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“Three Strikes and You’re Out” Bill

In late June 2011, the Minister announced the proposed “3 Strikes” legislation targeting licensed premises. This concept was part of the policy platform of the then opposition in its election campaign. The Liquor Amendment (3 Strikes) Bill 2011 was introduced to parliament on 22 June 2011. Whilst there is considerable detail in the bill not necessary to recite in this paper, the general impact is that it is possible that a venue can have its liquor licence cancelled if multiple offences of the Liquor Act are committed (or alleged to have been committed).

Whilst it has always been possible for a licensee to be suspended or a licence to be cancelled under the current and indeed previous versions of the legislation, such powers have only been exercised in extreme circumstances and very rarely. The proposed bill sets out a systematic regime whereby it would appear that there is a more aggressive focus on dealing with venues which are subject of multiple licensing offences.

Overview of Proposed Strike System

A very simple breakdown of the proposed law is set out below. If a licence other than a Club Licence incurs 3 strikes which are in force the following consequences flow:

- the licence is automatically cancelled;
- no new applications for a licence at the premises can be made by any person associated with the business owner of the premises at the time the 3rd strike was alleged to have occurred for a period of 12 months after the licence is cancelled;

- any licensee or manager of the premises at the time of the offence which caused the 3rd strike is permanently disqualified from holding a licence or managing a licence at that premises;
- any licensee or manager of the premises at the time of the offence which caused the 3rd strike is disqualified from being the licensee or manager of any other premises either permanently (if also licensee or manager at the time the first 2 strikes were incurred) or for some other time determined at the discretion of the Director General.

There is a rather complicated process of determining the various strikes. It is not simply a case of 3 offences resulting in the consequences set out above. For the first strike, at least 3 prescribed offences need to be alleged to have been committed by the licensee or relevant person (such as employee) in a 12 month period, or the first offence determined so significant by the Director General that a strike should be recorded. Note that an offence need only be alleged (by way of Court Attendance Notice or Infringement Notice) for it to be counted towards a strike. It is not necessary that a conviction or finding of guilt be made against the licensee.

The second strike is incurred if the first strike is in force and the licensee or relevant person (such as an employee) is charged with a prescribed offence within 12 months after the first strike came into force and is charged with another prescribed offence. Both offences subject of the second strike must also be offences which have been previously committed to gain a first strike.

Again, the offence need only be alleged for it to count and the Director General retains a discretion that if the first alleged offence counting towards the second strike is sufficiently serious to warrant the second strike without a supporting offence.

The third strike is incurred if two strikes are in force and within 12 months of the second strike coming into force the licensee or a relevant person (such as an employee) is charged with a prescribed offence, AND importantly, the charge has not been withdrawn or dismissed and the Director General considers that a third strike should be incurred in the circumstances. The major difference here is that if the alleged offence is contested in court and ultimately withdrawn or dismissed, it cannot be used to incur a third strike, whereas it would still count in the case of a first or second strike.

Prescribed Offences

The prescribed offences for which a venue may be subject of a strike include:

- breach of licence condition;
- permit intoxication, indecent, violent or quarrelsome conduct;
- supply liquor to intoxicated person;
- permit sale, use or possession of drugs; and,
- sell or supply liquor to minor.

A breach of licence condition would include those conditions imposed by statute, along with others imposed on a particular premises. The breach of some of these conditions is almost innocuous and occurs frequently. For example, there is a statutory condition that requires the licensee to maintain a register containing the RSA certificates of all persons involved in the sale and supply of liquor and involved in security related activities. If a certificate of one person is missing, there is a breach of licence condition.

The other concern is the liability for the actions of employees.

Practical Consequences

There are obvious ramifications for operators and other industry participants such as freehold owner investors and mortgagees. There could be potentially significant civil obligations between operators and other industry participants as a result of the impacts of this proposed legislation which would require detailed consideration in contract documentation such as leases, mortgages and charges. It is imperative for operators that operations are conducted which avoid the potential for allegations to be made as to prescribed offences, however this is no easy feat. It may also become important for operators to seek to defend prescribed offences, as although mere allegations can cause the first and second strike, the third strike requires a charge for a prescribed offence to have not been withdrawn or dismissed. Further, the third strike is subject to the discretion of the Director General, and if previous strikes did not result in convictions, then this could be a relevant discretionary factor to consider not recording a third strike.

Such onerous regulatory conditions highlight the need for competent and effective risk assessment, aversion planning and implementation.