

LIQUOR (EVICTIONS, UNLICENSED SALES AND OTHER MATTERS) AMENDMENT BILL 1999

EXPLANATORY NOTES

Objectives of the legislation

The objectives of the Bill are:

To strengthen the provisions of the *Liquor Act 1992* (“the Act”) relating to the sale of, carrying for sale or exposure for sale of liquor without the authority of a licence or on unlicensed premises;

To clarify the power of licensees and other persons in control of licensed premises to remove certain persons from the premises.

Reasons for the legislation

The Act currently provides that a person on unlicensed premises, who is disorderly or unduly intoxicated, may not be supplied with liquor. It also provides that it is an offence for a person to be drunk or disorderly or to create a disturbance on licensed premises. A licensee or permittee, or their employee or agent, can seek to evict a person from licensed premises in exercise of the right to refuse to sell or supply liquor or in exercise of a power or performance of a duty under the Act. The person must not resist the licensee, permittee, employee or agent or refuse to leave the premises when required to do so.

It was the intention of the 1992 Act to empower licensees to manage their premises in a manner consistent with the responsible serving of liquor. It was intended that licensees be able to operate their business in a manner of their choosing eg by enforcing dress standards to attract particular markets. It was considered that licensees had the right to evict persons in the circumstances outlined and particularly that the right to refuse to sell liquor was of broad application.

Some recent decisions of the Magistrates Court have raised doubt as to the effectiveness of the Act in achieving these objectives.

The Bill amends the Act to clarify that licensees, permittees, employees and their agents may require people who are unduly intoxicated, disorderly or creating a disturbance on licensed premises to leave and can remove them, using such force as is necessary and reasonable, if the person refuses to leave.

The Bill also clarifies the power of licensees, permittees, employees and agents to restrict entry to premises.

Unlicensed trading and service of liquor is a problem for many reasons. Operators of unlicensed premises are not subject to the same legal requirements as licensees with respect to responsible service of liquor. In particular licensees have obligations regarding minors, people who are unduly intoxicated and the amenity of the surrounding area (noise and trading hours).

General licence holders, such as hotels, are required to pay large premiums upon the grant of the licence. Illegal trading impacts on the viability of such businesses.

Existing outside the regulatory regime these illegal business operators place an additional burden upon the resources of the Police and the Department of Tourism, Sport and Racing.

The provisions of the Act relating to unlicensed trading are to be strengthened by a range of measures including an increase in penalties, including jail terms, and by extending the power of seizure to equipment used or potentially to be used in the commission of such offences.

Disincentives for trading illegally include disqualification from holding a licence for specified periods of time following second and third convictions.

The Act currently imposes liability on owners and occupiers of unlicensed premises who permit or knowingly permit the sale of liquor illegally. A person “knowingly” allows such a sale if there has been three convictions relating to the premises in the previous 12 months brought to the attention of the owner or occupier. Occupiers and owners have been able to avoid liability by continuous adjournments granted by the courts ensuring that although offences are committed within 12 months, convictions for these offences may not be. The Bill amends the Act to address this problem.

The current provisions of the Act relating to unlicensed trading have not been sufficient to deter persons from operating illegally. Large amounts of resources have been committed to enforcing these provisions with no noticeable impact on particular operations. On many occasions the same premises are found to be operating illegally even after being targeted by Police and the Department many times. In some cases these premises have been found to have resumed trading illegally within twenty-four hours of being investigated. The courts have frequently imposed fines at the lower end of the scale. The increase in penalties and the graduated scale provided for in the Bill will indicate to the Courts the serious nature with which these offences are regarded.

Cost of implementation

There is no additional cost to the Government in implementing the provisions of this Bill. Indeed by providing for the recovery of costs of seizure and storage of seized property where a person is convicted of an offence the Government may decrease the expense associated with the enforcement of the unlicensed trading provisions.

Fundamental legislative principles

Extension of seizure of property powers

The Bill provides that an investigator can seize certain property where unlicensed trading is occurring. In particular it provides that property that the investigator believes, on reasonable grounds, that it is necessary to seize to prevent its use in continuing or repeating the sale or supply illegally can be seized. It is intended that property such as refrigerators, glasses, glass washers, keg lines, measures, pourers, liquor display cabinets, shelving, signage, dry bars, bar stools, bar serveries may be seized. It could be argued that such a provision is a breach of fundamental legislative principles. However it has become necessary as the existing provisions have not deterred illegal operations. In some instances, Liquor Licensing investigators and police officers have conducted an investigation on premises where illegal trading was occurring and seized liquor only to discover that the same premises continued to operate illegally a matter of hours later.

The requirement that investigators have a reasonable belief that the property will be used to commit further offences is a protection against the

misuse of this provision. The Bill provides guidance as to the reasonableness of the belief. However the reasonableness or not of such a belief will differ from case to case. It is difficult to envisage an investigator having such a belief on the first occasion premises are visited. However conduct or statements by the operator of such premises could give rise to a belief in such circumstances. It is much easier to envisage such a belief arising in circumstances where premises resume unlicensed trading within a matter of hours of the first investigation.

Further protection for the exercise of this power comes from the fact that entry is only pursuant to a warrant. The additional provisions of the Act relating to damage and compensation for property seized will provide some measure of protection.

Further protection is provided by the inclusion of procedures relating to seizure of property, such as the formal requirement to issue a receipt. In practice, this already occurs.

Overall it is considered that the expanded seizure provisions are necessary to deter continued breaches of the Act relating to unlicensed trading.

Licensees right to refuse entry and remove persons from premises

It could be argued that the provisions relating to the power to remove persons from premises or to refuse entry to certain persons does not have sufficient regard to the rights and liberties of the individual. However it can be argued that the rights of licensees to conduct their business in a socially responsible way would be hindered in the absence of this amendment.

Further, to enable licensees to operate premises in accordance with the requirements of the Act regarding the responsible service of liquor and in maintenance of a safe environment these amendments are necessary. A licensee has a positive obligation to remove a person who is a minor, unduly intoxicated, disorderly or creating a disturbance. In these limited circumstances the licensee is given the power to use such force as is reasonable and necessary. It would not be practical for the police service to be required to be called in every instance where a licensee wished to remove such person. In certain parts of Queensland a police officer may be some hours distance from the licensed premises.

On balance, any breach of a fundamental legislative provision is considered necessary.

Occupier and owner of premises liable for sale of liquor

The amendment to section 173 of the Act, which imposes liability on an owner or occupier for sales of liquor contrary to that Division of the Act, does not of itself breach a fundamental legislative principle. The section already offends by the reversal of the onus of proof contained in subsection (2). The amendment broadens the application of this section by making an owner liable in cases where three illegal sales have occurred in the previous two years rather than three convictions in the previous year which is the current provision. Delays in having matters finalised by the courts have created problems with this provision. These types of offences are regarded as serious and this amendment ensures that section 173 is an effective part of the total scheme of the Act addressing these types of illegal sales.

Section 173(3) allows an owner to terminate the tenancy of an occupier, of unlicensed premises, with two convictions for selling liquor. By reducing this to one conviction it will enable an owner of premises to take steps at an early stage to reduce the possibility of liability under subsection (2). It addresses the case where there may be more than one occupier convicted of illegal sales.

Consultation

Consultation occurred with the following Government agencies:

Department of Justice

Department of Premier and Cabinet

Queensland Police Service.

Formal consultation with the liquor industry has not been undertaken in relation to either of the main proposals contained in the amendment. However, the issue of the power of a licensee to evict has previously been identified by the liquor industry as a major concern. Following recent court decisions and publicity surrounding those decisions, the Department of Tourism, Sport and Racing has received representations from numerous licensees expressing concern with the current uncertain situation.

Notes on clauses

Clause 1 provides for the short title of the Act.

Clause 2 provides that the Act amends the *Liquor Act 1992*.

Clause 3 amends section 4 by inserting a new definition of “disqualified person”. This definition relates to new provisions inserted disqualifying a person from holding a licence in certain circumstances.

Clause 4 amends section 107 of the Act which provides that the Chief Executive may only grant an application for a licence or permit if satisfied that the applicant is a fit and proper person to hold that licence or permit. The amendment will now specify that an applicant must not be a disqualified person.

Clause 5 amends section 131A, which deals with applications to continue trading in certain circumstances. Again applicants must not be disqualified persons.

Clause 6 amends section 134 by inserting a provision requiring the chief executive to cancel a permit, immediately the permittee becomes a disqualified person.

Clause 7 amends section 136 (Cancellation of licences) by inserting a new sub-paragraph dealing with the situation where a nominee for licensed premises is a disqualified person. In such circumstances a licensee will be given a “show cause notice” under section 136 and have an opportunity to remove the nominee thereby avoiding cancellation of the licence.

Similarly, where a licensee becomes a disqualified person, a “show cause notice” is issued to the licensee. A licensee will be able to avoid automatic cancellation of the license by showing that the disqualification does not relate to them.

Clause 8 amends section 146 by relocating existing section 169 paragraph (b). It is more appropriate for this to be located in section 146 which relates to the supply of liquor contrary to the provisions of a licence or permit (in terms of time, quantity, way or purpose) and carries a penalty of 100 penalty units. Section 169 relates to a person making sales without the authority of a licence at all and will have increased penalties.

The provisions of section 146 are widened to apply to employees and agents of licensees or permittees. This is consistent with the scheme of the Act which makes such people liable for a number of offences related to the sale and supply of liquor.

Clause 9 omits existing section 165 and replaces it with a new section dealing with removal of persons from premises. An authorised person which includes the licensee, permittee, or an employee or agent of the licensee or permittee, may require a person to leave licensed premises in the following cases –

- the person is unduly intoxicated; or
- the person is disorderly; or
- the person is creating a disturbance; or
- the person is a minor (other than an exempt minor); or
- the person has entered the premises despite being refused entry under section 165A; or
- the person refuses to state particulars or to produce evidence as to age when required to do so.

Section 3 of the Act defines “unduly intoxicated”.

When required to do so, a person must immediately leave the premises. Failure to leave immediately constitutes an offence carrying a penalty of 25 penalty units.

If a person fails to leave as required, the authorised person may use necessary and reasonable force to remove that person. It is an offence for a person to resist an authorised person who is removing them. The penalty of 25 penalty units reflects the existing penalty in section 165.

Clause 9 also inserts a new section 165A. Under this section an authorised person may refuse entry to the premises for persons in similar categories to those outlined in section 165. It is an offence (penalty – 25 penalty units) for a person to enter or to attempt to enter premises to which they have been refused entry.

Subsection 3 clarifies that if a person attempts to enter premises, despite being refused, an authorised person may use necessary and reasonable force to prevent that person entering the premises.

Subsection 4 makes it an offence for a person to resist an authorised person who is preventing a person from entering the premises. Again a penalty of 25 penalty units is imposed.

Subsection 5 provides for the definition of authorised person.

Section 184(1)(d) provides that investigators, including police officers, can exercise the powers of authorised persons under sections 165 and 165A.

New section 165B preserves the rights of persons to prevent entry to the premises or remove persons from the premises other than in the circumstances outlined in sections 165 and 165A. Licensees have the same general rights as the operator of any other business to manage the business in a manner that they see fit. This may include targeting a niche market, through dress codes for example, and generally setting standards regarding patron behaviour. This will differ from premises to premises. It is not intended that sections 165 and 165A limit those rights in any way.

Clause 10 amends section 167 by omitting subsections 2 and 3 and renumbering subsection 4. These subsections have now been included in section 165. For the sake of consistency the authority for investigators and police to exercise the remaining powers given under section 167 is relocated in section 184(1)(d).

Clause 11 replaces existing section 169. Existing subsection (b) has been moved to section 146 and existing subsection (a) has been redrafted. New penalties have been imposed for the sale of wine or liquor other than under the authority of a licence or permit. The section provides for the penalty to increase as the number of convictions rises. The new penalties are substantial and reflect the serious nature of the offences. For a second and third offence the penalty includes a term of imprisonment as a sentencing option.

The new penalties will apply only to offences committed after the commencement of the Bill. Convictions for offences committed before the commencement of the Bill will not be taken into account when determining the level of penalty applicable. This is provided for in new section 255 that is inserted by Clause 21.

Clause 12 amends section 171 by inserting new penalty provisions. Section 171 provides that a person must not carry or expose liquor for sale in premises that are not licensed or to which a permit relates. The range of penalties applicable is the same as in section 169. Again, the new penalties only apply to offences committed after the commencement of the Bill (new section 256).

Clause 13 amends section 173 firstly by replacing the word “suffered” with the word “allowed” and by renumbering some sections.

Section 173(1) currently imposes liability on the occupier and owner of unlicensed premises who permits or knowingly allows the sale of liquor on the premises. Subsection (2)(a) provides that, an owner is taken to have knowingly suffered the sale if, on three occasions during the year before the sale, a person has been convicted of selling liquor on the premises. It was not required that the same person be convicted.

The Bill amends paragraph (a) to apply if, during the two years before the sale, liquor has been sold on the premises on at least three occasions and someone has been convicted of an offence relating to each of the sales. It does not have to be the same person convicted in relation to each of the sales. The section also links liability of the occupier and owner to the commission of offences within the previous two years regardless of when the actual convictions are obtained. This ensures that delays in the court process do not circumvent the intention of the legislation.

Section 173(3) enables an owner to terminate the tenancy of an occupier of unlicensed premises convicted twice for selling liquor on the premises. This is amended to one conviction. This will allow owners an opportunity to act to minimise the chances of liability under subsection (1).

Transitional provisions are made for this amendment in Clause 22 which inserts new section 257 in the Act. This section provides that when deciding for section 173(2)(a), whether liquor has been sold on 3 other occasions in the previous 2 years, an occasion before the commencement of section 13 of the Bill must not be considered.

Clause 14 amends section 177 by omitting section 177(2)(b) and renumbering the subsequent paragraph. This provision is incorporated in the new Division relating to seizure.

Clause 15 amends section 178 (General Powers of Investigator in Relation to Places) by inserting a reference that includes section 183A, a new section detailing seizure powers.

Section 178 is further amended by removal of the reference to seizure in paragraph (4). Again this is dealt with in a new Division 2 relating to seizure. Subsection (4) now deals with the procedure where property that is damaged in the course of an investigator exercising a power under Part 7.

Clause 16 inserts new section 183A. Subsection 1 relates to seizure of certain property where liquor has or it is suspected on reasonable grounds, has been sold, or is being sold, consumed, possessed or carried for sale illegally. In such cases the liquor and the bottles and containers in which the liquor is contained may be seized.

Subsection (1)(c) details further powers that apply where liquor is being or has been sold in contravention of section 169 (unlicensed sales). In these circumstances, in addition to the liquor and the containers in which it is held, investigators are able to seize other property that the investigator believes, on reasonable grounds, it is necessary to seize to prevent its use in continuing or repeating the sale.

Paragraph (d) provides that in cases where liquor is carried for sale in contravention of section 171 investigators may also seize utensils suitable for measuring or consuming liquor and a vehicle, boat, aircraft, animal or other thing being used to carry the liquor.

Examples of the types of property that may be seized under paragraph (c) are given.

Subsection (2) outlines the matters an investigator must consider when deciding whether it is necessary to seize property to prevent its use in continuing or repeating the sale. What is reasonable when considering the seizure of property in such cases will vary from case to case. It is a question of fact in each circumstance.

Subsection (3) provides that “liquor” includes anything suspected on reasonable grounds to be liquor.

Clause 17 amends section 184(1)(d) by making a consequential amendment resulting from the consolidation of powers in sections 165 and 165A. This amendment gives investigators the same powers as an authorised person under those sections. In order to ensure consistency of approach, investigators are also given powers under section 167 in this subsection.

This clause also renumbers some paragraphs and omits subsections (3) and (4). Subsection (3) requiring seized liquor to be taken to a place of safekeeping is an outdated requirement. Subsection (4) is now covered by new section 183A.

Clause 18 inserts a new Division – Provisions relating to seizure – which outlines the procedures investigators are to adopt when seizing property under the Act. The Division applies to investigators, who are not police officers (section 187A). The procedures established under the *Police Powers and Responsibilities Act 1997* applies to seizures of property by police officers.

In general receipts must be given, as soon as practicable, to the person from whom it was seized (section 187B(1)). If not practicable, an investigator can secure the receipt at the place of seizure in a conspicuous position (section 187B(2)). The receipt must describe generally each thing seized and its condition.

Where it would be impracticable or unreasonable given the nature, condition and value of the property in question to do so, a receipt need not be given. It may be that an investigator is seizing one open container of liquor from a minor who is consuming it. Given the low value of the property and the circumstances it would be impracticable and unreasonable to issue a receipt.

Section 187C deals with the return of seized property, which is not forfeited under the section. The property must be returned at the end of court proceedings involving it or after 6 months. Any court proceedings must be commenced within 6 months. If the property was seized only as evidence, it must be immediately returned if the investigator believes that it is no longer required as evidence.

Section 187D allows the owner of seized property to inspect it and copy it (in the case of a document) where practicable and reasonable.

Section 187E makes provision for the forfeiture of unreturned property where the person from whom it was seized cannot be found, or it would be unreasonable to make inquiries to find the person, or reasonable efforts made to return it fail or it would be unreasonable to return the property. Examples are given of where it would be unreasonable to return the property. In this section regard must be had to the nature condition and value of property.

Section 187F provides for forfeiture of seized property by a court upon conviction of a person for an offence against the Act. The section outlines the court's powers in this regard.

Section 187G provides that upon forfeiture the property becomes the property of the State and the chief executive may deal with it as appropriate. This could include destroying, disposing of or selling the property or some other manner of dealing.

If the property is sold the proceeds go first to meet the cost of the sale, secondly in meeting the costs of storage and seizure and thirdly to consolidated fund. The current provision in this regard is section 232 which has been added to here by the addition of the costs of seizure and storage.

Clause 19 inserts a new section 228A, which provides for circumstances in which a person is disqualified from holding a licence. If a person is convicted two or more times of an offence against sections 169 or 171 of the Act the person remains disqualified for the following period –

- if the conviction was the person's second conviction – five years from the date of conviction or
- if the conviction was the person's third or later conviction – ten years from the date of conviction.

When counting convictions for the purposes of this section, those convictions for which the rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act 1986* has expired and not been revived, are not counted.

Section 258, a transitional provision inserted by Clause 22, provides that section 228A is to apply to convictions that occur after the commencement of the section only if the convictions relate to offences also committed after the commencement of the section.

Clause 20 omits Section 232, which related to forfeiture of property seized under the Act. This is now dealt with in new division 2, part 7.

Clause 21 inserts a new division dealing with transitional provisions for these amendments.

New section 254 provides a definition of the amending Act for the purposes of the division.

New sections 255 to 258 are the transitional provisions for sections 169, 171, 173 and 228A. These provisions are referred to in the notes relating to the individual provisions.

The *Schedule* to the Bill makes minor amendments to the Act.