REGISTERED CLUBS AMENDMENT ACT

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Typically being a lawyer I will start with disclaimers and qualifications. Firstly, this paper is to bring to the attention of clubs the principal features of the Act and the way that certain aspects of the Act are qualified or modified by the Regulations. It is a guide only and is not a substitute for reading the relevant provisions of the Act and Regulations and where appropriate obtaining specific legal advice.

The Act and the Regulations can be accessed through the websites of the Department of Gaming & Racing and the NSW Parliament as well as other specialist websites. They will shortly be accessed through the ClubsNSW website.

Secondly, this paper is work in progress. All of us are feeling our way with this legislation. Towards the end of May this paper including any modifications which may arise along the way will also be available on the ClubsNSW website.

Background

Three key concepts are the genesis of this new legislation. Those concepts are:

- Accountability
- Transparency
- Corporate governance

You will be hearing a lot about these concepts. The club industry taskforce has been and is fully supportive of these concepts as being the guiding principles behind the legislation.

Regrettably, there has been the perception of some clubs being less than transparent from the point of view of members in their handling of some fundamental issues – property dealings in particular, but in other issues as well.

There has also been a perception that the governing bodies and management of clubs need to report more fully on certain aspects of their activities over and above what they are currently required under the Corporations Act and the Registered Clubs Act to disclose in their annual reports. In other words, there should be greater accountability for some of their activities.

But driving these two principles of greater accountability and transparency has been a very real concern shared by the Department of Gaming & Racing and the club industry representatives on the taskforce that due to a lack of accountability and transparency clubs have been exposed to being taken over, controlled or effectively directed by outside commercial interests which, if the case, would be not only entirely contrary to the Act but quite the opposite of what a club is all about.

You will note that I have not said anything about "corporate governance". I will leave that to the end because despite all the mumbo jumbo about corporate governance there is a very simple formula to working out what it is and how to apply it to this legislation and to your duties generally as directors and secretaries of clubs..

Appointment of Managers to separate premises of clubs

Section 34A provides that <u>if a club has more than one set of defined premises</u> (for example additional premises acquired through amalgamation) <u>then there must be a separate manager appointed to each set of premises</u> at which the secretary of the club is not in attendance.

The manager must be approved by the Liquor Administration Board.

However, this requirement will not apply where:

- the club has only two sets of premises that (if the main premises of the club is in the metropolitan area) are within than 10 km apart or (if the main premises are in a non metropolitan area) that are within 50 km apart, or

- the premises (that is the second premises as opposed to the main premises) are staffed by less than 5 fulltime employees.

The Regulations provide that the requirements of this section will not come into operation for a period of six months ie. until 9 October 2004 to allow clubs to make the appropriate appointments of managers and to obtain LAB approval to those appointments.

Only natural persons can be appointed managers of club premises.

A person who is a manager of club premises of another registered club cannot be appointed as a manager.

A person who has not been approved by the LAB may be appointed to act as a manager provided that the club has applied to the LAB for approval of the person to be appointed as manager.

The application for approval will be by way of a form to be approved by the LAB.

Section 34C provides that the LAB must not give its approval unless it is satisfied that the person is:

- a fit and proper person to manage the premises;

- understands his or her responsibilities in relation to, and is capable of implementing practices in place at the premises for ensuring responsible service of alcohol and responsible conduct of gambling on those premises.

Clubs will need to ensure that there are practices in place in relation to RSA and RSG and that those practices are fully documented and up to date.

The LAB can give provisional approval to a manager before making a final decision in relation to the application for approval.

The appointment of a manager is not effected until notice in writing of the appointment is given to the LAB and the notice is accompanied by a declaration (in a form approved by the LAB) by the proposed manager indicating his/her acceptance of the appointment and certifying matters such as the person's capacity to implement RSA and RSG practices. No doubt these matters will become clearer when the form is provided by the LAB.

The appointment of a manager is revoked by the club giving notice to the LAB (once again in a form to be approved by the LAB) of the appointment of a new manager or by the club or manager giving notice (also in a form approved by the LAB) of ceasing to act as manager.

A notice of appointment or of revocation to the LAB can specify a later date from which the appointment or revocation is to take effect. It is recommended that this would be appropriate in most circumstances save in the case of summary dismissal or the immediate resignation of a manager as an employee of the club.

Responsibilities of Managers

A person appointed as a manager of any premises of a club is responsible at all times for the personal supervision and management of the business of those premises in accordance with the Registered Clubs Act and the Gaming Machines Act including compliance with conditions imposed on the club's certificate of registration under both Acts.

A manager of premises of a club is liable to prosecution for certain offences as if he or she was the secretary of the club. Those offences in summary are those relating to the service and supply of alcohol, juveniles, conduct of patrons and responsible gaming.

Before accepting any appointment as a manager the person concerned should be made aware of each of the sections under both Acts and the penalties under them for which he or she may be held personally liable before accepting an appointment as manager of any premises of a registered club.

Clubs will need to have written position descriptions for managers which incorporate their RSA and RSG responsibilities and other responsibilities under the Act.

A brief description of some of the matters for which managers will be liable are as follows:

- Violent, intoxicated or quarrelsome conduct on club premises
- Responsible service of alcohol
- Responsible conduct of gambling activities
- Compliance with industry codes of practice
- Unauthorised persons using defined premises of registered clubs
- Minors' names in guests registers
- Carrying away liquor from premises of registered clubs at prohibited times
- Offences against rules of club
- Restriction on sales of liquor
- Consumption of liquor or operation of poker machines by persons under 18 years
- Sale or supply of liquor to a person under the age of 18 years
- Prohibition on persons under 18 years being in bars
- Prohibition on persons under 18 years in poker machine areas
- Persons under 18 years attempting to enter club premises or obtain liquor
- Sale of stolen goods and possession, use or sale of drugs not permitted in registered clubs
- Unlawful gambling on club premises
- Permitting credit for gambling

For example, if a minor is supplied with alcohol in the separate premises of the Club the manager of those premises is guilty of an offence under Section 50 of the Act which, if there are circumstances of aggravation will attract a fine of $11,000 and 12 months imprisonment.

It is not clear from the new legislation whether a manager although being in the same way liable as the secretary of the club (for example) the sale or supply of alcohol to a minor is also entitled to what is known as the "secretary's defence" under Section 56 of the Act. That section affords a defence to a secretary who can prove that:

- He/she took all reasonable precautions to avoid the commission of the offence and

- At the time of the offence the secretary did not know and could not reasonably have been expected to have known, that the alleged offence had been committed.

In my view it is implicit in the wording of the legislation that this defence is available for a manager in the same way as it is available to the secretary. However, it remains to be seen whether the Court will take the same view.

Wider powers of investigation

The powers of investigation by the Director of Liqour & Gaming have been widened. In particular if a person including a director or employee of a club which is the subject of an investigation is given a notice to produce information or documents specified in the notice the person must not fail to comply with this notice.

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Accountability

Under the generic heading of accountability the Act introduces new requirements regarding disclosure of interests by directors and employees including:

- interests in hotels
- gifts from contractors
- much more extensive annual reporting of information to members
- controls over disposals of land
- restrictions and controls on certain contracts entered into by clubs.

In order to understand these new provisions it is necessary to be aware of the definitions of what is meant by "close relative" and "top executive" as they occur time and again throughout this part of the Act.

A **"close relative"** of a person means:

- a parent, child, brother or sister of a person or

- a spouse (including de facto spouse) of the person ; or

- a spouse (including a de facto spouse) of a parent, child, brother or sister of the person.

"Top executive" means a person who is one of the 5 highest paid employees of the club at each separate premises of the club. (This applies irrespective of what position such employees actually hold or their remuneration.) Accordingly, in small clubs a senior bar manager may well be a top executive.

Great care needs to be taken in working out who is a top executive as will be apparent later.

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Disclosure of interests in contracts ("contract" includes a "commercial arrangement" ie. not a strict contract in the legal sense)

Section 41C requires a director of a club who has a material personal interest in a matter that relates to the affairs of the club to declare as soon as practicable the nature of the interest at a meeting of the Board of Directors of the club.

In effect what has happened is that provisions similar to Section 191 of Corporations Act have replaced what was formerly in Section 39 of the Registered Clubs Act.

The old Section 39 confined itself to the need to make declarations only in respect of contracts or proposed contracts with the club.

However, "material personal interest" is much wider than simply an interest in a contract or a proposed contract. Indeed, it is wider than a "pecuniary interest".

The difficulty will be determining the circumstances when a director has a material personal interest.

What has to be considered is:

- the materiality of the matter that is before the Board for consideration or decision; and

- the materiality of the interest of the director in the matter.

There have been very few cases on material personal interest. The most useful short definition of what is meant by a material personal interest is in *McGellin v Mt King Mining NL* (1998) 144 FLR 288 which stated in summary that a material personal interest is one where the nature of the interest has the capacity to influence the vote of the particular director upon the decision to be made bearing in mind that the conflict of interest must be of a real or substantial kind.

The best way of better understanding the issue is by considering the following hypothetical situations:

- a close relative or a business associate or a personal friend of a director appearing before the Board on a disciplinary charge

- the Board considering making some staff redundant and one of those staff is or may be a relative of a director

- The Board considering entering into a building contract with a building company and a director is either a director or shareholder of that company

- a donation to a sporting body where a director is an official of that sporting body

- an RSL club negotiating a lease with its sub branch and a director is a member of the committee of the sub branch

- an RSL club negotiating the purchase of sub branch land from its sub branch and a director is a member of the sub branch but not a member of the committee nor a trustee of the Sub Branch.

In all but perhaps (arguably) the last of these examples the director concerned has a material personal interest.

If in doubt it is much safer to err on the side of caution and for directors to make a declaration of material personal interest. This is the recommended course. Alternatively directors should seek legal advice as quickly as possible.

Particulars of declarations of interests by directors must be displayed on the Club notice board within 48 hours and those particulars must remain so displayed for 14 days. A copy of those particulars must be sent to the Liquor Administration Board within one month of the Club's annual general meeting.

These have long been requirements of the Act. However, in addition there is a new Section 41G which requires the secretary of a club to keep a register of disclosures by directors. I will deal with this register in greater detail shortly.

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Interests in hotels

Section 41D provides that a director or a top executive who acquires a financial interest in an hotel must give a written declaration of that interest to the secretary within 14 days. No matter how small the interest of a director or top executive in an hotel, the interest must be declared.

The secretary of a club continues to be prohibited from having any interest in an hotel pursuant to Section 33A.

This prohibition is extended by Section 34E(4) to any person appointed as a manager of separate premises.

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Disclosure of gifts from affiliated bodies

Section 41E provides that a director or a top executive must declare any gift of $500 or more that is received from an affiliated body.

An "affiliated body" includes a related body corporate under the Corporations Act. This covers any company which is:

- a holding company of the club
- a subsidiary of the club
- a subsidiary of a holding company of the club

What is or is not a subsidiary or a holding company is not straightforward and is beyond the scope of this seminar. If there is a slightest uncertainty get legal advice or contact the Department of Gaming & Racing.

However, many of the major rugby league football clubs are probably subsidiaries of their registered leagues clubs and therefore any gift of $500 or more by a football club to a director or top executive of the leagues club must be disclosed.

A gift for the purposes of this part of the Act includes "money, hospitality or discounts".

Accordingly, free seats, free travel, accommodation and generous hospitality provided by (for example) a rugby league football club for leagues club directors is likely to be caught by the section.

The directors of those clubs receiving such gifts will need to declare them if they are over $500.

The definition of "affiliated body" also includes any other body that within the 12 months immediately before receipt of the gift obtained a grant or subsidy from the club. Accordingly, if the club makes a donation to a community organisation and within the 12 months after the donation is made that community organisation makes a gift to the President of the club and the gift is over $500 then it must be declared.

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Disclosure of gifts from persons or organisations with contracts with a registered club

Section 41F provides that a director of a club or <u>any</u> employee of a club that receives a gift in excess of $500 from any organisation that is a party to a contract with the club must submit a written return each year to the club declaring the gift.

The Regulations provide that the return:

- must be in a form approved by the Director of Liquor & Gaming
- is to be submitted within 21 days of the end of the financial year of the club
- must relate to gifts received during that financial year

The gifts that must be included in the return are:

- those gifts which exceed $500 and

- gifts from the same contractor in the one financial year which added together exceed $500.

The value of any gift is the reasonable estimate of the amount which it would have cost the recipient to obtain it at the time of the gift. However, if the value cannot be determined in this way then the gift must be declared.

These requirements will necessitate operational procedures to be put in place to ensure that directors and employees are aware of who the club has contracted with and to require them to submit to the club details of all relevant gifts within 21 days of the end of the financial year.

Clubs will need to educate directors and employees to make inquiries appropriate as to the value of any significant gift they receive from contractors to the club unless the gift is obviously much less than $500.

It will be some incentive for compliance if directors and employees are reminded that individuals who do not comply will be liable to a fine of $5,500.

There are limited defences to these disclosure requirements.

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Register of interests and reporting requirements

Section 41G requires the secretary to keep a register of:

- declarations of material personal interest by directors
- disclosures of gifts of $500 or more from affiliated bodies received by directors and top executives
- returns of gifts of $500 or more received by directors and employees

The register must be disclosed to the Director of Liqour & Gaming each year and must also be disclosed to the Director of Liquor & Gaming on demand.

The register must be made available for inspection on the written request of a member. That written request must include the name, membership number and postal address of the member making the request. There is no provision for the register to be copied by a member or for a copy to be provided to the member or for the register to be taken away by a member.

Neither the Act nor the Regulations provides a time frame for inspection of the register by a member but the club should make the register available for inspection within a reasonable time once the request is received.

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Annual reporting requirements

Section 41H requires a club to report to members each year in respect of the financial year of the club the following information:

- Information about declarations of material personal interests by directors and declarations of gifts received by directors, top executives and employees

- The number of top executives whose total remuneration is equal to or more than $100,000 per annum for the reporting period. This information is to be disclosed in successive bands of $10,000.

- Details (including the main purpose of) any overseas travel by a director or employee of the club including costs wholly or partly met by the club for the director or employee and any other person. That means that overseas travel on behalf of the club must be disclosed irrespective of whether or not it has been funded wholly or partly by the club. If it has been funded in any way by the club the amount also has to be disclosed.

  Accordingly if a director or employee of a club while on private overseas travel attends a gaming conference in the United States as a representative of the club then that has to be disclosed. If the club paid or reimbursed any of the expenses associated with that person's attendance at that conference then those expenses also have to be disclosed.

- Details of any loan in excess of $1,000 (or which added to other loans amounts to $1,000 or more) which are unpaid made to an employee of the club the amount of the loan and interest rate if any. Details which identify the employee are not required to be disclosed.

- Details of any contract for remuneration of a top executive approved during the financial year and details of any controlled contracts. "Controlled contracts" will be dealt with shortly. As yet, it is not clear what "details" are required to be disclosed to members.

- The name of any employee of the club (no matter what the position) who is a close relative of a director or a top executive and the amount of the remuneration package (no matter how small) paid to that employee.

- Clubs may not know whether employees are close relatives of directors or close relatives of top executives. The Act requires the club to make all reasonable inquiries to find out this information. One suggested way of doing this is for the club to require all directors and top executives to complete a questionnaire at the end of each financial year.

- Details of any amount of $30,000 or more paid to a particular consultant including the name of the consultant and the nature of the services.

- The total amount paid to consultants other than those over $30,000 and already covered by the preceding disclosure.

  There is no definition of a "consultant" in the Act or the Regulations. Clubs will therefore have to fall back on dictionary definitions. One that has been proposed and taken from the New Shorter Oxford Dictionary is that a consultant is "a person who gives professional advice or services in a specialist field").

  Nevertheless, clubs are urged to take a broad approach to who may be a consultant and to err on the side of caution by choosing, in cases of doubt, to include a person as coming within the definition of a consultant rather than excluding them.

  Lawyers, architects, management gurus and accountants will all be consultants for the purposes of this disclosure.

- Details of any settlement made with a director of the club or an employee of the club as a result of any legal dispute and the amount of any legal costs by the director or employee that were paid or are payable by the club. However, this disclosure is not required if it will breach any confidentiality agreement.

It is often the case that legal proceedings are settled on the basis of some agreement as to confidentiality. However, greater attention will need to be given to the extent that these agreements provide confidentiality. Also remember that a "legal dispute" does not necessarily mean that court action has been initiated. Once lawyers are involved in a dispute it is probably a legal dispute for the purposes of the section but will not always be finally determinative of the matter. Also, legal disputes can arise and be dealt with without any involvement of lawyers. If in doubt the club should seek advice. The Department of Gaming & Racing will be ready to assist clubs in relation to this issue.

- Details of any legal fees (not covered by the previous disclosure) paid by the club on behalf of a director or any employee of the club. Hence if a director or the secretary are sued or threatened to be sued by a third party for anything that they have done or omitted to have done in the course of carrying out their duties and the club pays some or all of their legal costs (possibly because they are entitled to rely on the indemnity available to them under the Corporations Act and/or the club's constitution) then the details of those fees must be disclosed. Arguably the confidentiality exclusion in the previous disclosure only applies if there is a settlement of the dispute. The confidentiality provisions do not apply if there is no settlement and in most cases will not apply if there are proceedings heard and determined by way of final judgment or order of a court or tribunal.

- The total profits from gaming machines during the period of 12 months ending 30 November each year.

- The amount applied to community development and support during the same period of 12 months ending 30 November each year.

The Regulations specify that the information required under Section 41H must be in a form approved by the Director of Liquor & Gaming and must (among other things) be sent to members within 4 months of the end of the financial year of the club. This corresponds with the requirements of the Corporations Act to provide members with

copies of the club's financial statements, directors' declaration and auditor's report within 4 months of the end of the financial year of the club. Some people in the club industry believe the period is 5 months. That is incorrect. The period of 5 months is for the purpose of holding the AGM. The statutory reports have to be sent out within 4 months.

The reporting requirements under Section 41H can be satisfied by including the information required by that section as part of the club's annual report that is sent to members at least 21 days prior to the AGM (provided it is sent within 4 months of the end of the financial year of the club).

However, members cannot opt out of receiving information under Section 41H as they can with the financial statements, annual reports and auditor's report as permitted by the Corporations Act.

Some clubs may therefore choose to have the Section 41H information printed separately to the annual report.

It is possible in certain circumstances for clubs to obtain an extension from the ASIC for sending out annual reports and holding their AGMs beyond the time limits in the Corporations Act. However, no such extension is available for sending out the information under Section 41H.

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Contracts with the club

Section 41J of the Act provides as follows:

> "(1) A registered club must not dispose of any land of the club unless:
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> (a) the disposal has first been approved at a general meeting of the ordinary members of the club at which a majority of the votes cast supported the approval, and

(b) the disposal is by way of public auction or open tender conducted by an independent real estate agent or auctioneer (subject to the requirements of any other Act or law), and

(c) in the case of a sale of land, the club has first obtained a valuation of the land from an independent registered real estate valuer within the meaning of the Valuers Registration Act 1975.

Disposal of land is very widely defined in subsection (2) as follows:

(2) In this section, "disposal of land" by a registered club includes:

(a) the granting by the club of a lease or licence of the land for a period of more than 3 years (including any option to renew), or

(b) the granting of an easement, or

(c) the granting by the club of an option to buy the land, or

(d) the termination by the club of a lease or licence held over land by the club or the granting by the club of a sublease or sublicence over land.

There has been some minor modifications to the effect of this section in the Regulations as follows:

“47I (1) The granting of a lease or licence by a registered club in the following circumstances is exempt from Section 41J(1) of the Act:

(a) where the lease or licence was granted to a person for the purpose of enabling the person to provide goods or services exclusively to members of the club and their guests and to other persons attending the club in accordance with a functions authority held by the club under section 23 of the Act,

(b) where the lease or licence was granted to a person for the purpose of enabling the person to provide goods or services to members of the club and their guests and to other members of the public and the granting of the lease or licence for that purpose has been approved at a general meeting of the ordinary members of the club at which a majority of the votes cast supported the approval.

(2) The granting by a registered club of an easement over land is exempt from Section 41J(1)(b) of the Act. That is, you will not require it to be done by public auction or open tender.

(3) The termination by a registered club of a lease or licence held over land by the club is exempt from Section 41J(1)(b) of the Act.

(4) The disposal of land to a government department, statutory body representing the Crown, State owned corporation or local council is exempt from the provisions of Section 41J(1) of the Act."

Subparagraph (1)(a) of the Regulation is intended to cover the position of a contract caterer and similar persons who provide goods and service to members and guests – but not to the public except pursuant to a Section 23 functions authority.

Clubs should be aware that Section 23 function authorities do not apply to wedding receptions, 21st birthday parties and similar "private" functions.

Subparagraph (1)(b) of the Regulation covers the situation of (for example) the golf professional who is provided with facilities to conduct a business as part of a registered club but the golf course is a public golf course and therefore the professional provides services to members of the public as well as members. Any lease or licence of 3 years or more to the professional golfer in these circumstances will require the approval of the members in general meeting.

Please note carefully that members who have the right to vote in relation to disposals of land under Section 41J are all of the ordinary members of the club. In the case of a golf club this will include social members as well as golfing members. Hence there will arise the potentially contentious situation of social members approving a lease for the golf professional and about which the golfing members of a golf club may have very strong views but may be outnumbered by the social members.

In RSL clubs where there is to be an accommodation and services agreement between the club and the sub branch which will give the sub branch rights to have an office and other facilities within the premises of the club the members will now have to approve these agreements (as nearly all of them are for well in excess of 3 years). Once again it will be all ordinary members and not just RSL and sub branch members who will be entitled to vote on resolutions approving these agreements.

Transactions entered into prior to 9 April 2004

The Regulations provide that Section 41J will not apply to the following circumstances:

- if a contract of sale of the land or some other binding agreement was entered into by the club before 9 April 2004;

- if an option to buy the land was granted by the club before 9 April 2004;

- if a lease in relation to the land was entered into before 9 April 2004 that included an option to renew that would take effect after that date;

- if the club had given notice prior to 9 April 2004 that it intended to terminate a lease or licence held over the land by the club.

Other transactions which may be affected

Notwithstanding the exclusion of certain transactions made prior to 9 April 2004 from the operation of Section 41J there will be some clubs which have been working on complex commercial arrangements which have been evolving over a long period of time which may now be effected by Section 41J.

It is understood that in relation to these transactions the Department of Gaming & Racing will be applying some policy guidelines one of which is to the following effect:

> If a club has entered into negotiations for the disposal of land prior to 10 December 2003 and the disposal will be completed after the date the legislation is proclaimed to commence then the Director of Liquor & Gaming will take no action with respect to the transaction even though the club has not complied with Section 41J provided that a club can demonstrate that the disposal has genuinely been for the benefit of members of the club and some agreement (eg. memorandum of understanding) has been entered into between the parties prior to the commencement of the legislation.

Time does not permit a full discussion of this, but if there are any clubs that are concerned about such arrangements they should seek urgent legal advice or contact the Department of Gaming & Racing.

Enforcement provisions

Section 41Q provides that if a club disposes of land other than in accordance with Section 41J the Director of Liquor & Gaming can make application to the Supreme Court for an order:

- declaring a contract for the disposal of land void; and/or
- that the land be transferred back to the club; and/or
- directing the payment of an amount or further amount in relation to the disposal of the land by the person to whom the club disposed the land or any person who benefited from the disposal of the land; and/or
- such other orders as the Supreme Court considers necessary.

However, the Supreme Court is not to make any orders if in the opinion of the Court the order would:

- unfairly and materially prejudice an interest or right of a person who has acted in good faith and with no reasonable grounds to suspect the disposal of the land concerned was in contravention of the Act; or
- would result in the extinguishment of an interest in the land without proper compensation held by a person who had no knowledge that the land had been disposed of in contravention of the Act or no means of preventing the disposal of the land.

Also, before the Supreme Court makes any order it must be of the opinion that the disposal of the land has not been generally to the benefit of the members of the registered club.

The circumstances where this opinion can be formed is unlimited but clearly if land is being sold at an undervalue or is being disposed of in a way that will adversely effect the future of the club then there is a sound basis for the Supreme Court to form such an opinion.

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Contracts in which a director or a top executive has an interest

Section 41K of the Act provides:

- that the Board of the club must first approve all contracts with:
    - a director
    - a top executive
    - any company or other body in which a director or top executive has a pecuniary interest.
- "Pecuniary interest" is not defined but clearly being a shareholder (no matter how minor the shareholding) will constitute a pecuniary interest.
- Before entering into <u>any</u> contract the club must make reasonable inquiries to find out whether directors, top executives or their companies are in any way connected with the contract. In this regard the club is entitled to rely on a statutory declaration from the other party to the proposed contract.

Ideally as a matter of course clubs should obtain a statutory declaration from each proposed contractor with the club to the effect that no directors or top executives or their companies have any pecuniary interest in the contract.

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Contracts with the secretary manager and close relatives

Section 41L provides that a club must not enter into a contract (other than a contract of employment) with a secretary, a manager of premises or a close relative of the secretary or a manager of premises or any company in which the secretary, a manager or a close relative of either of them has a controlling interest.

A "controlling interest" has a complex definition but any proposed contract with any company in which the secretary or a manager or a close relative has any interest will require careful inquiry and assessment.

There have been occasions when clubs have engaged a secretary manager through a family company of the secretary manager and the remuneration is paid to that company. This will now not be possible.

The only relationship that can exist between a club and a secretary manager or the manager of separate premises is a contract of employment. So if Joe Smith is the secretary of a club the contract of employment is with Joe Smith and the wages are paid to Joe Smith and not to Joe Smith Pty Limited.

Once again before entering into any contract the Act requires the club to make reasonable inquiries and the club can rely on a statutory declaration from the other party to the contract as to who has an interest in the contract.

Because Section 41L may have an adverse effect in non metropolitan areas where the only suppliers of goods and services may be related to the secretary or a manager the Regulations provide that clubs in non metropolitan areas may enter into contracts which would otherwise be in breach of Section 41L provided the contract is "as a result of an open tender process conducted by the club".

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Remuneration of top executives

Section 41M provides that a club must not enter into a contract for the remuneration of a top executive unless the proposed contract has been first approved by the Board of Directors. It is arguable that if there is an existing contract and all that is being varied is the rate of remuneration of a top executive then this does not need to be approved by the Board of Directors. However, and once again erring on the side of caution it is strongly recommended that all increases in remuneration of top executives are approved by the whole Board and not by sub committees although sub committees can do the detailed analysis and comparisons and provide a recommendation to the full Board.

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Loans to directors and employees

Section 41N provides:

- A club cannot lend money to a director.

- A club cannot lend money to an employee unless the amount (included with any other loans to that employee that are unpaid) is $10,000 or less and has been approved by the Board of Directors.

- This prohibition on loans to employees does not effect loans made pursuant to an employee's contract of employment. For example, a loan to a new CEO pursuant to the contract of employment to cover his/her removal expenses to take up the position at the club is outside the provisions of Section 41N.

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Controlled contracts

Section 41O in effect provides that a "controlled contract":

(a) is a contract by a club with a director or a top executive or a company in which a director or top executive has a pecuniary interest; and

(b) "a contract with a registered club for the provision of professional advice (other than legal advice or advice provided by a registered liquidator) relating to any of the following matters:

(a) significant changes to the management and structure of the club or the governance of the club;

(b) significant changes to the financial management of the club;

(c) the disposal of real property owned by the club;

(d) the amalgamation of the club with another club.

(see Regulation 47K)

Regulation 47K(2) deems the following terms are included as terms of a controlled contract:

"(a) that the contract is of no effect unless it has been approved by the governing body of the registered club concerned;

(b) that the other party to the contract must not be employed or otherwise engaged by the club to carry out functions relating to the governance of the club or the financial management of the club;

(c) that the other party to the contract must not buy or otherwise receive from the club any real property disposed of by the club as a result of the advice provided under the contract."

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Controlled contracts must be sent to the Director of Liquor & Gaming

Within 14 days of entering into a controlled contract the club must send a copy of that contract to the Director of Liquor & Gaming.

Termination of controlled contracts etc

Section 41R provides in effect that if there has been a disposal of land contrary to Section 41J or the club has entered into a controlled contract and a party to that controlled contract (in the opinion of the Director of Liquor & Gaming) is failing or has failed to comply with the deemed terms the Director of Liquor & Gaming can serve notice on each party to the contract giving them 14 days to show cause why the contract should not be terminated.

After considering any submissions from the parties to the contract the Director of Liquor & Gaming may issue a notice terminating the contract. However, he shall not do so if he is of the opinion that the club will be adversely effected by the termination.

The provisions of Section 41R extend to contracts entered into by the club before the commencement of that section. This retrospective effect needs to be considered in the light of the policy guidelines referred to above but probably does not catch contracts entered into prior to 10 December 2003.

Effect of termination by the Director of Liquor & Gaming

Section 41S provides that if a controlled contract is terminated by the Director of Liquor & Gaming:

- the termination does not effect a right acquired or liability incurred by a party to the contract before that termination;

- no liability for breach of contract is incurred by a person who is a party to the contract by reason only of that termination;

- neither the Crown nor the Director of Liquor & Gaming can be held liable by reason of the termination.

Section 41T provides that a party to a contract that has been terminated cannot give any further effect to any part of the contract.

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Notification to top executives

The concept of "top executive" and its potential to cover employees who are not normally considered executives and who would be surprised to be described as such has caused some difficulties for clubs to date.

Section 41U of the Amendment Act provides that when a person becomes a top executive then the club must as soon as practicable give written notice to that person informing them that they are a top executive with responsibilities under the Act.

It is believed that these responsibilities are onerous but if you go through the Act and Regulations you will find that although there are some responsibilities they are reasonably benign. They are as follows:

1. A top executive must disclose any financial interest in an hotel within 14 days of becoming a top executive.

2. A top executive must disclose any gift of $500 or more from a body affiliated with the club.

3. If the remuneration of a top executive is $100,000 or more then that remuneration must be included in the annual report to members by being included in the $10,000 bands.

4. Any close relative of a top executive who is an employee of the club must be named in the annual report to members and the amount of that employee's remuneration must also be stated in the report.

5. The club must not enter into a contract with a top executive or with a company in which a top executive has a pecuniary interest unless the contract is approved by the Board of the Club.

6. A club cannot enter into a contract for the remuneration of a top executive unless the proposed contract has been approved by the Board of the club.

Of course, a top executive will also be an employee covered by the disclosure requirements on employees.

The approved secretary and chief executive officer of the club will also be a top executive and on who there are wider restrictions and duties.

However, in my view most top executives will be able to shoulder these responsibilities relatively easily.

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Offences by secretary and directors in relation to contracts

If a club contravenes any provisions dealing with:

- disposals of land
- controlled contracts
- the requirement to notify top executives of their position

The club is not guilty of an offence but each person who is the secretary of the club and each person who is a director of the club or a close associate of the club is guilty of an offence punishable by a maximum penalty of $11,000 unless the person can satisfy the court that

- the contravention occurred without the knowledge, actual, imputed or constructive of the person.; or

- the person was not in a position to influence the conduct of the club in relation to its contravention; or

- the person if in such a position used all due diligence to prevent the contravention by the club.

Clearly, these provisions are going to place increased obligations on directors and secretaries to ensure that the club strictly complies with the provisions relating to disposals of land and controlled contracts. Because the consequences of non compliance can result in a criminal conviction it is not possible to cover the fine arising out of that conviction with directors and officers liability insurance.

Slide 18
Inquiries in relation to registered clubs

Under Section 41X if the Director of Liquor & Gaming receives an allegation about any "corrupt or other improper conduct in relation to a registered club" then for the purposes of investigating that allegation the Director may arrange for an inquiry to be held. The person appointed to conduct the inquiry has the powers of a Royal Commissioner including the power to compel witnesses to attend before the person to answer questions on oath or affirmation.

The subject of such an inquiry may among other things include matters relating to the termination of employment of members of staff of a registered club.

The person presiding at the inquiry is to report to the Director on the findings of the inquiry and the Director may refer any matter to a law enforcement agency or to any other person or body who may have an interest in the matter (eg) the Australian Taxation Office, the Police, the Anti Discrimination Board.

Under Section 41ZA the Director may order the club to provide each member of the club with information about the findings of the inquiry and/or order the club to hold an election for the Board of Directors. In either case the Director can specify the time within which either order is to be satisfied.

Corporate Governance

Finally, I said I would say something about corporate governance that may be useful.

Most certainly there are reams and reams of literature on the topic that are not in the least bit useful for the average director. Although Peter McLean has shown me a good publication issued by the Stock Exchange for Publicly Listed Companies.

However, the following is the best short definition of corporate governance. It is:

- Doing the right thing

and

- Doing things right.

Per Professor Michael Adams
Professor of Corporate Law UTS

This deceptively simple rule should be followed at every Board meeting. Before every decision is made simply, individually and collectively ask:

> "Are we doing the right thing by the decision we are proposing to make, and are we going about making the decision in the right way/ or having made the decision are we proposing to implement it in the right way?"

Follow this rule consistently not just in relation to the new legislation but in respect of everything and you should not go too far wrong.