

LICENSING & LEGISLATION

AVOIDING LEGAL PROBLEMS AT CELLAR DOOR

Presented at the Finlaysons Wine Roadshow XII

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INTRODUCTION

There are a number of legal issues (and potential risks) which affect all cellar door operations, regardless of whether the particular cellar door forms only a small part of the business, or is a substantial operation providing a major source of revenue.

In this paper I discuss:

Liquor licensing – ensuring that your wine can be sold pursuant to your licence, and ensuring that you continue to comply with liquor licensing laws generally;

Service of alcohol – the risks that this presents to you as a cellar door operator; and

Occupiers' liability – your potential liability for any injury that may occur to visitors to your premises.

LIQUOR LICENSING

Many liquor licensing issues are relatively straightforward, and are often simply matters of administrative compliance and “filling out forms”. There are, however, certain liquor licensing issues which create problems for licensees from time to time, and which you need to be aware of and manage in advance.

Licensing Issues Generally

In our experience, liquor licensing applications are often more complex, and in particular more time consuming, than many businesses anticipate. Significant difficulties can arise if the licensing side of a particular transaction or business re-structure is left until late in the day – applications can take months to process and there is little that can be done to speed up the process.

If you think that you may need to make changes to your licensing position, you should seek advice, and commence any necessary licensing applications or enquiries, well before any critical dates. This will ensure that the process is as stress-free as possible, and will help minimise the risk of the licensing part of the process causing delay. In our experience it is sensible to never under-estimate the time it might take for a particular issue or application to be dealt with by the relevant authority.

Cellar Door Licensing Issues

The liquor licences that are typically used to operate cellar doors are subject to particular restrictions and limitations.

This reflects the fact that the liquor sale market is, generally, tightly regulated. The holders of hotel type licences and retail bottle shop type licences enjoy a certain level of protection (varying from State to State) from competition in the “on premise” and “take away” markets for liquor sales respectively, and those licence types have the broadest trading rights, and are generally tightly held and commercially valuable in their own right.

The other forms of licences that are available, including those typically used for cellar door operations, generally have significant restrictions on the type of liquor that can be sold and the manner in which it can be sold. As such, cellar door operators have to work within particular licensing constraints that can at times seem harsh and inflexible.

Compliance

In addition to the specific restrictions on certain licence types, there is a range of general conditions and legislative requirements that govern the operation of all liquor licences.

It is important to make sure that you are operating in accordance with your licence and the liquor licensing regime generally. Penalties for failure to comply with the liquor licensing laws can be severe, and might include, for example, fines for not only a licensee company, but also the directors of the company personally, and staff involved in the commission of the breach or offence.

Traditionally, the licensing authorities (and police, local councils and other interested groups) have focussed their attention (and any inspections and audits) in the main on hotels, nightclubs and retail bottle shops. In recent years we have also seen that there has been an increase in the number of audits and inspections of winemakers' businesses.

What Wine Can You Sell?

There are important restrictions on what wine you are entitled to sell (in addition to where, when and how you can sell that wine). The specific requirements vary from state to state.

It seems obvious to say that you need to make sure that your wine can be sold under your licence, but this is an important issue, and one where we have seen a number of licensees run into trouble. If you have produced or obtained wine for sale, and then find that it does not “fit” with your licence, you may have a significant problem – you can be left with a large volume of wine which cannot legally be sold through your cellar door.

If certain wine does not fall within the authority for sale granted by your licence, offering that wine for sale at your cellar door premises will be illegal. Sales of any such “ineligible” wine can expose you to penalties and disciplinary action under the licensing legislation. We have also seen cases where there has been a “double barrel” effect, with the licensee facing action for illegal sales, and also being required to re-pay Wine Equalisation Tax rebates and subsidies which had been received for those sales.

So, obviously, you need to ensure at the production stage that you are producing wine in such a way that it will satisfy the specific requirements of your licence and can legally be sold under your licence.

The licensing regimes vary from State to State. There are some significant differences between the States in the amount of flexibility afforded to the licensee, and the manner in which the right of sale is limited by reference to the characteristics of the wine.

South Australia - Producer's Licence

In South Australia, cellar doors will most often be operated pursuant to a “Producer's Licence”.

A Producer's Licence is specifically restricted to an authorisation to sell, and sell only the licensee's “own product”.

For wine to be your “own product”:

- It must be fermented by you, or “under your direction” (or if it is a blend, be produced from Australian primary produce and a substantial portion be fermented by or under direction of licensee); and
- It must be uniquely your own product; and
- You must have assumed the financial risk of the production.

The definition of “own product” does allow you to use a contract winemaker. The requirement is that the fermentation be “under the direction of” the licensee. It is vital that this is reflected in the contract with, and in your practical relationship with, the contract winemaker.

It must be apparent that you have given direction in the winemaking process, and have not put yourself entirely in the hands of the contract winemaker. A properly constructed written contract with your contract winemaker is highly advisable.

New South Wales – Off Licence (Vigneron)

In New South Wales, the “Off Licence (Vigneron)” licence is the predominant licence type used for cellar door operations. The significant restriction on the authority to sell wine is that the wine sold must:

- Be Australian wine substantially made by the licensee, or Australian wine made on the licensee's behalf from fruit grown by the licensee; and
- Be made at, or made from fruit grown at, the premises.

The requirements by reference to the location of the premises impose a significant restriction on the wine that the licensee is entitled to sell. The licensee must be able to demonstrate wine was either produced at the winery on the same premises as the cellar door, or from grapes grown on the same premises as the cellar door.

Queensland – Wine Producer Licence

In Queensland, the “Wine Producer Licence” allows the licensee to sell the “licensee’s wine”, being wine at least 85% of which is:

- Made from fruit grown on the licensed premises by the licensee; or
- Made on the licensed premises by the licensee.

An authority can also be sought to allow the licensee to sell wine other than the licensee’s own wine, subject to the restriction that the amount of any such wine sold in a financial year must not exceed the amount of licensee’s wine sold in that year.

Queensland wine producers are required by law to maintain certain records including details of all fruit grown on the premises (types, area of each type, dates vineyards planted, and the dates of the relevant harvest), fruit sourced from others (name and address of supplier, amounts supplied and dates supplied), wine production on the premises (amount and type of fruit, dates of bottling), and wine produced by others (name and address of winemaker, amounts of fruit delivered and date delivered to winemaker, volume produced).

Tasmania – Special Licence

The position in Tasmania is more liberal than some other states. Most cellar doors operate under a “Special Licence”. The specific conditions of each Special Licence will govern what wine can and cannot be sold – this will usually be limited to Tasmanian or local wine.

Under the legislation, “Tasmanian wine” is defined wine produced in Tasmania from fruit of which at least 85% is grown in Tasmania.

Depending on the specific licence and circumstances, there may also be a condition requiring that the majority (or some other, fixed proportion) of the grapes used in the production of the wine to be sold be sourced from the licensee’s vineyard.

Victoria – Vigneron’s Licence, Renewable Limited Licence

There are two categories of licence which are utilised by cellar door operators in Victoria, being the “Vigneron’s Licence” and, in some circumstances, a “Renewable Limited Licence”.

A Vigneron’s Licence allows for the sale of wine “produced on the premises”. Further, the wine must, to the extent of at least 70%, be made from fruit grown or fermented by the licensee.

In the alternative, producers who might not operate their own wineries but wish to operate a cellar door have the option of a Renewable Limited Licence. Such licences generally have specific restrictions on the liquor which can be sold – for example, “wine produced from grapes grown by the licensee”.

Western Australia - Producer’s Licence

In Western Australia, the relevant licence category is that of “Producer’s Licence”.

A WA Producer’s Licence allows you to sell “liquor produced by the licensee”. For wine, this means:

- Wine fermented by, or under the control or direction of, the licensee or
- Where (in the case of wine produced by blending) all the wine used was fermented from produce grown or produced in Australia.

Ensuring your wine “fits” your licence

The restrictions discussed above limit the range of wines that you can offer at your cellar door.

There are various ways in which licensees can find themselves in breach of their licence conditions. Examples include instances where re-labelled cleanskins obtained from other producers have been sold, where blended wine not including the appropriate proportion of the licensee’s own product has been sold, and where port bought in bulk from another producer has been sold at cellar door.

It is important that your wine not only satisfy the specific requirements of your particular licence so that it can legally be sold, but that you keep appropriate records so that, if necessary, this can be proven to the relevant authorities.

You should ensure that the specific restrictions applying to your licence are complied with, for each and every one of your wine products sold at cellar door.

Generally, you should:

- ❑ Create and retain appropriate written records of the source of all of the grapes used in your winemaking, including copies of supply contracts and details of supply if you are not producing the grapes yourself;
- ❑ Use appropriate written contracts for contract winemakers, and in addition keep records of your discussions with (and directions given to) the winemaker; and
- ❑ Make sure your sales and accounting records are appropriately detailed to allow you to track all wine sold in appropriate detail.

Liquor Licensing –Compliance Issues

There are some general compliance issues common to all liquor licences which cellar door operators should be aware of and review from time to time.

Ongoing issues that should be checked for liquor licensing compliance from time to time include:

The identity of the licensee

Licences can be held in individual names, or by partnerships, or companies. In some states, ownership and operation of a licence can be in different names. From time to time you may re-evaluate or re-arrange your business structure – make sure that your licences are in the appropriate name – that of the person or entity that actually owns the wine which is sold. You may also need to notify the licensing authority if you change the business name under which the business is operated.

Approval of persons

If your licence is held by a company, any changes in directors or shareholders may need to be notified to and approved by the relevant authority. Similarly, any change in managers (or other senior employees involved with the business) may require a formal application to the authority for approval of the new personnel.

Physical changes to premises

If you renovate or upgrade your licensed premises, you may need to make a formal application to amend the licence, particularly if your floor plan or layout changes.

Responsible service of alcohol/ staff training

You should ensure that all relevant staff (and in particular any new staff as they join your business) have the appropriate training as may be required by the licensing authority from time to time.

Temporary approvals

You may need temporary permits or limited licences for specific events (such as functions, wine festivals and the like). You should seek advice as necessary, and apply for these as far in advance as possible.

Other conditions / restrictions

There is a range of general obligations imposed by the licensing legislation, and there may be conditions or restrictions specific to your licence. These conditions can include, for example, hours or days of operation, or the locations at which wine stocks may be stored. Make sure that you have displayed and/or kept on the premises all documents and signage (such as your liquor licence, and any other signs or notices regarding liquor service) which may be required by law.

Mailing list issues

Cellar door sales are not limited to “in person” sales to visitors to your premises – most liquor licences will allow you to make sales for delivery to the customer on the basis of orders received remotely (by mail or telephone order, for example).

For mail order sales, the same restrictions on the wine that can be sold pursuant to the licence apply as for “in person” sales.

If you collect and use information about customers for your mailing list, you need to be aware of the provisions of the Privacy Act 1988 and the Spam Act 2003.

If you ask customers to complete forms or add their details to a mailing list (whether at the winery, or perhaps by way of your web site), you should include information at that point confirming why you are collecting information about them, to whom that information might be disclosed, and the way in which you will be using the information.

You are obliged to maintain and use the information in such a way as to protect the privacy of the information, and ensure that it is used only for the purpose for which it was provided (which may be, for example, to receive newsletters and order forms from your business).

If you use e-mail to communicate with your customer list, you will need to comply with the Spam Act, which regulates commercial e-mail use. The important requirements are that you may not send unsolicited commercial e-mails, any commercial e-mails must clearly identify the individual or organisation who authorised the message, and any commercial electronic messages sent must have a "functional unsubscribe facility" (for example, clear, easy instructions about what steps a recipient can take to prevent them receiving any similar "bulk" e-mails from you in the future).

SERVICE OF ALCOHOL – LEGAL RISK

As a supplier of liquor, you have various obligations under liquor licensing laws, including an obligation to ensure that "responsible service of alcohol" principles are followed in the conduct of your business.

Such matters are obviously not a significant concern in a wholesale environment (where you are selling to other licensed entities), but become much more important when you open a cellar door to the public.

Unfortunately, as a supplier of liquor for consumption, there is a risk of liability for you in the event that any of your customers becomes intoxicated.

Under the liquor licensing legislation, it is an offence to supply liquor to intoxicated persons (whether or not that person attained that intoxicated state on your premises).

While the likelihood of problems with intoxicated patrons will usually be far less for a cellar door than, say, hotels and nightclubs, the fact that you are serving alcohol to the public means that there is a risk.

Potential for Civil Liability

In addition to the potential for offences under liquor licensing legislation, there is the possibility of civil liability.

The cases where it has been suggested that civil liability may attach to a licensee are based on the concept of a duty on the part of a licensee to minimise harm to an intoxicated patron (and, perhaps, a duty to prevent harm to others who might be injured by the actions of an intoxicated patron).

Fortunately, we are yet to see in Australia any significant growth of claims of these types against licensees. It is worth noting, however, some of the examples of such cases in the US and Canada:

- ❑ A hotel patron, known to the staff, became visibly intoxicated, harassed other patrons, and was removed from the premises. Later, while he was staggering along the highway, he was hit by a car. He successfully claimed against both the driver of the car, and against the hotel. The trial judge held that the hotel was in breach of a common law duty not to serve the patron when he was already intoxicated. Even though the hotel was obliged to remove drunken patrons from the premises, in doing so the court found that the hotel had an obligation not to subject the patron to "danger of personal injury, foreseeable as a result of the eviction". The court suggested that in the circumstances appropriate alternatives to that course of action would have been to call the police or to otherwise have safe transport arranged for the patron (a Canadian case).
- ❑ A hotel employee served a (single) drink to an intoxicated person, and the hotel owner then attempted to convince that person to give his car keys to a friend. The hotel was sued, and found liable, in respect of a subsequent accident after the hotel employees stood at the window and watched the patron leave the premises and drive out onto the highway (another Canadian case).
- ❑ An alcohol supplier was found liable for the death of three persons involved in a vehicle collision, which occurred after a "visibly staggering" customer in a liquor store was sold a bottle of whisky and allowed to leave. The empty bottle was found in the car after the accident (another Canadian case).

- ❑ Various US cases have established a relatively onerous duty on licensees to actively engage patrons in conversation and to observe their conduct carefully, so as to determine their state of intoxication, prior to providing them service. There have also been successful actions in the US courts against private persons who hosted parties in their homes at which guests became intoxicated and later caused or suffered injury.

In Australia, the law is still (generally speaking) of the view that a person is responsible for their own actions, including the consequences of drinking to the point of intoxication.

In a case considered recently by the High Court, for example, it was claimed that a patron's injuries suffered after she departed licensed premises were a result of the licensee's failure to prevent her departure in an intoxicated state. The High Court found (by majority) that the licensed venue was not at fault. In that case, the venue had been appropriately responsible in the service of alcohol, had not served her further when it was clear that she was intoxicated, and had offered the patron a courtesy bus or taxi.

What does all this mean for a cellar door operator in Australia? Fortunately, it seems unlikely that we will see any significant growth in litigation in Australia along the lines of the US and Canadian examples, and it is unlikely that a licensee, in usual circumstances, would be held liable for injuries suffered by a patron as a result of a state of intoxication, when they are injured after they leave the premises. However, the cases have not ruled out the possibility, and in particular have not ruled out the possibility of the licensee being liable for such injuries if the licensee is found to have continued to serve the patron while the patron was intoxicated.

Generally, while the potential for liability is remote, it does exist.

A cellar door may not have associated with it the same risks of extreme intoxication or alcohol related violence as would, say, hotel or a nightclub. It is clear, though, that cellar doors may present a risk, given that they can involve alcohol sales where many patrons may have consumed some liquor before arriving at the premises, many patrons will be driving, and patrons may want to purchase take-away liquor and/or consume more liquor on the premises.

There are also the specific risks associated with special events such as functions, bus tours, or wine festivals when the number of visitors (and the visitors' average state of intoxication) may be significantly higher.

Minors

As a final point on licensing issues, it should be noted that sale or supply of liquor to a minor on licensed premises is illegal. Consumption of liquor by a minor on licensed premises is illegal. If, for example, on your licensed premises, an adult hands a child a glass of wine and that child takes a sip, in most states an offence will have been committed by the licensee, the adult in question, and the child.

In short, while some customers may choose to share wine with their children in the privacy of their own home, it is illegal for them to do so on licensed premises.

Steps to Minimise Risk

From a practical point of view, to minimise the risk of breaches of licensing laws, and to avoid the risk of civil liability, you need to take a committed approach to ensuring compliance with responsible service of alcohol principles. This could include:

- ❑ Ensuring that all staff involved with the service and sale of liquor are appropriately trained and are familiar with responsible service of alcohol principles (the licensing authority can provide details of training courses and materials available);
- ❑ Developing written policies and procedures regarding responsible service, and updating and discussing these regularly with staff;
- ❑ Having in place as many harm minimisation measures as possible – for example, the provision of water and non-alcoholic beverages, providing food, and providing contact details for taxi services and local accommodation;
- ❑ Ensuring that if you have special events, any additional staff employed for the event and are appropriately qualified and trained – for example, using liquor service staff who have appropriate hospitality experience, employing security guards where necessary for special events, and not using untrained friends and family members for wine sales and service; and

- ❑ In general, ensuring that you and your staff adopt a professional and serious approach to the service of liquor – the informal approach that may be entirely appropriate in a private setting, and may have been a feature of some cellar doors in years past, will not be appropriate for licensed cellar doors in the present environment.

OCCUPIERS' LIABILITY

"Occupiers' Liability" can be used as a general description of the type of claim that is made in the situation where a visitor is injured on your premises, and seeks damages from you as the "occupier" of the premises to compensate for the injuries suffered.

You are required by law to take reasonable care to prevent harm to persons attending your premises. You owe your customers, and indeed any persons entering your premises, a certain duty of care. If you are found by a court to have failed to meet an appropriate standard, you may be liable for any injuries suffered by your visitors.

When you decide to invite members of the public on to your premises, you assume a responsibility for doing all things reasonable to ensure their safety.

It is therefore vital that you take appropriate steps to discharge your duty of care to ensure the safety of your customers. Otherwise, you invite the risk of legal action in the unfortunate event that any of your customers suffers an injury while on your premises.

"Standard of Care" - General Principles

The general test which courts apply in respect of any injury that has occurred, is whether a "reasonable person" in the occupier's position would have foreseen that the conduct in question involved a real risk of injury to the person injured. If there was a "real risk", the question is what would a reasonable person have done to prevent that risk.

This question of what a "reasonable person" would have done, can take into account the magnitude of the risk (that is, the scale of the harm that might occur), the degree of probability of it occurring, the expense, difficulty and inconvenience of alleviating the risk, and any other conflicting responsibilities which the occupier may have.

At law, the question of what standard of care you need to meet will also take into account factors such as the age and sobriety of the visitors to your premises. This will be relevant to the standard of care for your cellar door, as no doubt you will have from time to time customers who are under the influence of alcohol (even if only one or two glasses of wine), you may have elderly customers, and you may have children accompanying their parents.

If a visitor to your premises is injured, and a court subsequently determines that a "reasonable person" in your circumstances would have done more to prevent that risk occurring, then you may be found liable for that injury.

Some Examples of Occupiers' Liability Cases

Occupiers' liability cases in the retail and commercial environment give an idea of the types of claims that are brought against occupiers, and some of the factors that courts look to in assessing whether the occupier has met the appropriate standard of care in the circumstances of the particular case. Some examples of situations where the occupier was found to have failed to meet an appropriate standard:

- ❑ A case where a shopping centre customer slipped on oil spilt in the centre car park – the court decided that inspections should have been carried out every 20 minutes, and this had not been done;
- ❑ A case where a supermarket customer slipped on spilt vegetable oil in the supermarket aisle – the court found that while all staff had been told of, and knew of the need to attend to spills immediately, there was no proper system of inspection;
- ❑ A case where a mall patron slipped on a bark chip that had fallen from a garden box – it was held that the inspections and clean-ups should have been more frequent; and
- ❑ A case where a cinema operator was found liable for a patron's injuries when the patron did not know that the seats were of a type which automatically folded up when vacated – the patron stood up to attend to a small child, and sat back down on the seat frame – the court held that a warning about the seats should have been screened.

- ❑ There are, of course, many cases where the occupier is found not to be liable, for example:
- ❑ A case where a user of a beachside swimming area slipped on rocks and was injured – it was held that in the circumstances it was unreasonable to expect the local council to have erected warning signs; and
- ❑ A case where a department store customer slipped on spilt icing sugar in the drapery section – the store was not liable as the court determined that the cleaning and inspection regime for that section of the store was adequate and had been followed.

The cases show the particularly high standards to which occupiers can be held in certain circumstances, but more importantly demonstrate the importance of implementing and maintaining specific procedures to deal with any potential risks to your visitors.

Risks Associated with Wineries

The winery environment presents particular risks and dangers, particularly for those who are unfamiliar with such environments.

It is important to realise that the “premises” for which you are responsible not only include the cellar door area itself, but also the surrounding areas to which the public may gain access, including any gardens, car parks and the like.

By way of example, areas that might present a risk could be:

- ❑ Unsafe flooring or spills in the cellar door area;
- ❑ Steep or poorly lit stairs (to cellars, for example);
- ❑ Easily accessible winery areas where working machinery could present a risk;
- ❑ Insufficient separation or distinction of areas intended for public access;
- ❑ Machinery operating in visitors' car park;
- ❑ Old or poorly maintained playground equipment; and
- ❑ Vineyard areas, dams and the like.

Steps to Take

While the standard of care and the exact steps which an occupier must take will always depend on the facts, it is clear that a documented, practical approach to reviewing and addressing risks (such as posting appropriate warning signs and repairing any defects), and maintaining ongoing procedures for continual review will go a long way to proving to a court that you have met an appropriate standard of care.

You and your staff need to be constantly aware of any sources for potential for harm to your visitors, and to take all reasonable steps to prevent such harm occurring. This would include:

- ❑ Undertaking a formal review of your buildings and premises for any safety issues (where necessary by a qualified inspector), and taking steps to appropriately remedy any faults;
- ❑ In doing so, considering any additional or specific risks for children and/or the infirm who may visit your premises (including a careful review of any playground equipment and the like – the unfortunate reality is that such equipment may present an unacceptable risk unless it is professionally inspected and maintained on a regular basis);
- ❑ Using fencing, clear signage, or other means to designate those areas which are intended for public access, and to prevent access to areas which should be “off-limits” to customers (for example, clearly marking areas to which entry is prohibited, and providing clear signage and directions from, for example, the car park to the cellar door, and the cellar door to the toilet facilities);

- ❑ Having in place appropriate procedures and protocols for regular inspection of the premises themselves when they are open to the public (for example, looking for and cleaning up spills, broken glass and the like), and also regular inspections of outdoor and other accessible areas;
- ❑ Incorporating protocols for phylloxera (and other disease) risk management in your review of risk, and in the steps taken to preclude or manage entry to certain areas – in many cases you may be able to “kill two birds with one stone” and minimise risk to your visitors at the same time as you minimise the risk of them causing damage to your vines; and
- ❑ Liaising with your insurance provider to ensure that your coverage is adequate, and to obtain advice about what further preventative steps can and should be taken.

SUMMARY

In summary, while a cellar door operation brings the potential for new sales and business growth, it will also open several new areas of potential legal risk. It is important to manage and minimise these risks by taking active steps to:

- ❑ Ensure that you are operating in compliance with your liquor licence, that you produce wine that can be sold under your licence, and keep records to enable you to prove this should it be necessary to do so;
- ❑ Maintain compliance with responsible service of alcohol requirements, and ensure your staff are appropriately trained and aware of these issues; and
- ❑ Consider and address the safety of your premises for your visitors, and put in place procedures for the ongoing review and monitoring of any risk.

[This paper was presented by Andrew Williams, Senior Associate, Finlaysons, at Finlaysons Wine Roadshow XII]

Disclaimer

This paper is based on the law as it stood on 1 July 2004. It is not intended to be a complete and definitive statement of the law and the information and views contained in it should not be regarded as a substitute for specific advice in individual situations. Further professional advice should be sought before applying the content of this paper to particular circumstances.

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