

AHA ARTICLE

Ryan Commercial Lawyers recently had the opportunity to support a seminar at the AHA offices for Licensees. Paul Ryan of Ryan Commercial Lawyers, John Larkins, Barrister and Brian Kearney, CEO of the AHA presented at the seminar.

The focus of the seminar was the importance of Licensees to protect the single most valuable asset of their business - the liquor licence. An overview of the current licensing regimes and issues facing liquor licensing and the industry and the sale and purchase of businesses were also canvassed at the seminar.

Rarely, if ever, have licensees faced the challenges and media scrutiny which currently exists. For licensees, their liquor licence is fundamental to the continued operation and success of their business. It is imperative that the licence is protected to ensure the business survives and succeeds.

It is important that when there is any threat to, or any doubt about your licence (or your suitability as licensee) that you obtain appropriate legal advice as soon as possible - it is clear that early advice can often avert serious (and costly) problems later.

Proposed changes to liquor laws

You will have seen in the media that the State Government proposes to amend the Liquor Control Reform Act. The proposed changes include:

- A Police power to shut down nightclubs immediately for 24 hours if violence is occurring or public safety is threatened. I suggest this proposed power needs detailed and considered criteria to be implemented appropriately.
- The power to ban troublemakers from entertainment precincts for 24 hours.
- The Courts to be given power to issue Exclusion Orders for up to 12 months for repeat offenders.
- The Director of Liquor Licensing to be given power (in consultation with police) to declare an area an entertainment precinct. Areas currently under consideration are King, Queen and Chapel Streets.
- The Director of Liquor Licensing be given the power to suspend licences or vary trading hours. Largely has these powers already exist but it is possible they will be extended and the procedures changed.
- Streamlining of the power of the Director of Liquor Licensing to make a late hour entry declaration to introduce a lockout. It is suggested that rather than streamlining the process appropriate procedures should be introduced to ensure the Director has fully informed herself of the situation before making an Application and adequately consulted with and had regard to the opinion of stakeholders and other interested parties.

There is a concern that the proposed streamlining of the process may remove or erode the 'Natural Justice' and other rights of licensees.

- The definition of Associate of a licensee is to be amended to explicitly include any individual who has significant influence over the conduct of the licensed venue.
- Cafes and restaurants which operate as bar/nightclubs late into the night will be required to have appropriate security. It is submitted steps should also be

taken to ensure those businesses should first have the appropriate licence and planning permit to operate as a late night bar/nightclub.

- The penalty for serving alcohol to intoxicated persons or allowing them on licensed premises to be increased to a maximum of \$13,200. One practical concern is that the Police and licensees may have different interpretation of what is 'intoxication'.

The 'on the spot' fine for this offence is to be increased to a not insignificant \$1,320. Serious consideration also needs to be given to appropriate defences being introduced to give Licensees a level of 'protection' similar to the New South Wales situation.

We watch with interest as the Government, in consultation with the various stakeholders in the industry moves to formalise and implement the proposed changes.

Infringement Notices

Most Licensees would be aware that under the *Liquor Control Reform Act 1998*, a member of the Victoria Police has the power to serve an Infringement Notice for any breach of a Licensee's Liquor Licence or the Act.

Licensees who pay an Infringement Notice are deemed to have pleaded guilty to the alleged breach. This guilty plea may subsequently be taken into account in any inquiry or disciplinary proceedings initiated at the Victorian Civil and Administrative Tribunal (VCAT) relating to the Licence or Licensee. Section 90(1)(b) of the Liquor Control Reform Act 1998 specifically includes payment of a penalty under an Infringement Notice as a ground for an inquiry.

Further, a guilty plea on one or more Infringement Notice may have further ramifications for the Licensee, the Directors of a Licensee Company and for the Liquor Licence where a history or record of breaches can be established by the Victoria Police.

It is imperative Infringement Notices be treated seriously and that, where appropriate, the Notice is defended.

One issue which has come to light in recent times is where Managers or Staff pay Infringement Notices without the knowledge of the Directors or Licensees. This has occurred either through Managers wanting to protect their position or through ignorance of possible consequences and needs to be addressed by Licensees to ensure they are immediately made aware a Notice issues.

Intoxication

The *Liquor Control Reform Act 1998* provides that a Licensee must not supply liquor to a person in a 'state of intoxication'.

In Victoria, the definition of a state of intoxication is; 'if a person's speech, balance, coordination or behaviour is noticeably affected and there are reasonable grounds for believing that this is the result of the consumption of liquor'.

This relatively new definition of 'state of intoxication' has been included in Section 3AB(1) of the Act. In addition to this definition, the Director of Liquor Licensing has produced Guidelines to offer assistance to people in the liquor industry.

Most notably, the Guidelines make reference to signs that a person is becoming intoxicated:

- Becoming loud, boisterous and disorderly
- Becoming argumentative
- Becoming incoherent, slurring or making mistakes in speech
- Glassy eyes and lack of focus
- Rambling conversation
- Difficulty in paying attention
- Not hearing or understanding what is said

It is important to note that this obligation on Licensees applies in all circumstances.

Apart from the more well known obligations and offences Licensees should also be aware of the following:

- **Change of Directors**

A change of Directors must be notified in writing to Liquor Licensing within 14 days after cessation/resignation of the Director.

The Licensee Company must not appoint a new Director prior to approval of that Director by Liquor Licensing.

- **Subletting**

Licensees must not sublet all or part of licensed premises without the approval of Liquor Licensing.

- **Registration of Owners**

An owner of the freehold of Licensed Premises must be registered with Liquor Licensing. It is an offence not to be registered.

- **Nominees**

The Licensee must advise the Director within 14 days after a nominee ceases to manage the premises.

- **Plans**

A copy of the plans currently approved by Liquor Licensing need to be available at premises and provided to the police on request.

- **Associates**

Must declare all Associates - Transfer form does not mention shareholders but recently a Transfer was refused by the Director of Liquor Licensing where a proposed transferee mistakenly did not include a shareholder. Definition has been extended to include any person who has significant influence over the conduct of licensed venues.

Issues to consider when buying and selling Licensed Premises

If you are intending to enter into a Contract of Sale for the Freehold and/or the Business of licensed premises, there are a number of issues which need to be considered prior to signing any documentation.

When entering into a transaction as a Purchaser, due diligence including but not limited to the following should be undertaken:

- reviewing the Liquor Licence for the Premises including all conditions and ensuring the transaction is conditional on the successful transfer of the Licence;
- reviewing any Planning Permits attached to the Property and confirming these are being complied with and properly reflect the business being conducted;
- where the Property is subject to a Lease, reviewing all Lease documentation ;
- company searches where the Vendor is an incorporated entity;
- confirming the current registration of the Business Name and ensuring its ownership will be transferred at settlement;
- considering any intellectual property issues, particularly any trademarks which form part of the Business assets;
- reviewing the Liquor Licensing Victoria approved Plan to ensure it accurately reflects the current situation at the Premises and where it does not, having the Vendor attend to making (including paying for) any necessary Application for Variation of Licence; and
- obtaining a copy of the Registration of Food Premises from the Health Department of the local Council and ensuring the Registration is transferred to the Purchaser.

When considering entering into a transaction for the sale of Licensed Premises/Business, a potential Vendor should consider and confirm the following:

- all the matters detailed above;
- ensuring all aspects of the Lease are in order including payment of rent and outgoings, maintenance obligations (including painting), exercise of options and so on;
- whether the sale qualifies as a supply of going concern and is therefore GST exempt;
- how the Vendor intends to deal with its employees. For example will the Purchaser be required to assume employment of the staff, or will the Vendor terminate the employment on or before the settlement date;
- ensuring all Services Contracts and other Agreements are included in the Contract to ensure the Purchaser assumes the responsibilities of the Agreements;

- specific terms, options and/or other conditions included in the documentation which are relevant to the transaction and required by the Vendor.

As can be seen, there are a number of complex issues to consider and address prior to entering into any form of Contract or Agreement. I recommend that both a Purchaser and a Vendor undertake an appropriate level of due diligence. The Purchaser to ensure they know exactly what they are buying and the Vendor to ensure all is in order before signing a Contract and to avoid a situation where a Purchaser discovers an 'issue' after Contracts are signed but before settlement. I recommend legal advice be obtained before embarking on the sale or purchase of a Licensed Business or freehold.

Ryan Commercial Lawyers has extensive experience in the areas of hospitality, liquor licensing, commercial property including leases, sale and purchases of licensed businesses and all aspects of commercial law. We would be happy to be of assistance in any commercial venture you may wish to undertake.



Please contact Paul Ryan on 03 9628 600 or visit www.liquorlegals.com.au