

*The Licensing Court 2011**

I would like to give you an overview of recent developments and anticipated future developments for the Licensing Court.

In preparing for this address I thought it a good idea to trace the history of Liquor Licensing regulation in this State. I began my search with a study of the Report issued by the Honourable Keith Sangster that was issued 45 years ago following a Royal Commission into Liquor Licensing reform.

I took particular notice of the section of his report that dealt with the establishment of the Licensing Court.

Prior to 1967 the Licensing Court operated through a series of Licensing Districts, with each district having its own Court. Back then, at least in connection with licensing matters, there was no credence given to the notion of “Justice delayed is justice denied”. The Court was comprised of a special magistrate who was only obliged to sit as the Licensing Court once a year to consider the applications that had been lodged over that period in the relevant district.

Mr Sangster knew that such a relaxed approach was not compatible with the demands of an industry that involves planning and investment. He recognised, in the words of US Supreme Court Chief Justice Warren Burger, “that people come to believe that inefficiency and delay will drain even a just judgment of its value”.

Accordingly he proposed the establishment of a single dedicated court covering the whole State that should be able to sit whenever and wherever it saw fit.

Acting upon his recommendation the Licensing Court came into being in September 1967 and it acted in the way that Mr Sangster expected it would, that is: “having all the normal judicial attributes of being a court of record, presided over by a judge or equivalent, dealing with questions before it upon sworn testimony in open hearings, exercising discretions according to judicial practice, and subject in appropriate cases to appeals to higher courts.”

And thus it has remained, although my sense of it is that following the retirement of a dedicated Licensing Court Judge, and the allocation of adjudicatory work to the Commission, the presence of the Court diminished and it had no real home.

* This is an abridged version of a speech delivered by Judge Brian Gilchrist to a group of hospitality lawyers at a continuing legal education program conducted on 9 November 2011

My introduction to the work of the Licensing Court commenced with a call over on 31 January this year on my first day back from annual leave at which 45 cases were called on for mention. Unhappily, for the Yankalilla Football Club, having the misfortune of being named with a letter at the back of the alphabet, it meant a very long wait. It also proved very frustrating in that in 24 of the cases the common plea was to go through the whole process all over again in the next callover.

It also struck me as a little unusual that the Commissioner supplied the majority of the administrative support to the Court. That is not to say that his input was unhelpful. It was, at the time, very welcome. It just struck me as a bit odd that within the same callover I had one officer from the Commissioner's office supplying my Associate with the files that I was to deal with, that he had prepared, whilst another officer from the Commissioner's office was appearing before me as a party.

At the next callover a party asked the Court to issue a summons to secure the attendance of a witness. A rudimentary request, common in any Court. But my enquiries as to the form of such a summons met with a complete blank.

Our sense of concern deepened when a solicitor from the Crown Solicitor's office rang the Industrial Registrar to seek instructions in relation to an Application for Judicial review that had been issued against the Court in connection with a ruling made last year. Unsurprisingly the Industrial Registrar thought it a bit presumptuous to enter the fray and looked to Judge Jennings and me for some guidance. But it begged the question: Who is the Licensing Court?

At around the same time we received an email seeking a review of a decision made by the Commissioner. The email was effective, in the sense that it brought to our attention the fact that a review was being sought. But it struck us as a rather novel initiating process.

Drawing on our prior experience Judge Jennings and I knew that the solution lay in creating some structure. But our search for the statutory power to create that structure proved elusive.

Despite the absence of that statutory power we resolved to act upon that well of implied powers that the officers of any Court can call upon to facilitate the disposition of its work and we set about making changes to the way the business of the Court was to be conducted.

We split civil and quasi-criminal matters. Civil matters are allocated a directions hearing upon lodgement and are managed by a Judge to oversee the preparation of the case for trial.

In relation to disciplinary matters the prevailing practice was for them to be conducted through a callover held once every two months. That resulted in some unfortunate outcomes. It meant that on occasions the police would issue complaints prematurely in the fear that if it were not issued then there would be a delay of two months before another date was available. It also meant that if a party sought an adjournment to the next callover and then the next four months could slip by with no progress being made.

We therefore resolved to conduct callovers every month and if the need arose more than once per month.

We encouraged the Police to include with the complaint an advice to the respondent that contains information about what will happen and which suggests that the respondent take some action, such as seeking legal advice, before the callover. That has been taken up. We also encouraged them to attempt to effect service well before the callover. That generally seems to be occurring.

We also decided to break the callovers up into smaller batches, listing one batch at 10.00 am and another at 11.00 am. That way parties do not have to wait so long before a matter is reached. It also creates some space between callovers that enables constructive discussions between respondents, their representatives and the police. This has resulted in anything up to 20% of cases being sorted out on the day of the callover.

We have encouraged parties to avoid adjournments to the next call over by offering multiple dates for plea or mention.

We attempt to deal with disciplinary matters immediately following submissions and then publish more detailed reasons as soon as possible thereafter. Our decisions are distributed electronically to interested parties in the hope that they provide a bank of precedents that will enable practitioners to give appropriate advice to their clients.

We encourage settlement of civil matters by offering early trial dates in the knowledge that an imminent hearing focuses the mind towards compromise. Where civil cases do proceed we endeavour to hand down our judgments expeditiously.

We have assumed ownership of the Court and have developed a more distant but very respectful and productive relationship with the Commissioner.

But we would like to go further.

Following meetings with the Crown Solicitor and correspondence with the relevant Minister and the Attorney General legislation enabling the Court to create its own rules was placed before Parliament and has very recently been passed. Draft Rules prepared in anticipation of this enactment have been prepared and will be circulated for comment in the near future.

I want to make it clear that the Rules should not cause anyone any angst. They will not provide a vehicle through which solicitors can conduct procedural battles. They are intended to do no more than formalise many of the practices that we have already put in place and to tidy up some loose ends.

As a Court of record there needs to be a custodian of the court's records, a Court seal and a custodian of the seal. My Associate, Ms Sharon Henderson, has acted as the de facto Clerk of the Court and Judge Jennings's Associate, Ms Lorraine Boord, has acted as the de facto Deputy Clerk. The Rules will formally create those offices and will stipulate their powers.

The premises of the Industrial Court have acted as the Court's Registry for most of the year. The Rules will formalise the existence of and place of the Registry.

Proceedings before the Court can involve multiple parties. In the case of s 106 complaints and objections there can often be a blurred line between a representative acting with the permission of the Court under s 25 of the Act and the party. The Rules will create a mechanism through which the Court will know what is the status of a person appearing before it. In the case of lay representatives the Court cannot necessarily be completely confident that the representative or the parties that the representative represents are across issues such as agency and the making of binding representations to the Court. The Rules will spell that out.

Courts generally construct their own initiating processes that conform to the requirements of the Court. Parties should be able to know what initiating process they should adopt in particular cases and they should have ready access to the relevant forms. The Rules will provide for this.

In cases before the Court there will be occasions when inspections are required, summonses issued and documents filed. The Rules will put some structure around these processes.

Sometimes a proceeding might require summary relief. The Rules will spell out where that is appropriate and will provide the mechanism by which it can be sought.

The orders and determinations of the Court need formal recording. The Rules will provide the procedure by which that will occur.

All of this is intended to do no more than that which Mr Sangster envisaged all those years ago namely that the Court would have all the normal judicial attributes of being a court of record.

Since Judge Jennings and I assumed responsibility for the Court we have dealt with over 100 disciplinary matters. We have also dealt with a range of other matters.

The *Liquorland* case dealt with an application to transfer a retail liquor licence from West Terrace to Hutt Street. It concerned the issues of locality and discretion. The Full Court of the Supreme Court recently affirmed the decision to allow the transfer.

The *Playford City Soccer and Community Club Inc* case concerned a successful application for a Hotel licence. It involved a consideration of the issues of locality and needs.

The *Mill at Middleton* involved an application for a special circumstances licence to permit the consumption and sale of boutique wines from premises in close proximity to the Middleton Tavern. The decision discussed the requirements for a special circumstances licence. It noted that applicants must prove that the use of an existing class of licence would produce a result that the proposed business would be substantially prejudiced if it had to operate under that license. The Court found that the applicant's existing restaurant licence would enable it to achieve much of what it wished for and that there was insufficient evidence that the proposed business would be substantially prejudiced if the business had to operate under this licence. Accordingly the application failed.

The *Holdfast Bay Charters* case related to a review of the Commissioner's decision to grant an interim licence to a person with an extensive criminal history. The issues concerned the scope of a review and the meaning to be attributed to a fit and proper person. The Court agreed with the finding made by the Commissioner that the applicant had turned his life around and had acted responsibly for many years – Accordingly it upheld the Commissioner's decision to grant an interim licence on strict terms.

The *Greater Union* case involved a review of the Commissioner's refusal to grant an extension of a special circumstances licence to permit Greater Union to allow patrons to consume alcohol in a particular cinema within the complex and his refusal to grant an authorisation to permit minors to enter and remain in licensed premises at that site after midnight. It focussed on the scope of a review and the issue of discretion. The Court held that the evidence did not

establish that the grant of the extension to permit consumption of alcohol in a V-max cinema was likely to lead to a major social issue. Accordingly it held that the Commissioner erred in not granting an interim extension to allow that portion of the premises to be licensed. It upheld the decision in relation to minors on the basis that there was insufficient evidence.

The *Victoria Hotel* case involved a noise complaint that was dismissed. Judge Jennings embarked upon an extensive analysis of how these complaints are assessed. He noted that the test is objective and that very different considerations apply to those that would apply in the case of an application for a new licence or new conditions. He also made some important observations about the scope of the costs provision concerning the bringing of frivolous or vexatious proceedings.

The Court dealt with an application for summary relief in the *Glenelg Jetty Hotel* case that concerned the relationship between criminal matters and the disciplinary jurisdiction exercised by the Court. In dismissing the application it held that they were fundamentally different.

The Court dealt with a strike out application in the *Crown Inn Hotel* case. In allowing the application it noted that it was not permissible to use a general provision in the Act that permits the imposition of conditions as a backdoor method of imposing sanctions in the context of what were really disciplinary proceedings.

It is notable that in the civil cases just discussed the delay between the conclusion of the hearing and the delivery of judgment was never greater than seven weeks and in most cases was of the order of two or three weeks. In the application to strike out and the application for summary relief written reasons were produced almost immediately.

Judge Jennings and I recognise that the hospitality industry plays a key role in the economic prosperity of this State and that litigation that arises out of it warrants prompt and efficient disposition. We and our support staff are committed to achieving that outcome.

I would like to conclude with some final observations.

In my brief time as a Licensing Court Judge I have been impressed with the quality of advocacy and the courteous demeanour of practitioners both to the Court and to each other.

Until I assumed this role I had no comprehension of the extent to which hospitality law touches people's lives. Licensing laws do not just affect pubs, bars and restaurants. They transcend into clubs of all description, country racing meetings and even church socials. This State needs and is fortunate to

have a group of competent practitioners who are able to assist members of the community to navigate their way through our licensing regulations.

Finally I would like to share with you some relics from the past.

The list of counsel who appeared before Mr Sangster's Royal Commission back in 1966 included Dr John Bray, who represented the AHA; Howard Zelling and Trevor Griffin, the Presbyterian Church; Frank Boylan and Ted Mullighan, the Restaurant's Association; Sam Jacobs and Bruce DeBelle, the SA Brewery; Andrew Wells, SA Police; Bob Mohr, the Registered Clubs; Rod Mathieson and Don Brebner, various wine storekeepers; and Chris Sumner, the Adelaide University Union. Counsel assisting was Len King.

In his forward to the first published reports of the Licensing Court in 1968 then Attorney General Len King made special reference to John Doyle and Tim Anderson in thanking them for their work in preparing headnotes.

To my reckoning that makes three Chief Justices, nine other Supreme Court Judges, three Attorneys General, the Chief Judge and another Judge of the District Court, all, at least at that time, intimately involved in licensing work. When you add Max Basheer, who predicably acted for the SANFL League Clubs before the Royal Commission, I think that those practicing in this jurisdiction are entitled to think that they follow in the footsteps of some pretty exalted company.