Case Law and Legislative Update

Tony Hatzis
Director
Hatzis Cusack Lawyers

legalwise SEMINARS
www.legalwiseseminars.com.au

A. INTRODUCTION AND OBJECTS OF THIS PAPER

The object of this paper is to review the more significant developments which have occurred in the liquor and gaming space over the last year or so, giving attention to changes most relevant to practitioners. Specifically, the paper will consider:-

- Legislative changes.
- Judicial decisions.
- Decisions of the Independent Liquor and Gaming Authority ("ILGA").

Amendments made to the laws concerning the internal management of registered clubs fall outside the scope of this paper.

B. LEGISLATIVE DEVELOPMENTS

B1. The '3 Strikes' Legislation

The new Part 9A of the Liquor Act 2007, incorporating the "3 Strikes" provisions commenced on 1 January 2012. We have now had some 15 months' experience with the new Part 9A.

Practitioners who Must be Aware of Part 9A

Part 9A is particularly relevant to practitioners who:

(a) advise licensees facing infringement action for alleged breaches of the Liquor Act;

(b) advise incoming purchasers (or their financiers) on the acquisition of a licensed business or property; and/or

(c) advise landlords on granting a lease of licensed premises.

What Does it Do?

Part 9A sets up a system whereby repeat offenders are put on a path towards disciplinary action. That disciplinary action may include having restrictive special conditions placed upon the licence, disqualification of the licensee, suspension of the licence or even cancellation of the licence.

Part 9A does not affect the existence of other powers which are contained in the Act and which otherwise authorise the taking of action against the licensee or the licence. These include sections 53 and 54 (which enable regulators to impose restrictive special conditions, in the public interest), s.148 (which enables a Court to cancel a licence, suspend a licence or disqualify a licensee or impose conditions upon convicting a licensee of any offence) and Part 9 (which empowers ILGA to impose disciplinary sanctions, including monetary penalties and licence cancellation, where certain specified grounds are made out).

How Did Part 9A Come About?

The policy underlying Part 9A was first announced by the then Opposition Leader, Barry O'Farrell, in late November 2010, in the lead-up to the 2011 State election. The policy announcement was made in response to public calls for more to be done to curb alcohol-related violence.

At the time of its announcement, the policy was short on detail. It was contemplated that repeat offenders would face cancellation of their liquor licences after incurring 'three strikes'. The election catchcry of the Opposition Leader accompanying the policy was a message to so-called 'rogue' operators to 'change your ways or change your job".

At the time of the announcement, it was said that the '3 strikes' disciplinary scheme would be overseen by a panel headed by a Magistrate, with representation by Police, the Bureau of Crime Statistics and Research and the Office of Liquor Gaming and Racing.

The policy announcement was part of a package of other measures including enhanced 'move-on' powers to Police, the creation of an offence of being 'drunk and disorderly' (see now sec. 9 *Summary Offences Act)* and a trial of 'sobering-up' centres in areas particularly affected by alcohol-related violence.

How Does Part 9A Work?

Under Part 9A, a "first strike" occurs where the licensee[1] is convicted of a breach of a prescribed section of the Liquor Act. The types of breach for which a strike may be incurred include:

- permitting intoxication or selling liquor to an intoxicated person;
- permitting indecent, violent or quarrelsome conduct;
- selling liquor to a minor;
- permitting the use or sale of a substance suspected to be a drug;
- selling liquor outside permitted hours;
- failing to comply with certain licence conditions imposed under Schedule 4A (which deals with violent venues) or conditions imposed under Part 9A itself;
- failing to comply with certain written directions of the Director-General.

Where there are multiple prescribed offences (such as where a group of minors are served in a hotel), the multiple offences will be treated as a single offence if they all occur within a single 24 hour period: sec. 144C(3).

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[1] Or the approved manager, if the licence is a corporate licence. Note that a licensee can be made vicariously liable for a servant's actions in selling liquor to a minor, or permitting intoxication: sec. 144B(k)

A person is 'convicted' of a prescribed offence if he or she is convicted by a Court, pays a penalty notice or is the subject of a penalty enforcement order: s.144C(1). If a Court finds a person guilty of a charge, but otherwise dismisses the charge without conviction under s.10(1) of the Crimes (Sentencing Procedure) Act 1999, a "strike" will not be incurred.

Strike One- What Happens?

A 'conviction' for a prescribed offence *automatically* brings about a first 'strike': sec 144D(1).

A 'strike' remains in force for a period of three years, commencing from the date that the relevant offence was committed: sec. 144D(4),(5). This means that the strike will take effect from the time of 'conviction', but will relate back to the date of commission of the relevant offence, with the three years calculated from the date of offence.

This raises a practical issue. Generally, police have a period of 12 months in which to commence proceedings for a breach of the Act: sec. 146 *Liquor Act 2007*. Police might elect not to issue a Court Attendance Notice immediately, but wait until after offences giving rise to a second (or even a third) strike occur. The first time that a licensee might know about the first prescribed offence is when he or she receives multiple Court Attendance Notices, making him or her simultaneously liable to action for a second or third strike. For this reason, it would have been preferable for the strike to take effect from the date of *service* of the Court Attendance Notice or Penalty Infringement Notice, rather than relate back to the date of the relevant offence.

Where a first 'strike' is incurred against a licence, the Director-General may thereupon impose certain conditions on the licence, including:

- Requiring the use of plans of management.
- Prohibiting the use of glass.
- Requiring the employment of responsible service of alcohol officers at the venue.
- Notifying third parties (such as banks or landlords) that a strike has been incurred: sec. 144E(1).

Before imposing any new licence conditions under Part 9A, the Director-General must be satisfied that the conditions represent a reasonable response to the behaviour that led to the 'strike': s.144E(4).

It is important to note that 'strikes' are not merely personal to the licensee. Any 'strikes' incurred will continue to affect the licence. Future licensees will take transfers of the licence subject to existing 'strikes' affecting the licence. Indeed, any conditions imposed as a result of a 'strike' remain on the licence permanently (that is, even after the relevant underlying 'strike' expires), unless the decision-maker exercises a power to revoke the relevant condition: s.144E(5), 144F(6).

Strike Two

If a licensee is again convicted of any prescribed offence while a first strike remains in force, the Director-General may impose a second strike, if the Director-General considers that it is warranted by the seriousness of any harm associated with the offence: s.144D(2). Unlike a first 'strike', a second 'strike' is not automatic and whether it is imposed at all is at the discretion of the Director-General.

On a second 'strike', the Director General may impose the following additional range of conditions:

- Conditions as to who may be appointed manager.
- Security measures.
- Winding back liquor trading hours to 11.00pm.
- Patron lock outs at certain times.
- Prohibiting certain types of liquor being sold.
- Prohibiting certain types of entertainment:

sec. 144E(2).

Notification Requirements for Second and Third Strikes-

Before deciding whether to record a second (or third) 'strike' against a venue, the decision-maker is required to notify and take submissions from the licensee, relevant former licensees and anyone who is listed in a notice given by the licensee to the Authority under sections 41 or 55 as being financially interested in the conduct of the business. Ordinarily, a landlord will be included in that list. These provisions make it important that landlords ensure that their interest is recorded on the OLGR computerised database, so that the landlord is made aware of any possible disciplinary action.

Strike Three

If two strikes are in force against the licence and the licensee is again convicted of a further prescribed offence, the Independent Liquor and Gaming Authority (note, not the Director-General) may decide that a third strike should be incurred, after taking account the seriousness of any harm associated with the commission of the relevant offence: s.144D(3)(c). As with a second 'strike', the imposition of a third 'strike' is not automatic and only occurs after a discretion is exercised to impose a third 'strike'.

Notably, the legislation vests the decision to impose a third 'strike' in a different decision-maker (the Authority). No doubt, this was done to prevent allegations of bias on the part of the Director-General (who will have recently decided to impose a second 'strike'), as well as to reflect the more serious sanctions available at the third 'strike' stage.

If the Authority decides to impose a third 'strike', the Authority must take action to prevent the commission of further prescribed offences: sec. 144F(1). The regulatory

options available to the Authority include cancelling the licence, suspending the licence, disciplining the licensee or imposing any relevant conditions on the licensee.[2]Any regulatory action taken must, however, be reasonably necessary to prevent further prescribed offences being committed: sec. 144F(3).

Club Licences on a Third Strike- If the relevant licence is a club licence, the regulatory option of cancelling the licence is not open to the Authority. However, the Authority may appoint an administrator to the club: sec. 144F(4)(d).

Court Appeals against Convictions for a Prescribed Offence

The mere lodgement of an appeal against conviction for a prescribed offence does not automatically delay the incurring of a 'strike' or the taking of regulatory action in respect of the 'strike': sec. 144J. However, any regulatory sanctions will be suspended pending determination of the appeal: sec 144J.

If the appeal succeeds in overturning a conviction, any strike based on the conviction is revoked and any regulatory action taken as a result of the 'strike' ceases to have effect: sec. 144C(2).

Rights of Review and Appeal against Decisions made under Part 9A

All decisions made by the Director-General under Part 9A are reviewable by the Authority, which then stands in the shoes of the Director-General:: sec 144H(2).

Any first-instance decisions made by the Authority are reviewable by the Administrative Decisions Tribunal: sec. 144H(2).

Any applications for review must be made within 21 days after the review applicant receives notice of the decision.

Importantly, the application for a review operates to stay the reviewable decision, unless the reviewing body decides to dissolve the stay.

Effect on licence values

Clearly, the statutory scheme carries potential to limit the trading activities of a licensed business and, in turn, to reduce the capital value of both the business and the licensed premises. It may be said that this statutory scheme adds a further element of investment risk into the hospitality industry.

What Must Practitioners Do?

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[2] Note that any prescribed offences which occur within a 24 hour period are treated as one offence for the purposes of the Act.

Practitioners who act for intending purchasers must make inquiries as to whether any "strike" is current in respect of the licence and as to whether there is any pending action which may result in the incurring of a 'strike'.

A public register of 'strikes' is maintained by the OLGR and is published on OLGR's website.

Freehold owners of licensed premises, as well as financiers, would be well advised to regularly check that register, in order to protect their investment.

Practitioners acting for landlords should seek instructions as to what number of 'strikes', or what other regulatory action, is to give contractual grounds for terminating a lease. Landlords should be advised of the risks to the licence arising under this regime.

Practitioners who advise a licensee about any alleged infringements must keep in mind the potential consequences for a licensee under Part 9A. The payment of a penalty infringement notice, relating to the commission of a prescribed offence, will be considered to be a conviction for the offence and may result in the incurring of a "strike". That, of itself, may provide sufficient incentive for clients to defend allegations that they have committed a prescribed offence. Even if a client admits the facts giving rise to a prescribed offence, consideration should be given to the client's prospects of obtaining an order under sec. 10(1) Crimes (Sentencing Procedure) Act, which would otherwise avoid the incurring of a 'strike'.

As of the date of writing, there are 37 venues noted on OLGR's public register as having incurred a "strike". One of those venues is noted as having incurred a second strike (although the second strike determination is the subject of a review application). Twenty of the thirty-seven strikes are for the offence of "licensee permit intoxication" pursuant to Section 73(5) of the Act. Initially this seemed to be the most popular offence drawing a "strike". More recently, enforcement authorities seem to favour the offence of "sell or supply liquor outside authorised trading hours".

If a licensee is charged with "permit intoxication", there are essentially 3 lines of defence available to the licensee. First, the Police must prove that the relevant patron was "intoxicated" to the criminal standard, i.e. beyond reasonable doubt. The Prosecutor must prove that the relevant patron's speech, balance, co-ordination or behaviour was "noticeably affected" and that it is reasonable in the circumstances to attribute that to the consumption of liquor: Section 5. There is eminent interstate authority (which has been applied by Local Court Magistrates in NSW) that a person is not "noticeably" affected unless his symptoms would have been noticed by a reasonable person standing in the shoes of the licensee or employee concerned: Starkie v Van Tobruk [2007] WASC 51. Secondly, a licensee will have a complete defence to the charge if he can show that, notwithstanding the intoxication of the patron, all "reasonable steps" were taken by the licensee to prevent intoxication. This requirement has been interpreted more liberally in recent years: see R vs Kenny [2008] NSWDC 389. Thirdly, a licensee will avoid a strike if the Court does not record a conviction, pursuant to Section 10(1) of the Crimes (Sentencing Procedure) Act: sec. Section 144C, definition of "commits a prescribed offence".

Practitioners should particularly note the provisions of Section 23(2A) of the Fines Act 1996. This section (inserted in 2008) enables a person to elect to take a matter to Court even after having paid a penalty infringement notice. The Court election must however be made within 90 days after the penalty notice was first served. In my experience, this has been a particular useful provision in the context of the "3 Strikes" legislation as some licensee have only realised after paying a Penalty Infringement Notice that the consequence would be a "strike" against their licence.

Some amendments made in July 2012 filled a lacuna in the legislation as originally enacted. Originally, a Penalty Enforcement Order (which follows if a person simply ignores a Penalty Infringement Notice under the Fines Act) did not trigger a "strike". Under the original provisions, a strike would only be incurred where a person *paid* the Penalty Infringement Notice or was otherwise convicted by a Court. The person could therefore avoid "strike" action by simply taking no action in respect of a Penalty Infringement Notice.

The experience over the past year has also illustrated the potentially harsh consequences for innocent parties, such as landlords. In one case, the landlord of a leased hotel had issued a Notice of Termination to the tenant for non-payment of rent and other breaches. The notice indicated that the landlord intended to take possession within a 14 day period if the breaches continued. After service of that notice, but a few days before the landlord retook possession, Police visited the hotel after midnight and found a beer bottle within the hotel. This was a breach of conditions applying to the hotel under Schedule 4 (the "violent venues" provisions), which required that no drinks be sold in glass after midnight and that the licensee remove all glassware. Police issued a Penalty Infringement Notice to the tenant, which the tenant duly paid. The consequence was that when the landlord retook possession of his hotel, the hotel licence had incurred a "strike".

Fortunately, in this case, the Director-General accepted submissions that the Penalty Infringement Notice should not have issued to the tenant, but could only have been issued to the landlord. The submission was that, because the landlord had given the tenant a Notice of Termination of Lease, the landlord was "entitled to" possession at the date of the relevant breach, meaning that the landlord (and not the tenant) was deemed to be the licensee as at the date of the alleged breach: sec 61 Liquor Act 2007. As the landlord had not paid the Penalty Infringement Notice, the landlord (as deemed licensee) had not been convicted of a prescribed offence. The requirements for incurring of a 'strike' had not been met.

In that case, the landlord was very fortunate in being able to avoid a "strike" because he had issued a Notice of Termination. Had he not done so the landlord – though innocent of any offence – would have inherited a hotel of potentially diminished value.

As noted above, another difficulty with the legislation as presently drafted is that enforcement authorities may simultaneously issue a licensee with a number of penalty notices for "strike" offences incurred on different dates. The consequence is that a licensee may be facing multiple strikes in one go. I had one case where a licensee was

simultaneously served with 2 penalty infringement notices for 2 alleged "strike" offences (on different dates) and was thereby facing 2 strikes.. This is at odds with one of the expressed objects of the '3 Strikes legislation', namely to encourage, educate and compel licensees to improve their performance as they incur 'strikes'. It seems that, rather than achieving that object, the legislation encourages enforcement authorities to stockpile enforcement action, such that a licensee may be confronted with a major threat to his/her livelihood.

B2. The Kings Cross Legislation

This special legislation arose in the aftermath of the tragic death of Thomas Kelly on a Kings Cross street in July 2012. Immediately following that event, the NSW Government announced that it would undertake an audit of Kings Cross licensed venues.

In general terms, that audit found that more people had been asked to leave Kings Cross venues for intoxication purposes than were refused entry in the first place. The audit report concluded that venues were transferring the problem of intoxicated persons onto the streets.[3]

Following the audit report, the Director-General proposed the imposition of licence conditions on all Kings Cross venues, under Section 54 of the Act. That proposal spawned litigation in the Supreme Court: Director-General v Lewis [2012] NSWCA 436. That litigation prompted the Minister to pass special legislation, to ensure that the proposed conditions would be imposed on Kings Cross venues.

The special legislation was the Liquor Amendment (Kings Cross Plan of Management) Act 2012. In his Second Reading Speech, the Minister said that the Act was passed to "prevent reforms [being] undermined by legal or other processes that will delay implementation of solutions that address the very significant problems in Kings Cross". The Act empowered the making of special regulations to apply to Kings Cross venues. Those regulations (Liquor Amendment (Kings Cross Late Trading Venues) Regulation 2012) commenced on 1 December 2012.

In general terms, the regulations imposed conditions which require:

- No liquor sales between 4.00 and 5.00 am (or during the last hour of trade if the venue closes before 5.00 am) on Saturday and Sunday mornings.

- No glass to be used in serving drinks after midnight on any day.

- No shots or high strength drinks after midnight on weekends.

[3] Given that the law regarding "permit intoxication" does not allow licensees the option to keep patrons on the premises where they show signs of intoxication, it is hardly surprising that there will be numbers of people asked to leave. To the writer, this is not an abrogation of responsibility but rather an indication that venues are being responsible.

- No more than 4 drinks to be served to one patron at any one time on weekends.
- RSA Marshalls after midnight on weekends.
- CCTV system covering all publicly accessible areas and the outside footpath.
- Incident Register to be maintained at all times.
- Crime Scene Preservation conditions.
- Exclusion of persons wearing colours or insignia of certain motorcycle groups.
- Promotion of Police campaigns regarding responsible service of alcohol.
- Maintaining hourly alcohol sales data, if required by the Director-General.

The legislation provides that exemptions may be granted by the Director-General.

According to the Second Reading Speech, the purpose of the exemption provision is so that controls can be "tailored to specific circumstances so that regulatory measures do not impose unnecessary costs on lower impact businesses such as small restaurants and cafes." In the same vein, the Minister warned that "applications for exemptions will not be used to frustrate the process" and that "applications will only be entertained in specific circumstances".

The Liquor Amendment (Kings Cross Plan of Management) Act 2012 also extended the "freeze" applying to the Kings Cross Precinct until 24 December 2015.

In extending the "freeze", Parliament carved out of the "freeze" provisions [which also apply to the Oxford St/Darlinghurst precinct] all "small venues". For the purposes of the "small venue" carve out, a "small venue" is defined as premises where not more than 60 patrons may be lawfully on the premises under the terms of the relevant DA or liquor licence, there are no gaming machines, the licence is an on-licence and the premises do not operate as a public entertainment venue. (Note that the definition of "small venue" will be changed by the Small Bars Bill presently before the Parliament – see B4 below).

The Liquor Amendment (Kings Cross Plan of Management) Act 2012 also expanded the geographical area of the "Kings Cross Precinct", to which these controls apply.

The controls in the Act and Regulations repealed the controls previously imposed under the Kings Cross Liquor Accord, and the Kings Cross Precinct Liquor Accord. Those Liquor Accords thereby became redundant and were terminated by the legislation.

B3. Changes to the Liquor "Freeze"

The Freeze – All practitioners advising clients who purchase or lease premises for hospitality purposes within the City of Sydney Local Government Area should be aware of the "freeze", contained in sections 47A-J of the *Liquor Act 2007*. The "freeze" commenced in mid-2009. It prohibits the grant of certain liquor licence approvals and certain kinds of development consent for land located within the "freeze precinct".

The 'freeze' was imposed to deal with concerns about alcohol related violence and antisocial behaviour in certain "hot spots" within the city of Sydney.

Originally portrayed as a temporary measure (and originally enacted for 12 months to mid-2010) so as to "stabilise" the situation until more permanent solutions were developed, the "freeze" was extended three times, in 2010, 2011 and again (for six months) in mid-2012.

Apparently, the Government has commissioned certain research on alcohol-related violence and anti-social behaviour in the freeze precincts. More permanent solutions are to be crafted once that research is fully considered. In the meantime, the 'freeze' continues to apply.

The freeze precinct

The freeze precinct is defined in Schedule 5 of the Act. Originally, it covered three areas located within the Sydney Local Government Area, which can be described generally as:

- CBD South (lifted from the 'freeze' in December 2012)
- Kings Cross
- Oxford Street /Darlinghurst.

The precise boundaries of those areas are defined in Schedule 5 of the Act. The freeze applies to any premises if part of the premises falls within the 'freeze precinct': s.47A(1).

What applications are affected by the "freeze"?

Grants of certain New Licences- During the freeze, certain types of licences cannot be granted for premises located within the freeze precinct. These types of licences are as follows:

- Hotel
- Club
- On premises licence for a nightclub (public entertainment venue)
- Packaged liquor licence (bottle shop)
- Producer/wholesaler licence.

Applications for other types of on-licences (such as a restaurant *simpliciter)* are not prohibited, but ILGA ("the Authority") must nonetheless be satisfied that the grant of such a licence is not likely to result in any increase in the numbers of people entering the freeze precinct principally to consume alcohol: s.47B(2).

Extensions of Trading Hours Past Midnight - No extended trading hours authorisations (which permit trade past midnight) can be granted during the period of the 'freeze'. Premises which have an existing extended trading hours authorisation cannot have their hours further increased into the post midnight period.

Relaxation of Licence Conditions- The 'freeze' prohibits the relaxation of any licence conditions for the types of venues specified above, as well as for on-premises restaurants, where the relaxation would result in:

(a) an increase in the numbers entering the freeze precinct to consume alcohol; or

(b) an increase in the patron capacity of the premises.

'Primary Service Authorisations' under s24(3) - The freeze also prevents the grant of authorisations (under s.24(3)) which would otherwise allow a restaurant to serve liquor without a meal.

Boundary changes - The freeze prohibits the Authority from approving changes of boundaries for hotels, clubs, on-premises licences (including restaurants) and bottle shops, if the boundary change would result in:

(a) an increase in the number of people entering the freeze precinct to consume alcohol; or

(b) an increase in the patron capacity of the premises.

Development Consent - Section 47I prohibits the granting or modifying of a development consent, if the carrying out of the development requires the obtaining of an approval that cannot be granted because of the freeze.

The particular prohibition does not extend to a development consent for the purpose of conducting a restaurant: 47I(3).

On 24 June, the "freeze" was extended for another 6 months, for all 3 original freeze precincts.

The "freeze" for the Kings Cross precinct has been extended to 24 December 2015: Liquor Amendment (Kings Cross Plan of Management) Act 2012. For the Oxford Street/Darlinghurst precinct, the "freeze" has been further extended for another 12 months, to 24 December 2013: Liquor Regulation (Extension of Freeze Period) Regulation 2012. By the same regulation, the CBD South Precinct was removed from the "freeze" altogether, with effect from 24 December 2012.

When announcing that the CBD South Precinct was removed from the "freeze" from 24 December 2012, the Minister announced that a new software tool ("EVAT", an acronym for Environment and Venue Assessment Tool) will be trialled to assess new liquor licence applications in the City of Sydney from early 2013. The software tool apparently provides a framework for a risk assessment of specific applications made to the Authority. Factors considered include:

- Venue-specific factors (the licence type, patron capacity, extended trading, liquor accord membership, mitigation strategies).

- Factors relating to the wider vicinity (density of licences, proportion of "high risk" venues, proportion of late trading venues).

- Wider environmental factors including levels of assaults and offensive behaviour in the area, late night transport options and assessments of risk made by Police and Councils.

The tool apparently enables various ratings to be attributed to these risk factors (namely low, moderate and high).

The tool is to inform the Authority, which in turn must be satisfied that a particular application meets the "overall social impact" test in sec 48(5) and/or is otherwise in the public interest.

B4. The Small Bars Bill

The Liquor Amendment (Small Bars) Bill was introduced into Parliament on 20 February 2013. At the date of writing, the Bill had been passed through the Lower House but had yet to be introduced into the Upper House.

The Bill provides for a new category of licence (a "Small Bar Licence").

A Small Bar Licence will authorise sales of liquor for consumption on the premises only. Food must be provided and liquor may not be sold if the number of patrons on the premises exceeds 60.

The Small Bars Bill exempts Small Bar Licences from the operation of the "freeze" provisions. If enacted, this concession would replace the "small venue" concession in sec 47AA, which was enacted in late 2012 as part of the Kings Cross amendments to the Liquor Act.

The standard hours for a "small bar" will be noon to midnight 7 days. If a "small bar" is located outside of a "freeze" precinct, its trading hours will automatically extend to 2.00 am: Clause 20B(2).

In addition to the above hours, a "small bar" can seek an extended trading hours authorisation, but not so as to permit trading between 5.00 am and 10.00 am on any day. A small bar located in a 'freeze precinct' can apply for an extended trading hours authorisation, notwithstanding the 'freeze': cl.48(3B).

An applicant for a Small Bar Licence will be required to satisfy the Authority that "the overall social impact of the licence… being granted will not be detrimental to the well being of the local or broader community": sec 48(5).

However, no Community Impact Statement need be lodged with the licence application if the use as a small bar (or the application for an extended trading hours authorisation) requires development approval and where the local police and the Director-General have been notified within 2 days of the making of application for development approval: Clause 48(3A). Otherwise, a Category B Community Impact Statement would be required: Sch 2, cl.[2].

An applicant for a small bar licence who does notify the local police and the Director-General within 2 days of making an application for DA/modification is also exempted from the other notification provisions in the legislation (for example, the requirement to notify all occupiers of neighbouring premises within 50 metres, and affixing a notice to the premises).

In that event, the only further notification required is notification to local police, whom the applicant must notify within 2 days after lodging the liquor licence application with the Authority.

It appears that the effect of these provisions is to make small bar licences subject to the same "social impact" test as applies to most other licences (including bottle shops and hotels), but to streamline and fast-track the process for small bar applicants.

In favouring small bar applicants in this way, the provisions somewhat corrupt the "social impact" process, as the process is dependent upon wide notification and consultation with members of the local community. It is quite conceivable that under this process, people who might be affected by the grant of a new licence (such as neighbours) might not become aware of applications.

B5. "De–coupling" of Liquor and Gaming

For many years, the Act has included a provision requiring that the primary purpose of the business of a hotel must be the sale of liquor by retail, and that the keeping of gaming machines must not unduly detract from the character of the hotel: sec. 15.

This rule, together with the rule limiting the number of machines for hotels with small footprints (see Gaming Machines Regulation Clause 43) was developed to prevent hotels being carried on essentially as "gambling dens".

Commencing 30 March 2012, the primary purpose rule was relaxed, to enable hotels to stop selling liquor under certain circumstances as follows:-

Without gaming machines- if gaming machines are not being operated, the hotel may cease alcohol service at any time, and provide other services and facilities (such as food and beverages): sec. 15A(5),(1).

This enables, for example, a hotel to provide a breakfast service without serving liquor.

With gaming machines – However, if gaming machines are to be operated, liquor sales may cease during the period in which the hotel is otherwise authorised to trade under an extended trading authorisation (midnight to 5.00 am Monday to Sunday or 10.00 pm to 10.00 am Sundays): sec. 15A(1). This amendment was justified on the basis of "concerns about poker machine players playing under the influence of alcohol" (Second Reading Speech).

If a hotel seeks to cease liquor service during the standard trading period (5.00 am until midnight Monday to Saturday or 10.00 am until 10.00 pm Sundays) approval must first be obtained from the Authority: sec. 15A(2). The Authority must be satisfied that the operation of gaming machines would not detract unduly from the character of the hotel and that gaming activities will be conducted responsibly: sec. 15A(4).

The relaxation of the primary purpose rule gives incentive to hoteliers to seek extended trading hours to operate only a gaming room. In that event the hotel is required to specifically address the social impact of gaming activities, when applying for an extended trading hours authorisation: sec. 48(7), cl. 10A Liquor Regulation.

B6. New arrangements for gaming machines

AADs – As at 31 January 2012, any remaining AADs (or "cardie" machines) which had not by that date been converted into gaming machine entitlements[4] lapsed.

Hardship gaming machines – "Hardship" machines were a species of authorisation to operate poker machines issued after the lifting of the initial poker machine "freeze" in 2002. Hoteliers who had been caught out by the freeze (such as those who had lodged applications for new licences expecting to obtain gaming machine entitlements, or

[4] Pursuant to the 2 for 1, or 3 for 1 "swap" arrangement in former Section 22 of the Gaming Machines Act.

those who had renovated their hotels expecting to get such entitlements) could apply for "hardship" entitlements: see sec. 27 Gaming Machines Act 2001.

The 2001 Act provided that, at any time following a period of 3 years after the allocation of a hardship gaming machine, the licensee could apply to the Board/Authority to surrender the hardship gaming machine for a (transferable) poker machine entitlement: sec. 31. The purpose of the 3 year embargo was to prevent hoteliers trafficking in these entitlements – the purpose being to provide them with an income stream from the operation of machines which would assist them to overcome the initial "hardship".

Amendments which came into effect in 2012 pursuant to the Clubs, Liquor and Gaming Machines Legislation Amendment Act 2011, provide that any remaining hardship machines expire on the tenth anniversary of first approval by the Liquor Administration Board: Schedule 1 [52].

Permits – The Clubs, Liquor and Gaming Machines Legislation Amendment Bill 2011 closed a loophole that previously existed in the Gaming Machines Act in respect of permits.

Previously, a hotel which transferred poker machine entitlements would have its gaming machine threshold reduced by the number of PMEs transferred.

Instead of transferring PME's, a hotel which had permits attached to its licence could transfer those permits and retain its full gaming machine threshold. For hotels within a group, they could transfer permits to a hotel with an unused threshold, without reducing the threshold of the transferring hotel.

That "loophole" has been closed. Section 26 of the Act provides that the gaming machine threshold of the transferring hotel is to be reduced by the number of permits transferred.

B7. Review of the Liquor Act due 2013

The Liquor Act 2007 was assented to on 13 December 2007.

Section 162 requires that a 5 year review be conducted and that the review be tabled in Parliament by 13 December 2013.

Feedback is being sought from industry groups during 2013. That feedback may well result in further debate and reform.

B8. Density Study

In early 2012, OLGR commissioned a study by the Allen Consulting Group into the cumulative impact of the number of licensed premises in New South Wales– in particular, as to the "density" of licensed venues.

In licence applications before the Authority, where the Authority is required to consider the "social impact" of a particular application, considerations of licence density invariably arise. Usually, such "density" is expressed as the number of licences per population in a given territorial area.

There are several Australian and international studies on the effects of higher liquor licence densities. Some studies find that higher liquor licence densities are associated with higher levels of social harm – such as assaults, disturbances, adverse health effects. Other studies find no such associations. In its 2009 report for the Victorian Government, Allen Consulting Group itself found, following its review of the literature, that density studies demonstrate "mixed findings".

The 2012 NSW study has been completed by Allen Consulting Group. Submissions were taken from many interested agencies, community groups and industry players. However, the Government has not published or released the results of that study to date.

According to a media release from the Minister's office dated 20 December 2012, the research showed that liquor licence density is "not the sole cause of negative social impacts". The release said that whilst there is a relationship between density and alcohol-related violence, "a range of factors might contribute to alcohol-related assaults and anti-social behaviour".

C. JUDICIAL DECISIONS

C1. Content of Procedural Fairness – Director-General v Lewis [2012] NSWCA 436.

This case was prompted by the Director-General's attempt to alter the Kings Cross Precinct Liquor Accord so as to impose a range of licence conditions on Kings Cross venues. (Ultimately these conditions were imposed by means of regulation, as note earlier in this paper).

In August 2012, the Director-General wrote to affected licensees, stating that he had formed a preliminary view that it was necessary to vary the existing terms of the Kings Cross Precinct Liquor Accord to impose those conditions on licensees.

The Director-General's view was informed by a report prepared by the Compliance Branch of OLGR. That report wa based on an audit of venues carried out by compliance officers, as well as crime data sourced from the Bureau of Crime Statistics and Research and from NSW Police.

The report concluded that there were high numbers of alcohol-related incidents within the precinct, that the period midnight to 5.00 am was the highest risk period, that there were "significant numbers of glassings" and that patron migration contributes

substantially to violence and anti-social behaviour in the public domain: at [23]. The report claimed that there were significant numbers of alcohol-related assaults on licensed premises and in public places and "high levels of alcohol-related street offences". The report referred to 28 glassing incidents reported to Police in the 4 years to July 2012.

Solicitors for the Kings Cross Hotel wrote to the Director-General, stating that there was reason to believe that the data summarised in the report was inaccurate. The Kings Cross Hotel requested to be provided with the source data summarised in the report, much of which was not publicly available.

The essential question before Nicholas J, and thereafter the Court of Appeal, was whether the Kings Cross Hotel was entitled to be provided with that source material. The Hotel argued that it required the material in order to make a submission to the Director-General opposing the proposed conditions.

Nicholas J ruled in favour of the Hotel. His Honour reasoned that, in order for the Hotel to have a real opportunity to contest the proposed measures, the Hotel should be provided with the substance of the information relied upon in the compliance officers' Report. That would enable the Hotel to test and call into question the accuracy of the conclusions expressed in the Report. His Honour added that if the Hotel were denied access to the source material, the Hotel would be denied the opportunity to contest that the summaries contained in the Report were inaccurate and/or unreliable.

The Court of Appeal reversed the decision of Nicholas J. In denying the Hotel any entitlement to be provided with the source material, McColl JA (with whom the other members of the Court agreed) made the following points:-

- The larger the class of persons to be affected by a decision, the less the likelihood that procedural fairness will be attracted and, if it is, the lower the likely content of the duty: at [60].

- An obligation to accord procedural fairness does not require a decision maker to disclose material of which the decision maker (in this case the Director-General) does not have actual knowledge and does not propose to consider in making the relevant decision: at [65].

- An administrative decision maker (such as the Director-General) is only obliged to disclose material which amounts to "adverse information that is credible, relevant and significant to the decision to be made". Administrative decision making is not to be "over judicialised" by requiring processes more appropriate to adversarial litigation: at [66].

- An adequate opportunity to be heard may be satisfied where the gist of any adverse information is disclosed, without the entire text or document being disclosed: at [71].

- It was "telling" that the Precinct Liquor Accord provisions made no express provision for affected licensees to make submissions against proposed changes

to a Precinct Liquor Accord. This contrasted with other provisions in the Act (such as the disciplinary provisions in Part 9) which give affected licensees a right to make submissions. In the view of the Court of Appeal, this was an indicator that Parliament intended to modify the procedures of natural justice in the case of Precinct Liquor Accords; such Accords are intended to achieve outcomes in a geographical area rather than focusing on the conduct of a particular licensee: at [104].

The Court concluded that the Hotel had been notified of the information which the Director-General proposed to have regard (being the Report) and which the Director-General considered to constitute "adverse information that is credible, relevant and significant to the decision to be made". As the Hotel had been provided with that Report and invited to make submissions to the Director-General on the Report, that was sufficient compliance with the rules of procedural fairness.

In a separate judgement, Sackville AJA relied upon the following factors in refusing relief to the Hotel:-

- The exercise of the statutory power did not directly affect only the hotel, but also affected other participants in the Accord, as well as members of the public visiting the precinct.

- The matters to be considered by the Director-General are general in character and do not relate to the particular characteristics of the respondents or their hotel.

- The material sought does not specifically relate to the conduct or management of the Hotel but is statistical material that relates to alcohol-related incidents in the precinct as a whole.

- The source material sought by the Hotel would not be before the Director-General when he made his decision.

His Honour concluded that, having regard to those matters, refusing to provide the Hotel with the source information requested involved "no practical injustice".

C2. Sale of liquor "with or ancillary to a meal"

In a case decided in the District Court in February 2012, Hackett v R, an issue arose as to whether liquor was sold "with or ancillary to a meal".

Mr Hackett operated a restaurant with an ordinary on-premises (restaurant) licence. The licence did not have a primary service authorisation, which might have otherwise authorised the sale of liquor without meals.

Three undercover policemen entered the premises at 7.30 pm and sat at a table. They were given 3 meal menus and ordered 3 beers. The beers were served at 7.41 pm. At 8.05 pm the waitress returned, asking if the undercover officers wanted some more

beers. The officers ordered 2 more beers and a coffee, which were served shortly thereafter. At 8.53 pm the officers left, paying only for the liquor and coffees.

In the Local Court Mr Hackett was convicted of selling liquor in breach of the conditions applying to his licence (namely, conditions requiring him to serve liquor "with or ancillary to" a meal).

The decision was overturned by Judge Williams in the District Court.

His Honour held that the prosecution must show that the liquor was not sold for the purpose of consumption with a meal. The person whose 'purpose' is relevant is the licensee, or his employee (the waitress who served the three officers). His Honour said that there was nothing on the facts before him to rebut the presumption that the waitress believed that the undercover officers intended to have a meal. In particular there was nothing unreasonable in the waitress' actions in serving a second round of drinks at around 8.05 pm.

C3. Meaning of a "wall" for the purposes of the Smoke Free Environment Act : Blacktown Workers Club Limited vs O'Shannessy [2011] NSWCA 265

This case is significant for venues which allow patrons to smoke in their gaming rooms.

The Club operated a gaming room. Three of the 8 sides of the gaming room were enclosed by glass or solid walls. Five of the 8 sides comprised of security mesh. Behind the security mesh was a covered loading dock area and walkway.

In contest was the question of whether the gaming room comprised a "smoke free area" under the Act and Regulations. That turned on whether the security mesh comprised a "wall". If it did, then the gaming room would be treated as "substantially enclosed" and would need to be kept 'smoke free'. The Regulations defined a "wall" as including any structure that "prevents or impedes lateral airflow".

The mesh comprised some 41 – 50% solid material, within which there were apertures. Evidence from an expert in the Local Court was to the effect that the mesh screens had "some impact" on the lateral movement of cigarette smoke but that such impact was "extremely minor". The Local Court Magistrate found that, on that evidence, the mesh screens did not have a "discernible diminishing impact" on airflow, such that they could not be said to "impede" airflow through the mesh.

In the Supreme Court, Harrison AJ overturned the Magistrate's decision. Harrison AJ held that, given that the mesh screens performed a dividing function (that is they divided the gaming room from the adjoining areas), the mesh screens could be regarded as a "wall", within the ordinary meaning of that term.

The Court of Appeal disagreed with Harrison AJ and reinstated the Magistrate's decision. The Court of Appeal held that a purposive interpretation should be applied to the Smoke Free Environment Act. The Act is concerned with the effect of structures in aggravating the exposure of smokers and others towards tobacco smoke

in public places. Given that purpose, there is good reason to accept that a structure or device which does not discernibly impede lateral airflow is not to be considered as a "wall": at [39].

One area of uncertainty created by the decision is that the Court of Appeal left open the possibility that the guidelines contained in the Regulation are not mandatory in determining whether a particular space is "substantially enclosed". An unfortunate consequence of that approach, if adopted in other cases, is that a Magistrate might be able to convict a venue which complies with the "75% rule" contained in the Regulations, where the Magistrate otherwise forms the impression that the relevant gaming room is "substantially enclosed".

Handley AJA also left open another possibility, that is that there may more than one way of defining the relevant public place to which these provisions might apply: at [68]. In *Blacktown Workers* the gaming room had been defined by the prosecution as being the relevant "public place". Handley AJA left open the possibility that the prosecution might have defined the public place as including the adjoining walkway or loading dock areas. In that event, the relevant calculations might be quite different.

C4. Alliance Engineering v Yarraburn Nominees Pty Limited [2011] NSWCA 301 – Ownership of Poker Machine Entitlements

This case concerned the question of whether a landlord could restrain a transfer of gaming machine entitlements away from the Hotel. The tenant licensee had sold and transferred an entitlement. The landlord claimed that this was a breach of the Lease.

Clause 4.10 of the Lease provided that the tenant must, at the end of the Lease, do everything necessary to transfer to the landlord "the hotelier's licence and any other licences of the said premises for the then current year".

Clause 4.11 prohibited the tenant from making "any application for removal of the licence or licences of the said hotel" without the prior written consent of the landlord.

Previous cases had suggested that a poker machine entitlement was not properly considered to be a "licence".

The Court of Appeal focused upon the proper interpretation of clauses 4.10 and 4.11 in the context of this particular lease. The Court concluded that it is a conventional use of language to describe the tenant as having a "licence" to keep poker machines at the Hotel. The Court held that it was equally a conventional use of language to describe the permission to keep poker machines as a "licence of the premises for the current year" within the meaning of clause 4.10 of the Lease. The tenant's actions in transferring an entitlement were properly described as an application "for removal of the licence" which contravened clause 4.11 of the Lease, because the tenant's actions amounted to an application to remove the licence to keep and operate a poker machine at the hotel.

It appears from this and some other more recent decisions, that the superior Courts are now more willing to interpret Lease covenants widely, so as to grant injunctive relief

to landlords who wish to restrain their tenants from removing gaming machine entitlements from a hotel licence.

D. DECISIONS OF THE INDEPENDENT LIQUOR AND GAMING AUTHORITY AND DIRECTOR-GENERAL

D1. Black Head Surf Life Saving Club and Wild Rover

In two recent decisions, ILGA has considered the consequences of an applicant failing to comply with the notification requirements under the legislation.

In Black Head a Surf Club made an application for an on-premises licence in 2010. The Liquor Regulation required that notice of the application be served on the occupiers of any building, where any part of the *land* on which the occupiers' building is constructed falls within a 50 metre radius of the Surf Club.

The Club misunderstood the requirements of the Regulation thinking that they only had to notify residents who resided within a *building* located within a 50 metre radius of the Surf Club. Using a 3 metre tape measure, a Club officer measured the distance to a nearby residential apartment building as being 50.87 metres. (The nearest boundary of the apartment building *land* was within 50 metres). The residents of that building were not notified.

In June 2012 a resident pressed a submission that the licence was invalidly granted because the resident had not been notified. There was some evidence that, in 2010, the application had in fact come to that resident's attention and he had made submissions opposing the application at that time.

The Authority took the view that compliance with the notification requirements set out in the Act and Regulations amounts to a precondition to the valid exercise of power by the Authority to grant a licence. The Authority particularly had regard to the use of mandatory language, in relation to the advertising and notification requirements, as well as the subject matter and objects of the Act, which give a right to persons to make submissions in respect of licence applications. The Authority concluded that the right to make submissions would be rendered largely ineffectual if people were not made aware of the existence of applications.

The consequence was that the purported decision in 2010 to grant an on-premises licence was invalid.

In Black Head, the Authority also referred to case law to the effect that an administrative decision maker may treat a purported decision affected by clear jurisdictional error as being void and of no effect: Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597.

In Wild Rover the Authority refused a licence application on the ground of non-compliance with Clause 9 of the Liquor Regulation, which requires that a notice of the application be affixed to the premises until the application has been determined by the

Authority. The relevant notice was maintained on the premises for some 6 weeks but was taken down by the applicant on 27 November, some 2 days before the Authority's scheduled meeting, in the expectation that the Authority would grant the application. The applicant re-affixed the notice in the afternoon of the next day, 28 November, after an objector had informed the Authority that the notice had been taken down. The notice was down for a total period of about 27 hours.

Again the Authority applied similar principles, holding that compliance with the advertising/notification requirements is mandatory and that such compliance is a precondition of the exercise of the Authority's power to grant a licence. The application could not be granted, due to the failure to comply with the notification requirements.

D2. Extended Trading Hours applications

Certain decisions of the Authority in relation to applications to extend trading hours show a readiness to refuse applications. Applications have been refused in areas where there has been some evidence of alcohol-related violence, even though the venue itself is not shown to contribute to those problems. Refusals have also been made in areas where there are low rates of alcohol-related assaults, but some evidence of assaults on the premises (such as Hillside Hotel).

In some decisions the Authority has remarked that late trading premises enable people to drink longer for later, creating a greater potential for disturbance and/or crime. The observations contained in these cases come close to an expression of a philosophy against late trading venues.

D3. Social Impact and Bottle Shop applications

There have been a number of bottle shop applications refused by the Authority. The particular reasons vary from case to case.

Some refusals (such as at Lake Cargelligo) involved places with a disadvantaged population. Yet there have been other refusals in places (such as Bondi Junction and Manly) with advantaged populations.

The Authority is particularly interested in criminal statistics and the potential of the proposed outlet to aggravate those statistics.

In a recent case involving Dan Murphy's at Byron Bay, the Authority paid particular regard to the large scale of the proposed premises and to recent research, which suggests that larger-scale premises are likely to give rise to commensurately more harm. In this case, the Authority considered that the proposed liquor store would contribute to existing problems with underage drinking, public drinking and pre-fuelling (with 'pre-fuelling', in particular, exacerbating existing problems with alcohol-related crime in Byron Bay). While the Authority accepted that the applicant had a good regulatory record and had appropriate plans of management and other controls in place, nonetheless the Authority was not satisfied that the applicant could control and respond to issues beyond the point of sale.

TONY HATZIS
11 March 2013