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MULLINS
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PROPOSED GLASSINGS BAN – LICENSED PREMISES

CURT SCHATZ

You will all have seen a lot of commentary in the papers recently in relation to 'bans on booze', 'alcohol abuse', and the like.

It is no secret that through amendments to the *Liquor Act 1992* (the Act) over the last couple of years, which took effect from the 1st January this year, the State Government has been keen to take steps to minimise the harmful effects of alcohol use and misuse. The question is have they gone too far?

More recently and without a lot of notice, the State Government assented to amendments to the *Liquor Act* that went through Parliament on the 15th October 2009. On the 16th October 2009, the State Government issued approximately 73 Notices to various venues on the back of a Police briefing. In relation to those venues, they were given a Notice stating why they were considered 'high risk' and should therefore have part or all of their licensed premises converted to non-real glass product for the serving of alcohol.

One only wonders whether this extends not only to drinking containers, but also to stubbies, RTDs, bottles of wine and champagne. In the event that it does extend this far, then the damage that may be done to our State reputation in tourism can only be imagined.

We have represented 14 client venues in seeking to have the Supreme Court consider both of the following matters:

1. whether or not the Notices themselves are invalid; and
2. whether or not our clients should be given more time in order to prepare written submissions regarding the proposed classification of high risk in order to receive the least changes to their licensing conditions.

The commercial ramifications of being declared high risk may include the following:

1. reduction in turnover;
2. reduction in profit;
3. reduction in value of premises;
4. resultant breach of covenants with mortgagee; and
5. increase in public liability insurance – perhaps by 10 times (provided it can be obtained at all).

There will also be the cost of converting from real glass to toughened or hardened glass or some form of poly carb product.

The problem is that the conversion from real glass to other types of receptacles will not alter the ability of a patron to injure another patron. This could be done with the plastic or poly carb glass product, a mobile phone, pool cue or a bar stool.

It seems to me that the real concern is the anti-social behaviour of patrons and the need for the Government to focus on alternative ways of dealing with this unruly minority as opposed to imposing expensive sanctions on licensees. For the most part, licensees are very responsible in relation to the provision of alcohol, employing staff trained in responsible service of alcohol and the responsible management of licensed venues.

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OUT OF IPA AND INTO THE SPA

ANTHONY O'DWYER

The Sustainable Planning Act 2009 (SPA) is a result of a review that overhauls and replaces the *Integrated Planning Act 1997* (IPA). There had been criticism that the IPA had become too process driven and needed major reform. The SPA, it has been stated, is designed to provide a system that streamlines planning schemes and moves away from process, with a primary focus on outcomes. Time will tell.

The SPA 2009 will commence on 18 December 2009.

This article provides a brief summary of some of the changes resulting from the SPA:

State Planning Instruments

One of the key criticisms of the IPA was the lack of consistency in the format, layout and definitions in the various local government planning schemes. With no criteria in the structure of planning schemes, each scheme consequently had its own rules to navigation and interpretation that led to difficulties for the applicant. In light of this criticism, the SPA has introduced the Queensland Planning Scheme Provisions (QPS Provisions), which include both mandatory and optional compliance for development applications.

Local governments are responsible for ensuring their planning instruments are consistent with the QPS Provisions.

Assessable Development

Compliance Assessment is when an application is assessed against standards that are certain in the approval process. Examples of its use are in operational works or building approvals and low risk material change of use or reconfiguration applications.

Compliance Assessment assures the application will be approved if it complies with the identifiable standards in the planning scheme. Rather than the deemed refusal process if the application languishes without a decision, the applicant obtains a deemed approval.

As planning schemes take shape in the years ahead, it would be hoped that Compliance Assessment would allow applicants a degree of certainty that delay would not prejudice their development.

Deemed Approvals are also an option for some code assessable applications. Applicants will be required to put the assessment manager on notice of the relevant time frames and, if the assessment manager fails to comply, then an approval will be issued with a standard set of conditions.

Assessment Time Frames

There has been tinkering with the periods allowed for parts of the assessment process, however, this is unlikely to result in any perceivable change to the time taken to assess anything other than 'standard' applications.

There will be a less rigid approach to changing applications without having to restart the application process or undertake public notification again.

Infrastructure Charges and Rights to Appeal

The SPA provides for negotiations between the relevant assessment manager and the applicant after an Infrastructure Charge Notice is issued, suspending the Appeal period until negotiations have ended. This provision is intended to ensure that all negotiations are exhausted prior to exercising the right to Appeal an Infrastructure Charge Notice to the Planning and Environment Court.

Now they can see your documents...

GREG SHAW

The Freedom of Information Act 1992 (Qld) (the FOI Act) has been replaced with the *Right to Information Act 2009* (Qld) (the RTI Act).

We look at the most important of these changes and how they may impact you and your business.

What is the RTI Act?

The RTI Act provides a regime by which any person may request access to documents held by a Queensland Government agency. An 'agency' includes a Government owned corporation (GOC) or a subsidiary of a GOC.

Why does the RTI matter to you?

Documents that may be accessed are not just documents created or relating to government agencies.

The RTI Act is important to you because documents held by an agency that may be accessed under the RTI Act:

- may relate to, or contain information about, you or your business; and
- are not limited to documents 'created' by a Government department such as reports and so on, but may also include documents submitted to a Government department by members of the public (such as you or your business).

Presumption of access

Unlike the previous FOI Act, the RTI Act proceeds on the presumption that a person has the right to access (hence the new name) to documents unless:

- they contain 'exempt information'; or
- on balance, access would be 'contrary to the public interest'.

This presumption represents a fundamental shift in policy from the previous FOI regime.

Other changes

In response to criticism about the previous FOI Act regime, the RTI Act:

- provides for an 'approved form' to assist the person requesting access to documents to 'ask the right questions' when identifying the documents required. The use of an approved form should reduce the number of requests being rejected because the 'right questions' were not asked;
- imposes a duty on agencies to minimise the cost/charges to the person requesting those documents. This is in response to suggestions that charges imposed by some agencies for access to documents were excessive resulting in some requests being abandoned.

Potential impact on you

Under the RTI Act if a person seeks access from an agency to documents that are 'of concern' to you or your business then that agency must contact you or your company to ascertain your views about whether or not access should be granted to those documents.

Knowing how the RTI Act works will assist you to object (if possible) to the release of documents relating to you or your business to the media or a potential competitor.

ITS IN THE MAIL!

KATE WHALAN

In challenging economic times, it is vital that directors are aware of the statutes that impose personal liability on company directors for the actions of their company.

Sections 222AOE and 222APE of the *Income Tax Assessment Act* (ITAA) provides that a director will be held liable for a tax offence committed by the company if the company:

1. fails to remit deductions as required (such as PAYE, PPS and/or withholding tax);
2. fails to pay an estimate as required; or
3. contravenes a repayment arrangement made with the Australian Taxation Office (ATO).

Once the ATO determines that a company has failed to pay its tax, the director of the company is issued with a notice pursuant to sections 222AOE and section 222APE of the ITAA requiring the director to pay a penalty which is equal to the unpaid amount of the company's liability. These notices are called director's penalty notices. If a director receives a penalty notice, the director must (within 14 days) either:

1. cause the company to pay the outstanding amount;
2. enter into a satisfactory repayment arrangement with the ATO;
3. appoint an administrator to the company under the *Corporations Act*; or
4. place the company into liquidation.

If none of these options are adopted or put in place prior to the expiration of 14 days, the ATO will be entitled to recover the full amount of the unremitted tax referred to in the penalty notice from the director in his or her personal capacity, unless other relevant exceptions apply.

This 14 day time limit must be strictly adhered to. The ATO only have an obligation to send the director's penalty notices to the residential address currently recorded with ASIC. Accordingly, it is imperative that you keep your personal details up to date in this regard. Similarly, if you are going away for an extended period of time in the Christmas holidays, you should arrange for a reliable person to check your personal mail on a regular basis. Unfortunately, once director's penalty notices are issued, the clock is on and can't be wound back. No allowances will be made for way-laid mail or your failure to receive the notice.

If you have any concerns regarding your company's solvency or wish to inquire about any other matter raised in this article, please contact Kate Whalan on (07) 3224 0213.

SMSF INSTALMENT WARRANTS – A FRIENDLIER APPROACH?

NOEL DUFFY

Until September 2007, the *Superannuation Industry (Supervision) Act 1993* prevented superannuation funds from borrowing except in some very limited circumstances. In September 2007, this legislation was amended in relation to instalment warrants which in practice allowed borrowing to be made by superannuation funds in certain circumstances.

The various provisions and requirements to undertake such borrowing have been adequately dealt with in numerous articles. What I wish to introduce is the potential for the 'friendly lend'.

Despite the change, financial organisations were slow to respond and when they eventually did, their fees, interest, and certain clauses and provisions, such as personal guarantees that have caused some 'disquiet' with the Australian Taxation Office (ATO), were very restrictive. The up-shot of this was that relatively few instalment warrant borrowings have taken place in Australia.

However, there is an alternative to borrowing from a financial institution and this is an area that has grown considerably over the last year. In this case, a Member of the fund borrows from a financial institution personally and then lends these monies on to the fund or the Member personally or some other entity lends to the fund. This approach allows for much more flexibility and removes the need for certain clauses that cause the ATO such concern, such as the personal guarantee requirement.

Perhaps, ironically, it is the current Global Financial Crisis that has created the situation were Members have considerable cash reserves, as they have been reluctant to enter the market given the ongoing uncertainty. This together with the fact that most financial institutions are adhering strictly to their lending requirements or, it is probably fairer to say, basing their requirements on much reduced asset valuations, that the 'friendly lend' has become a much more attractive option.

There are obviously some very strict criteria that has to be met and documents must be precisely drafted to ensure such borrowing falls within the legislation but, it is definitely an alternative that more and more people are now considering with their financial advisor or accountant.

We are happy to discuss any of the legal aspects of such an arrangement with you.

SENDING AN EMAIL MAY COST YOU $10,000 AND YOUR COMPANY $55,000

GREG SHAW

Recently, the Australian Communications and Media Authority successfully brought proceedings in the Federal Court of Australia against individuals and companies for breaching the *Spam Act 2003 (Cth)* (the Act).

This case is a timely reminder to all businesses that they should seek advice about the use of electronic means, such as emails, to promote their business, so as to avoid prosecution for breaching the Act.

The recent case

In *ACMA v Mobilegate Ltd* (No 4) (2009) FCA 1224, the Federal Court found that the offending company was in breach of the Act (and had engaged in false and misleading conduct in breach of the *Trade Practices Act 1974* (Cth)) by:

- setting up false 'profiles' (that is, profiles of non-existent persons) on internet dating websites;
- using the false profiles to obtain the mobile telephone numbers of legitimate users of the internet dating websites;
- sending SMS messages promoting the company's internet dating websites to the mobile telephone numbers; and
- charging individuals who responded to the SMS messages up to $6 per SMS.

Even though this case involved what appears to be a deliberate misconduct, a business that used electronic messages to stay in touch with potential customers may also be in breach of the Act.

The Spam Act – the basics

What does it prohibit?

The Act prohibits the sending of 'unsolicited commercial electronic messages' including email, SMS, MMS and instant messaging but excluding faxes, letters or 'voice to voice' telephone communications.

What types of messages are prohibited?

The Act only applies to electronic messages that are commercial in nature or have a commercial purpose such as where the sender:

- offers to sell, promotes or advertises goods; or
- directs the recipient to a place where goods or services are offered for sale, promoted or advertised (for example, a website, another telephone number or a physical location).

Whether or not a message is commercial in nature or for a commercial purpose is determined by applying a 'common sense' approach.

Penalties

The penalties under the Act include:

1. a fine of $55,000 per offence (that is, per message) up to a maximum of $1,100,000 for a company; and
2. a fine of $11,000 per contravention up to a maximum of $220,000 for an individual.

When is it permissible to send a commercial electronic message?

The Act permits the sending of commercial electronic messages if:

1. the recipient has consented to receiving that message or messages of that type;
2. the message clearly identifies the sender; and
3. the message contains an 'unsubscribe' facility by which the recipient can 'opt out' from receiving any further messages from the sender.

The sender of the message will be in breach of the Act if any of the above elements have not been complied with.

What should I do if I want to send messages to my customers?

While the points above provide a rough guide to the legislation, businesses are advised to carefully consider the Act and obtain legal advice before using electronic messages to communicate with current or potential customers.

JOHN MULLINS
EDITORIAL

The last 12 months have been very challenging in business, but like most Australian businesses we have survived and whilst many overseas economies have still got difficult times ahead, I think it would be fair to say that most Australian businesses are looking forward to the New Year with an increased amount of optimism, and significantly more optimism than was the case 12 months ago.

The challenge for us like any other business is to look at what has occurred over the last 12 months, and determine what lessons there are to learn.

As a firm we have always valued relationships. Those relationships are with the people, which make up this firm and with our clients. Difficult times can test these relationships, but as with the rest of life, if you are committed to these relationships, and you invest in these relationships, they will endure and prevail in whatever circumstances.

To our clients, we thank you for your ongoing support over the last 12 months. To our staff we thank you for your ongoing commitment to our clients and the firm in what has been challenging times.

Our firm is involved in a wide diversity of legal matters and as usual this edition touches on an array of these different legal issues. That is no shortage of new legislation and changes to the way companies interact with Government and do business.

One of the most high profile matters which we have been involved in, in recent times, is the issue of the Government legislation intended to reduce the incidents of glassing. Any rationale person would be disgusted and appalled at such a cowardly act, and disturbed as to the life long consequences and scars of such an attack, but the question is, how far can the State go to legislate against violent crime.

For those of you who have investments through your Superannuation Funds, you will be pleased at the change in legislation, freeing up the ability to borrow for investment in your Superannuation Fund.

We take this opportunity to wish you all a very happy Christmas. We will be closing the office between Christmas and New Year to allow our people to spend this important time of year with their family and friends. We wish you a safe, happy Christmas and a prosperous New Year.

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