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NSW ALCOHOL LICENSING REGIME IN THE CONTEXT OF EVENT RISK MANAGEMENT

Alcohol Culture

Alcohol is an important part of Australian society and culture. As such, most events will involve supply and consumption of alcohol.

Consumption of alcohol is expected and catered for at sporting events, music and theatrical performances, restaurants, cinemas and many other public environments.

Alcohol is available to consume on licensed premises and also to purchase for the purpose of consuming away from the point of purchase.

As alcohol has the potential to affect the behaviours of people and the increasing awareness of problems associated with alcohol consumption, we have seen an increase in the amount of regulation of the sale, supply and consumption of alcohol in NSW and across the country.

The risks associated with events where alcohol is supplied and consumed are universally known and as a result, there is a significant amount of regulation of the sale, supply and consumption of alcohol in public areas. It is important to have a knowledge of the relevant liquor licensing laws in order to plan and manage successful events and ensure that regulatory compliance is achieved. Failure to do so may result in direct and indirect breaches of the law which can result in criminal sanctions, and may also expose, managers, owners and contractors to civil damages claims, which may not always be indemnified by insurance policies.

Regulation of Alcohol in NSW

The laws controlling the sale, supply and consumption of alcohol are predominantly state laws. Each state has its own set of regulations however most follow a similar basic model.

Aside from limited exceptions, a person is prohibited from selling alcohol in NSW unless they are appropriately licensed to do so. The person licensed to sell alcohol is known as the licensee. The licensee is generally legally responsible for ensuring that the conduct of the sale, supply and consumption of alcohol is compliant with the relevant statutory regulatory system.

The regulatory regime is focused on the licensed premises and the licensee is generally liable for events which take place on the licensed premises. The licensed premises extends to the boundaries defined at the time the licence is granted or as varied by later applications.

Until 1 July 2008, NSW was subject to a judicial system of alcohol regulation predominately under the Liquor Act 1982. The system involved a specialist Licensing Court which determined applications concerning liquor licences and also dealt with persons accused of breaching the licensing laws.

From 1 July 2008 the Liquor Act 2007 commenced operation. It had the effect of disbanding the Licensing Court and the judicial system of liquor regulation and replaced it with an administrative system and a statutory authority known as the Casino Liquor and Gaming Control

Authority was established. The Office of Liquor Gaming and Racing is the departmental office responsible for administering the licensing laws. All applications for liquor licences and changes to existing liquor licences are made to the Casino Liquor and Gaming Control Authority. The Casino Liquor and Gaming Control Authority is also responsible for dealing with disciplinary complaints made against licensees in relation to breaches of licence conditions. Proceedings for offences against provisions of the relevant statutes are now heard in the Local Court within the area where the licensed premises are located.

Liquor licences are often subject to conditions imposed at the time of grant of the licence, or later imposed when the licensee seeks changes to the licence, or may be imposed as a result of a noise complaint, disciplinary complaint, or on the application of Police, or the Director of Liquor and Gaming.

The Director of Liquor and Gaming is also empowered to impose conditions on liquor licences.

There are also conditions imposed by statute.

Enforcement of the licensing laws is generally undertaken by the Police and inspectors employed by the Office of Liquor Gaming and Racing. Police and inspectors have statutory powers to enter licensed premises and inspect business records of the licensed premises.

Application Options and Process

There are only limited options in respect of appropriate licences and licence authorisations to enable the sale and consumption of alcohol at an event. The most common and often most appropriate arrangement to enable the sale and consumption of alcohol at isolated events conducted for the purpose of deriving profit, is to use an existing hotel licence, which is subject of an approval to allow the sale of liquor for consumption at a function away from the licensed

boundaries of the hotel premises. This is known as a Function on Other Premises Authorisation. In order to obtain a Function on Other Premises Authorisation for an existing hotel licence, the licensee of the hotel must make an application to the Casino Liquor and Gaming Control Authority.

As the current regime is administrative, there is no requirement to attend at a Court hearing, and applications are determined by the Casino Liquor and Gaming Control Authority on the basis of prescribed forms and written submissions. As such, the system is of a procedural nature and prescribed time periods apply to applications. Any application for a Function on Other Premises Authorisation should be prepared well in advance of the date of the event and obviously after negotiations have been had with the prospective licensee of the hotel licence which is proposed to be subject to the Function on Other Premises Authorisation.

The application requires details and particulars of the proposed event to be provided to the Casino Liquor and Gaming Control Authority in order to assess it. Applications that do not include the required particulars may be subject to delays and requisitions, or may be refused. Although the licensee will be the applicant it may be necessary to prepare, or at least review the application made by the licensee to ensure that all necessary particulars are included. It may also be of benefit to engage a specialist liquor and gaming solicitor or consultant to assist in the preparation of the application as often a legal submission supporting the application can assist to clarify the application and avoid requisitions being raised.

Currently the application fee for a Function on Other Premises Authorisation is \$50.00. The application must be submitted at least 28 days prior to the date of commencement of the event. A separate application is necessary for recurring events, however a single application is able to cover an event over consecutive days.

The application must include a plan of the premises where it is proposed to hold the event, and the relevant boundaries of the areas where liquor is to be sold, supplied and consumed including any bar areas and points of sale of liquor.

It is a requirement that a copy of the application is to be served on the local consent authority and the local Police station within two working days of lodgement of the application. This allows the relevant stakeholders to make submissions in relation to the application. From time to time, stakeholders will seek that the application be granted only in the event that operational conditions are imposed in relation to the event, which are then incorporated as conditions of the licence for the duration of the event. Examples of such conditions include, numbers, locations and roles of security, hours of operation of bars and restriction on the number of points of sale of alcohol. Any breach of such conditions could lead to disciplinary action against the licensee.

If approved, the Function on Other Premises Authorisation will have the effect of creating a licensed premises within the boundaries of the area indicated on the plan submitted with the application, thereby authorising the licensee to sell liquor for consumption within that licensed premises and within the licensee's own hotel. The licensed premises created for the event will be subject to the conditions of the hotel licence and any conditions imposed at the time that the Function on Other Premises Authorisation is granted.

The use of a hotel licence may not be appropriate in some circumstances and has obvious drawbacks as it is by necessity extremely dependant upon the hotelier's consent, there exist potential commercial set backs which are insurmountable, issues of liability exist and there is potential for conflicts as to control. If the event organiser is unable to make mutually agreeable arrangements with an hotelier, then other options will need to be explored.

If it is the case that full catering services are to be provided on a regular basis, it may be appropriate that application is made for an on-premises licence for the purpose of conducting catering services. This licence allows the licensee to sell liquor for consumption at generally any premises, provided that a commercial catering business is conducted and 14 days notice is provided to the local consent authority and local Police station of each proposed event. In order to obtain the licence however the applicant must satisfy a primary purpose test as to the nature of the business being that of a commercial caterer.

In circumstances where an event is conducted by a non-profit organisation, a limited licence may be obtained which allows the sale and consumption of alcohol on designated premises ancillary to the event. In the case of a special event which has regional, state or national significance, and occurs infrequently, there is scope to obtain a limited licence.

Application Pitfalls

Organisation and timely planning is the key. Most problems are able to be avoided with good planning and organisation.

If insufficient time is allowed to negotiate as to licensing of the event and to make the necessary applications there will be a major risk that liquor will not be able to be sold at the event.

Difficulties may be experienced in sourcing a licence to apply for a Function on Other Premises Authorisation on terms which are viable.

Reliance on the licensee to prepare documents and make applications can lead to delays or inefficiencies.

Failure to co-ordinate or communicate with stakeholders prior to making the application could result in delays, the imposition of onerous conditions or refusal of the application.

An absence of any required development consent or approval from local authorities to conduct the event could result in delays, the imposition of onerous conditions or refusal of the application.

Applications which are made in areas in circumstances where there have been strong objections from the Police, Council and residents or the potential for such objections are likely to be dealt with adversely. Similarly applications made in areas where there exists real potential for disturbances to the quiet and good order of the neighbourhood may cause issues.

An application based on an event plan which has unrealistic objectives or is under resourced is likely to be dealt with adversely.

Operational Issues

Liability

Liability for the conduct of the business on the licensed premises in terms of compliance with the liquor licensing laws remains with the licensee, however any contracts entered into with the licensee or the licence owner may have the effect of providing for civil remedies against the event manager in circumstances where offences are committed, or event staff fail to meet their statutory obligations and/or directions of the licensee.

There is the potential for conflict between directions of the licensee and those of the event managers in this regard which needs to be managed or anticipated and dealt with by clear communication prior to the event.

If an event is conducted which results in the licensee being the subject of proceedings for offences which the licensee is vicariously liable, even if there is no contractual basis for compensation to be paid by an event manager (and many licence owners will ensure that there are such provisions in any contract) it is highly likely that future commercial opportunities with the

licensee and owners of the licence will be extinguished and your network of available licences for future events reduced.

Civil liability for injuries or loss may be uncertain, or the licensee may have delegated duties to the event manager or operator in certain circumstances which could result in contractors to the licensee such as event managers and security companies becoming subject of civil proceedings which can sometimes involve damages claims of many millions of dollars and may not always be indemnified by policies of insurance.

Liability – Case examples

Quintano v BW Rose Pty. Limited & Anor [2009]
NSWSC 446

- brawl inside nightclub resulting in shooting and serious brain injury to victim
- insufficient security to avert risk – also issues with security positioning
- delegable duty, however contracts did not delegate duty to security company
- failure to take reasonable steps to safeguard from risk of harm
- responsibility of nightclub operator

Perkins v Redmond Company Pty. Limited [2007]
NSWDC 147

- glassing in hotel
- insufficient security as compared to conditions of Council entertainment approval
- no delegation of duty
- responsibility of hotel owner

Spedding v Nobles; Spedding v McNally [2007]
NSWCA 29

- assault and theft of watch by patron of hotel

- victim left hotel and re-entered to retrieve watch and was seriously assaulted along with her friends
- state of knowledge of manager of hotel relevant factor
- reasonably foreseeable risk to victims
- hotel liable

Portelli v Tabriska Pty. Limited & Ors [2009] NSWCA 17

- fight inside hotel terminated by staff and instigators ejected
- victim assaulted after leaving hotel in surrounding streets by same attackers
- duty of hotelier extends to the prevention of injury on premises under control, however reasonable steps still need to be taken if foreseeable risk to patron of injury upon leaving
- hotel not liable

Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem [2009] HCA 48

- fight inside licensed restaurant resulted in a man being hit in the face
- victim returned to the premises shortly after with a gun and shot 2 patrons
- no security engaged
- duty to provide reasonable care not absolute – in the circumstances related to control of activities that occurred on the licensed premises
- prospective consideration of probability of harm, likely seriousness of harm, burden of taking precautions to avoid harm and social utility of activity which creates the harm
- restaurateur had not failed in assessment of risk by not engaging security in the circumstances
- to be liable in this case it was necessary to establish that it was more probable that the shootings would not have occurred if security was in place.
- Irrational and unpredictable conduct of gunman

- Restaurant not liable

C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L. No 14 Pty Ltd v Scott [2009] HCA 47

- hotel patron made arrangements to leave motorcycle and keys in the custody of hotel licensee
- some time later the patron demanded keys be returned and while at first refusing the licensee submitted after aggressive behaviour of patron
- patron lost control of vehicle and was killed returning BAC of .253%
- argued that licensee was liable for damages due to failure to honour arrangement to retain custody of motorcycle
- may be circumstances where licensee has duty to take reasonable care in relation to consequences of serving alcohol however outside of exceptional circumstances no general duty of care requires patrons to be monitored or protected from the alcohol that they choose to consume
- even if duty existed causation unable to be made out due to unresolved variables
- statutory liquor licensing requirements need to be considered along with civil liability statutes
- hotel not liable

Licensed premises

The venue for the event is deemed to be a licensed premises following the approval of the application for Function on Other Premises Authorisation. Appropriate steps will need to be made in order to control public access to the premises and also to manage the behaviour of persons whilst on the licensed premises. Responsibilities of licensees for licensed premises extend to beyond the licensed premises also in that there is legislative provision for complaints to be made regarding disturbances to the quiet and good order of the neighbourhood.

It is an offence to sublet rights to sell alcohol as it is to sell alcohol without a licence. There is potential for some commercial arrangements between event managers and licensees or licence owners offending these legislative provisions. In some circumstances, commercial arrangements may result in a delegation of the licensee's duties to contractors.

Intoxication

The major issue regarding alcohol consumption at events and generally is intoxication, the effects of intoxication on the behaviour of people and the consequences and common resulting actions. Recent media focus has been concentrated on late trading hotel and nightclub premises and the unwelcome consequences of intoxication including violence, noise and anti-social behaviour.

The majority of the issues that will need to be dealt with at an event will relate to intoxicated persons be they affected by alcohol or other substances.

Intoxication is defined in the Liquor Act 2007.

For the purposes of this Act, a person is "intoxicated" if:

- (a) the person's speech, balance, co-ordination or behaviour is noticeably affected, and
- (b) it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of liquor.

The statutory definition is derived from previous common law interpretations which focused on observable indicators of intoxication. For this reason it is important that security and staff closely monitor persons on licensed premises in order to make observations as to the behaviour of persons which may indicate intoxication, and allow appropriate action to be taken.

It is an offence for alcohol to be supplied to an intoxicated person, or for an intoxicated person to remain on licensed premises. The Liquor Act 2007 deems that a licensee has permitted intoxication unless certain steps are followed such as:

- asking the person to leave licensed premises
- contacting or attempting to contact a police officer to assist in the removal of the person
- refusing to serve the person any further alcohol

Licence Conditions

A lack of understanding of the conditions of the licence can cause operational difficulties. The conditions imposed generally on the hotel licence apply to the event as well as any additional conditions imposed when the Function on Other Premises Authorisation is granted. A caterers licence or limited licence will have conditions that were imposed when the licence was granted and any other conditions imposed in respect of subsequent applications.

There are also statutory conditions which apply to some licences which will apply to the event and may be unviable, such as the "6 hour liquor shutdown" period between 4.00am and 10.00am.

Legislative amendments in 2008 resulted in the establishment of special licence conditions for "declared premises". The scheme originated with the "top 48" list of violent premises being subject to special licence conditions. The list was based on a compilation of data from the Bureau of Crime Statistics and Research (BOCSAR) provided by police reports linking violent offences to licensed premises during the 2007/2008 financial year. The scheme developed subsequently so that currently BOCSAR data is compiled and reviewed every 6 months for the preceding 12 months. Any premises that has between 12 and 18 incidents recorded for the preceding 12 months are

declared as level 2 venues, while those recording 19 or more incidents during the preceding 12 months are declared as level 1 venues and all level 1 and level 2 venues are listed in Schedule 4 of the Liquor Act.

Level 2 venues are subject to the following special licence conditions:

- additional security measures (eg: extra security staff, security training, cctv, identification scanning)
- 2.00am lock out
- drink restrictions between midnight and 5.00am

Level 1 venues are subject to the same conditions as level 2 venues in addition to the following:

- prohibition on use of glass drinking vessels between midnight and 5.00am
- mandatory alcohol service time outs for 10 minutes every hour between midnight and 5.00am
- cessation of alcohol service 30 minutes prior to closing
- maintain an incident register for hours prior to midnight (normally this requirement only applies to post midnight trade)

There is scope under the Liquor Act 2007 for an urgent short term closure order to be made in respect of a licensed premises on the application by the Director of Liquor and Gaming or the Police which may be made by telephone where there is a risk to public safety or serious offences being committed (amongst other things).

Strategies to Overcome Application Pitfalls and Operational Issues

Ensure that you have a good network of hotel licensees and owners who will consent to the making of an application for a Function on Other Premises Authorisation on reasonable terms. Make contact with the licensees early and with a

definite plan so as to make their role in the process easier.

Obtain legal advice on contractual issues, preferably from an experienced liquor and gaming lawyer.

Avoid delays so as to allow time to negotiate any issues with stakeholders and ensure that there is an effective and timely liaison, communication and negotiation with stakeholders. Well articulated management plans and proactive strategies are likely to impress stakeholders and result not only in support for the application, but also more operational support at the event and less of an adversarial approach which is frequently applied with respect to licensed premises.

Endeavour to understand the conditions imposed on the licence, as well as any imposed on the approval of the application for a Function on Other Premises Authorisation and as may apply due to the legislation. Disseminate information as to the conditions to operational staff including security and staff engaged at point of sale and document the methods of dissemination.

Ensure that there is proper supervision of staff, security and patrons to ensure that there is diligent enforcement of responsible service of alcohol practices so as to avoid intoxication issues. Agents and employees of the licensee are entitled to turn persons out and refuse to admit persons into licensed premises who are violent, intoxicated, disorderly or quarrelsome or who is in possession of what is suspected to be a prohibited plant or drug.

The Director of Liquor and Gaming has published guidelines on intoxication and responsible service practices which may assist to assess operational risks and allow prevention strategies to be devised.

Ensure that there is a practice of diligent recording of all important operational events and incidents. The Liquor Act 2007 requires an incident register

to be kept by all licensed premises which trade beyond midnight which is to record details of the incidents that occur after midnight, including:

- incidents involving violence or anti-social behaviour occurring on the licensed premises
- incidents of which the licensee is aware that involves violence or anti-social behaviour occurring in the immediate vicinity of the licensed premises and that involves a person who has recently left, or been refused admission to, the premises
- incidents that result in a person being turned out of the licensed premises

It is considered best practice that an incident register is maintained even if it is not intended to trade beyond midnight, as it can assist to demonstrate compliance and the implementation of appropriate systems which may provide a defence or at least grounds for mitigation of any penalty in any later Court or disciplinary proceedings.