LIQUOR AND GAMING UPDATE MARCH 2017

THE CALLINAN REPORT

1. The major event in the liquor and gaming calendar in 2016 was the Callinan Review into aspects of the liquor legislation.

2. Former High Court Justice Ian Callinan received 1,800 written submissions and conducted more than 50 interviews with interested parties.

3. The Review's terms of reference centred around 3 main aspects, as follows:

    1. To assess the impacts of the 1.30 am lock out and 3.00 am cessation of liquor sales requirements on the Sydney CBD Entertainment Precinct, Kings Cross Precinct, potential displacement areas and the broader community (including aspects of safety and general amenity and broader impacts to stakeholders and the wider community).

    2. Positive and negative impacts of the 10.00 pm takeaway liquor restriction across the State.

    3. Impact of the proposed periodic risk-based licensing system on business viability and vibrancy.

4. In relation to Kings Cross and the Sydney CBD Entertainment Precincts, the Review found that these precincts were previously overcrowded, violent, noisy places which had been "transformed" by the 2014 amendments: para. 17. The review found that, broadly speaking, the policy objectives behind the 2014 amendments were and remain valid.

5. The Review recommended that the 10.00 pm takeaway alcohol ban be extended to 11.00 pm. The Review found that takeaway sales made little or no contribution to violence in the two entertainment precincts.

6. The Review found that the 2014 amendments had reduced opportunities for live entertainment and that there is a public interest in providing greater opportunities for live music performances, to secure vibrancy. The Review recommended a limited relaxation of the lock out and cease service requirements by half an hour, to be administered by ILGA. The Review recommended a trial relaxation for a limited period, of around 2 years.

7. In terms of licence fee regulation, the Review considered as valid the policy objectives for imposing recurrent licence fees. Generally speaking, the levies to be raised by the risk-based levy system would fall short of the cost of regulating the liquor industry and far short of the wider societal costs of alcohol sales. Specifically, the Review recommended that the Government proceed to impose the compliance history risk-based element of licence fees, which had been legislated to apply from 29 May 2017 (including the proposed patron capacity loading and location loading).

8. Mr Callinan appeared to have been impressed by the results of the Newcastle experience which, he found, suggested a 64% reduction in alcohol-related assaults since 2008, when a 1.00 am/3.00am lock out/cease service of alcohol requirement was imposed simultaneously with other broadly comparable measures (such as drink restrictions): para. 3.30. Mr Callinan found that Newcastle is a suitable comparator to Sydney: para. 3.30.

9. Mr Callinan distinguished the repeal of the short-lived Melbourne lockout in 2008, saying that (unlike Newcastle) that lock out was not accompanied by other measures, such as drink restrictions: para. 3.46. Further, the effectiveness of the short-lived Melbourne lockout was undermined by decisions of the Victorian Civil and Administrative Tribunal granting stays from the lock out to 25% of venues in the lockout areas: para. 3.47.

10. In several parts of his report Mr Callinan mentions that, prior to 1989, no venues were permitted to trade after midnight under NSW law.

11. Mr Callinan broadly accepted submissions that venues were adversely affected by the 2014 amendments, but said that that impact was a necessary and intended by-product of the 2014 legislative package, designed to reduce alcohol-related impacts in the entertainment precincts: para. 5.61. Further, from a broader societal perspective, consumer money not being spent in the Kings Cross or Sydney CBD Entertainment Precincts is likely to be spent elsewhere: para. 5.61. In this context, Mr Callinan referred to the fact that small businesses often fail and that there is a degree of regulatory risk in setting up businesses involving the service of alcohol. The 2014 amendments have hastened a trend towards gentrification, particularly in Kings Cross: para. 5.61. However, it may be expected that localities will change in their character over time.

12. Whilst appearing to show little sympathy for the affected businesses, the Review described entertainers as unfortunate casualties of the 2014 amendments: para. 5.77.

13. As to the arguments that the 2014 amendments would merely transfer assaults to other locations, the Review considered the available evidence and found only a relatively "small" increase in the number of assaults in Newtown, Double Bay and Pyrmont. The Review found that those relatively small increases did not bring into question the overall policy objectives of the 2014 amendments.

14. Mr Callinan QC was clearly impressed by evidence from academic researchers and the medical profession. In his report, he spoke of a visit to St Vincent's Hospital and of speaking to the doctor in charge (Dr Fulde). Dr Fulde described the emergency ward on Friday and Saturday nights pre-2014 as similar to a "military field hospital" with people bleeding, vomiting and unable to control their bladders: para. 6.5. Dr Fulde said that the ward had been "transformed" following the 2014 amendments. Mr Callinan accepted that evidence: para. 6.5. In his report, Mr Callinan QC quotes large reductions in emergency admissions for St Vincent's Hospital, whose catchment was said to extend as far as Double Bay, Bondi and Coogee. Mr Callinan refers to anecdotal evidence of

doctors and ER workers having been abused, punched and spat on by drunk patrons: para. 6.8.

15. Mr Callinan appears to have been particularly impressed by the submissions of medical personnel who, he said, have no financial interest and sought only to speak in the broad public interest: para. 6.17.
16. In relation to risk-based licensing, Mr Callinan found that risk-based licensing would encourage the development of business models associated with a lower risk of alcohol-related harms and that the risk-based licensing model would offset costs associated with liquor regulation. More broadly, Mr Callinan remarked that it is common to have arrangements that give financial incentives to businesses to comply with the law and to avoid risky activities: para. 8.11.

17. Mr Callinan found it is valid and appropriate for the Government to recover the direct costs of administering the liquor industry from such a fee model: para. 8.12.

18. The Review found that the sale of takeaway alcohol after 10.00 pm makes little or no contribution to violence and anti-social behaviour in the precincts and even less so when the liquor is home delivered. The Review recommended relaxing the latest hour for takeaway sales until 11.00 pm and until midnight for home deliveries: para. 9.10.

19. Mr Callinan recommended a staged relaxation of the lock out/cease service requirements – initially a half hour extension for "live entertainment" venues, as a means of "orderly restoration of vibrancy and employment opportunities" in the two entertainment precincts: para. 9.16.

THE GOVERNMENT'S RESPONSE

20. After a period of consideration, the Government announced a package of measures, some implemented by Regulation and some (such as the "three strikes" amendments) to be the subject of later legislative amendment.

21. The more immediate response was embodied in the Liquor Amendment Regulation 2016.

22. A broad description of the measures announced are set out below:

    1. Live entertainment relaxation

23. New clauses 53OA and 53ZHA of the Liquor Regulation enable relaxation of the lock out until 2.00 am and extension of the cease service requirement till 3.30 am, for certain venues in the Kings Cross and Sydney CBD precinct areas, on condition that live entertainment must be held or provided after midnight on the premises: Clauses 53OA(4), 53ZHA(4).

24. The exemption is only available where the Secretary is of the opinion that the premises have a market orientation towards live performances, the arts and cultural events and endeavours: Clause 53OA(5).

25. Without limitation, the Secretary may consider the compliance history of the venue under the CBD/Kings Cross requirements: Clause 53OA(7).

26. The exemption is not available to Level 1 venues, karaoke bars, premises operating solely as a "nightclub" or premises used primarily to provide adult entertainment of a sexual nature: Clause 53OA(11).

27. Note that there is a definition of "live entertainment" as meaning:

    (a) An event at which one or more persons are engaged to play or perform live or pre-recorded music; or

    (b) A performance at which the performers (or at least some of them) are present in person. Clause 53OA(13).

    2. Extending the 10.00 pm close for packaged liquor sales to 11.00 pm

28. For sales of packaged liquor, clause 70AB extends the time for last sales of packaged liquor from 10.00 pm Monday to Saturday to until 11.00 pm Monday to Saturday. The last sale requirement for 10.00 pm on Sundays remains in place: Section 12(1A) Liquor Act 2007.

29. This regulation does not override any specific condition that may have been imposed on the relevant licence which otherwise requires packaged liquor sales to stop at an earlier time: Clause 70AB(3).

30. In enacting this regulation, the Government notably eschewed the Callinan recommendation that home deliveries be permitted to be made until midnight. The Minister justified this by saying that the Government preferred to have a "level playing field" operating between providers.

    3. Extension of the freeze

31. The regulation extends the present "freeze" applying in the Sydney CBD and Kings Cross Precinct to 1 June 2018.

32. This effectively extends into an eighth year the "freeze provisions" which were initially intended by the Rees Government as a temporary measure until more permanent regulation could be figured out.

33. The extension of the freeze is consistent with the finding of the Callinan Review that the existing measures only be relaxed, incrementally, over a longer period.

    4. Retaining the risk-based licence fee system

34. The Liquor Regulation 2016 makes no amendments to the previously legislative risk-based licence fee system.

35. In the 2016 year, annual licence fees were payable for the base component (Clause 5D - $500 for a hotel) and trading hours risk loading component (Clause 5F - $2,500 for trading until 1.30 am, $5,000 for trading past 1.30am).

36. Commencing with the 2017 assessment (that is for the year commencing 15 March 2017 with licence fee payable by 29 May 2017) the compliance history risk loading element (Clause 5E) will be payable, including any location risk loading (Clause 5G) and patron capacity loading (Clause 5H).

37. The compliance history risk loading element is as follows:

- $3,000 if:

    (i) there was one relevant prescribed offence event committed by the licensee or manager in the preceding calendar year (2016)

- $6,000 if:

    (i) two relevant prescribed events were committed by the licensee or manager in the preceding calendar year; or

    (ii) The licence was listed as a Level 2 venue in either of the two rounds concluding in the previous calendar year.

- ($9,000) if:

    (i) Three or more relevant prescribed offence events were committed by the licensee or manager in the preceding calendar year; or

    (ii) The licence was a Level 1 venue at the conclusion of either of the previous two rounds in the preceding calendar year.

38. Note that, for this purpose a "prescribed offence" is not only a prescribed offence that would attract a "strike" under the provisions of Division 9A, but also extends to offences committed by a licensee or manager for breach of licence conditions relating to trading hours, where the trading hours condition was imposed under the Sydney CBD/Kings Cross condition, the "violent venues" scheme (Schedule 4) or trading hours conditions imposed as a result of a "strike" offence.

39. Multiple breaches occurring with 24-hour period are treated as a single breach for the purpose of this scheme: cl. 5E(5).

40. The compliance loading is attracted where a Penalty Notice is paid, a Penalty Enforcement Order is made or a Court convicts a person of the offence: Clause 5E(3).

41. This creates a considerable incentive to defendants to take Penalty Notices to Court and, if possible, successfully defend the Penalty Notice or else seek that the Court exercise a discretion to not record a conviction pursuant to the Court's discretion under Section 10 Crimes (Sentencing Procedure) Act 1999.

42. Where a compliance history risk loading applies, a further location risk loading element of $2,000 is payable if the premises are within the Kings Cross or Sydney CBD Entertainment Precinct: Clause 5G.

43. Where a compliance history risk loading element is payable, there will also be a patron capacity loading element payable, regardless of the location of the venue.

44. The loading is as follows:

Patron capacity of up to 60	$1,000
Patron capacity 61 – 120	$3,000
Patron capacity 121 – 300	$5,000
Patron capacity 301 + patrons	$8,000

45. Patron capacity is established either by a licence condition or by the capacity previously notified to the Secretary before the relevant assessment date (typically by means of the biennial returns previously required to be submitted). The Secretary may substitute his own opinion for the patron capacity previously notified or if no patron capacity has previously been notified to the Secretary: Clause 5H(5).

46. On 17 February 2017, some beneficial amendments were made to the compliance risk loading scheme, pursuant to the Liquor Amendment Regulation 2017. These changes are as follows.

47. First, the scheme has been altered so as not to attract a capacity loading merely because a "strike" remains in force. Under the original drafting, a venue could attract a compliance loading in every succeeding assessment year in which a "strike" remained in force. The amended Regulation now provides that a compliance history risk loading is only attracted where a "prescribed offence event" occurred in the preceding calendar year.

48. Secondly, the types of offences that can give rise to a "prescribed offence" have been considerably narrowed. Under the original drafting, any breach of a licence condition [for example, breach of a condition that a security guard wear a particular name tag] could give rise to a "prescribed offence" attracting a compliance history risk loading in the following year. Now, a "prescribed offence" only arises in relating to a "strike" offences and a breach of licence condition relating to a trading hours, but only where the condition was imposed under the "Declared Premises" scheme, under the "prescribed precinct" rules for Sydney CBD or Kings Cross or as a consequence of a strike being imposed on the particular venue.

49. Thirdly, the relevant offence must have been committed by the licensee or manager, rather than by any person. Presumably, this has been done so as to limit the prospects of hotel owners being surprised by compliance risk loadings in circumstances where an offence was committed by an employee, an infringement notice has issued to the employee and the employee has simply paid the infringement notice without notifying

the employer. If risk loadings can only be attracted for offences by the licensee or an approved manager, there is a lower risk of that scenario unfolding.

50. These very recent, and beneficial, amendments to the "risk loading" scheme appear to remove some of the "harder edges" of that scheme.

OTHER AMENDMENTS – LIQUOR AMENDMENT REGULATION 2016

Interim Restaurant Authorisations

51. Clause 16A of the Liquor Regulation 2016 enables the issue of interim restaurant authorisations to applicants for restaurant licences. These authorisations issue immediately if:

- The application for a restaurant licence is made online.
- The application is not required to be accompanied by a Community Impact Statement (in other words no PSA and no extension of trading hours after midnight is sought).
- The manner and form requirements are met.
- A DA for use as a restaurant is in place.
- There was a public consultation process as part of the DA.
- No previous interim authorisation has been revoked, and there has not been a licence refusal relating to the premises in the last 12 months.

52. In these cases, there is no need to notify within a 50-metre area, but Police and Council must be notified at least 2 days prior to the sale of liquor commencing.

Small Bar Licences

53. The number of patrons permitted in a small bar has been relaxed to 100 (from the previous limit of 60): cl. 17A.

54. For small bars located in the freeze precincts which were previously only able to trade until midnight, these may sell liquor until 2.00 am (note that small bars are not the subject of the lock out): cl. 70AC. If, however, any DA condition requires an earlier close, then that DA condition still applies.

55. There is also a provision encouraging existing small bar licensees and the holders of on-licences to convert to small bars, without payment of an application fee: cl. 70D.

56. The advantage of such a conversion is that it would enable operators to take advantage of the automatic extension to 2.00 am trading. It may lead to lower licence fees as small bars are exempt from the trading hours loading and compliance loadings.

"Staffies" drinks

57. There have been several cases where Police have successfully prosecuted venues which offered "staffies" drinks after trading hours.

58. "Staffies" is a time-honoured hospitality tradition of long standing. Notwithstanding, a number of strikes have been recorded against venues since the commencement of the Three Strikes regime for operating "staffies" drinks.

59. A new clause 70C enables hotels, clubs, small bars and certain on-licences to sell liquor to a "staff member" for a period of up to 2 hours after the time at which the premises are required to cease trade. A "staff member" for this purpose includes security agents and entertainers, or others engaged to provide services to the venue.

60. The staff member must have been working at the premises "immediately before" the premises were required to cease trading. The exemption is only available to staff who have been working on shift that night.

Announcement regarding Three Strikes

61. As part of the reform package announced after the Callinan Review, the Government announced that the "three strikes" legislation would be amended. The relevant Fact Sheet states that the "Government is proposing that strikes be incurred by individual licensees rather than attaching to a venue's licence". ILGA will determine strikes, with an appeal to NCAT.

62. The Fact Sheet says that licensees who comply with any remedial action imposed on them can apply to ILGA to have a strike lifted after 6 months.

63. The Fact Sheet refers to certain anti-avoidance safeguards that will be in put in place to prevent the "churning" of licensees to avoid the operation of the Three Strike Scheme.

64. At the date of writing, no legislation has yet been presented to Parliament.

Announcement re reforms to the Minors Sanctions Scheme

65. The Minors Sanctions Scheme was implemented in 2015 to provide a series of escalating sanctions in cases where there is an offence of "sell liquor to minor".

66. The Government announced in late 2016 that sanctions (which to date have been determined by a delegate of the Secretary Department of Justice) will be determined by ILGA, with a right of merits review to NCAT.

67. It has been my own experience to date that the Secretary has invariably exercised a discretion to suspend a licence in all cases where there has been a sale of liquor to a minor. The Secretary has justified doing so on the grounds of "general deterrence", in every case that I am aware of.

68. The subjective circumstances surrounding the offence (for example where the employee has mistakenly accepted a form of ID) have only proved relevant to the length of the suspension, and not whether the Secretary suspends.

Overcoming the "Smoking Panda" decision

69. The Liquor Regulation 2016 specifies certain licences to which the lock out and cease service requirements specifically apply: Schedule 1AA.

70. This overcomes the Supreme Court decision in the "Smoking Panda" case, referred to later in this paper.

OTHER SIGNIFICANT REFORMS

No biennial returns

71. A previous regulatory amendment in 2016 removed the requirement to lodge biennial returns.

Identity cards

72. An earlier 2016 regulation prescribed the Australia Post "key pass identity card" as a prescribed proof of age document.

Revocation/suspension of RSA certifications

73. Under amendments passed in 2015, ILGA may revoke or suspend a person's RSA certificate, if a person contravenes obligations relating to RSA, or otherwise commits a serious indictable offence involving violence in or around the premises: Clause 39AA Liquor Regulation. There is a right of merits review to NCAT against any such decision.

74. Obviously, such an order can have wide-ranging ramifications on the livelihood of frontline hotel and bottle shop staff.

Cases involving sentencing principles in liquor matters

75. The consequences of a "strike", the minors sanctions scheme and the compliance risk loadings will not be attracted where a Court exercises a discretion to not convict a defendant.

76. Accordingly, it becomes important that to consider, in any given case, whether a client is able to persuade the Court to exercise such a discretion.

77. In the recent case of *DPP v Stephen Grant O'Sullivan* [2016] NSWDC 331, Judge Scotting in the District Court considered the principles of sentencing and how they should apply to a charge of "sell liquor to a minor".

78. The case involved the Steyne Hotel at Manly. Mr O'Sullivan was the licensee of that Hotel at a time when 4 underage young ladies entered the Hotel and remained there for a period of 2 hours, consuming a number of drinks.

79. In every case the Court, in determining penalty, weighs the objective seriousness of the offences, together with considerations of deterrence and subjective matters relating to the particular defendant.

80. In that case, Judge Scotting said that the objective seriousness of the offence should be assessed by reference to the length of time which the young ladies were present on the premises and the extent to which the systems put in place by the licensee failed to detect them.

81. Given the length of time that the young ladies were on the premises, the offences were considered by his Honour to be in the mid-range of objective seriousness.

82. Interestingly, there was evidence in that case of the effects that a conviction would have on the Hotel owners. In particular, a strike would be imposed, the Hotel would be subjected to a period of suspension under the Minors Sanction Scheme, risk loadings totalling $33,000 would be payable over the succeeding 3 years, and the Hotel would be in breach of its loan-to-valuation-ratio covenants with its bank.

83. His Honour effectively put these considerations aside in arriving at his sentencing decision; saying that impacts on third parties can only be considered in exceptional circumstances. His Honour was not prepared to consider these consequences to be exceptional.

84. His Honour also noted that it is not appropriate to dismiss a matter under Section 10 merely to avoid some other legislative provision which is otherwise applicable.

85. In the result His Honour convicted Mr O'Sullivan and imposed a fine, which then attracted the other consequences for the Hotel owners.

86. In an earlier judgement ***Muinying v OLGR***, unreported 2015, Judge Scotting set out at some length the relevant sentencing principles applicable to Liquor Act matters. In that case, His Honour exercised a discretion under Section 10(1)(b) of the Crimes Sentencing (Procedure) Act to not record a conviction for a charge of "permit intoxication".

87. His Honour exercised such a discretion despite noting that a charge of "permit intoxication" is nonetheless a "strike" offence.

Automatic Licence Suspensions

88. Amendments made in late-2014 provide that, in circumstances where an owner in possession application may be made (such as where the licensee resigns his/her employment) the licence is automatically suspended if it is not transferred within 28 days: Section 61(5A). A similar provision applies if a licence is not transferred within 28 days following the death of a licensee: Section 63(5A).

Prevention of Intoxication Guidelines

89. Amendments made in late-2014 removed the previous general "reasonable steps" defence to a prosecution for permitting intoxication. Instead, a licensee can only establish "reasonable steps" if the licensee has complied with all of the 16 or so steps prescribed in the "Prevention of Intoxication Guidelines" document published by OLGR in March 2015.

90. There has been a noticeable increase in the number of "permit intoxication" prosecutions commenced against licensees since the publication of the new guidelines.

91. Typically, prosecuting officers will attend at a licensed venue and seek to obtain evidence which "unticks" one or more of the "prescribed steps" set out in the guidelines. For example, officers may ask questions of bar staff to establish that food was not in fact available at the relevant time. Officers may ask questions of all staff on duty (including security staff) to establish whether they have been instructed and trained in the anti-intoxication steps set out in a venue's Plan of Management. Officers may also check the currency of all RSA certifications for staff and security. In some respects, the guidelines are ambiguous – for example they require that there be "active promotion" of free drinking water to patrons and that "action is taken to make patrons aware of" the availability of low strength and non-alcoholic drinks (whatever that may mean).

Minors Sanction Scheme

92. The Minors Sanction Scheme (Part 7 Division 4) has been operating for more than a year. The Scheme empowers the Secretary to suspend the licence of a venue where any person commits the offence of "sell liquor to a minor" on the premises: sec. 130B. (Note in this respect the Minors Sanction Scheme differs from the "Three Strikes" Scheme. For the purpose of "Three Strikes" the offence must be committed by a licensee or "manager" [which I take to mean "approved manager"]).

93. Where the discretion to suspend is enlivened, the Secretary is empowered to suspend the licence for up to 28 days on a first offence: Section 130C. There is then provision for escalating sanctions for offences occurring more than 28 days apart. If a second offence occurs within 12 months of the first offence – but more than 28 days after the first offence – an automatic 28 days' suspension applies: Section 130D. If a third offence occurs within the 12-month period – and the 3 offences are more than 28 days apart – the licence is automatically cancelled: Section 130E.

94. At the date of writing 11 venues have been suspended under this Scheme. To my knowledge no venue has been able to persuade the Secretary not to suspend.

95. The Scheme does not differentiate between licence types and disproportionately affects hotel venues. For example, a supermarket with a discrete liquor department which suffers a suspension would only be required to close its liquor department for the period of suspension. On the other hand, a large gaming hotel with a small bottle shop would be required to close the whole of the hotel operations (including the gaming room) for the period of the suspension.

Real life example: Steyne Hotel

Gaming and Liquor Administration Act changes

96. Reforms made in late-2014 require the publication of reasons for ILGA decisions as soon as practicable on the ILGA website: Section 36C GALA.

97. The Gaming and Liquor Administration Amendment Act 2015 now affords a right of administrative review to NCAT for parties aggrieved by certain decisions of ILGA. (Note the right does not arise in relation to situations where ILGA determines a merits review from a decision of its own delegate: Section 13A(4)).

98. Standing to seek a review is limited to the applicant, a person who was required to be notified of the application [such as a local resident] or a person who has made a submission to ILGA: Section 13A(5).

99. The right of merit review arises in respect of "prescribed decisions". These are decisions made on applications lodged after 1 March 2016 for:

- Grant or removal of hotel, club, on-premises for public entertainment and packaged liquor licences.
- ETA for trading after midnight (or to vary a condition to allow trading after midnight).
- Applications to vary gaming machine thresholds required to be accompanied by a Class 2 LIA:

  Clause 7 Gaming and Liquor Administration Regulation

100. I am unaware of any merits review applications having yet been determined by NCAT.

Strict compliance with advertising requirements: *Coote v State of NSW& ILGA* [2016] NSWSC 1492

101. In previous decisions, ILGA had determined that a failure to comply with the notice and advertising requirements in the legislation resulted in ILGA being deprived of jurisdiction to determine the substantive application: see ILGA decisions in *Blackhead Surf Life Saving Club* and *Wild Rover*. In other words, the notice and advertising requirements in the legislation are considered to be mandatory. *Coote's Case* concerned an application for extended trading hours for the Gladstone Hotel, Dulwich Hill.

102. The Plaintiff made an application in mid-2014 for an extended trading authorisation for its hotel. The application was refused on 4 March 2015 by ILGA. The Plaintiff then commenced judicial review proceedings in the Supreme Court. The judicial review proceedings were resolved by consent; the consent order being that the ILGA determination be set aside and that the substantive application be re-determined by ILGA.

103. In the meantime, the Plaintiff had removed the site notice from the Hotel some time after the first ILGA decision.

104. When the matter came before ILGA again in September 2015, it came to ILGA's notice that the site notice had been taken down.

105. In October 2015, the Plaintiff re-affixed the site notice to the Hotel premises and asked that ILGA proceed to determine the substantive application. Rather than lodge a fresh application (which ILGA invited the Plaintiff to do) the Plaintiff instead insisted that ILGA determine the application which had been previously made.

106. On 29 October 2015, ILGA determined that it did not have jurisdiction in relation to the substantive application, because the site notice had not been kept up at the premises continuously since the making of the application, as Clause 9 of the Liquor Regulation requires.

107. The Plaintiff then sought orders in the Supreme Court to the effect that its substantive application was valid. The Plaintiff sought to compel ILGA to determine his application.

108. Justice Bellew held that strict compliance with advertising requirements is necessary in the context of the Liquor Act 2007 and that, without such compliance, the Plaintiff's application was invalid.

109. His Honour particularly noted the objects of the Liquor Act which include regulating the industry in a way that is consistent with the expectations, needs and aspirations of the community and facilitating balanced development of the industry in a manner which is in the public interest. Compliance with notice requirements is the method by which the community, and all relevant stakeholders, are notified of the making of an application. Unless there is strict compliance with the notice requirements, these objects are compromised. His Honour rejected a submission that substantial, as distinct from strict, compliance with the advertising requirements is sufficient. In rejecting that submission His Honour said that the concept of substantial as opposed to strict compliance is "fundamentally at odds with the scheme of community consultation to which Parliament has obviously attached considerable importance in setting out the objects of the Act."

110. His Honour then referred to the possibility that trivial non-compliances might be ignored: at [53], based on *Lloyd v Police* [2004] SASC 278. However, on the facts of this case the notice had been absent for a period of approximately 20 months and it could not be said that the non-compliance was a trivial one.

111. The case again affirms the necessity for strict compliance with advertising and notice requirements.

Determination of "immediate vicinity" under the Gaming Machines Act

112. *Buckley v ILGA* [2016] NSWSC 1533 involved a determination by ILGA that a proposed new hotel at Campsie is in the "immediate vicinity" of a local public school, namely Campsie Public School.

113. Under Clause 36(1)(b) of the Gaming Machines Regulation 2010, ILGA cannot increase the gaming threshold of a proposed new hotel above zero, where the Hotel is proposed to be situated in the immediate vicinity of a school.

114. In that case, there was evidence that the rear loading dock of the proposed Hotel (which itself was not part of the proposed licensed area) would be approximately 50 metres from the closest point of the school's campus. In determining the "immediate vicinity" question, ILGA had placed some emphasis on estimates given by the School Principal, and by the Principal of another school (St Mel's) that certain numbers of students would walk past the proposed hotel each day.

115. Section 36C(4)(a) of the Gaming Liquor Administration Act required the Authority to include in its reasons "*the findings on material questions of fact, referring to the evidence or other material on which those findings were based*".

116. The evidence before the Authority was that the two school principals considered that there would be some 342 students walking past the proposed hotel either on their way to or from school. Yet the Authority's finding was that some 350 children would pass by the proposed hotel "both in the morning and again in the afternoon on their way to and from school".

117. No explanation was given in the reasons for this departure from the evidence. Justice Adams found that this aspect of the ILGA reasons failed to explain the process of reasoning that led the Authority to conclude that 350 school students walked past the proposed hotel both in the morning and again in the afternoon. This was a failure to comply with the requirements of Section 36C of the GALA Act.

118. In addition, Justice Adams found that ILGA impermissibly took into account the numbers of students from St. Mel's who might walk past the proposed Hotel, in determining whether Campsie Public was in the "immediate vicinity" of the proposed Hotel. In doing so the Authority had regard to an irrelevant consideration.

119. In the result, Justice Adams quashed the ILGA decision and remitted the matter back to the Authority for re-determination.

Duffy v ILGA [2016] NSWSC 1062 Surrender of ETA by hotel licensee – no requirement to notify or obtain consent of freehold owner

120. This case concerned the Lakemba Hotel. In early-2015, the licensee received a notice of periodic licence fee for $5,500. This was for the base fee of $500 plus a $5,000 loading, because the hotel (a large gaming hotel in Western Sydney) had the right to trade until 4.00 am.

121. For some time, the Hotel had not traded beyond midnight. The licensee Mr Bourke (who was the grandson of the freehold owners) suggested to his grandfather that they should only pay $500 because the Hotel was not trading past midnight. Grandfather agreed.

122. The licensee then filled in a "surrender of ETA" form and submitted it to ILGA, which was accepted within 3 days. An order for revocation of the ETA was made by ILGA.

123. The licensee thought that he was giving up the ETA for the then current year, but in fact he surrendered the Hotel's ETA permanently.

124. Some months later, the grandparents decided to sell the Hotel and the selling agents discovered that the Hotel's ETA had been permanently surrendered.

125. The freehold owners (the grandparents) brought proceedings in the Supreme Court seeking to set aside the decision of ILGA. The grandparents argued that they had been denied procedural fairness, as ILGA should have given them notice of the intended revocation of the ETA before accepting surrender of the ETA.

126. His Honour focused on the provisions of Section 51(13) of the Liquor Act, which gave ILGA an express power to revoke an ETA on the application of a licensee. His Honour said that there was nothing in that provision that required notice to be given to, or submissions to be received from, third parties such as freehold owners. The provision enabled the Authority to revoke an ETA on the application of the licensee. That had happened here.

127. His Honour distinguished a previous decision of his own made under the Liquor Act 1982: *Sunset Investments Pty Limited* [2010] NSWSC 1411, on the ground that it was made under a different statutory framework.

128. Nor, in the circumstances of this case, was there any activity akin to fraud committed on the plaintiffs.

129. In the result, the ILGA decision stood.

130. Happily, the case has a post-script. The new owners made application to ILGA for a fresh ETA to restore the ability to trade till 4.00 am. I understand that that application was granted by ILGA.

131. O'Connor v Secretary Department of Justice [2016] NSWSC 1179 – part of Liquor Regulation held invalid. Invalid part enabled Secretary to determine the particular area to be "CBD subject premises" for the purpose of the 1.30 am lock out/3.00 am cease liquor service requirements ("the Smoking Panda case").

132. The Hotel Coronation Sydney operates what is known as the "Smoking Panda" Bar on an upper floor. The same hotel operates a tourist accommodation room, such that it may be said that the Hotel is a "tourist accommodation establishment".

133. The lockout/cease service requirements for Central Sydney were introduced by the Liquor Amendment Act 2014. Section 116I provided as follows:

> "(1) The Regulations may prescribe conditions to which a licence relating to premises situated in a prescribed precinct is subject…
>
> (3) The conditions that may be prescribed by the regulations under this section may, without limitation, apply to a specified class of licensed premises or to specified licensed premises."

134. The relevant regulations, (Clauses 53Y and 53Z) included within the definition of "CBD subject premises" (to which the lock out/cease service requirements apply) hotel premises, other than tourist accommodation establishments.

135. From 15 March 2014, a new Clause 53Y(d) applied, enabling the Secretary to declare so much of a "high-risk venue" (within the meaning of Section 116B of the Act), to be "CBD subject premises" for the purpose of the Regulation).

136. The Secretary purported to make such an order in writing declaring the "Smoking Panda Bar" to be "CBD subject premises" to which the lock out and cease service requirements would apply.

137. In the Supreme Court, Justice Adams held that clause 53Y(d) was not a proper exercise of the regulation making power conferred by Section 116I of the Act. It followed that any order purportedly made pursuant to that regulation was invalid. The Secretary's order declaring the "Smoking Panda Bar" to be a "CBD subject premises" was therefore invalid.

138. In her Honour's view, Section 116I conferred power to make regulations prescribing conditions on specified premises or upon a specified class of premises. To accord with Section 116I (the ultimate source of power) the specification of the relevant class of premises had to be contained in the regulation itself, rather than being delegated to a third party such as the Secretary.

139. The particular issue raised in this case was swiftly cured by the Government. A new Schedule 1AA specifies a number of premises as coming within the definition of "CBD Subject Premises", including the "Smoking Panda Bar" at the Hotel Coronation.

Tony Hatzis
27 February 2017