

SUBMISSION

NSW LAW REFORM COMMISSION INQUIRY PURSUANT TO SECTION 10 LAW REFORM COMMISSION ACT 1967, LAW RELATING TO THE USE OF PENALTY NOTICES IN NEW SOUTH WALES.

1.0 INTRODUCTION

- 1.1 This submission seeks to raise for consideration matters I view as issues of concern relating to one aspect of Penalty Notices issued pursuant to the Liquor Act 2007. The concern centers on what I believe to be unfair long term implications for Licensees when such penalty notices are issued.
- 1.2 Licensees are subject to strict statutory obligations to control conduct on their premises.¹ A primary weapon in the armory of authorities for ensuring that Licensees exercise their statutory power are the provisions concerning the prevention of excessive consumption of alcohol on licensed premises.²
- 1.3 This submission deals with one aspect of those conduct provisions. Specifically, s73³ of the Liquor Act 2007 (“the Act”). This provision refers to the requirement that a Licensee must not permit⁴:
- (a) intoxication, or*
- (b) any indecent, violent or quarrelsome conduct,*
- on licensed premises.*
- 1.4 The section also makes it an offence for a Licensee or a person other than the Licensee to supply liquor to an intoxicated person on licensed premises.⁵
- 1.5 There are also circumstances set out in s73(4) where a Licensee is deemed to have committed an offence. That is, if an intoxicated person is on licensed premises the Licensee is deemed to have permitted intoxication on the licensed premises unless the statutory defence is made out.

2.0 HOW OFFENCES ARE PROSECUTED

- 2.1 A prosecution for an offence under s73 may be commenced by way of a penalty notice.⁶ A penalty notice can be served on a person (including a Licensee) by an

¹ See *Liquor Act (NSW) 2007* – Part 5 “Regulation and control of licensed premises”.

² ss73 – 78 of the *Liquor Act 2007*;

³ A full extract of the section is an annexure to this paper.

⁴ s73(1)

⁵ s73(2) & (3).

“*authorised officer*” . An *authorised officer* means a *police officer* or an *inspector*.⁷ An “*inspector*” means an inspector within the meaning of the Casino, Liquor and Gaming Control Authority.⁸

- 2.3 The notice can be served personally or by post.⁹ A brief of evidence is not required to be served.¹⁰
- 2.4 A 12-month time limit applies to the commencement of proceedings for offences under s73.¹¹ Time runs from the date on which the offence is alleged to have been committed.
- 2.5 Once served with a penalty notice the person has the option of having the matter determined by the court or paying the penalty.¹² If the penalty is paid this does not preclude subsequent disciplinary action being taken¹³.
- 2.7 The consequence of paying the penalty is that the person served is taken to have been convicted of the offence to which the penalty notice relates¹⁴.

Section 73 - (and the vicarious liability of Directors and other office holders).

- 2.8 One of the significant (and I suspect little known) consequences of a contravention of the Act is the implication for directors of corporations and other office holders¹⁵.
- 2.9 For example, in relation to section 73 conduct offences, where the Licensee is a corporation “*each person who occupies a position of authority in the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.*”¹⁶
- 2.10 A person who occupies *a position of authority* is a reference to a person who occupies the position of chief executive officer, director or secretary of the corporation¹⁷.

⁶ s150 (2) of the *Liquor Act 2007 (NSW)*.

⁷ s150 (1) of the *Liquor Act 2007 (NSW)*.

⁸ s4 of the *Liquor Act 2007 (NSW)*.

⁹ s150 (4) of the *Liquor Act 2007 (NSW)*

¹⁰ Reg 21 *Criminal Procedure Regulation 2010*.

¹¹ s 146 of the *Liquor Act 2007 (NSW)*

¹² s 150 (3) of the *Liquor Act 2007 (NSW)*

¹³ s150(10) of the *Liquor Act 2007 (NSW)*

¹⁴ s 150 (7) of the *Liquor Act 2007 NSW*

¹⁵ s 71 of the *Liquor Act 2007 NSW*.

¹⁶ s 71 (1) the *Liquor Act 2007 NSW*.

¹⁷ s 72(1) the *Liquor Act 2007 NSW*.

- 2.11 A director of a corporation, for example, may be served with a penalty notice for a contravention of s 73 even if the corporation itself (or the manager responsible for the licensed premises) has not been proceeded against or convicted.¹⁸
- 2.12 If a corporate licensee is taken to have contravened the Act because a manager has contravened the Act then *each person who occupies a position of authority in the corporation is taken to have contravened the same provision unless that person proves*¹⁹ that he or she:

(a) was not knowingly a party to any authorisation by the corporation of the contravention by the manager, and

(b) took all reasonable steps (within the scope of the person's authority) to ensure that the corporation maintained control over and supervision of the activities of the manager of the licensed premises in an effort to prevent any such contravention by the manager occurring

Statutory Defence

- 2.13 In each of the statutory defences to ss 71 & 73(4) charges, the officer or Licensee concerned obviously has the onus of making out the statutory defence. It must be established on the balance of probabilities.²⁰

3.0 PENALTY

- 3.1 The most recent statistical analysis available is that between 1996 and 2001, 421 conduct offences were finalized in NSW courts²¹. The majority of the conduct offences were for permitting intoxication at licensed premises (309) or selling or supplying alcohol to an intoxicated person (77 offences)²².
- 3.2 Of the 272 offences proven in the Licensing Court for the period of the study (prior to its abolition) 74 per cent received a fine and 24 per cent were dismissed without conviction under s10 of the Crimes (Sentencing Procedure) Act 1999 NSW. The fines ranged from \$100 to \$2500 with the median fine being \$450.
- 3.3 Of the 11 proven conduct offences that had a penalty imposed by a Local Court the fines ranged from \$200 to \$2,000 and two were dismissed without conviction.

¹⁸ s 71(3) of the *Liquor Act 2007 NSW*.

¹⁹ s 71 (2) of the *Liquor Act 2007 NSW*.

²⁰ Section 141(2) *Evidence Act 1995 NSW*; *R v Kenny (NSWDC unreported 18 July 2008) Blackmore DCJ*.

²¹ Briscoe & Donnelly "Liquor Licensing Enforcement Activity in NSW" Alcohol Studies Bulletin Number 4 2006 NSW Bureau of Crime Statistics and Research.

²² *Supra Briscoe & Donnelly* p 8

- 3.4 The maximum fines for the various provisions of s73 are prescribed by Regulation 74 (and set out in Schedule 2) of the Liquor Regulation of 2008.

Additional Penalties

- 3.5 A fine is not the only risk for this kind of conduct offence. The court may if it thinks appropriate²³ do any or more of the following:

- (a) reprimand the licensee or person,*
- (b) impose a condition to which a licence is to be subject,*
- (c) suspend a licence for such period, not exceeding 12 months, as the court thinks fit,*
- (d) cancel a licence,*
- (e) disqualify the licensee from holding a licence for such period as the court thinks fit,*
- (f) withdraw the person's approval to manage licensed premises,*
- (g) disqualify the person from being the holder of an approval to manage licensed premises for such period as the court thinks fit,*
- (h) give such directions as to the exercise of the licence as the court thinks fit.*

- 3.6 If the court imposes any condition on a licence under subsection (b) application may be made by licensee, the Authority, the Director-General or the Commissioner of Police to the court to vary or revoke it.

- 3.7 The previous Licensing Court had used the equivalent power²⁴ under the Liquor Act 1982 Act to disqualify one licensee and one Secretary of a registered Club for conduct offences.²⁵

4.0 COSTS

- 4.1 One of the consequences even of a successful defence is that the commercial cost of defending a penalty notice is that the cost out-weighs even the maximum penalty that might be imposed.

- 4.2 If proceedings are dismissed or withdrawn in certain circumstances²⁶ the court may make an award of costs. Otherwise there is a specific prohibition on the award of professional costs unless one or more of the circumstances set out in s214 of the Criminal Procedure Act 1986 is established.

- 4.3 The prosecution can also be awarded costs if successful²⁷. Either party may apply for costs of an adjournment but only if the court is satisfied that the other party

²³ s 148 of the *Liquor Act (NSW) 2007*.

²⁴ s 143A *Liquor Act 1982 (NSW)*.

²⁵ *Supra Briscoe & Donnelly* p 8.

²⁶ See s 213 of the *Criminal Procedure Act 1986 (NSW)*.

²⁷ See 215 of the *Criminal Procedure Act 1986 (NSW)*.



has incurred additional costs because of unreasonable conduct or delays of the party against whom the order is proposed to be made.²⁸

5.0 ISSUES OF CONCERN

- 5.1 My primary issue of concern relates to the position of Licensees faced with penalty notices issued under the Liquor Act.
- 5.2 My specific concerns are the:
- (i) fact of a conviction and the implications that follow for Licensees; and
 - (ii) cost of defending a penalty notice.

A conviction

- 5.3 The nature of the liquor industry has changed dramatically over the years. In days gone by a publican or owner of a hotel was usually also the Licensee. Now, hotels in many cases, are part of large corporate enterprises where beneficial owners are not themselves the Licensees. Or in the case of corporate Licensees, young people may find themselves occupying a “*a position of authority*” leaving them exposed to being issued with a penalty notice. They generally do not have any beneficial interest in the business.
- 5.4 In many cases, young people starting in the industry find themselves being appointed or taking up the position of Licensee of particular premises perhaps not always understanding the implications of the onerous statutory obligations that go with that appointment. Their actual status is that of an employee.
- 5.5 A young or inexperienced person faced with a penalty notice issued pursuant to s73(4) for example (the deemed offence) has to decide whether to pay the notice or defend it. The maximum monetary penalty is 100 penalty units (\$1,100).
- 5.6 Because the maximum penalty is what it is, in my experience, many Licensees simply plead to the charge or pay the penalty notice. They do so in circumstances where they have not even seen the police or authority brief and quickly become aware of what the cost of defending such charge will be.
- 5.7 Further, those authorities are now not even required to give them the brief in order to make any informed decision!²⁹
- 5.8 Even paying the penalty notice still exposes a Licensee to a potential for disciplinary proceedings pursuant to s139 of the Liquor Act 2007.³⁰ In other

²⁸ See 216 of the *Criminal Procedure Act 1986 (NSW)*.

²⁹ Reg 21 Criminal Procedure Regulation 2010.

³⁰ s 150 (10) Liquor Act 2007.

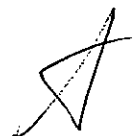
words paying the penalty notice (especially if this is done more than once) can and will be used by the relevant authorities in any subsequent disciplinary proceedings for those or any other matter the subject of proceedings. There are numerous sanctions that can be imposed in disciplinary proceedings but from the perspective of a Licensee such sanctions can include disqualification from holding a licence.³¹ The same costs implications set out below also apply to disciplinary proceedings.

- 5.9 Licensees often pay the penalty notice for purely economic reasons when there is in most cases a perfectly good defence available (i.e at a prima facie level or in making out the statutory defence). However, the first and most serious consequence, as outlined, is a criminal conviction.
- 5.10 Such a conviction has all sorts of potential implications if those Licensees leave their employment. They may be prejudiced in their capacity to apply for certain other employment and indeed potentially prohibited in their travel to certain countries. These implications are matters many Licensees are not aware of or fully understand when they find themselves being appointed as Licensees.

Cost - Defending a penalty notice

- 5.11 There is another a serious issue. A penalty notice is issued to a Licensee. As set out, that Licensee is in most cases simply an employee. There is no obligation on the employer to fund any defence to a penalty notice. There is certainly no economic incentive to do so. A Licensee faced with a penalty notice may wish to defend it but unless he or she is backed by their employer they invariably do not have the resources themselves to do so.
- 5.12 If a Licensee receives a penalty notice and then leaves their employment (or is dismissed) there is no obligation (or incentive) for the former employer to pay for a defence. I personally have had a situation where a Licensee served with a penalty notice left his employment to join a rival hotel group between adjourned hearing dates. The former employer was considering whether they would continue to fund the defence of their former employee.
- 5.13 Even if a Licensee does seek to defend a charge and succeeds for the reasons outlined they are unlikely to get the costs back of doing so.
- 5.14. In virtually every other penalty notice offence I can think of a penalty notice issued to a person is the result of the direct consequence of their personal actions. However, in the case of Licensees where they are deemed to have committed an offence under s73(4) of the Liquor Act they may not even be physically working on the relevant premises at the time the alleged deemed offence is said to have

³¹ s 141 Liquor Act 2007.



occurred. Yet the consequence may be a criminal conviction and all the implications that flow from such a serious result.

A handwritten signature in black ink, appearing to read 'MJH', is written over the typed name.

M J Heath
Barrister
Chambers
17 November 2010.