

LIQUOR LICENSING AMENDMENT BILL 2001

Second Reading

Resumed from 25 September.

HON N.D. GRIFFITHS (East Metropolitan - Minister for Racing and Gaming) [9.24 pm]: I thank those members who spoke during the second reading debate for their comments and support for the Bill. The Leader of the Opposition and Hon Peter Foss complimented Hon Barry House, who was the lead speaker for the Opposition, on his colourful summary of the history of liquor licensing in Western Australia, and we are all obliged to Hon Barry House for that most interesting account. A number of observations were made during the second reading debate and a number of questions were asked. I will try to answer those questions as best I can. Therefore, my concluding comments may be a little longer than some of my colleagues may prefer, but so be it; I will try to be as brief as I can.

Hon Barry House made a number of observations. In particular, he queried whether the Director of Liquor Licensing might be able to exercise greater discretion when dealing with the relatively few hotels across the State that seek an extended trading permit. He outlined, as he put it, the potential for unforeseen consequences if a bit more discretion were not granted to the Director of Liquor Licensing to provide those extended trading permits when needed. I hope I have the correct tenor of the remarks of Hon Barry House. It was suggested that it may be appropriate that the Parliament, through me as minister, provide a form of words to give comfort to the director to grant those extended trading permits to the hotels that desire them, or are of the view that they need them. I responded, by way of interjection, which I hope was not too unruly, stating that it was a very live issue, and when I responded in due course I would give a fairly full response about the role of the director, the law and the current position of the Government. That issue was at the kernel of the commentary by Hon Barry House on issues surrounding the Bill, although this Bill is primarily about special facility licences and some other matters. I am in the process of answering the questions put in the course of the second reading debate, so I will move away from the centrepiece of the Bill if I need to in order to answer those questions.

The Director of Liquor Licensing is not bound by any policy directives from me or the Government. In fact, it would appear from the Act that there is no legislative authority on my part or the part of the Government to direct the Director of Liquor Licensing in the exercise of his discretion, including his discretion to approve extended trading permits. The current practice of the Director of Liquor Licensing in granting ongoing extended trading permits arose from a decision of the Liquor Licensing Court in relation to an application for the grant of a cabaret licence for the Palace Hotel in Kalgoorlie. That application was refused, and the decision of the judge presiding over the court was appealed to the Full Court of the Supreme Court of Western Australia. The decisions of the Liquor Licensing Court and the subsequent decision of the Full Court comments on the director's reliance on policy to refuse applications for extended trading permits. The Full Court, in its judgment, noted the observation of the judge of the Liquor Licensing Court - it is interesting how the judiciary quote each other - to the effect that refusal of an application for an extended trading permit pursuant to the policy described would be neither in accordance with the scheme of the Act, nor accordance with the law, and would constitute a failure to exercise the relevant discretion.

The Full Court in the case agreed with the position of the judge of the Liquor Licensing Court and expressed the view that it would be invalid for the director to make a decision within his discretion by simply applying a policy decided on by the minister instead of the merits of the application. If the director were to apply a policy rather than deal with the merits of the application, the director would be failing to exercise his discretion according to law.

The decision is significant in understanding how the issue of extended trading permits is currently dealt with. First, the decision draws attention to the fact that section 33(2) of the Act states that each application must be dealt with on its merits. Where a power of discretionary decision is conferred upon a public servant in his official capacity, government is not in every case an extraneous matter which may not be considered. Reference is made to an earlier decision of the now deceased High Court judge, Justice Menzies, in the case of *The Queen v Anderson, ex parte IPEC-AIR Pty Ltd*. The learned judge said -

. . . the sound theory behind conferring a discretion upon a departmental head rather than his minister is that government policy should not outweigh every other consideration.

A policy of government may not be taken into consideration if the policy runs counter to the legislative purpose or is inconsistent with the relevant law; that is, in administering an Act of Parliament, a minister should not have a policy that is contrary to the Act of Parliament. It would be a pretty rough state of affairs if that were the case. One would certainly get into well-deserved trouble.

Under the Act, the licensing authority is the director or the court. With the exception of extended trading permits, the power of the licensing authority to vary conditions imposed by the Act is limited to making those conditions more restrictive. The important point is that any decision must have regard to the merits of the particular application and the objects of the Liquor Licensing Act. Provided there is consistency, a policy can be taken into account but cannot override and is not the primary instrument.

Hon Barry House: If I may interject -

Hon N.D. GRIFFITHS: That is all right. I am aware there is disquiet in the industry and that people believe difficulties can be dealt with by way of extended trading permits.

Hon Barry House: With regard to the director's discretion, the director may draw some comfort from what has been said in the Parliament as a reflection of the community's views.

Hon N.D. GRIFFITHS: Yes, that is a proper point. However, I am dealing with a wider point, and that is policy, the role of policy and the necessity to deal with each matter on its merits. It is not really a matter of ministerial intervention. As to what is said in Parliament, one would hope that the director would read *Hansard* and note what has been said. In this House, Hon Barry House represents the views of many people in Western Australia, and in other debates on this issue he has expressed views that are commonly and properly held. Have I answered the member's concerns on this aspect of extended trading permits? Does he want me to go any further?

Hon Barry House: No.

Hon N.D. GRIFFITHS: Another issue raised by Hon Barry House concerned the definition of "tourist". There was a concern that the definition might be too restrictive and perhaps defeat the purpose for some of the people involved in the industry. I think I dealt with that by interjection when I referred to the fact that that matter is under constant review. If concerns arise and come to the notice of Hon Barry House or other members, I would be happy to take them on board, because good administration is about dealing with issues as they arise and perhaps being proactive rather than reactive.

I am conscious of the purpose of special facility licences. They were introduced in 1988. If the House agrees to this legislation, I do not want the regime to inhibit those genuine tourist operations that were to have the benefit of the special facility licence provisions. In dealing with these areas, which are technical, there are potential difficulties. That is why one must keep them under constant review. The legislative scheme is the way it is to enable that constant review to occur, so that, in time, we can get it right by way of regulation. When the regulations are in the right form - that is, they are shown to work - it is my intention to bring in a further Bill to have the wording of the workable regulations enshrined in primary legislation, because that is the preferred way to deal with the matter. In the meantime, because this area is difficult and technical, there may be a bit of trial and error in how the regulations work. That is the motivation, and that is why it was proposed that we deal with this matter in the way in which I am dealing with it.

Hon Barry House raised a hypothetical situation. It is always interesting to deal with hypotheses, and I will comment on that matter. It is the intent that tourism operations will continue to be a prescribed purpose for the grant of a special facility licence. The hypothesis concerned a cafe restaurant. Although a cafe restaurant may be a worthy applicant for a special facility licence, the grant of a liquor licence by the authority is not necessarily an easy matter. Provided the applicant can satisfy the requirements of proposed section 46, it is still incumbent on an applicant for a special facility licence to demonstrate that the licence is necessary to provide for the reasonable requirements of the public for liquor; and one can go back in the legislation to the section 38 requirements. The liquor licensing authority must then decide whether it is in the public interest to grant that special facility licence in accordance with section 33. The authority may also have to undertake a weighing-up exercise if there is any conflict between the primary harm minimisation objects and the secondary objects under section 5 of the Act. Hon Barry House made some observations on clubs and the 20 per cent requirement for restaurants to serve liquor without a meal. I note those comments at this stage, given what the Bill is primarily about. We will be revisiting matters to do with liquor in the course of this Parliament - I hope, in a constructive way.

Hon Murray Criddle made observations on boutique breweries and heritage listed premises. In passing, he made reference to a then application for a liquor licence at the Geraldton Airport. I am pleased to note that the Director of Liquor Licensing has granted a special facility licence for the Geraldton Airport.

Hon B.K. Donaldson: That is pleasing to hear.

Hon N.D. GRIFFITHS: That is a very good thing for the Geraldton Airport, but I should not comment on a particular licence.

Hon B.K. Donaldson: It provides refreshments for passengers coming in and going out.

Hon N.D. GRIFFITHS: That is a very proper interjection by Hon Bruce Donaldson.

With respect to boutique breweries, the Bill does not change any of the present provisions of the Liquor Licensing Act regarding the grant of a producer's licence. In addition, considering the grant of a special facility licence that incorporates the boutique brewery, a beer producer's licence combined with a restaurant licence in separate parts of the premises, or a tavern licence, may be appropriate, depending upon the manner in which the applicant seeks to carry on the business. With respect to the issue raised by Hon Murray Criddle dealing with heritage-listed premises, the purpose of excluding premises that are heritage listed from the proposed non-contiguous provision is to protect heritage-listed buildings from being damaged or compromised by alterations to the structure of the original building. In this regard the licensee of a heritage-listed hotel may seek to construct a drive-through bottle shop adjoining the hotel, if construction of the premises would impact upon the heritage value of the property. The point is that it would be preferable for the bottle shop to be detached from the original building.

Hon Murray Criddle, Hon Christine Sharp and Hon Frank Hough raised a number of issues about that part of the Bill that deals with authorised persons - issues relevant to crowd controllers and so-called bouncers. The concerns that were raised were proper and real. Subsequently, a number of discussions have taken place to see whether an appropriate legislative regime could be put in place to accommodate their concerns. Those discussions are intended to continue. They involve the agency that sought to have these parts of the Bill come into being, namely the Police Service. Discussions are continuing with the Police Service; however, it is not particularly happy with where we are at with those discussions at the moment. Therefore, I will interpose comments on the second reading and foreshadow that I propose, in due course, to seek to split the Bill, so that the authorised person matters can be dealt with separately. It might be better to deal with the authorised person issues in detail when we have what I hope will be a workable legislative document. That can be dealt with in stages in Committee, because many of the issues raised by members can be properly dealt with at that stage.

Hon Norman Moore said that the Bill seeks to amend the Liquor Licensing Act 1988 so that a special facility licence may be granted only for a purpose that is prescribed, thereby removing what was virtually unlimited access to special facility licences. He expressed an interest in what the regulations would provide. He said that I might wish to advise what the status would be and what would be in the regulations relating to that purpose. He expressed an interest in the definition of "tourist". That is not finalised in the regulations. It could not and should not be finalised, because Parliament has not yet given approval to this Bill. Significant preliminary work and consultation has been undertaken and I advise that in the event the Bill is passed, it is proposed that the following prescribed purposes be retained: tourism, bed and breakfast and room service facilities, food halls, sports promotion, work canteens, theatre, reception or function centres, private or public transport, post-secondary educational institutions, food and beverage caterers, amusement venues, wine clubs and a liquor auction. That will not necessarily be the full extent of it, but each purpose will be reviewed to ensure that a special facility licence may not be granted solely to sell packaged liquor. In addition, each would specify whether the sale of packaged liquor is authorised.

Discussions with industry on the regulations are continuing. Hon Norman Moore was concerned about there being a different definition of "tourist". Until July this year, there was no definition of "tourist" in the regulations. The regulations were amended in July and a definition was inserted. That definition is based upon the one used by the Western Australian Tourism Commission. A tourist is a person who is -

- (a) staying at a place that is at least 40 kilometres from his or her usual place of residence for a period of at least one night;
- (b) intending to stay away from his or her usual place of residence for a period of less than 12 months;
- (c) not in the course of travelling on a regular journey between his or her usual place of residence and his or her place of work or education; and
- (d) travelling in the course of a holiday or for leisure, business, to visit friends or relatives or for any other reason.

The Leader of the Opposition also mentioned his concern about The Good The Bad and The Ugly Mexican Restaurant in Northbridge, which was granted a special facility licence. He pointed out that he was horrified when he heard that the restaurant had been granted such a licence. He said he understood that those premises have an area in which underage people can have underage parties. That special facility licence was suspended in September 2000, but another was granted in August with a condition prohibiting juveniles from entering the premises at any time liquor is being sold or supplied.

The Leader of the Opposition asked the minister to consider granting liquor stores in the middle of major shopping centres contiguous licences so that people who would otherwise have to carry their liquor long

distances can pick it up from another area. He suggested that I may need to find a solution for those people who must wheel cartons of beer around a shopping centre that is some distance from their vehicles because, as he put it, they are disadvantaged as customers. Hopefully, these people do not start consuming vast quantities of beer while they are wheeling it in their trolleys, because if that were the case, they would be disadvantaged. Section 47 of the Act authorises the licensee of a liquor store to sell packaged liquor on or from the licensed premises. It also provides that the director of liquor licensing may authorise the licensee to store liquor on or supply or deliver liquor from premises other than the licensed premises. Thus, people who mind having these cartons of beer in their trolleys can collect their liquor from an area without carrying it long distances. I believe that base is covered.

I am almost finished.

Hon Derrick Tomlinson: Don't worry; you are doing an admirable job.

Hon N.D. GRIFFITHS: I am trying to answer the questions.

Hon Derrick Tomlinson: You are doing an admirable job. Do not apologise.

Hon N.D. GRIFFITHS: I am worried about the Leader of the House.

Hon Kim Chance: I am worried about Hon Derrick Tomlinson!

Hon N.D. GRIFFITHS: The Leader of the Opposition referred to the national competition policy review, which was carried out by the then Office of Racing, Gaming and Liquor last year. He said that it was now for me to deal with that report. I note his words -

I was pleased that I was able to avoid dealing with it, having had only a year or so to read it and contemplate its ramifications.

There is much wisdom in his words. In March I released for comment the national competition policy review report on the Liquor Licensing Act prior to the Government's determining its position on the review's recommendations. The review does not represent government policy on the operation of the Liquor Licensing Act, nor does it represent the policy of the previous Government. It was a review that had to be undertaken because we had this beast called "national competition policy". What happens with it will turn on events, but the Government's treatment of it will be in accord with its pre-election commitment; that is, the Government opposes the further deregulation of the Liquor Licensing Act and is of the view that its treatment of liquor licensing should be subject to a public interest test.

Hon Peter Foss also had a concern about national competition policy. He expressed surprise that the Bill could come through a national competition policy review unscathed. The view of the Government is that the matters proposed in the Bill support the integrity of the licence category system, are in the public interest and the public interest should override matters of ideology that tend on occasions to drive national competition policy. Hon Peter Foss also said that he was puzzled that an amendment had been suggested to section 77 of the Liquor Licensing Act, as there was a prohibition on extending licensed premises unless the premises were contiguous. He went on to say that there was no instantly logical reason to separate places from the Register of Heritage Places compiled under the Heritage of Western Australia Act and those other places. I think I dealt with that heritage issue when discussing the matter raised by Hon Murray Criddle.

Hon Peter Foss also raised matters dealing with the issue of "authorised person", and I have suggested how I propose to deal with them. I think my method of dealing with them will save the time of the House. He also made a number of constructive comments in that regard.

I again thank those members who have contributed to the debate for their support and I look forward to the Bill proceeding.

Question put and passed.

Bill read a second time.

Instruction to Committee of the Whole House - Motion

HON N.D. GRIFFITHS (East Metropolitan - Minister for Racing and Gaming) [9.58 pm]: I move -

That it be an instruction to a Committee of the Whole House on the Liquor Licensing Amendment Bill 2001 that it have power to divide the Bill into two or more separate Bills and report them to the House.

The purpose of this motion is to enable the Bill to be divided so that the issue of "authorised person" and related matters may be placed into one Bill, and the primary purpose of the legislation - the special facility licences and a couple of other matters - may be dealt with in another Bill.

HON BARRY HOUSE (South West) [9.59 pm]: I am aware of the time. Briefly, I thank the minister for his comprehensive response to this issue. I will support the motion. However, it seems to be a little unnecessary. There had been some debate about one aspect of the Bill concerning crowd controllers. Hon Christine Sharp had moved an amendment, had discussions about that amendment and had changed the wording to suit. It seems that, with a little negotiation and discussion, that issue could have been resolved and we could have dealt with the whole Bill.

Debate adjourned, pursuant to standing orders.