



# Policy

## Profit Sharing and Management Agreements

### Disclaimer

This Policy is designed to provide information in regard to the subject matter covered, and with the understanding that the Director of Liquor Licensing is not passing legal opinion or interpretation or other professional advice. The information is provided on the understanding that all persons undertake responsibility for assessing the relevance and accuracy of its contents.

### Introduction

Section 104 of the *Liquor Control Act 1988* ('the Act') provides that the Director of Liquor Licensing may approve of an arrangement or agreement between a licensee and a third party in relation to the conduct of the business under the licence.

This document provides guidance on the legislative provisions relating to profit sharing and management arrangements, and the circumstances that must be taken into consideration when contemplating such arrangements.

### Legislative provisions

Section 104 of the Act provides that —

- (1) *Subject to this Act, if a licensee —*
  - (a) *enters into a partnership with another person in relation to the business carried on under the licence;*
  - (b) *enters into any agreement or arrangement under which another person may participate in the proceeds of the business carried on under the licence; or*
  - (c) *remunerates another person by reference to the proceeds or profits obtained from the business carried on under the licence or by reference to the quantity of liquor sold, the licensee and that other person commit an offence. Penalty: \$10,000.*

Section 104(1) does not apply to or in relation to any agreement or arrangement in respect to the following —

- (a) an occasional licence, where it is authorised under section 59(3); or
- (b) an extended trading permit, where it is approved under section 60(8); or
- (c) the provision of entertainment solely for juveniles on licensed premises or a part of licensed premises, where it is approved under section 126B(5); or
- (d) the disbursement of profits or proceeds to a person in a position of authority in a body corporate that holds a licence; or
- (e) any other agreement or arrangement that is entered into with the approval of the licensing authority or is of a kind prescribed for the purpose of this subsection.

With respect to cellar door extended trading permits involving more than one producer, section 104 does not apply where each producer only retains the profits from the sale of their own products. If the producers each take a share of the overall profits of the cellar door operation, the approval of the licensing authority is required.

## **Agreements and Arrangements must adhere to the provisions of the Act**

Parties to profit sharing and management agreements should be aware that the provisions of the Act override the terms of any agreement. An application of this nature will not be approved where any terms of an agreement are contrary to the Act or seek to 'contract out' of the Act. In this regard, any agreement that purports to authorise a person to conduct the business carried on under the licence; or exclude, modify or restrict any requirement, responsibility or duty imposed on the licensee under the Act, has no effect.

Depending on the drafting of the agreement, any offending provision(s) may be required to be removed from the agreement prior to approval by the Director. Alternatively, if the offending provisions are fundamental, such that if removed from the agreement, the agreement would be rendered inoperative or meaningless, the entire application may be refused. Irrespective of any legal issue under contract law, any agreement that in any way infringes the provisions of the Act will not be approved.

## **Licensee and Third Party Obligations Under Profit Sharing or Management Agreements**

The licensee's duties and obligations remain the same even with the creation of a profit sharing or management agreement. The licensee always has responsibility for the conduct of the business under the licence and must ensure the business carried on under the licence is personally supervised and managed by natural persons. Therefore, any agreement between the licensee and the management company must not deviate from the principles set down in section 100 of the Act.

Furthermore, the agreement must not contradict section 37(5) of the Act. This means that the licensee must retain exclusive possession of the whole of the licensed premises and cannot lease out a portion of the licensed area to a third party. Agreements that seek to allow a company or manager to sell liquor on behalf of the licensee will not be approved.

There is nothing in the Act to suggest that the establishment of a partnership or other arrangement between a licensee and a management company creates a joint licenseeship between the licensee and the management company.

While the Director can allow for the establishment of a partnership in relation to the business carried on under the licence, in the absence of a joint licenseeship the provisions of the Act setting out the duties and obligations of the licensee do not alter. Therefore, the licensee's duties and obligations remain the same despite the creation of a management agreement.

Each person directly or indirectly interested in the application, in the business, or the profits/proceeds of the business to be carried on under the licence must be a fit and proper person to be so interested. Prior to any approval being granted, the licensing authority will need to be satisfied that all persons seeking to be involved are fit and proper.

An application fee is applicable (in addition to the base fee payable for the approval of a profit sharing or management agreement) for each person who is party to the agreement / arrangement and in relation to whom a police probity check is sought to verify that they are fit and proper.

## **Applications for approval of a profit sharing or management agreement**

As a matter of general principle, approvals under section 104 for profit sharing or management agreements or other arrangements will only be granted if the Director is of the opinion that it would be in the public interest to approve of such an agreement or arrangement. In submissions for approval, applicants are required to address the public interest issue as to why it is in the public interest that such an agreement should be approved. The onus is on applicants to prove that agreements comply with the requirements of the Act as well as to identify clauses that demonstrate such compliance.

It is the Licensing Authority's view that section 104 of the Act is not intended to be the mechanism whereby not-for-profit organisations raise funds through the promotion and sale of liquor. For example, fundraising which involves a person inviting the placement of orders of liquor and is then responsible for distributing, collating and controlling these orders. In this instance, the member of the not-for-profit organisation is controlling the sale and supply of liquor, rather than the licensee. This is not considered to be in the public interest, nor is it consistent with the proper development of the liquor industry, a matter to which the licensing authority must have regard under section 5(1)(c) of the Act.

Examples of agreements and arrangements that may be approved include:

- A boxing tournament whereby the organiser retains all monies received from door sales, and the licensed premises hosting the tournament receives all monies from bar sales.
- A dance studio will retain all monies from bar sales and the performing dance group will retain all monies from door sales.
- A fundraising event held at a licensed premises – the licensee retains all monies received from the sale of liquor and the foundation organising the event will retain all proceeds of ticket sales.
- The promoter of a music festival will retain all proceeds from ticket sales and the licensee will retain all monies from liquor sales.
- A wine tasting fundraiser is conducted – the licensee retains 10 percent of the profits and the fundraising organisation retains 90 percent of profits.

Examples of agreements and arrangements that would NOT be approved:

- A not-for-profit group organises the sale and supply of wine to its members and shares the profits with the liquor store licensee from whom the liquor was sourced.
- An organisation holds an event whereby it hires out the entire licensed premises in order to serve liquor to the public, without supervision of the licensee and the proceeds are to be shared equally with the licensee.
- A licensee leases a portion of his store to a travel agent.

### **Conduct of a Business on or From Licensed Premises (that is; not under a Profit Sharing or Management Agreement)**

Section 119A of the Act prohibits, except where approved by the licensing authority, the conduct of a business on or from the licensed premises other than the business conducted under the licence.

In this regard, the type of licensed premises and the nature of the proposed business will determine whether approval is required to conduct the business. Approval is required where the business has no connection with the licensed premises. For example, a travel agency is not ordinarily associated with a licensed premises and would therefore require approval. However, vending machines on a hotel/tavern licence are ordinarily expected and therefore no approval needs to be sought for this type of business.

### **Lodging an Application**

Applicants for approvals under section 104 must lodge certain statutory information with the Department of Racing, Gaming and Liquor prior to an application being considered. To assist applicants in lodging their application, an application kit containing a lodgment guide, forms, and an information bulletin is available from the Department's [website](#).

Applicants for approvals of a non-liquor business under section 119A must lodge an application with the Department of Racing, Gaming and Liquor. To assist applicants in lodging their application, an application kit containing a lodgment guide, forms, and an information bulletin, is available from the Department's [website](#).

Customer Service staff are available at any time during office hours to assist applicants to understand the legislative requirements relating to the lodgement of an application. The Department's website address is [www.rql.wa.gov.au](http://www.rql.wa.gov.au) and telephone number is (08) 9425 1888.

**DIRECTOR OF LIQUOR LICENSING**