CASE LAW AND LEGISLATIVE UPDATE

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:-

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

B. Legislative Developments

B.1 *The Liquor Act Review*

When it commenced operation in July 2008, the Liquor Act was scheduled for a five year review in 2013.

A former Commissioner of the Office of Liquor Gaming and Racing, Michael Foggo, conducted the statutory review. 106 submissions were received from a range of interested parties. The review was completed in late November and publicly released in mid-December 2013.

Some 91 recommendations for reform were made by Mr Foggo. Among those recommendations, and those most likely to be relevant to practitioners, are as follows:

1. An annual "risk based" licensing fee for all licensed venues across the State, similar to the system presently operating in Victoria. (Provisions to implement such a scheme were included in the *Liquor Amendment Act* 2014 which commenced on 6 February 2014, but details of the licensing fee scheme have yet to be determined).

2. Creating a new statutory position (Director of Licensing) with power to determine lower-impact applications, such as boundary changes and transfers to new licensees. The idea is to streamline and fast-track such lower impact applications. The review recommended greater delegation of the Authority's functions to the Chief Executive and to individual Authority members.

3. Liquor licence application fees should be aligned to the actual business cost of processing applications and should be indexed to CPI every four years. Presently, such fees cover only about 28% of the business cost of processing the applications.

4. Non-profit associations should be exempted from the need to obtain any licence for up to six events per year, for fundraising activities.

5. That the "reasonable steps" defence in sec. 73(4) to a charge of "permitting intoxication" (sec. 73(1)) should be removed.

6. That the primary purpose of requirements in the legislation should apply <u>at all times</u> when a venue trades, subject to a defined grace period. For example, a restaurant with a primary service authorisation ("PSA") would have to continuously serve meals throughout its trading hours, subject to a defined grace period, suggested as being one (1) hour at the end of trade.

7. That venue capacity limits be incorporated into licence conditions – as a means of controlling social impacts and preventing overcrowding.

8. The review supported a merger of the CIS process (which considers the overall social impact of granting an application) with the similar process for obtaining DAs from Local Councils, so as to reduce red tape and duplication. The review foreshadowed a "liquor development application" which would be determined by Local Councils, after obtaining input from OLGR. The Authority's role would be reduced to overseeing probity and competency standards when issuing a licence. The Authority might still conduct a CIS where no development approval is required.

B.2 *The Liquor Amendment (Kings Cross Plan of Management) Act 2013*

This Act commenced on 6 December 2013.

It adds further regulatory requirements to those first imposed under *The Liquor Amendment (Kings Cross Plan of Management) Act* 2012. Both pieces of legislation were said to be designed to "tackle alcohol-related violence" in the Kings Cross precinct.

"Strikes"

Significantly, the Act amends sec. 144B, such that any breach of the special licence conditions imposed on Kings Cross venues will amount to a "strike" offence under the "three strikes" scheme. The imposition of a strike can potentially devalue the business or the licensed premises very substantially. A strike can now be incurred for offences such as:-

- CCTV not covering every "publicly accessible area" within the premises: clause 53H Liquor Regulation.
- Not record details in the "Incident Register" required to be maintained under clause 53I.
- Not comply with the Crime Scene Preservation Guidelines: clause 53J.
- Not keep the adjacent footpath clear of litter: clause 53L.
- Not permanently display an "hours of operation" sign at the entrance to the premises in the required form: clause 53NA.
- Not comply with the rules relating to ID scanners: sec. 116A.

High-Risk Venues

The Act creates the concept of "high-risk" venues: sec. 116A(2). These are venues which can trade beyond midnight at least one night per week and have a patron capacity of more than 120. Other venues can also be designated as "high risk" by regulation, or if so designated by the Director-General: sec. 116A(2)(b), (c). Venues can also be

excepted from these requirements by regulation. Presently 15 venues (mainly restaurants and accommodation hotels) are on the excepted list: clause 53S.

There are presently 35 "high-risk venues" in Kings Cross.

If a venue is designated as a "high-risk venue" then:-

(a) The appointment of an "approved manager" is required: sec. 116A(2)(i). Such a person can only be appointed if he has satisfied the Director-General that he has the experience and capacity to be responsible for a high-risk venue: sec. 116A(4A). If the premises trades at any time between 9.00 pm and 7.00 am and the licensee is not present (or the manager, in the case of a corporate licensee) such an "approved manager" must be present: clause 53GA.

As with the other Kings Cross special conditions, failure to comply is a "strike" offence.

(b) The venue must comply with the patron ID scanning requirements, when those requirements commence. At the date of writing, those requirements have not yet commenced as the Government is still seeking tenders for a central provider, who will maintain the database system associated with the scanners. When these requirements commence, venues must not permit patrons to enter unless the patron produces a form of identification containing a photograph of the person with her residential address and/or date of birth. The photo-ID must be scanned into the system: sec. 116AC(1). High-risk venues must refuse admission to the person if she fails to produce the photo-ID or if the person has been subject to a banning order: sec. 116AC(1)(b).

The ID scanners must be of a kind approved by the Director-General.

Each licensee of a high-risk venue must prepare a privacy policy and a privacy management plan relating to the use of ID scanners: sec. 116AC(5). Privacy policies must be displayed at the entry to the venue.

In introducing the legislation into Parliament, the Minister referred to the ID scanning scheme as being under "trial" for a period of 12 months from its implementation.

(c) High-risk venues must exclude any person who is the subject of a temporary or long term banning order: sec. 116AC(1)(b).\

Banning Orders

The Act introduced the concept of "banning orders" applying to venues in the Kings Cross precinct.

A Police Officer (at or above the rank of Sergeant, or a lower ranked officer with the approval of such a higher ranked officer) may, by written order prohibit a person from entering or remaining on any licensed premises (other than licensed restaurants trading no later than midnight) in the Kings Cross or adjacent precincts: sec. 116AD(1).

Such an order can only be given if the person refuses to comply with a move-on direction, or fails to leave a licensed premises (or does not move away from the vicinity) when required to do so under sec. 77 (that is, because the person was intoxicated, violent or quarrelsome): sec. 116AD(1). The Police Officer must be satisfied that the person's conduct is likely to continue to cause a public nuisance or a risk to public safety.

The details of such an order are then required to be entered into the precinct ID scanner system: sec. 116AD(4).

The ILGA is empowered to make "long term banning orders" which prohibit a person from entering or remaining on any "high-risk" venue for a period of up to 12 months: sec. 116AE(1). Only the Commissioner of Police may apply for such an order: sub-sec. (2). Such an order may only be made by ILGA if:-

(a) The person has been charged with, or found guilty of, a serious indictable offence involving alcohol-related violence (whether or not in Kings Cross); or

(b) The person has been the subject of three temporary banning orders during a continuous 12 month period.

A "serious indictable offence" is defined in sec. 4 of the Crimes Act 1900 as meaning an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more. By way of example, an assault occasioning actual bodily harm carries a

maximum penalty of 7 years jail and so would fall into this category: sec. 59 *Crimes Act* 1900.

The legislation does not specify any criteria for the exercise of discretion by ILGA in determining whether or not to make a long-term banning order. Nonetheless the purpose of the legislation is clearly protective – that is, to protect the public from the consequences of alcohol-related violence. Any decision to impose a long term banning order would have to have regard to that object: and see Interpretation Act 1987 sec. 33.

Decisions of the Authority to impose a long term banning order may be reviewed by the Civil and Administrative Tribunal of NSW: sec. 116AF. One of the two initial decisions made by the Authority on 7 January 2014, is presently undergoing such a review.

A person who fails to comply with a temporary or long term banning order is subject to a maximum penalty of $5,500.00. Alternatively, Police may issue a penalty infringement notice for $550.00.

Cancellation of RSA Competency Cards

The Regulations made under this Act (clause 39AA) enable the Authority to suspend or revoke the RSA competency card of any staff member and/or disqualify the person from obtaining a Competency Card for up to 12 months: clause 39AA(1). Such an order may be made if the Authority is satisfied that the person has contravened any of his or her obligations under the legislation relating to RSA or relating to the use of a patron ID scanner.

Where such an order is made, the person must not work in any capacity as an employee in licensed premises in NSW: clause 39AA(8). A person affected by such an order may seek a review from the Civil and Administrative Tribunal: clause 39AA(6).

Liquor Sales Data

From 1 January 2014, all clubs, hotels, public entertainment on-premises venues (including all high-risk venues) in the Kings Cross precinct must keep quarterly records of all liquor sold for consumption on-premises from 8.00 pm until a time that the premises are required to cease trading: clause 53O. The rationale for this rule is

supposedly to allow decision-makers to make better informed regulatory decisions about the links between quantity of alcohol consumed and alcohol-related violence in the Kings Cross precinct.

B.3 *The Liquor Amendment Act 2014*

This legislation was introduced and passed in a special sitting of Parliament convened on 30 January 2014, following an announcement made by the Premier only 9 days earlier, on 21 January 2014.

The Premier's announcement followed a relentless campaign in the Fairfax media and elsewhere, calling for extensive measures to combat what were perceived to be more intense and frequent incidents of alcohol-related violence. That campaign, and the seeming moral panic that it caused, was mounted in the face of data showing that, State-wide the number and incidence of alcohol-related assaults has been reducing steadily in recent years. For example, BOCSAR figures showed a reduction of 6.3% in the rate of alcohol-related assaults in NSW in the year to 30 September 2013. Over a 5 year period to September 2013, BOCSAR data shows that the rate of non-DV assault in NSW has reduced by one seventh. BOCSAR attributes two thirds of the fall in non-DV assaults over the last 2 years to a reduction in *alcohol-related* non-DV assaults.

The Act was introduced to Parliament together with the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014, which introduced a new offence of one-punch assault where the victim dies. A minimum mandatory sentence of 8 years, and a maximum sentence of 25 years apply where the perpetrator was intoxicated by drugs or alcohol at the time of assault. Any non-parole period must be at least 8 years.

This legislation was apparently passed to encourage greater "personal responsibility" on the part of offenders.

Its effect – particularly the effect of mandatory minimum sentencing – has been extensively debated elsewhere. It will not be further discussed in this paper, which is concerned with the liquor licensing aspects of the new legislation.

The Liquor Amendment Act incorporates a number of reforms, which may be summarised as follows:-

1. *10.00 pm Close for all Off-Premises Sales Throughout NSW*

The legislation ensures that hotels, clubs and bottleshops cannot any longer sell liquor for consumption off the premises after 10.00 pm on any day. The apparent purpose of this reform was to deal with concerns that "pre-loading", most notably in entertainment precincts, was exacerbating problems of drunkenness and associated misbehaviour.

Unlike some of the reforms in the Act, this reform is not limited to Central Sydney and applies to all premises in NSW.

2. *Recurrent Licence Fees: A "risk-based" licence fee for all NSW licences*

The Act empowers the raising of recurrent licence fees by way of regulations (which have yet to be passed or drafted).

Since 1997, there have been no recurrent licence fees levied on NSW licences (except in the case of some licences granted between 2004 and 2008, but these fees were abolished in 2008).

At the date of writing, no regulations have been made nor have any draft regulations been published. Nonetheless, section 58A(3) makes clear that the system of recurrent licence fees will be a "risk-based" system. That section requires that, in setting a fee, relevant factors to be taken into account must include the location of the premises, trading hours, patron capacity, offences committed "at or in relation to the licensed premises" and the licensee's compliance history.

If fees are unpaid for 28 days after first falling due, the licence is automatically suspended. If fees remain unpaid for a further 28 days, the licence is cancelled: sec. 58B.

If a licence is cancelled, an application to reinstate the licence can be made (within 56 days of cancellation) by a freehold owner, or by another party interested in the business, upon payment of the outstanding fee, late fees and an application fee: sec. 58C.

It will be important that freehold owners (and their mortgagees) monitor the payment of fees by a tenant, in order to protect and preserve the value of the owner's interest.

3. The Sydney CBD Entertainment Precinct

The Act creates the concept of a "prescribed precinct", to which particular new restrictions apply: sec. 116B, C. The main restrictions involve an extension of the liquor "freeze", a 1.30 am lock out commencing 24 February 2014 and a 3.00 am cessation of liquor service also commencing on 24 February 2014.

The area known as the Sydney CBD Entertainment Precinct is declared a "prescribed precinct": clause 53V Liquor Regulation 2008. That area is shown on a map published under the Regulation. A premises that fronts or backs onto a street within a prescribed precinct, or which abuts such a street, is deemed to be within the prescribed precinct: sec. 116C.

It appears clear that the legislation has been drafted in this way so as to readily permit other areas to be made subject to the same regulations as now apply to Sydney CBD entertainment area. Indeed, when the Premier announced these reforms, the NSW Police Association called for these reforms to immediately extend to Byron Bay and Parramatta.

4. The Freeze

The Act extends the "liquor freeze" which presently applies to premises in the Kings Cross and Oxford Street/Darlinghurst precincts, to the whole of the Sydney CBD Entertainment Precinct. For now, the freeze is to apply until 5 February 2016: sec. 47A(1)(b), clause 79.

The "freeze" significantly limits the development potential of land within the freeze zone. In particular, the freeze prohibits the grant of the following licences/authorisations/development approvals:-

- The grant of a hotel, club, packaged liquor, producer/wholesaler or on-licence for a public entertainment venue: sec. 47B(1).

- Any other class of on-licence, if the Authority is satisfied that granting the licence would result in an increase in the number of persons entering the freeze precinct principally to consume alcohol: sec. 47B(2).

- Any extended trading authorisation ("ETA") or further extensions of hours under an existing ETA: sec. 47C.

- Revoking or varying licence conditions on certain types of licences, where the effect would either be to increase patron capacity or cause an increase in the number of people entering the freeze precinct principally to consume liquor: sec. 47D.

- The grant of a "primary service authorisation" ("PSA") (which allows liquor to be sold to patrons otherwise than with or ancillary to another product or service) for an on-licence relating to a restaurant or public entertainment venue. For other on-licences, a PSA cannot be granted if it would result in an increase in patron capacity or an increase in the number of people entering the freeze precinct principally to consume alcohol: sec. 47E(1), (2).

- Removals of certain licence types outside or within the freeze precinct: sec. 47F.

- Changing the boundaries of certain licence types where the change of boundaries would result in an increase in patron capacity or in the number of people coming to the precinct principally to consume liquor: sec. 47G(1).

- The grant (or modification) of development approval, if the development requires the obtaining of a licence approval or authorisation that cannot be granted because of the operation of the freeze. This part of the freeze does not apply to DAs lodged before the freeze commenced (6 February 2014) or for restaurant DAs: sec. 47I(3).

- Specifically, the freeze does not apply to a "small bar" (defined in Division 3A as a particular licence type where the number of patrons cannot exceed 60 at any one time: sec. 20C): sec. 47AA. This is a further advantage for "small bar" licences, which are regarded by the Government as being less problematic for alcohol-related violence than bigger venues. Nor does the 'freeze' apply to or in respect of specific premises, or classes of premises that are prescribed by the regulation: sec. 47AB.

New clause 79(2) of the Liquor Regulation exempts from the 'freeze' any CBD subject premises that are a "tourist accommodation establishment" (other than a club) or a licensed restaurant. This raises something of an anomaly in the legislation regarding the grant of PSAs for restaurants in the Sydney CBD. On the one hand, sec. 47E(1) prohibits the grant of such PSAs absolutely. On the other hand, clause 79 of the Regulation now says that the freeze provisions do not apply to or in respect of CBD subject premises that are a licensed restaurant. On the face of it, it appears that this does "carve out" from the freeze any application which concerns licensed restaurants, including PSAs.

5. The 1.30 am Lock Out

Section 116I empowers the making of regulations, prescribing conditions to which a licence in a "prescribed precinct" is subject.

Clauses 53Y and 53Z respectively prescribe a 1.30 am "lock out" and a 3.00 am "cease alcohol service" requirement for most on-premises licence types. The sale of liquor in the room of a resident or guest in a "tourist accommodation establishment" is exempt: clause 53Y.

The 1.30 am lock out requirement applies to all clubs, hotels, karaoke bars and on-premises licences relating to a public entertainment venue (except for a cinema or theatre), and to all 'high-risk' venues.

The lock out does not apply to a "tourist accommodation establishment" which is defined to mean premises operating under a club, hotel or on-licence which provides accommodation of at least 20 rooms or self-contained suites and provides meals and beverages to temporary residents and guests. Clearly, this is designed to exempt accommodation hotels from the lock out requirement. However, a bar that is accessible from the street is not exempt, even if that bar forms part of a "tourist accommodation establishment": clause 53Y(3). The lock out period commences at 1.30 am and continues until 5.00 am the next morning: clause 3, sec. 12(1)(a)(i) Liquor Act 2007.

Patrons are permitted to remain on the premises after 1.30 am during the licence's permitted trading hours, but if they leave they must not be permitted to re-enter during the lock out period: clause 53Y.

An affected licensee may seek an exemption from the Director-General: clause 53ZA. However, the Director-General may only grant such an exemption if satisfied that:-

(a) the exemption is unlikely to result in an increase in the level of alcohol-related violence or anti-social behaviour or other alcohol-related harm in the Sydney CBD Entertainment Precinct; and

(b) measures other than the specified condition to which the exemption relates are in place and that such measures will be effective in reducing the risk of alcohol-related violence or other anti-social behaviour on or about the premises.

The Director-General may exempt part only of that particular premises. By way of example, this would empower the Director-General to grant an exemption permitting continued entry to patrons of the Hotel's gaming room.

6. Liquor Sales Cessation Period

Clause 53Z applies a 3.00 am cease liquor service requirement to hotels, clubs, karaoke venues and on-premises licences (other than a cinema or theatre) and to all 'high-risk' venues. This requirement does not apply to licensed restaurants, small bars and tourist accommodation establishments.

The requirement is that liquor not be sold or supplied during the "liquor sales cessation period" which is from 3.00 am to 5.00 am: clause 3.

The Regulation does not itself prevent a venue from continuing to offer non-liquor beverages or from providing other services. So, for example a nightclub licensed to trade 24 hours can continue to provide entertainment during the "liquor sales cessation period". A hotel licensed to trade 24 hours might continue to operate its gaming room provided that liquor is not sold or supplied.

(Note that a hotel must keep closed the bar area after its licensed trading hours: sec. 103 and must remove all patrons from a bar area within 30 minutes of closing time: sec. 104).

Exemptions can be granted from these requirements, on the same ground as an exemption to the "lock out".

7. Banning Orders

The 2014 Act extends to venues in the CBD Entertainment Precinct the Police powers to issue temporary banning orders to individuals, preventing them from entering or remaining in licensed premises: sec. 116AD, sec. 116F. It also extends the powers of the ILGA to issue long term banning orders preventing people from entering or remaining in "high risk venues" in the Sydney CBD Entertainment Precinct.

8. ID Scanners

The 2014 Act replicates the provisions of the Kings Cross (Plan of Management) Act 2013 with regard to the ID scanning requirements.

As with Kings Cross, the ID scanning requirement will apply to venues defined as "high risk". The ID scanning scheme is not expected to commence until after a tender process has been completed.

9. Other Conditions?

The 2014 Act enables the imposition, by regulation, of other conditions on licences located within the "prescribed precinct".

In enacting the legislation, the Premier said that a number of additional measures might be considered in the coming weeks. These might include similar condition to those imposed on Kings Cross venues – such as no shots, prohibiting the use of glass, requiring RSA Marshalls and CCTV requirements.

10. Strikes

Any breach of a condition deemed to be imposed on a venue in a "prescribed precinct" under these new provisions will amount to a "strike" offence: sec. 144B.

Again, this creates the potential for a relatively minor breach (such as mistakenly allowing back into a venue a patron who leaves to have a cigarette after 1.30 am, or failing to scan a particular patron's ID) to incur a strike, which may significantly devalue a business or premises.

C. Significant Judicial Decisions

C.1 Catering Arrangements

In hotels and clubs, it is not uncommon for arrangements to be made with external food providers/caterers, who will run the food operation of the kitchen as an independent business, leaving the hotel/club to operate the bar and other services in the venue. Commercially, this can be a beneficial arrangement for both parties.

However, two recent decisions demonstrate that such arrangements may attract the provisions of sec. 16 of the *Retail Leases Act*, which grants a minimum 5 years statutory term to the caterer/food provider.

In *Gnych –v- Polish Club Limited* [2013] NSWSC 1249, the plaintiffs agreed to operate a restaurant on the first floor of the Polish Club premises. Negotiations for a lease of 2 years (with 2 options of 2 years each) commenced in late 2011, but were never concluded. Mr and Mrs Gnych entered into possession in March 2012 and undertook renovations. Their relationship with the club then soured in mid-2013 and they were excluded from the restaurant in August 2013.

Shortly before they were excluded, Mr and Mrs Gnych's lawyers wrote to the club's lawyers, asserting that Mr and Mrs Gnych were entitled to a minimum 5 year term under the *Retail Leases Act*.

Mr and Mrs Gnych then sought a declaration in the Supreme Court that they were entitled to a minimum lease term of 5 years under sec.16 of the Act.

The Court held that there was a "retail shop lease", as the premises were being used as a restaurant, that Mr and Mrs Gnych had entered into possession of the shop and they paid rent pursuant to an agreement with the club. Ball J. found that the arrangement amounted to a periodic month-to-month tenancy. The club argued that the Act did not apply to a retail shop lease of less than 6 months with no option to renew: sec. 6A(1). However secs 6A(2) and (4) provide that if the tenant has been in possession for more than a year and has notified the landlord in writing that the tenant relies on sec. 16, the tenant will be entitled to the minimum 5 year term. Ball J found that the letter from the Gnych's solicitors to the Club's lawyers satisfied that requirement.

The club also argued that the catering arrangement was illegal under sec. 92(1)(c) and (d) of the *Liquor Act* 2007. That section provides that a licensee must not:-

> *(c) "lease or sub-lease any part of the licensed premises on which liquor is ordinarily sold or supplied for consumption on the premises… or*
>
> *(d) lease or sub-lease any other part of the licensed premises except with the approval of the [Independent Liquor and Gaming] Authority".*

Ball J. held that the arrangement between the club and the Gnychs' offended sec. 92(1)(d). His Honour held that the restaurant was a part of the Club's licensed area and was leased to Mr and Mrs Gnych without the approval of the Authority.

However, his Honour held that the breach of sec. 92(1)(d) of the Liquor Act did not disentitle Mr and Mrs Gnych from obtaining a declaration that they had the right to occupy the premises pursuant to the statutory lease term. His Honour concluded that the Gnychs' claim did not depend upon any illegality. Indeed, it was the Club that had sought impermissibly to rely upon the illegality.

Though not stated in the judgement, it appears material to the decision that the offence against the *Liquor Act* was committed by the licensee – in this case the club or its employee. It would therefore have been unreasonable to deny Mr and Mrs Gnych the benefit of a declaration and injunction because of an illegality committed by the Club.

The Court also rejected a submission by the Club that a "retail shop" cannot include a restaurant from which liquor is sold.

In the result, the Court granted the Gnychs a declaration that they were entitled to a 5 year term commencing on the date that they first took possession of the restaurant, together with an injunction preventing the Club from interfering with that right.

A similar result was reached in respect of another catering arrangement, heard by the Administrative Appeals Tribunal's Appeal Panel: *Lytton –v- North Bondi RSL Club* [2012] NSWADTAP 8.

In that case, the Club had entered into a written licence agreement with a caterer, granting the caterer exclusive use of the kitchen and non-exclusive use of any other areas within the Club required to serve meals to customers, for a term of 4½ years. The caterer operated the Club's bistro servery.

The Appeal Panel held that there was a retail lease in respect of the kitchen and servery area. Pursuant to Section 16, the term of that lease was extended to 5 years. Further, the Club was required to repay to the caterer certain capital costs charged under the licence agreement, but which could not be permissibly charged under the *Retail Leases Act* provisions.

These cases emphasise the importance in ensuring that solicitors acting for clubs and hotels should require a certificate under the *Retail Leases Act* for catering arrangements, in order to avoid the implication of a minimum 5 year term.

There mere fact that a catering agreement is expressed to be a "licence" or to be "non-exclusive" will not be enough to prevent the implication of a retail shop lease. The definition of "retail shop lease" expressly includes an arrangement where a person grants another a right of occupation for value to use premises as a retail shop whether or not the right is a right of exclusive possession and whether the agreement is express or implied, oral or in writing.

A retail shop lease is considered as having been entered into when the caterer enters into possession pursuant to the arrangement, or begins to pay rent (whichever happens first): sec. 18(1). Accordingly, clients should be advised not to allow a caterer into possession unless and until the caterer has signed a lease/licence agreement and has given a certificate under sec. 16(3) waiving the caterer's right to a minimum 5 year term.

C.2 "Staffies Drinks"

In 2012-13 it became a regular practice of Police to attend hotels after hours, during the time-honoured practice of "staffies" drinks. Police would then charge the publican with "serve/supply liquor after trading hours", which gave rise to a "strike" offence under the Liquor Act: sec. 144B. Indeed, a number of "strikes" were incurred in 2013, precisely in such circumstances.

On Good Friday 2013, Police viewed "staffies" drinks being held within a dining area of the Byron Bay Beach Hotel, after the required closing time of 10.00 pm. As is usual in such arrangements, liquor was being sold to staff at a discounted price. Police issued an infringement notice to the publican, which was defended. The matter was heard by Magistrate Dakin at Byron Bay Local Court.

The Liquor Act contains a general prohibition against selling liquor after permitted trading hours: sec. 14(2), (3). Police relied on that general prohibition in prosecuting the publican. However, there is also a more specific prohibition on selling liquor to residents or employees. That prohibition is contained in sec. 17(5) and prohibits the sale of liquor to an employee in a "bar area" of a hotel after licensed trading hours.

A "bar area" is defined in the Act as meaning an area where liquor is ordinarily sold or supplied, but excludes a dining area (or areas which are otherwise the subject of a minor's area authorisation).

Magistrate Dakin held that the specific prohibition in sec. 17(5) governed when employees could be served alcohol. As the "staffies" drink session took place in a "dining area" the provisions of sec. 17(5) were not offended. Accordingly, the sale of drinks to employees after 10.00 pm on Good Friday within the dining area was not prohibited and the charge was dismissed.

Whilst the decision is not binding on other Local Court Magistrates it is nonetheless of some persuasive authority. Accordingly, solicitors who have clients charged with this offence should consider what area within the Hotel the sale of drinks to employees took place, as there may be a defence to a "strike" charge against the venue.

D. Decisions of the Independent Liquor and Gaming Authority

Over the past year there have been a number of significant decisions of the Authority.

Set out below are three of the more significant areas of decision which arise in practice:-

(i) *Extensions of trading hours*

The Authority has shown a restrictive approach to granting applications for extended trading hours. Many examples of that restrictive approach can be seen in the

Authority's decisions published on its website www.ilga.nsw.gov.au. It appears that it will be particularly difficult to persuade the Authority to grant extensions of trading hours in areas where there are high levels of alcohol-related crime, even if there are no objections to the application and even if the venue appears to be well-run.

One example of this approach is an application refused in early 2013 to permit an extension of the trading hours of a licensed restaurant at Manly from 10.00 pm until midnight on a Sunday (Belgrave Cartel). In that case there was no objection by Council, Police or any members of the public. The restaurant did not have a PSA (meaning that liquor could only be sold with or ancillary to the provision of meals).

The Authority looked at the very high level of alcohol-related crime in Manly.

In refusing the application they said that the introduction of one more licensed premises with extended trading hours into an established hotspot for alcohol-related crime was not in the interests of the wider community.

Despite the applicant's best efforts to supply liquor responsibly, the Authority considered that the extension of trading hours would more likely than not mean that the premises would host a minority of patrons who would consume alcohol to excess over an extended period. Such patrons would move through the neighbouring streets of Manly after departing the premises, either migrating to other late trading premises or taking transport away. In doing so, they would be likely to contribute to incidents of alcohol-related disturbance and offensive conduct. Some patrons would talk loudly amongst themselves, laughing arguing, yelling and/or making noise when departing. The Authority found that these alcohol-related impacts become of greater concern, from a social impact perspective, at a time when the majority of other licensed premises are required to cease the supply of alcohol.

Similar reasons have been given by the Authority in refusing a number of other extended hours applications. In some cases the Authority has said that the extension of trading hours would only increase the contribution made by patrons of the premises to alcohol-related crime and disturbance in the neighbourhood. In other cases the Authority has said that the extension of trading hours is likely to cause patrons to drink over a prolonged period, who are likely to achieve higher levels of intoxication and

thereby generate, or contribute to, higher levels of disturbance in the surrounding neighbourhood.

In a number of refusal applications the Authority has also played down the public interest benefits urged upon it by applicants. In doing so the Authority has taken a "macro" view of such benefits, often finding that there is such a large number of existing outlets that the grant of an individual application is unlikely to make any significant contribution to overall public benefits.

That is not to say that the Authority has refused all applications for extended trading hours before it. Some have been granted, but usually subject to very stringent controls.

Nonetheless, the reasoning applied by the Authority in quite a number of refusals seems to mark a reluctance to grant applications of this kind. Further, despite an initial willingness to do so, it appears that the Authority is unwilling to approve applications subject to a trial period, which was a common device used under the pre-2008 legislation.

In this regard, the Authority's approach is that if an application fails the "social impact test" in sec. 48(5), the application must be refused.

(ii) *Winding Back of Trading Hours*

The current and former Liquor Acts contained provisions entitling Police to apply to reduce the trading hours of licensed venues.

In practice, these provisions were very rarely employed by Police. Police had preferred to bring disciplinary proceedings against recalcitrant venues, whereupon a range of orders (including large fines, disqualification and licence cancellation) could follow. However, the disciplinary provisions were read down somewhat by the Authority, finding that it was necessary to prove some "fault" on the part of the venue before a disciplinary complaint could be established.

This has led to the growing popularity, amongst Police, of bringing applications to reduce trading hours, pursuant to sec. 51 of the Act. This section does not prescribe any particular test that must be proven in order to establish a winding-back of trading hours.

Consequently, the Authority applies a general public interest test, weighing the various objects of the legislation.

In two recent decisions published on its website (involving Bada Bing at Kings Cross and La La Land at Byron Bay) the Authority has shown some willingness to grant such applications by Police.

In support of such applications, Police often put forward large amounts of "linking data" taken from the Police computer system, linking incidents of alcohol-related crime back to particular venues. Many of these incidents (such as PCA offences or offensive conduct) may take place far away from the licensed premises and are matters of which the venue would be likely to have little or no knowledge.

Given the very restrictive approach taken by the Authority to granting extensions of trading hours, and its readiness to conclude that extended hours cause adverse social impacts, it is likely that the Authority will favourably consider future applications by Police to reduce venue trading hours.

This introduces a new element of investment risk into the late trading hospitality sector.

(iii) *"Three Strikes"*

When the "Three Strikes" legislation was passed into law in 2011, there were some built-in protections for licensees. One of those was that a second or third strike should only be incurred against a licence if the Director-General or the Authority decides that such a strike should be incurred "because of the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence": sec. 144D.

Both the Director-General and the Liquor Authority appear to have taken the view that the word "may" entitles the decision-maker to look at the range of harms that could potentially have flowed from the relevant offence.

In Hue Karaoke the relevant offence was "permitting intoxication" on the premises. A waitress complained to Police that the intoxicated patron hit her face and then pushed her over onto a couch. The Director-General found that the harm that "may" have resulted from that "permit intoxication" includes community alarm and outrage when confronted with the impact of alcohol-related violence and anti-social behaviour. On

appeal, the Authority upheld the decision to impose a second strike and found that the alleged assault was more likely than not to have taken place. However, the Authority also took into account other harms that "may" have taken place, but which in fact did not. The Authority said that had the victim fallen the wrong way after the assault or onto a glass vessel, she may have been seriously injured. Had she been hit to the face in a different way, she may have incurred a facial injury.

This expansive interpretation of the provisions of sec. 144D is likely to erode the intended protections to licensees and more readily lead to conclusions that second and third strikes should be imposed.

Conclusions

The current political and regulatory environment appears to be one that is hostile towards liquor industry interests.

This is evident from the recent legislation affecting late trading venues in Sydney City, as well as in the freeze precincts of Kings Cross and Oxford Street/Darlinghurst.

The legislation is growing in complexity and is being administered by an Authority which is very receptive to arguments that late trading venues generally cause greater social impacts.

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