



PIGOTT STINSON LAWYERS

Basic Licensing Issues

Section 73 of the *Liquor Act 2007* provides, in effect as follows:

1. A registered club must not permit:
 - (a) intoxication; or
 - (b) any indecent, violent or quarrelsome conduct,on the licensed premises of the registered club.
Maximum penalty: \$11,000.00.
2. A registered club or an employee or agent of a registered club must not, on the licensed premises of the registered club, sell or supply liquor to an intoxicated person.
Maximum penalty: \$11,000.00.
3. A person (i.e. a member, guest of a member or patron of a club) must not supply liquor to an intoxicated person on the licensed premises of a registered club.
Maximum penalty: \$1,100.00.

Intoxication

Section 5 of the *Liquor Act 2007* gives a comprehensive definition of intoxication, which is as follows:

“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.”*

Section 5 also provides for the Director General of Liquor and Gaming *“to issue guidelines to assist in determining whether or not a person is intoxicated for the purposes of this Act”*.

The guidelines are available at www.olgr.nsw.gov.au.

The guidelines are quite helpful and should be prominently on display in areas of the club where staff are sure to see them and also should be included in the club’s staff handbook so that every employee of the club is aware of them.

How to help protect your employees from prosecution and, if prosecuted, to defend themselves for serving an intoxicated person

- It is essential that your employees have been well trained in their RSA obligations and that they have some experience, such that they can give evidence that, as a barperson,

they are confident in identifying the signs of intoxication quickly and they have refused service to patrons in the past because of this.

- Make sure that all employees know that when they make a call in relation to refusing service to a patron, management and the board will back them up. In particular, directors should not overrule the decision of an employee to refuse service of alcohol.
- Do not put trainees and inexperienced bar staff on duty without an experienced barperson being present to keep an eye on them and guide them. Adopt a “buddy system” for inexperienced staff.
- Do not roster inexperienced staff on at busy times.
- If there is an incident of intoxication and a person is refused service, make sure that, as soon as possible after the event, the barperson and any managers and other witnesses involved make statements with all the details and that, separately, the incident register that must be kept is properly completed.
- If an employee has been accused of serving alcohol to an (allegedly) intoxicated person, the employee should be asked to make a statement as quickly as possible after the allegation has been put to them and they should include in that statement all that they can recall about what they saw and did. A prudent course would be to quickly engage a lawyer to represent the employee, in which case, the statement should include a note that the purpose of the statement is to give instructions to the club’s lawyer. This will help keep it from the police and investigators from the OLGR as it should be subject to legal professional privilege.
- Obtain statements from other persons who can give evidence corroborative of the employee. These are likely to be fellow employees, but also there may well be patrons who are willing to come forward to assist.
- Interview and obtain a statement of the patron who is alleged to have been intoxicated. It is probably best to leave this to the club’s lawyer.
- The vital evidence that your employee will need to be able to give is that he or she recalls the patron, recalls serving the patron and recalls the conduct, demeanour and actions of the patron as they presented at the time of service or, if the patron was observed shortly beforehand, how that patron appeared at that time. Of course, what is highly relevant is whether there were any signs of intoxication to be observed.
- Make sure your employees do not work under so much pressure that they cannot make an assessment of every patron. This means clubs should not under-staff the bar or overwork bar staff.
- CCTV footage is increasingly vital evidence. It is often the best evidence available as to what really took place and a number of cases have been successfully defended because of the quality of the CCTV footage. Make sure that you have good quality cameras and that they are positioned so they show the bar or serving area.
- The employee almost always needs to give evidence in his or her defence and should present as a witness of credibility, honesty and good character.

The liability of secretaries

Section 73(4) of the *Liquor Act 2004* in effect provides that, if an intoxicated person is on the licensed premises of a registered club, the club is taken to have permitted the intoxication, unless it proves that the club and the club's employees or agents "took all other reasonable steps to prevent intoxication on the licensed premises" of the club.

Under section 91 of the *Liquor Act*, the secretary of the club or the approved manager of separate premises of the club can be held personally liable for the offence of permitting intoxication, contrary to section 73.

The good news for directors is that generally they cannot be held liable for the offence of permitting intoxication.

The defence of having taken all reasonable steps to prevent intoxication

While not wishing to be prescriptive, the evidence that needs to be available for a defence by a secretary of a club to a charge of having permitted intoxication include the following:

- The nature of the club's premises;
- The number of patrons in attendance at the time of the alleged offence and whether there was a particular function or event;
- The age demographic of the patrons;
- The skill, experience and training of all staff employed at the relevant time;
- The management structure of the club;
- The instructions, (preferably in writing) given to all staff and management about their responsibilities in relation to intoxication;
- The minutes of staff meetings prior to the events in question, when the issues of RSA and intoxication have been dealt with;
- The steps that the secretary or manager has undertaken to personally observe and monitor the performance of the staff, security personnel and the system to prevent intoxication. This is very important. It is not sufficient to simply provide evidence that there was a system in place to prevent intoxication. The secretary or manager who is the defendant must be able to show that he or she was involved in the establishment of that system and physically and personally monitor the effectiveness of the system in operation. Accordingly, if Saturday night is the busy trading night, the secretary needs personally to observe the system in operation on that night on a regular basis and the performance of the staff and, if necessary, initiate adjustments.
- The larger the venue, the more difficult will be the task for creating an effective operational system. In some cases, it may be necessary to have designated RSA marshals whose task it is to keep patrons under observation and to weed out those showing signs of intoxication.

Penalty Notices

Sometimes the police or OLGR inspectors issue penalty notices for certain offences made under the *Liquor Act*, including the offence of permitting intoxication. It is often simpler and less expensive to pay the penalty notices, but remember that, by paying them, the person

named in the penalty notice is in effect admitting the offence and this will result in a criminal record in circumstances of disciplinary action against the club or the secretary.

Accordingly, it is probably best to get legal advice before paying a penalty notice so that the decision to pay or not to pay is an informed decision.

Alcohol Related Violence

Since 2008, the NSW Government has implemented a scheme to regulate venues with high levels of alcohol related assaults and other incidents.

The scheme is based on statistics of alcohol related violence compiled by the Bureau of Crime Statistics (BOCSAR) over each 12 month period.

Under this scheme, any licensed premises can be made a “declared venue” with one of three tiers of restrictions imposed on its licence as follows:

Level 1 (19 or more alcohol related incidents recorded over a 12 month period)

- 2.00am lockout of patrons except members;
- No glass containers after midnight;
- Cease service of alcohol 30 minutes prior to closure;
- No shots, and drink limit restrictions after midnight, such as no ready to drinks over 5% alcohol content and limit of 4 alcoholic drinks per customer per order;
- 10 minute timeout or the provision of free water and food for 10 minutes every hour after midnight;
- Extra security measures;
- Maintenance of an incident register to record incidents during the standard trading period and any action taken in response;
- A venue safety plan.

Level 2 (12 to 18 alcohol related incidents over a 12 month period)

- No glass after midnight;
- Cease service 30 minutes after close;
- 10 minute timeout or the distribution of free water or food for 10 minutes every hour after midnight and actively encourage patrons to drink water;
- A venue safety plan.

Level 3 (8 to 11 alcohol related incidents over a 12 month period)

- No conditions imposed, but OLGR officers to liaise with the venue to develop a venue safety plan.

The next annual round of the scheme is being implemented in the following stages:

Stage 1

17 September 2010 - Data notification letter sent to venues.

Stage 2

24 September 2010 - Last day for venues to request review meeting with NSW Police.

Stage 3

1 October 2010 - Last day for review meeting between the venues and NSW Police.

Stage 4

8 October 2010 - NSW Police assessment provided to venues and Communities NSW.

Stage 5

15 October 2010 - Last day for venue safety plans to be submitted to Communities NSW.

Stage 6

22 October 2010 - Last day for venue submission on NSW Police assessments to the Director General, Communities NSW.

Stage 7

26 November 2010 - Publication of Regulation.

Stage 8

1 December 2010 - Commencement of Regulation for existing venues and removed venues.

8 December 2010 - Commencement of Regulation for new venues.

The purpose of the scheme is to reduce alcohol related incidents on licensed premises.

A violent incident which occurs on the premises of a club (or other licensed premises) will be assessed as alcohol related, except where it is apparent that the consumption of alcohol was not a contributor to it.

Some examples of circumstances in which violent incidents have not been attributed to licensed premises include:

- Where alcohol has not been consumed by either the victims or offenders;
- Where the incident occurred at an underage event at which alcohol was not sold or supplied;
- Where the incident involved persons seeking entry to the venue and the venue's management of the queue and the handling of the incident did not contribute to or exacerbate the incident;
- Where the offender was not a patron of the venue.

However, persons seeking to enter a venue are considered as patrons and police also consider an incident to have occurred on licensed premises if it occurs:

- on the premises itself; or
- in the immediate vicinity of the premises, such as the footpaths or car park where there is evidence of direct involvement with the premises.

As indicated above, there will be an opportunity (albeit a brief one) for clubs to discuss with the local police the various incidents attributed to their premises by the BOCSAR data before the police submit their assessments to the Director General of Communities NSW.

It will be in the interests of all clubs to maintain detailed records of each incident which they wish to have the police review.

Once again, CCTV footage and statements from witnesses taken at the time, or shortly thereafter, are going to be very important in the assessment.

Clubs are required by law to maintain an incident register, but the form of that register does not admit as much detail as may be desirable.

Accordingly, it is recommended that, as well as maintaining the incident register, clubs should also have a separate system whereby detailed statements of witnesses to incidents are collected and maintained. Those witnesses are likely to be employees or agents of the club, but also members and other patrons. The system should also retain any relevant CCTV recordings of the incident as they can often be wiped clean after a certain time, which is often quite short.

Venue Safety Plans

All Level 1 and Level 2 venues must have a venue safety plan.

It is expected that licensees will review the effectiveness of the venue safety plan after three (3) months and again at intervals of at least six (6) months.

Any venue safety plan that has been submitted will be taken into account in the categorisation of club premises.

In developing the venue safety plan, clubs should take into account areas for improvement, as well as the club's compliance history, so that the plan specifically addresses the highest risks for the venue.

An excellent template for a venue safety plan has been prepared by ClubsNSW.

Every club, irrespective of whether it is a declared premises, at risk of becoming a declared premises, or having no record of alcohol related violence, can benefit from implementing a venue safety plan if for no other reason than to implement better OH & S outcomes.

The need for a cultural change

Clubs (and indeed other licensed premises) that have no history, or a very limited history, of alcohol related violence usually have this history and the reputation which goes with it because they have a culture where such conduct is unlikely to arise.

Why this is the case is a product of the history of the club, its demographic (or at least the demographic that it targets) and the way it deals with troublemakers.

Clubs should have zero levels of tolerance for all forms of unacceptable conduct.

Clubs have the advantage over hotels and other licensed venues of being able to discipline their members and of being better able to prevent persons other than members and guests of members from entering their premises.

These are powerful tools for clubs and they should be used.

If a member of a club “plays up”, is intoxicated or offensive, then boards and management of clubs should deal with them firmly.

Substantial periods of suspension for members may cause them and others in the future to think twice before they behave in a fashion that is unacceptable to other members.

Serious and serial offenders should not be allowed to remain members of clubs. Boards of clubs need to be much more willing to use expulsion rather than suspension as a sanction for these people.

Boards of clubs also need to lead by example as they cannot hope to enforce exemplary standards of conduct on other members unless they display it themselves.

Board members should not:

- be seen to be intoxicated on the premises of the club;
- be abusive to other members or to staff.
- be seen to be subject to more lenient standards than the board imposes on members generally.

Board membership should be seen as a duty, not a privilege and should not be a reward for being a “good bloke” or someone’s mate.

The effect of becoming “declared premises” under the *Liquor Act*

If a club becomes a “declared premises” (particularly at Levels 1 and 2), it will be painful and expensive.

This is because, the cost of compliance will be significant – 10 minutes cessation of liquor sales, the cost of plastic to replace glasses, increased security, etc.

However, and above all, if your club does not comply with any of these requirements, then the club will be in breach of its licence conditions and that in turn may bring about a prosecution by way of a penalty notice or a court attendance notice on the club or the secretary or manager of the premises.

Under section 11 of the *Liquor Act* each breach of a condition of a licence attracts a maximum penalty of \$11,000 or imprisonment for 12 months, or both.

Accordingly if, contrary to the conditions, there are three drinks served in glass after midnight, rather than in plastic containers, then three offences are committed and there will be three separate penalties and three separate criminal convictions.

If staff omit to record an incident in the incident register, irrespective of when that incident occurred, and also fail to record the action taken in response to the incident, there will be two breaches which, if prosecuted, will result in two criminal convictions.

Campbelltown Catholic Club

Campbelltown Catholic Club found itself on the original list of 48 premises when the first version of the declared premises scheme came into effect on 1 December 2008. It is now, and has been for a long time, no longer on the list of declared venues.

In the short period between the announcement of the scheme and its starting date the club acted quickly and effectively to comply with the proposed new conditions.

One of the new conditions was to the effect that after midnight any drink (whether or not it contains liquor) sold or supplied for consumption on the premises of the club must not be served or supplied in a glass or breakable plastic container.

In anticipation of this, on 21 November 2008, the club gave written instructions to all staff as to the terms of the special conditions and that those special conditions would come into effect on 1 December 2008.

Every member of staff was spoken to by senior management of the club and was given the written instructions which they then signed off as acknowledgement that they had received the instructions.

The written instructions were in very clear terms.

On 19 December 2008 – a little over 2 weeks after the commencement of the new regime – undercover police entered the club.

The police were in the club from 10.00pm until 2.30am on the following day and during that time they observed three breaches of the condition about not serving drinks in glass.

They first observed a female patron purchase two 50ml glass bottles of wine from the bar. She then sat at a table with other patrons and started consuming the wine. A short time later, a female RSA marshal employed by the club approached the patron and removed the bottles. The RSA marshal also questioned the female patron as to where she purchased the bottles.

Later, police approached the main bar of the club and ordered a small bottle of sparkling rose. A male bar staff member opened the bottle and handed it to the police with a plastic wine cup. The police returned to their seats. The bottle was placed on the table where it remained for some time until it too was collected by an RSA marshal employed by the club.

Finally, a little later, the police observed a male patron drinking from a bottle of Heineken. When questioned, the male patron indicated that he had purchased the beer from the main bar only a short time earlier.

In relation to these incidents, the club's secretary was prosecuted by way of a court attendance notice alleging three breaches of the conditions on the club's licence.

The employees who served the liquor to patrons in the glass containers made statements acknowledging that they had received the appropriate training and instructions and simply had a lapse in their concentration at the time that they served the drinks in glass containers.

In each case, the glass did not remain very long on the tables or in the possession of patrons as RSA marshals collected the glass containers.

The secretary entered a plea of guilty to all three court attendance notices.

This plea of guilty came at the end of a 1 ½ day case in which the secretary had successfully defended two court attendance notices alleging that he had permitted intoxication on the club's premises on earlier occasions.

One of the major factors in the defence of permitting intoxication was that there was a comprehensive, well documented and established system operating in the club to prevent intoxication, including the engagement of a large number of well-trained security and RSA marshals.

The Magistrate who dealt with the plea of guilty in relation to supplying glass was well aware of that system and was well aware of the circumstances whereby the glass came to be served and of the statements by the two employees, as well as the evidence of the observations made by the police and the conduct of the RSA marshals.

The Magistrate was also aware of the prior, completely unblemished, record of the secretary.

Despite representations, the Magistrate remained firmly of the view that there should be a conviction and imposed a fine of \$600.00 for each offence.

In rejecting the submission made to him not to proceed to a conviction, the Magistrate indicated it was necessary to have regard to the deterrent effect of a conviction and fine and that it will "send a message" to the industry.

The matter was the subject of an appeal to the District Court.

The appeal was heard in two stages. The first stage was whether there was a common law defence available to the secretary of having taken all reasonable steps to prevent the commission of the offence.

The second stage was that, having regard to all the circumstances of the offence and the secretary's prior unblemished record, a conviction should not be recorded against him.

Each part of the appeal was heard by a different Judge.

The first Judge determined that at common law there was no defence of having taken all reasonable steps.

The second Judge determined that, notwithstanding all the circumstances of the offence, including a submission that:

- The secretary could not have possibly done anything more to prevent the commission of the offence.
- It was simply an error by two employees who acknowledged that they had been given the appropriate instruction and
- The secretary was a person of acknowledged good character and otherwise unblemished record,

it was in the opinion of the Judge appropriate that there be a conviction and the fines imposed by the magistrate were confirmed.

Accordingly, as the law currently stands, there is no defence to a prosecution of a Club for breaching a condition of its licence other than by convincing a Court then the relevant allegations constituting the offence have not been proved.

Furthermore, given the attitude of the magistrate and the judge in Mr Lavorato's case, it will be very difficult to persuade judicial officers not to proceed to a criminal conviction for such breaches even where there are extraordinary circumstances and no prior convictions.

The lesson in this for clubs and their secretaries and managers is that every effort needs to be taken to make sure that clubs do not become declared premises and that all conditions on Club licence are strictly obeyed.

The defence of having taken all reasonable steps to prevent the commission of the offence of permitting intoxication is available under section 73(4) of the *Liquor Act*. However, a similar defence of having taken all reasonable steps is not available to a breach of a condition on a licence and which is punishable by imprisonment for up to 12 months, as well as a fine.

In the Memorandum of Understanding recently entered into between ClubsNSW and the Liberal National Coalition, the Liberal National Coalition say that, if they take government in March 2011, they will introduce such a defence. However, if it is introduced, then, like the defence under section 73(4), it will be a difficult defence to establish.

John Ralston

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