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SUBMISSIONS

in response to

Registered club amalgamation and de-amalgamation review by Liquor & Gaming NSW

Dated: 26 July 2017

Table of Contents

1 Background

(a) We make these submissions in response to the NSW Government review of the current amalgamation and de-amalgamation requirements under the *Registered Clubs Act 1976* (NSW) (**Act**) and *Registered Clubs Regulation 2015* (NSW) (**Regulation**).

(b) We have reviewed the Information Paper issued by Liquor & Gaming NSW dated June 2017. Our submissions only address some of the matters raised in the Information Paper.

(c) Our Gaming & Leisure team at Thomson Geer is a practice dedicated to providing legal services to registered clubs. Our team regularly assists registered clubs with amalgamations and de-amalgamations, and is extremely familiar with the provisions of the Act and Regulation, together with related legislation that affect the process. The team is headed by partner Brett Boon, who has over 30 years' experience in working for registered clubs and has been involved with various changes to the Act, Regulation and related legislation and has spoken at many forums in relation to the legal issues in the registered clubs industry.

(d) Our submissions are based on our team's significant advisory and transactional experience in advising on over 50 club amalgamations and de-amalgamations.

(e) In general, the submissions outlined below are suggested to:

  (i) assist in streamlining the process by removing certain inefficiencies; and

  (ii) provide greater clarification for issues on which we regularly encounter unclear interpretations through our day-to-day practice.

2 Executive Summary

Our primary submissions in relation to the review of the amalgamations and de-amalgamations regime are as follows:

(a) a club's de-amalgamation should be recognised as reducing its total count of amalgamations for the purposes of the general limit under section 17AF of the Act;

(b) the requirement for the notice to members about a proposed amalgamation under section 17AE of the Act should be removed and potentially replaced with a simpler requirement;

(c) the Act should clarify the requirement under section 17AC(2) of the Act to establish a separate class of members to identify the members of the dissolved club following an amalgamation;

(d) the requirement to form a new registered club under section 17AJ(2)(a) should not be a mandatory requirement in instances where a club is seeking to de-amalgamate by transferring one of its relevant premises to another existing registered club;

(e) the requirement for the notice to members about a proposed de-amalgamation under section 17AK of the Act and clause 9(1) of the Regulation should be removed and potentially replaced with a simpler requirement; and

(f) the requirement to notify members of the licence transfer application and making of submissions under section 17AK of the Act and clause 9(2) of the Regulation should be removed and potentially replaced with a simpler requirement.

3 Club amalgamations

3.1 Section 17AF – Limit of 10 amalgamations per Club

(a) We submit that the Act should be amended to clarify that a registered club which has de-amalgamated should no longer have the club with which it was formerly amalgamated count towards the general limit of 10 amalgamations set out in section 17AF of the Act.

(b) The Act is currently unclear as to whether a club's de-amalgamation/s reduces its total number of amalgamations by a corresponding number for the purposes of section 17AF.

(c) We submit that this proposed amendment is consistent with the Act's policy objective of ensuring that club groups do not get too large.

(i) If the club group has de-amalgamated with one of its clubs, then the group will naturally have decreased in size.

(ii) It would be therefore be fair and appropriate for the club's number of amalgamations to be reduced when calculating whether the club has reached its maximum limit under section 17AF.

(d) Accordingly, we propose a new paragraph (2) for section 17AF of the Act as follows:

For the purposes of this section, if a registered club has de-amalgamated in accordance with Division 1B, its amalgamation with the relevant dissolved club (prior to the de-amalgamation) is not counted towards the limit under paragraph (1).

3.2 Section 17AE – Notifying club members of the proposed amalgamation

(a) We submit that the notice requirement under section 17AE of the Act should be amended (**Section 17AE Notice**).

(b) Pursuant to section 17AEB(d) of the Act, the Independent Liquor and Gaming Authority (**Authority**) is unable to approve an amalgamation unless it is satisfied that the amalgamation has been approved in principle at separate extraordinary general meetings of the ordinary members.

(c) In order to satisfy this requirement, each club is required to issue a notice of meeting in accordance with its governing legislation.

(d) Regardless of whether the club is a company limited by a guarantee governed by the *Corporations Act 2001* (Cth) (**Corporations Act**) or a co-operative governed by the *National Co-operatives Law*, it is required to give proper notice of a general meeting.

(e) The process of issuing a Notice of Extraordinary General Meeting is difficult and requires careful technical compliance. Furthermore, this notice provides more comprehensive disclosure to the members by way of stating the text of the proposed ordinary resolution and explanatory notes to assist the members in reaching an informed decision.

(f) Some clubs that undertake amalgamations are confused by the double notice requirements and may neglect to put up the Section 17AE Notice. This is particularly the case where clubs do not have the assistance of legal advisors who have a specialised understanding of registered club amalgamations.

(g) We submit that the Section 17AE Notice is superfluous given the obligation placed on clubs to issue the Notices of Extraordinary General Meeting.

(i) In particular, we submit that the Section 17AE Notice is a much less effective tool for communicating the amalgamation proposal to the members.

(ii) The club effectively discharges its obligations of proper communication of the amalgamation proposal via the Notices of Extraordinary General Meeting.

(iii) As Section 17AEB(d) specifies that the proposed amalgamation must be approved by "ordinary members", the Notice of Extraordinary General meeting is issued to *all* ordinary members (regardless of any voting restrictions on different classes of members in a club's constitution or rules).

(iv) The Section 17AE Notice is therefore just an additional unnecessary procedural step. Whilst it may serve the policy objectives, other procedural steps in the amalgamation process already achieve them.

(v) A club must strictly comply with the Act's requirements to satisfy the Authority in order to obtain approval of the amalgamation. Therefore, a defect in the Section 17AE Notice or a failure to publish it can have the unintended consequence of causing the amalgamation to fall through.

(h) Accordingly, as it does not substantively assist in the policy objectives, we submit that the Section 17AE Notice should be removed from the Act to assist in streamlining the amalgamation process.

(i) Additionally, the requirement currently in clause 5 of the Regulation could be modified so that the Notices of Extraordinary General Meeting must be displayed on the respective Club's notice board and published on the respective Club's website.

3.3 **Section 17AC(2) – Establishing members of the dissolved club by the parent club**

(a) We submit that section 17AC(2) of the Act be amended.

(b) Currently, section 17AC(2) provides that a separate class of members must be established which comprises the members of the dissolved club.

(c) Ordinarily, members often belong to multiple classes of membership of the dissolved club and are likely to want to join the parent club and become members of one of the parent club's existing classes of membership or new classes. However, as membership of a club grants personal rights, a person cannot be a member of two classes.

(i) For instance, if ABC Club and XYZ Club amalgamate, then the Act would require the creation of a new class of "ABC members" under XYZ Club's constitution or rules. However, ABC members are likely to want to join particular classes of membership of XYZ Club (e.g. Golfing member).

(ii) Our view is that it is not possible for the person to be a member of both the ABC member class and the Golfing member class.

(iii) Accordingly, the section 17AC(2) requirement becomes complicated and potentially inconsistent with the Corporations Act or National Co-operatives Law.

(d) Specifically, it becomes difficult to both create a single, separate class of members of the dissolved club, as well as to accommodate the ability for the members to join existing (or new) classes of membership at the parent club.

(e) As this issue arises with each amalgamation, we commonly address it via a series of complex amendments to the Club's constitution or rules. However, we submit that this complexity has been very confusing for many clubs and advisors participating in the amalgamation process.

(f) The policy objective will be better achieved if the Act only requires the parent club to identify that the transferring members on the parent club's register as transferring from the dissolved club or in a class or classes of membership. This would not mandate the creation of a separate class, but would identify those members in the parent club's members' register.

(i) This will mean that the information will still be available for identification purposes, especially if required in the event of a subsequent de-amalgamation, or a vote on disposal of the major assets of the dissolved club under section 17AI(2) of the Act.

(ii) However, transferring members will have the benefit of joining the class of membership of the parent club that best suits them (and new classes can be added as needed on a case-by-case basis, for e.g. in an amalgamation between an RSL club and a golf club).

(g) Based on the above, we submit that the existing section 17AC(2) be amended to simply require that members be identified (e.g. on the register) as originally hailing from 'the members of the dissolved club', without having to create a new membership class for that purpose.

(h) By doing so, the parent club will only be required to identify who was a member of the dissolved club. Therefore, the clubs can still opt to:

(i) create a single, separate class (e.g. ABC members);

(ii) several classes of members that identify them as originally members of the dissolved club (e.g. ABC Golfing members, ABC Social members etc. in addition to XYZ Golfing members, XYZ Social members etc.); or

(iii) have the flexibility to absorb the members of the dissolved club into the parent club's existing classes and designate them as being members of the dissolved club on the register.

4 Club de-amalgamations

4.1 Section 17AJ – Effecting a de-amalgamation to transfer the club licence

(a) We submit that the requirement under section 17AJ(2)(a) to form a new registered club should be amended.

(b) There are two types of de-amalgamation that can occur:

(i) Firstly, a club may de-amalgamate a set of premises which is then transferred back to the members of the dissolved club.

(A) This situation may arise where an amalgamation has been unsuccessful and it has been determined to be in the best interests of both sets of members to revert to the previously separate clubs as was the case prior to amalgamation.

(B) In this case, we agree that section 17AJ(2)(a) is necessary. Given that the pre-amalgamation entity would have been dissolved, a new legal entity must be formed to receive the club licence, premises and associated assets.

(ii) The second and more common type of de-amalgamation is where an existing registered club (**Transferor Club**) will de-amalgamate with one or more sets of premises, and transfer the club licence/s, premises and associated assets to another existing registered club (**Recipient Club**).

(A) This type of de-amalgamation is essentially a transfer of a registered club's licence from the Transferor Club to the Recipient Club.

(B) There is no need to form a new legal entity because the Recipient Club already exists as a suitable entity to receive the club licence, premises and associated assets.

(C) We submit that section 17AJ(2)(a) unnecessarily complicates this type of de-amalgamation, and can create considerable legal and corporate structuring costs without good reason.

(D) Therefore, the formation of a new entity might be an option but should not be mandatory for the second type of de-amalgamation described at paragraph 4.1(b)(ii).

(c) Our firm has experience in dealing with the complexities caused by section 17AJ.

(i) Our firm was involved in the first 2 de-amalgamations that occurred under the newly created section 17AJ.

(ii) In that transaction, an existing registered club was de-amalgamating with two of its registered clubs premises, the club licences of which were being transferred to another existing registered club.

(iii) We identified that section 17AJ(2)(a) required the creation of a new registered club and therefore the creation of a new legal entity. This view was confirmed by the then Office of Liquor and Gaming.

(iv) Accordingly, the transaction became significantly more costly and burdensome for all parties involved.

(d) Accordingly, we submit that section 17AJ(2) should be amended so that the requirement under section 17AJ(2)(a) does not need to apply to the second type of de-amalgamation described above.

(i) In circumstances where another existing registered club wants to take over the relevant premises, the process currently required by the Act unnecessarily uses membership funds and resources to undertake in effect, both a de-amalgamation and amalgamation. This involves greater intervention and input from legal and other advisors.

(ii) We submit that there is no policy advantage to the current process under section 17AJ. The current safeguards offered in relation to obtaining members' approval, inviting public submissions and obtaining the Authority's approval can still apply to a direct transfer of the club licence from the Transferor Club to the Recipient Club.

(iii) We recommend that section 17AM(d) of the Act be amended to require approvals of the transfer by the members of the dissolved club, the ordinary members of the Transferor Club, and the ordinary members of the Recipient Club.

(e) We also note that under section 17AN of the Act, members of the de-amalgamated club are taken to include the members of the dissolved club who have continued to be members of the parent club until the de-amalgamation takes effect. This should be amended as when a new legal entity is formed, the Corporations Act requires that a person consents to becoming a member (and cannot be deemed in the manner contemplated by section 17AN).

4.2 **Section 17AK – Notifying members of the proposed de-amalgamation**

(a) We submit that the following notice requirements under section 17AK of the Act should be amended:

(i) the requirement to publish a notice in accordance with clause 9(1) of the Regulation, to notify members of the proposed de-amalgamation; and

(ii) the requirement to publish a notice in accordance with clause 9(2) of the Regulation, to notify members of the date on which the liquor licence transfer application is to be made, and to state that submissions may be made to the Authority,

(together, the **Section 17AK Notices**).

(b) Similar to the discussion above at paragraph 3.2, the Section 17AK Notices are a duplication of notice requirements already placed on the Club. An amalgamated club is required to issue two Notices of Extraordinary General Meeting in accordance with either

the Corporations Act or National Co-operatives Law (as applicable) to the different groups of members required to approve the de-amalgamation.

(c) We submit that the obligation to issue and/or publish these additional notices increases the complexity and compliance requirements for the Club, without necessarily giving substantive notification or information to the members of the de-amalgamation proposal.

(d) These additional notice steps are confusing for clubs. Furthermore, the Act mandates strict compliance. Thus, there is a potential risk of the de-amalgamation failing due to non-compliance despite extensive work undertaken to compile and present substantive information in the Notices of Extraordinary General Meetings.

(e) The policy objective would still be achieved via the notices required to be issued to call the Extraordinary General Meetings under section 17AM(d) of the Act.

(i) We recommend that the Act require the Notices of Extraordinary General Meeting to include the information currently required under clause 9 of the Regulation.

(ii) This will ensure that the members will still be informed of the club's intention to seek approval of the proposed de-amalgamation and provide them with reasonable opportunity to prepare a public submission relating to that approval.

(iii) Additionally, clause 9 of the Regulation can require that the Notices of Extraordinary General Meeting be displayed on the respective Club's notice board and published on the respective Club's website.

5 Conclusion

We are happy to participate in further discussions about these submissions including a face-to-face meeting. If you would like to have a discussion, please contact Brett Boon to coordinate a mutually convenient time.

Yours faithfully
THOMSON GEER

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Partner
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