



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Your Ref: REG084
Our Ref: 3883.04

Hon Terry Waldron MLA
Minister for Racing and Gaming
8th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

By fax: 6552 6101

27 March 2012

Dear Minister

Liquor Control Amendment Regulations (No. 10) 2011

I refer to the *Liquor Control Amendment Regulations (No. 10) 2011 (the Amendment Regulations)* and to the explanatory material received by the Committee on 12 January 2012. The Committee considered this information at its meeting on 26 March 2012 and resolved to write to you regarding the following concerns with the instrument.

Unauthorised confiscation of Australian or foreign passports: regulation 18G

The Committee notes that one of the purposes of the Amendment Regulations is to prescribe in regulation 18G(b) what is to be done with passports that have been seized from juveniles on suspicion of being false, forged or counterfeit when the juvenile is on licensed or regulated premises.

Sections 126(2a) and (2b) of the *Liquor Control Act 1988* provide that an authorised person may confiscate a document produced by a juvenile under section 126(1)(b)(i) of the Act if the authorised person “*suspects on reasonable grounds*” that the document is forged, false or counterfeit (which may include a current passport, whether Australian or foreign).

The Committee notes that passports (whether Australian or issued by foreign governments) are the responsibility of the Commonwealth Government as a result of section 51(xix) of the *Australian Constitution*. The Committee has considered the operation of the *Australian Passports Act 2005* (Cth) and the *Foreign Passports (Law Enforcement and Security Act 2005* (Cth) and the interaction with the current Amendment Regulations and section 126 of the *Liquor Control Act 1988*. According to sections 23 and 17 of those Commonwealth Acts, respectively, there are only specific persons or classes of persons who may demand the surrender of a suspicious travel document.

The Committee notes that there are common features in the definition of “*officer*” in the *Australian Passports Act 2005* (Cth) and the definition of “*enforcement officer*” in the *Foreign Passports (Law Enforcement and Security Act 2005* (Cth): that the relevant persons are either employed in law enforcement roles or their role with the Commonwealth requires them to handle or otherwise deal with travel documents.

The definition of “*authorised person*” in section 3 of the *Liquor Control Act 1988*, however, includes licensees, occupiers, managers, employees or agents of the above and members of the WA Police Force. The Committee has concerns with the power to conduct forensic document examination being given to these authorised persons without the requisite forensic document examination training. There is a risk of a genuine travel document being confiscated from a person suspected of being a juvenile who has no other form of identity document available to them.

The Committee is also concerned that the power for an authorised person to confiscate a current passport which the authorised person suspects on reasonable grounds is forged, false or counterfeit (contained in the Amendment Regulations as well as section 126(2a) of the *Liquor Control Act 1988*) may raise issues of inconsistency with the Commonwealth statutes referred to above.

Section 109 of the Australian Constitution

Section 109 of the *Australian Constitution* provides that a State law that is inconsistent with a Commonwealth law is invalid to the extent of that inconsistency. This can include regulations, therefore where the Amendment Regulations conflict with provisions of the *Australian Passports Act 2005* (Cth) or the *Foreign Passports (Law Enforcement and Security Act 2005* (Cth), then the amendments could be held to be invalid to the extent of the inconsistency. This would also include any inconsistent sections in the *Liquor Control Act 1988*, or indeed the original wording of regulation 18G.

The Committee has formed the preliminary view that the Commonwealth law on this subject ‘covers the field’, with the intention that the Commonwealth law should be all the law there is on the topic of the surrender of suspicious travel documents.

The assessment of the scope and operation of the State and Commonwealth laws is an exercise for the Courts and not for Parliament, through the operations of this Committee. It is sufficient for the Committee’s role that it identify that this possibility exists and report to the Parliament in this regard.

Committee’s Terms of Reference

The Committee has identified that the Amendment Regulations, the previous wording of regulation 18G and the *Liquor Control Act 1988* may offend the following Terms of Reference, as currently in force:

- 3.6(a): not authorised or contemplated by the empowering enactment on the grounds of inconsistency with Commonwealth law;
- 3.6(b): adverse effect on existing rights, interests or legitimate expectations beyond giving effect to a purpose authorised by the empowering enactment;
- 3.6(c): ousts or modifies the rules of fairness;
- 3.6(d): deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review; and
- 3.6(f): contains provisions that, for any reason, would be more appropriately contained in an Act.

Summary of the Committee's concerns

As outlined above, the Committee has formed the preliminary view that there are serious flaws in the wording of new regulation 18G, but further, with the original regulation 18G and with the empowering section in the *Liquor Control Act 1988*.

The Committee is concerned that section 126(2a) of the Act is invalid to the extent that it is inconsistent with two Commonwealth Acts, as outlined above. Whilst the empowering Act itself is outside the scope of the Committee's Terms of Reference, the Committee takes this opportunity to raise this issue with you, as the Committee is concerned that a confiscation under section 126(2a) of the Act may be open to legal challenge on the grounds of inconsistency under section 109 of the *Australian Constitution*.

Whilst the Committee cannot offer legal or drafting advice, it has turned its mind to the possibility of section 126(2a) being amended to avoid invoking section 109 of the *Australian Constitution*. As the invalidity would only arise in relation to passports being used as identity documents, then words to exclude this class of document from the possibility of confiscation could rectify the issue: for example, section 126(2a) could be amended to read "... the authorised person may confiscate the document, unless that document is, or purports to be, a passport, whether issued by an Australian or foreign authority" (Committee's emphasis).

In any event, the Committee requests that you seek legal advice to clarify the concerns raised above and forward a copy of the legal advice to the Committee once received.

Additional queries

Further to the legal advice requested above, the Committee seeks your response to the following questions regarding the effect of the Amendment Regulations:

- What sort of training in forensic document examination is provided to all authorised persons under section 126 of the Act?
- What document examination equipment is provided/installed at all licensed premises (such as document examination units or magnification units) to enable the analysis of security features on passports or other travel documents?
- Why are the terms 'passport', 'false', 'forged' and 'counterfeit' not defined in either the Act or the Regulations, given these have specific meanings in the field of document examination? Alternatively, are the ordinary dictionary definitions of the words intended to be applicable?
- What training is given to authorised persons to enable them to form a suspicion on reasonable grounds that a document is false?
- What training is given to authorised persons to enable them to form a suspicion on reasonable grounds that a document is forged?
- What training is given to authorised persons to enable them to form a suspicion on reasonable grounds that a document is counterfeit?
- What safeguards are in place to ensure that authorised persons deliver the Australian or foreign passport to the relevant office, following the confiscation under section 126(2a) of the Act?

- How many prosecutions have been commenced against juveniles pursuant to section 126(2) of the Act? Please provide details, if any.
- How is a prosecution under section 126(2) of the Act commenced against a juvenile when section 126(2) is only triggered when the age or identity of a suspected juvenile is in doubt?
- What information is given to a person suspected of being a juvenile who is the owner of the confiscated document to enable them to claim their document from the relevant office? Is there provision for the person suspected of being a juvenile to be given a receipt for the confiscated property?
- How will regulation 18G be implemented in regional or remote Western Australia?
 1. Are there arrangements in place to station officers from the Department of Foreign Affairs and Trade (specifically from the Perth Passports Office) in regional centres around WA to inspect suspected false, forged or counterfeit travel documents which are confiscated under regulation 18G?
 2. Alternatively, are there arrangements to transport the suspected false, forged or counterfeit documents to Perth for the assessment of the document?
 3. Who is liable for the costs of stationing the DFAT employee(s) in regional areas or for the transportation of the suspected false, forged or counterfeit travel document(s) to Perth?


Disallowance timeframes

At its meeting on 26 March 2012, the Committee resolved to move a notice of motion in the Legislative Council to disallow the *Liquor Control Amendment Regulations (No. 10) 2011*, should the Committee recommend disallowance to the Parliament. The giving of notice in Parliament, however, should not be taken to indicate that the Committee has resolved to recommend disallowance and allows time for the information above (including legal advice) to be provided to the Committee.

Given the strict timeframes under which Parliament operates for disallowance, the Committee requests that you respond to this letter by **5pm, Thursday 12 April 2012**.

If you have any queries in relation to this letter, please contact the Committee's Advisory Officer (Legal), Ms Irina Lobeto-Ortega on ph: 9222 7302, fax: 9222 7805 or via email at delleg@parliament.wa.gov.au.

Yours sincerely



Mr Joe Francis MLA
Chairman

cc: Jos Stephens, Policy Officer, Department of Racing and Gaming
By fax: 9325 1041