phrase simply outlines the limits of the range the Court may act in (see, for example, [146] – [147]). Again, neither the Licensing Court at first instance nor any party before it so interpreted this provision.

The question the High Court in *K-Generation* considered was whether s28A was a valid law, not whether it was well or appropriately drafted. Indeed, the Court acknowledged that the legislation departed from rules normally observed in legislation affecting courts in this country (see, for example, [255]).

It is, of course, preferable for legislation to be clear on its face so it can be understood (as much as possible) by the community as a whole, not just the legal community. It is in its failure in this respect the Bill is open to some criticism. Whilst it seeks to standardise those provisions the High Court considered were valid, it does so without apparent regard to the clarity of the legislation. It would be preferable if the Bill could expressly, and in plain language, outline for all to read in a readily understandable way the important and fundamental features that led to the High Court ruling the legislation was valid.

The principal concern is to avoid in future the situation that occurred at first instance in *K-Generation*. One must not assume that all future litigants, including their legal representatives, will correctly read the legislation in light of *K-Generation*.

Clauses 5 and 9(2): Police Commissioner's Power to Delegate

These clauses seek to amend s69 of the *Casino Act 1997* and s28A of the *Liquor Licensing Act 1997* by deleting the following subsection ("the CI delegation subsection") from each of those sections:

A delegation by the Commissioner of Police under (this Act)—

- (a) must be by instrument in writing; and*
- b) may be absolute or conditional; and*
- (c) does not derogate from the power of the Commissioner of Police to act in any matter; and*
- (d) is revocable at will by the Commissioner of Police.*

In each Act, another sub-section of the same section provides that the Police Commissioner may not delegate the function of classifying information as criminal intelligence except to a Deputy Commissioner or an Assistant Commissioner.

The second reading speech explains that the Bill proposes to delete the CI delegation subsection because it is unnecessary due to s19 *Police Act 1998*. In our view this is not necessarily correct. Presently, ss69 and 28A of the *Casino and Liquor Licensing Acts* ("the principal Acts") appear to provide a separate code for the delegation of the power to classify criminal intelligence. Arguably the power to delegate emanates, by necessary implication, from ss69 and 28A rather than s19. The power, and the limitation applying to it, is clear and unambiguous.

It becomes confusing, however, if the CI delegation subsections are deleted. Section 19 provides as follows:

- (1) The Commissioner may, by instrument in writing, delegate any of the powers or functions conferred on, or assigned to, the Commissioner by or under this or any other Act—*
 - (a) to a particular person; or*
 - (b) to the person for the time being occupying a particular position.*
- (2) A power or function delegated under this section may, if the instrument of delegation so provides, be subdelegated.*
- (3) A delegation or subdelegation under this section—*
 - (a) may be absolute or conditional; and*
 - (b) does not derogate from the power of the delegator to act personally in any matter; and*
 - (c) is revocable at will by the delegator.*
- (4) A copy of every instrument of delegation issued by the Commissioner under this section must be retained as part of the records of S.A. Police.*

Under s19, the Commissioner may delegate any of the powers and functions conferred by *the Police Act* or any other Act to any person. Further, that person may sub-delegate if the instrument of delegation so provides. These features are very different to the present ss69 and 28A of the principal Acts in two important respects. Firstly, the power to delegate is strictly limited to two very senior positions within the police force and secondly, the power may not be sub-delegated.

By deleting the CI delegation subsections, ss69 and 28A change from being a code for the delegation of the power to classify criminal intelligence to being sections that limit the general power of delegation in s19. This is a significant change. As a result of this change, one must read s19(1) and (2) as not applying by virtue of ss69 and 28A. That arises by implication rather than clear and express language. Leaving matters to interpretation can lead to confusion and unnecessary legal argument/litigation.

In our view, it would be preferable to leave ss69 and 28A as they are because the meaning and strict limits of the delegation power is clear for all (including lay people) to read and understand. It would be regrettable for an amendment, which ironically was made to delete an unnecessary provision, ends up unnecessarily muddying the waters of statutory interpretation.

I trust these comments are of assistance. Please do not hesitate to contact me should you wish to discuss any aspect of this submission.

Yours sincerely



Ralph Bönig
PRESIDENT