

Community Services and Other Legislation Amendment Bill 2004

Explanatory Notes

Objectives of the Bill

The objectives of the Bill are to:

- Regulate the possession of home-brew kits used to produce alcohol in Deed of Grant in Trust (DOGIT) communities and the Shires of Aurukun and Mornington to further minimise harm caused by alcohol misuse and associated violence.
- Regulate homemade alcohol by banning:
 1. the possession of home-brew kits or home-brew concentrate used to produce liquor
 2. the possession or supply of homemade liquor.

Reasons for the Bill

The Bill is part of the Government's response to the Cape York Justice Study, which was submitted to Government by Justice Tony Fitzgerald in November 2001. Justice Fitzgerald recommended immediate Government intervention and pointed out that unless the epidemic of alcohol abuse in Indigenous communities is addressed, reforms in social and economic development and education will not be sustainable.

The Bill is part of a package of reforms to address the prevalence of alcohol abuse and violence in Indigenous communities in Cape York and other parts of Queensland. It builds on the 2002 amendments already made to the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984* and the *Liquor Act 1992*, which provided for the declaration of dry places and restricted areas.

The Bill ensures that the effect of dry place declarations, made by community justice groups or restricted area regulations, made under the provisions of the *Liquor Act 1992*, are not undermined by the use of home-brew kits.

The Bill makes a number of amendments to the *Community Services (Aborigines) Act 1984* the *Community Services (Torres Strait) Act 1984*, and the *Police Powers and Responsibilities Act 2000*.

Estimated cost of government implementation

Management of these amendments is considered to be within the purview of existing work of the alcohol management plans and current policing of alcohol restrictions, and supports the intent of the original legislative directions for controlling the misuse of alcohol within Indigenous communities.

Consistency with fundamental legislative principles

Section 112A inserted into the *Community Services (Aborigines) Act 1984* by *Clause 6* of the Bill and *Section 110A* inserted into the *Community Service (Torres Strait) Act 1984* by *Clause 22* bans the possession of home-brew kits, home-brew concentrate and the possession and supply of homemade liquor in a prescribed community area.

The restriction on the possession of home-brew kits means that alcohol will not be able to be brewed in any part of a prescribed community area. Potentially this could be interpreted as a breach of the “fundamental legislative principles” under section 4(2)(a) of the *Legislative Standards Act 1992* as it may be considered to impinge on a person’s rights and liberties.

However, the restriction is justified as the primary objective of the legislation is to minimise the harm caused by alcohol misuse and associated violence in Indigenous communities. It is considered that the restriction of home-brew kits is justified to contend with community specific problems and to reduce the harm caused by alcohol misuse.

Clause 13 of the Bill inserts proposed sections 180A and 180B into the Act. These provisions are evidentiary aids for the prosecution of offences against 112A. The sections essentially provide that, in the absence of proof to the contrary, a substance is proved too be home-brew concentrate or homemade alcohol if a police officer gives evidence that he or she believes this to be the case and the court condiders the belief to be reasonably held. If these tests are satisfied the onus will shift to the defendant to prove the contrary. *Clause 24* of the Bill makes similar amendments to the *Community Services (Torres Strait) Act 1984*.

This may be perceived as a breach of fundamental legislative principles under, s 4(3)(d) of the *Legislative Standards Act 1992*. Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

The provisions are justified since the knowledge of whether the substance is home-brew concentrate or homemade alcohol will almost certainly be peculiarly in the knowledge of the defendant and the cost to the prosecution of proving the matter by other means would probably be considerable in terms of time resources.

The legislative provisions do not deny a defendant, charged with an offence relating to homemade alcohol, to challenge the evidence of the police. If the defendant believes that the substance is not homemade alcohol, the defendant or the defendant's legal representative is entitled to challenge the belief of the police officer. In these matters the court continues to retain the discretion to exclude all or any of the evidence produced in the proceedings.

Consultation

Aboriginal and Torres Strait Islander communities have been consulted extensively over the past two years regarding alcohol management. The need for prohibition of home-brew alcohol was first revealed in discussions between the Department of Aboriginal and Torres Strait Islander Policy regional officers, community justice groups and other community members in the development of alcohol management plans. The proposed restrictions of home-brew alcohol in a prescribed community/council area support the intended direction of *Meeting Challenges, Making Choices*, and aim to prevent individuals circumventing the restrictions on the carriage of alcohol by producing homemade alcohol with home-brew kits.

Consultation about the Bill has been carried out with Aboriginal and Torres Strait Island councils, community justice groups and relevant public sector unions representing employees in remote Indigenous communities.

Notes on Clauses

Part 1 - Preliminary

Clause 1 provides for the short title of the Act

Clause 2 provides for the commencement of the amendments to the *Community Services (Aborigines) Act 1984*, the *Community Services (Torres Strait) Act 1984* and the *Police Powers and Responsibilities Act 2000* to be fixed by proclamation. The Bill will not be retrospective.

Part 2 - Amendment of Community Services (Aborigines) Act 1984

Clause 3 provides that the *Community Services (Aborigines) Act 1984* is amended in this part.

Clause 4 inserts new definitions in *Section 4*

Clause 5 omits *Section 94(2)* and inserts *Section 94(2)(a)(b)* to expand the purpose of this part. The amendment adds a purpose to prohibit, in certain community areas, the possession or supply of homemade alcohol, and the possession of certain substances and things used to make homemade alcohol.

Clause 6 inserts definitions for part 6 under *Section 95*

“fermenter” is defined for the purpose of identifying devices that comprise a ‘home-brew kit’.

“home-brew concentrate” defines possible ingredients of a substance used to make home-brewed alcohol for the purposes of *Section 112A(b)*

“home-brew kit” is defined for the purpose of *Section 112A* which establishes offences relating to homemade alcohol. The items identified within this definition are defined as the items that comprise a home-brew kit, used in the process to make home-brew alcohol as included in *section 112A(a)*.

“homemade alcohol” is defined for the purpose of Section 112A(c).

“prescribed community area” refers to a community area prescribed under a regulation for section 112A within which the offence provision relating to homemade alcohol will operate and means an Aboriginal council area and the Shires of Aurukun and Mornington and that a regulation may prescribe any or all of the community areas as prescribed community areas (see section 4 of *Community Services (Aborigines) Act 1984*)

Clause 7 inserts section 100(9) whereby any lawful suspension of a declaration of a dry place by a community justice group does not affect the operation of section 112A. Therefore, even if the community justice group suspends a dry place declaration, the prohibition on home-brew kits, home-brew concentrate and homemade alcohol continues to operate.

Clause 8 replaces the heading for Part 6, division 3 to clarify that the division only contains offences relating to community justice groups and dry places, as the new Division 5 contains offences relating to homemade alcohol.

Clause 9 replaces the heading to clarify that the division only contains appeals relating to dry places.

Clause 10 renumbers part 6, division 5 as a result of the insertion of a new part 6, division 5

Clause 11 inserts a new Division into Part 6 after section 112, *Division 5 – Provisions relating to homemade alcohol in certain community areas*.

‘112A makes it an offence to possess home-brew kits, home-brew concentrate or to possess or supply homemade liquor in a prescribed community area. Section 112A also specifies the maximum penalty for an offence under the provision, as 250 penalty units. The restriction on the possession of home-brew kits or homemade alcohol will mean that liquor can not be legally made within any part of the community area.

‘112B clarifies that if there is a restricted area declaration and a limit on the possession of liquor in an area under the *Liquor Act 1992*, this does not affect the prohibition on homemade liquor. For example, even if a restricted area declaration stated that up to one carton of beer can be possessed in a restricted area, it is nevertheless an offence to possess any homemade alcohol if the area is a prescribed community.

Clause 12 amends section 180 to expand the provision so that it can be used to assist in the prosecution of home-brew offences. This provision previously only assisted with proof in relation to ‘fluids’, but now can

assist with proof in relation to other substances, such as home-brew concentrate.

Clause 13 insert new sections 180A and 180B after section 180 to expand the evidentiary aids for the purposes of prosecuting home-brew offences under section 112A.

Section 180A is an evidentiary provision that applies in a proceeding for an offence against 112A(b) relating to the possession of a substance alleged to be home-brew concentrate. Subsection (2) has two elements to be satisfied. Firstly, subsection (2)(a) allows proof to be based on evidence that the container holding the substance has a label that indicates that it held home-brew concentrate. Secondly, under subsections (2)(b) and (c) an officer gives evidence of a belief and the court considers the belief reasonably held that the container held home-brew concentrate. If these elements are satisfied then it is proof that a substance in the possession of the defendant was home-brew concentrate, unless the defendant has evidence to the contrary; shifting the onus of proof from the Crown back to the defendant, requiring the defendant to produce proof to the contrary. Subsection (3) provides the definition for ‘home-brew concentrate’ has the same meaning as part 6. Subsection (3) also defines “label” for this section.

Section 180B is a similar provision to section 180A, that applies in a proceeding for an offence under section 112A(c) or (d) relating to homemade alcohol. Evidence relating to homemade alcohol has two elements to be satisfied. Firstly, subsection (2)(a) there must be evidence of the police officer’s belief that the substance in question was homemade alcohol. Subsection (2)(b) requires that the belief must be reasonably held. Subsection (3) sets the standard required that a police officer gives evidence of a belief and the court considers the belief reasonably held that the substance in question was alcohol and that it was homemade. Subsection (4) enables the Court to consider such a belief as reasonably held. Under subsection (5) subsection (3) does not limit the matters that may form the basis for a police officer’s belief that a substance was homemade alcohol, as long as the police officer’s belief is found to be reasonably held by the court. If these elements are satisfied then it is proof that the substance in question is homemade alcohol unless the defendant has evidence to the contrary; shifting the onus of proof from the Crown back to the defendant, requiring the defendant to produce proof to the contrary. Subsection (6) cross-references the definition of “homemade alcohol” back to Part 6.

Part 3 - Amendment of Community Services (Torres Strait) Act 1984

Clause 14 provides that the *Community Services (Torres Strait) Act 1984* is amended in this part.

Clause 15 inserts new definitions in *Section 4*

Clause 16 omits *Section 92(2)* and inserts *Section 92(2)(a)(b)* to expand the purpose of this part. The amendment adds a purpose to prohibit, in certain community areas, the possession or supply of homemade alcohol, and the possession of certain substances and things used to make homemade alcohol.

Clause 17 inserts definitions for part 6 under *Section 93*

“fermenter” is defined for the purpose of identifying devices that comprise a ‘home-brew kit’.

‘home-brew concentrate’ defines possible ingredients of a substance used to make home-brewed alcohol for the purposes of *Section 110A(b)*

“home-brew kit” is defined for the purpose of *Section 110A* which establishes offences relating to homemade alcohol. The items identified within this definition are defined as the items that comprise a home-brew kit, used in the process to make home-brew alcohol as included in *section 110A(a)*.

“homemade alcohol” is defined for the purpose of *Section 110A(c)*.

“prescribed council area” refers to a council area prescribed under a regulation for *section 110A* within which the offence provision relating to homemade alcohol will operate and means a Torres Strait Island Council area. (see *section 6* of the *Community Services (Torres Strait) Act 1984*.)

Clause 18 inserts a new subsection under *section 98*, subsection (9) “The suspension does not affect the operation of *section 110A*’. Any lawful suspension of a declaration of a dry place by a community justice group does not affect the operation of *section 110A*. Therefore, even if the community justice group suspends a dry place declaration, the prohibition on home-brew kits, home-brew concentrate and homemade alcohol continues to operate.

Clause 19 replaces the heading for Part 6, division 3 to clarify that the division only contains offences relating to community justice groups and

dry places, as the new Division 5 contains offences relating to homemade alcohol.

Clause 20 replaces the heading to clarify that the division only contains appeals relating to dry places.

Clause 21 renumbers part 6, division 5 as a result of the insertion of a new Part 6, division 5.

Clause 22 inserts a new Division into Part 6 after section 110, *Division 5 – Provisions relating to homemade alcohol in certain council areas*.

‘110A makes it an offence to possess home brew kits, home brew concentrate or to possess or supply homemade liquor in a prescribed council area. Section 110A also specifies the maximum penalty for an offence under the provision, as 250 penalty units. The restriction on the possession of home-brew kits or homemade alcohol will mean that liquor can not be legally made within any part of the council area.

‘110B clarifies that there is a restricted area declaration and a limit on the possession area declaration and a limit on the possession of liquor in an area under the *Liquor Act 1992*, this does not affect the prohibition on homemade liquor. For example, even if a restricted area declaration stated that up to one carton of beer can be possessed in a restricted area, it is nevertheless an offence to possess any homemade alcohol if the area is a prescribed council area.

Clause 23 amends section 190 to expand the provision so that it can be used to assist in the prosecution of home-brew offences. This provision previously only assisted with proof in relation to ‘fluids’, but now can assist with proof in relation to other substances, such as home-brew concentrate.

Clause 24 insert new subsections 190A and 190B after section 190 to expand the evidentiary aids for the purposes of prosecuting home-brew offences under section 110A.

Section 190A is an evidentiary provision that applies in a proceeding for an offence against 110A(b) relating to possession of a substance alleged to be home-brew concentrate. Subsection (2) has two elements to be satisfied. Firstly, subsection (2)(a) allows proof to be based on evidence that the container holding the substance has a label that indicates that it held home-brew concentrate. Secondly, under subsections (2)(b) and (c) a police officer gives evidence of a belief and the court considers the belief reasonably held that the container held home-brew concentrate. If these

elements are satisfied then it is proof that the substance in the possession of the defendant was home-brew concentrate, unless the defendant has evidence to the contrary; shifting the onus of proof from the Crown back to the defendant, requiring the defendant to produce proof to the contrary. Subsection (3) provides the definition for ‘home-brew concentrate’ has the same meaning as part 6. Subsection (3) also defines “label” for this section.

Section 190B is a similar provision to section 190A, that applies in a proceeding for an offence under section 110A(c) or (d) relating to homemade alcohol. Evidence relating to homemade alcohol has two elements to be satisfied. Firstly, subsection (2)(a) there must be evidence of the police officer’s belief that the substance in question was homemade alcohol. Subsection (2)(b) requires that the belief must be reasonably held. Subsection (3) sets the standard of a police officer gives evidence of a belief and the court considers the belief reasonably held the substance in question was alcohol and that it was homemade. Subsection (4) enables the Court to consider such a belief as reasonably held. Under subsection (5) subsection (3) does not limit the matters that may form the basis for a police officer’s belief that a substance was homemade alcohol, as long as the police officer’s belief is found to be reasonably held by the court. If these elements are satisfied then it is proof that the substance in question is proved to be homemade alcohol unless the defendant has evidence to the contrary; shifting the onus of proof from the Crown back to the defendant, requiring the defendant to produce proof to the contrary. Subsection (6) cross-references the definition of “homemade alcohol” back to Part 6.

Part 3 – Amendment of Police Powers and Responsibilities Act 2000

Clause 25 provides that the *Police Powers and Responsibilities Act 2000* (PPRA) is amended in this part.

Clause 26 amends section 44A that permits a police officer to seize and dispose of opened and unopened containers of liquor that involve or are likely to involve an offence mentioned in subsection (1). For the purposes of the subsection (1), liquor is extended to include homemade alcohol.

Clause 27 amends section 51, which permits a police officer to stop a vehicle and search a vehicle for the purpose of monitoring a liquor

provision, by extending the monitoring of liquor provisions to include homemade alcohol. If a breach of a liquor provision is detected the liquor may be seized by the police officer.

Clause 28 inserts the *Community Services (Aborigines) Act 1984* and *Community Services (Torres Strait) Act 1984* into Schedule 1 of the PPRA. Schedule 1 of the PPRA lists statutes where it is more appropriate to confer powers under another statute. The insertion of these Acts will alleviate any uncertainty with respect to the scope of the powers conferred under these Acts.