

Contact:  
Telephone:  
Email:

2 December 2015

The Hon Attorney-General Mr J Rau  
Attorney-General's Department  
GPO Box 464  
ADELAIDE SA 5001



Dear Attorney-General

I write in connection with the proposed review of the State's liquor laws.

In doing so I wish to emphasise that the Court unreservedly recognises that matters of policy concerning liquor licensing laws are entirely matters for the Government.

I offer the following simply as a suggestion of matters that might be considered worthy of some consideration.

### Costs

Section 26 of the *Liquor Licensing Act 1997* grants the Court the power to award costs. It is limited to circumstances in which a person has brought proceedings, or has exercised the right to object to an application, frivolously or vexatiously.

In my experience in other jurisdictions the frivolousness or vexatiousness of the party is not so much in the bringing of the proceedings but rather is in the way the proceedings are conducted. Other Acts seem to recognise this and further, extend the punitive power in respect of costs to the general description of unreasonableness. For example s 95(3) of the now repealed *Workers Rehabilitation and Compensation Act 1986* provides:

“(3) If the Tribunal is of the opinion that a party acted unreasonably, frivolously or vexatiously in bringing or in relation to the conduct of proceedings, the Tribunal may—

- (a) decline to make an award of costs in favour of the party and may further (if it thinks fit) make an award of costs against the party; or
- (b) reduce the amount of the award to which the party would otherwise have been entitled.”

It might be thought appropriate to have a similar provision concerning proceedings before the Court.

## **The “needs test” in connection with hotel and retail bottle shop licences**

The discussion paper raises the possibility of changing the existing criteria to a single factor as to whether it is in the public interest to grant such a licence. At present there is a two-step test. First, the establishment of need. Secondly, that the licensing authority is satisfied that to grant the application would not be contrary to the public interest. The paper also makes reference to the National Competition Review completed in 2003, and of its finding that the needs test is a serious restriction on competition and should be abolished.

The recent decision of the Full Supreme Court in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors* [2015] SASCF 72 appears to have relaxed the “needs test” in connection with retail liquor licences by holding that the public demand test requires consideration of the public’s expectations as to the accessibility of retail liquor services. In light of that I think it is doubtful that a test based on public interest would yield a different result to that which would result from the application of the existing criteria. If the proposed licence was not needed, as that concept is now to be understood, it is doubtful that it would be in the public interest to grant the licence.

The paper suggests that perhaps the primary focus should be on improving competition. That is plainly important. But as I observed in *First Choice Liquor* [2015] SALC 1, sometimes the grant of a licence calculated to improving competition can result in the public ultimately having less choice not more. I said:

“Given the existence of a large format store in relatively close proximity to the proposed premises, (which of themselves were to be a large format store) in this case there is a very real risk that over time the grant of this licence might result in the closure of some of the takeaway facilities attached to some of the hotels in the locality.”

## **Injunctive powers/Disciplinary proceedings**

In the exercise of the Court’s jurisdiction in connection with disciplinary matters the Court has been at pains to point out that its sole focus is the protection of the public. I am aware that on occasions the police are aware of proposed conduct at licensed premises that is likely to constitute a breach of the Act or the conditions of a licence. That is likely to compromise public safety, especially in connection with unsafe drinking practices.

For example, in *Mansions Tavern* [2011] SALC 61, I had to deal with disciplinary proceedings that concerned breaches of the Code of Conduct relating to a number of advertisements through various means to promote the sale and consumption of liquor at licensed premises. The advertisements included offers of drinks packages of \$60, \$90 and \$140, allowing patrons to drink as much as they wanted within a specified time. The price differential related to the alcoholic strength of the drinks available within the package. They included offers of cocktail jugs, cheap beer, wine and

cocktails with a slogan "Mansions would be honoured to be the reason for your hangover". They offered "free drinks to girls" at specified hours; "2 for 1 vodkas" and "free shots with every cocktail".

The Court can only act in connection with disciplinary proceedings if the breach has occurred and is admitted or proved, all of which are after the event.

On the face of the advertisements just mentioned, upon them being published, appeared to establish reasonable grounds to believe that the licensee was about to contravene the Code of Conduct. It might be thought appropriate that in such circumstances that alone would be enough for the Court to intervene and that the Court should be given the power to prevent the breach from occurring in the first place. By way of analogy s 15(2) of the *Fair Work Act 1997* provides that:

"If there are reasonable grounds to believe that a person is about to contravene or to fail to comply with a provision of this Act, an award or enterprise agreement, the Court has jurisdiction to order the person to refrain from the contravention or non-compliance."

If such a provision were to apply to the Liquor Licensing Act it would read:

"If there are reasonable grounds to believe that a person is about to contravene or to fail to comply with a provision of this Act or a condition of the licence, the Court has jurisdiction to order the person to refrain from the contravention or non-compliance."

The Court has repeatedly maintained that it is responsive to the needs of those that it serves and deals with matters with the timeliness that the hospitality industry are entitled to expect. It will respond to matters urgently if required and if given injunctive powers would endeavour to deal with matters before the anticipated breach occurs.

Moreover, I can envisage that the mere threat of Court proceedings might be sufficient to persuade a licensee to cease potential misconduct. In the case mentioned I can envisage that if police advised the licensee with words to the effect: "If you don't withdraw those ads immediately we will apply for an urgent injunction from the Court to close them down" that is likely to achieve the desired outcome.

I would be happy to discuss these matters further.

Yours sincerely



**His Honour Judge Brian Gilchrist**