

## PROFIT SHARING AGREEMENTS

Profit sharing occurs where a Club and an unlicensed entity work together to provide services (e.g. via a management agreement) and the services being offered involve business carried on under a licence (e.g. liquor sales, service and provision) and/or sharing profits from liquor sold.

An example of where this may occur is an individual approaching a Club and outlining how they can make a unique range of cocktails and mocktails at their Club for their members in exchange for part of the sales proceeds.

In a profit sharing agreement, a Club could engage another party to be involved in a variety of different services, along with the sale, supply or provision of alcohol e.g. providing food, being involved in Club functions and events etc.

### Liquor Licensing Act – Prohibition on Profit Sharing

When a Club is considering a profit sharing arrangement, section 99 of the *Liquor Licensing Act 1997 (SA)* (**Liquor Act**) is of utmost importance. This section imposes a prohibition on profit sharing where a licensee:

- enters into a partnership with an unlicensed person in relation to the business carried on under the licence; or
- enters into any agreement or arrangement under which an unlicensed person may participate in the proceeds of the business carried on under the licence (but this paragraph does not prevent the members of a licensed club from benefiting as members of the club from the proceeds of the business conducted under the licence); or
- remunerates an unlicensed 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; or
- permits an unlicensed person (not being a person approved by the licensing authority) to conduct, superintend or manage the business carried on at licensed premises under the licence; or
- permits an unlicensed person to exercise control or substantial influence, without authorisation or approval under this Act, over the business conducted under the licence; or
- permits an unlicensed person to hold himself or herself out to the public as the licensee.

In order for a Club to be able to enter into an agreement with an unlicensed person, or for an unlicensed person to participate and/or gain remuneration from the proceeds from the sale of liquor under a licence, the Liquor and Gaming Commissioner (**the Commissioner**) will have to grant an exemption. A Club must

not enter into any agreement without the Commissioner's authorisation, as to do so would be a breach of the Liquor Act.

Due to this restriction, a Club should also ensure they include a clause in any agreement that outlines the need for any approval by the Commissioner prior to its commencement.

In order to seek an exemption, a Club will firstly have to show that the agreement:

- is likely to assist the liquor industry and industries with which it is closely associated e.g. tourism and the hospitality industry; or
- it is otherwise in the public interest; or
- there is some other good reason for approving the agreement or arrangement.

In addition to the above, a Club would also need to show that the agreement does not adversely affect the rights and reasonable expectations of persons presently in employment.

Where any agreement approved by the Commissioner will provide for a trust or corporate entity to conduct, superintend or manage the business conducted under a licence, then the business undertaken has to be conducted under the personal supervision and management of a person approved by the licensing authority.

## Liquor Licensing Act – Other Clauses

Whilst section 99 is the main legislative provision that needs to be considered when a party is unlicensed, as to not comply with this would constitute a breach, Clubs and the other party, whether they be unlicensed or not need to also ensure compliance with the entirety of the Liquor Act. In particular, this includes the following sections:

- **s36 – Club Licence** – This section outlines the general restrictions and authorisations given by a Club Licence such as where the consumption of liquor is allowed, sales of alcohol via direct sales transactions etc.
- **s47 – How Licences are to be held** – Allows for a licence to be jointly held by two or more parties (provide that they are both either an association or company limited by guarantee) in which case all will be jointly and severally liable.
- **s97 – Supervision and Management of Licensee's Business** – Requires a Responsible Person to be present at all times a licensed premises is open to the public, unless an exemption is granted.
- **s105 – Prescribed Entertainment on Licensed Premises** – Prohibits the use of any part of licensed premises for the purpose of providing prescribed entertainment, that being entertainment of a sexually explicit nature or a professional public boxing or martial art event, without authorisation from the Commissioner.

## Template

In the Members Section of the Clubs SA website there is an editable template for an application to the Liquor and Gambling Commissioner to approve a profit sharing agreement.

For the actual terms and conditions between the parties themselves, a Club needs to refer to the guide and template on Management Agreements which is available on the Clubs SA Members Site.