NSW LIQUOR & GAMING

NEW DEVELOPMENTS

Subjects to be covered

- Vibrancy Reforms Legislation
- ILGA Guideline 16
- Responsible Gambling Officers
- ATMs
- Tourist Accommodation
- White Bull
- Granville
- Four Boys
- Penplay
- Taphouse
- Laundy Hotels (Quarrymans)

VIBRANCY REFORMS

- **24-HOUR ECONOMY LEGISLATION AMENDMENT (VIBRANCY REFORMS) ACT 2023**

1. ***Changes to "standard" trading hours***

Commencing 12/12/23 Sunday trading hours for all licences have changed from 10.00 am to 10.00 pm to 5.00 am to midnight (same as other nights).

But do you need to apply to ILGA?

Minister thought so.

LGNSW says you do.

Risks if you don't.

Risks if you do – if you are a hotel/club with gaming (Guideline 16).

Can also now apply for an ETA until 5.00 am on Monday mornings for hotels anywhere in the State.

Small bars can trade from 10.00 am, subject to making a change of conditions application.

2. ***Live music/performance venues – special entertainment precinct – incentivised events***

2 hours extension of trading available for:

- **"Prescribed live music venues" (hotels, clubs, small bars, nightclubs, restaurants).**
- **"Prescribed live performance venues" (on-premises licences for public entertainment venues).**

The 2 hours is in addition to the hours that apply under the standard trading period or an ETA applying to the venue.

Must have DA for the extra hours.

Must have, on night that trade the extra 2 hours:

(a) Live music performance or an arts or cultural event of 45 minutes or more duration; and

(b) Performance or event is held after 8.00 pm.

- **To become a "prescribed live music venue" or "prescribed live performance venue" you must apply and be published on a list kept by the Department.**
- **For live music, must hold an average of 2 live music performances each week and have a suitable performance space. (DJs will be included as live music: definition includes live persons playing pre-recorded music).**

Arts or cultural event is widely defined and can include literary events/art exhibitions.

What if the extra hours takes you past 3.30 am (when liquor sales must cease in the Sydney CBD area)?

Section 12A enables you to continue to sell liquor and overrides clause 90 Liquor Regulation.

1 extra hour of trade available for:

- **Venues in a defined special entertainment precinct (thus far only Enmore Road Precinct has been declared).**
- **"Incentivised events" (being events which are prescribed or declared as such).**

To take advantage of these you need to apply.

- **DA must permit the extra hour.**
- **Live music performances/arts or cultural events of 45 minutes or more duration held after 8.00 pm on at least 2 nights in any 7-day period.**

Licence Fee - 80% discount off the annual liquor licence fee and trading hours loading.

Special Event Trading expanded from just hotels and clubs and now extends to small bars, general bars and all dedicated live music/performance venues.

Note that special events trading hours does not enable gaming machines to operate during the additional hours, if you weren't otherwise authorised to trade during that period: sec. 13(5)(b).

Limited licences of infrequent or temporary nature can be granted by the Authority for a genuine event if the Authority is satisfied it is in the public interest to do so: sec. 39(4). It can be granted to a commercial organisation/non-proprietary association: sec. 37.

3. Restaurants and small bars can get authorisations to sell takeaway liquor with food sold : new sec. 25A Limits on quantities: Generally no more than one 750ml bottle of wine, 6 pack of beer, cider or RTDs, or 4 house made cocktails.

4. Licence application process – amendments expected mid-2024. A Statement of Risks and Potential Effects to be filed. Details of form to be published.

Applicant will notify neighbouring occupiers, recognised leaders of Aboriginal Community organisations and gambling-related counselling services and stakeholders as determined by the Authority. LGNSW will notify Government stakeholders (including Council, Police, Health, TfNSW).

5. Alcohol-free beer and spirits – no licence required.

6. Contracts extinguishing the right to make an objection/submission, disturbance complaint are rendered void.

7. Incident registers to be completed as soon as practicable but no later than 24 hours after the incident.

8. Preservation of unrestricted club trading hours on removals:

(a) In the same zoning and within one km; or

(b) In an urban zoning and within 5 km.

9. Section 75 Directions (now described as "improvement notices") may be given by the Secretary, Police officer or Marine Authority. Secretary's power is wide – to rectify a contravention that the Secretary reasonably believes is occurring or about any other matter relating to the premises including conduct thereon.

Police and marine authority directions only arise where an officer reasonably believes noise is being emitted in contravention of the Act or a noise-related condition.

Not to be issued in relation to a demerit offence.

10. Disturbance complaints:

- **Resident complaints require complainant + 4 authorisers (who work or live in neighbourhood). Complaints also allowed from Police or other person Secretary considers should be allowed to complain due to the gravity of the complaint or that the complaint is in the public interest.**
- **Complainant must have tried to address the complaint directly with the licensee or employee/agent of licensee.**
- **Where order of occupancy favours the licensed premises, complaint is established only if the quiet and good order of the neighbourhood has been unreasonably and seriously disturbed .**
- **In other cases existing test applies – that the quiet and good order of the neighbourhood has been unduly disturbed.**
- **Rules for order of occupancy: premises have been operating longer than the complainant has resided or worked there and there have been no substantial changes to operations since the complainant entered the neighbourhood.**
- **A change to operations that was reasonably foreseeable when the complainant entered is not a substantial change to operations.**
- **Addition of live music is not a substantial change in operations, where live music inside between mid-day and 10.00 pm or outside between mid-day and 6.00 pm.**
- **Unreasonable and serious disturbance is not established if the disturbance was reasonably foreseeable or if the complainant can take reasonable steps to mitigate the impact.**
- **Guidelines to be published in relation to disturbance complaints.**

11. ID scanning in Kings Cross venues removed.

12. Minors not permitted in bottleshops. A defence if reasonable precautions are taken to avoid commission of the offence.

13. Provision for a system of enforceable undertakings as alternative to taking complaint/disciplinary action. Breaches are punishable as if they were a contempt of Court.

14. Provisions allowing use of outdoor spaces for outdoor dining and performances made permanent: Council may declare such areas by notice published on their website.

15. Abolition of the location risk loading element on licence fees for venues in 'prescribed precincts'.

16. Giving primacy to the disturbance complaint provisions in the Liquor Act. The Regs. may prescribe that conditions of DA cease to have effect if a relevant matter is regulated under the Liquor Act or an instrument made under the Liquor Act. A relevant matter means noise emitted from licensed premises or the trading hours of the premises.

- In a special entertainment precinct, conditions of DA cease to have effect if inconsistent with trading hours/noise requirements in a planning instrument for the precinct.. Also carve out from requirements under Protection of the Environment Operations Act for activities carried out under a liquor licence.

17. Contract caterers on club premises can now sell alcohol under the club's liquor licence.

ILGA Guideline 16

- **Expresses Authority's concerns about applications that would result in significantly increased access to late night gaming – particularly gaming after 2.00 am. Such applications "unlikely to be approved" without conditions designed to mitigate the risk of gambling-related harm.**
- **The Guideline applies to any application that would result in increased availability of EGMs after midnight at any venue (previously was expressed to apply to venues trading after midnight in Band 3 areas or after 2.00 am at any venue).**
- **"Paramount" consideration will be given to harm minimisation.**
- **ILGA will consider imposing conditions under Section 53 Liquor Act, including conditions relating to conduct of gambling. ILGA may do so at any time, irrespective of whether any particular application is before the Authority.**
- **ILGA will take into account a wide range of matters including research literature and the robustness of harm minimisation measures proposed by an applicant including the strength of its GPOM.**

- Evidence of harm mitigation after midnight (especially after 2.00 am) is particularly influential.
- ILGA "shopping list" of gaming harm minimisation measures. Generally, applicants are expected to demonstrate they have all foundational strategies in place, most intermediate measures and at least some advanced level strategies.
- Need to prepare GPOM in all gaming-related matters (eg. extension of trading hours, transfers/leases of GMEs, LIA for additional machines).

Statement of Expectations . Minister issued a Statement of Expectations on 21 Feb, published on ILGA website setting out the Minister's expectations and stating that:

- The sale and supply of liquor is legal.
- Operation of gaming machines is legal.
- Matters of policy relating to gaming and liquor legislation are to be set by the Government and that ILGA must consider Government policy in exercising its functions.
- ILGA must assess each application on its merits and not apply blanket conditions except where specified by legislation.
- Timeframes for determining applications (generally 120 days from end of submission period).

Responsible Gambling Officers

RESPONSIBLE GAMBLING OFFICER POSITION PAPER – PUBLISHED DECEMBER 2023

- **Venues with 21 plus EGMs to have a Responsible Gambling Officer (RGO).**
- **All gaming venues to maintain an Incident Register.**
- **All gaming venues to maintain a GPOM.**
- **Training requirements in advanced RCG for club and hotel directors/senior management.**

RGOs –

- **Between 8.00 am and midnight RGOs can perform other duties.**
- **Midnight to 8.00 am RGOs to be dedicated but may include some incidental tasks.**
- **Clubs with 100 plus GMEs will be required to have additional RGOs.**
- **Primary function of RGOs will be to identify patrons at risk of harm and to identify problem gambling, intervention where required facilitating counselling help and self-exclusion, reviewing and maintaining the Gaming Incident Register.**
- **Incident Register to include any observable signs of problem gambling behaviour.**
- **GPOMs required for all gaming venues by 1 July 2024 – minimum requirements to be set out in GMR.**
- **RGO requirements to commence from 1 July 2024.**

ATMs

- **No credit function on ATMs located on any part of hotel or club premises: sec47C GMA. Change of interpretation by LGNSW, so that 47C captures ATMs anywhere on a hotel property.**
- **Patrons must not be compelled to pass through a hotel gaming room to access the ATM : cl 8(2)(c) GMR.**
- **ATMs must not be located in a "part of the hotel in which gaming machines are located": cl 28 GMR.**

What does that mean? Is that the gaming room or is it broader than that?

What about sec 68 GMA – location of gaming machines in hotels?

VBar case.

Mid-north coast case.

Tourist Accommodation Pty Ltd

Tourist Accommodation Pty Limited v ILGA [2023] NSWCA 67

Applicant was granted a hotel licence at Flemington, in very close proximity to another hotel (Wentworth Hotel) operated by the same group. The site was in a Band 2 LSA. The applicant applied for a gaming machine threshold of 20, which required lodgement of a Class 1 LIA.

At the time of application in 2019, the formula set out in Guideline 11 required payment of $3.7 million. The applicant proposed a community benefit payment of $1,000,000 and argued that it was providing additional community benefits (additional harm minimisation practices, trading only standard hours, a new business diverting business from the Wentworth Hotel).

Almost 2 years later ILGA provided the applicant with a report prepared by BIS finding that the appropriate positive contribution figure was $4.7 million (ILGA had calculated $4.6 million) in accordance with the guideline formula. That report addressed the applicant's arguments for a lower payment.

In March 2021 the applicant responds to ILGA with its own report proposing a community benefit of $3.7 million, subject to adjustment up or down based on the guidelines, being 75% of its own projection of gaming revenue for the proposed hotel.

June 2021 ILGA decides to (originally) refuse the Hotel licence application. In its reasons it stated that it would have refused the LIA and GMT increase because the applicant's proposed community benefit payment of $3.7 million is a $1 million less than the "minimum" level of financial contribution under the Class 1 LIA Guidelines.

ILGA also considered that approving the LIA would be inconsistent with the statutory object of gaming harm minimisation due to the clustering of 50 gaming machines across 2 adjacent co-owned properties, and where the Wentworth Hotel had the benefit of an ETA until 4.00 am.

The applicant sought merits review of the Hotel licence refusal. The NCAT proceedings were settled following without prejudice correspondence. In that correspondence the applicant stated, in relation to the LIA that it understood that ILGA would require payment of an amount which reflects the most recent profit figures for the LGA, based on its guideline

The NCAT proceedings were settled, and the Hotel licence was granted. The LIA and GMT applications went to a Board meeting of ILGA and were refused.

The applicant sought judicial review of the LIA and GMT refusal.

The applicant argued that it was denied procedural fairness because ILGA did not inform the applicant of the amount of the proposed community benefit payment and give the applicant the opportunity to pay that amount.

The Court of Appeal upheld the decision of the primary judge (Griffiths J) rejecting all appeal grounds.

The Court held that ILGA was not obliged to calculate a precise monetary figure and then disclose that figure to the applicant.

The Court affirmed the position of the primary judge that ILGA had complied with its procedural fairness obligations by providing the applicant with a copy of the BIS report and inviting its comments on that report.

"Otherwise appropriate"

ILGA also refused the application on the grounds that they considered it was not "otherwise appropriate" that the LIA be approved: sec. 36(3)(e). This was because ILGA was concerned that the grant of 20 gaming machines for the new hotel would create a "funnelling effect" whereby patrons would come to the new hotels gaming room which will then close at 12.00 and gamblers would be "funnelled" to the Wentworth Hotel next door which could trade till 4.00 am. Literature suggests that there is a much greater prevalence of problem gambling in the after-midnight period.

The applicant argued that it was not open to ILGA to take into account the so-called "funnelling effect" in the context of a Class 1 LIA.

This was said to follow from a consideration of the structure of Section 36(3) of the Act, which is in the following terms:

> "36(3) The Authority may approve an LIA only if it is satisfied that –
>
> (c) in the case of a Class 1 LIA –
>
> (i) The proposed increase in the gaming machine threshold to the relevant venue will provide a positive contribution towards the local community where the venue is situated.
>
> (d) in the case of a Class 2 LIA –
>
> (i) the proposed increase in the gaming machine threshold for the relevant venue will have a overall positive impact on the local community where the venue is situated; and
>
> (e) it is otherwise appropriate that the LIA be approved."

The applicant argued that consideration such as "funnelling" were appropriate only to be considered pursuant to the "overall positive impact" test applicable to Class 2 LIAs. It was argued that such considerations cannot be relevant to a Class 1 LIA which requires an applicant to demonstrate only that it will provide a "positive contribution" which in most cases amounts to payment of a monetary sum.

The applicant relied on dicta in previous Reading Speeches whereby the two-tier LIA system was provided, in part to create greater certainty for applicants.

The Court rejected the applicant's argument saying that it would amount to an impermissible reading down of the "otherwise appropriate" criterion in Section 36(3)(e), which applies both to Class 1 and Class 2 LIAs.

The Court found that Section 36(3)(e) is expressed in broad discretionary terms and no intention could be imputed to the Parliament to constrain ILGA in assessing whether it is "otherwise appropriate" that the LIA be approved. Section 36(3)(e) was described as a "broadly expressed catchall provision confined only by the subject matter, scope and purpose of the Act. In taking into account the "funnelling effect" ILGA was taking into account, and applying, considerations relevant to the statutory object of gambling harm minimisation.

White Bull

The case concerned 3 different applications made by the same hotel group. These were as follows:

1. Application for increase in GMT for White Bull Hotel from 17 to 25. It was a Class 1 LIA for a pub in a Band 2 LSA. Application was granted by ILGA subject to a condition that a Responsible Gambling Officer be present when machines were operating after midnight.

2. Application to lease 7 additional GMEs from the Griffith Hotel to the Area Hotel Griffith. Granted by ILGA subject to a condition that a Responsible Gambling Officer be present at all times that gaming machines were operating and that a Gaming Incident Register be maintained.

3. Application to transfer one GME from the Griffith Hotel to the Gemini Hotel in Griffith. ILGA concerned about Gemini "enjoying higher than average levels of gaming activity" giving rise to potential gaming-related risks. Applicant refused invitation to submit an enhanced Gaming Plan of Management. Application refused.

4. The Hotels ("White Bull Group") had argued:

(a) That the context, scope and purpose of the Gaming Machines Act did not afford ILGA a discretion to refuse transfers and leases of GMEs; so long as the requirements expressly set out in the legislation were met ILGA was required to grant those applications. Questions of discretion were expressly conferred in relation to other types of applications; and

(b) That the power to impose conditions on hotel licences under Section 53 of the Liquor Act did not extend to imposing conditions in applications made under the Liquor Act.

5. The White Bull Group arguments were accepted by the primary judge (McNaughton J). Her Honour set aside the conditions imposed by ILGA and ordered that the transfer application be granted.

6. McNaughton J considered that the structure of the GM Act (which sets out different legal tests to guide the exercise of discretion in different circumstances) militated against ILGA having a broad discretion to grant and refuse applications in every case. Her Honour considered that the vesting of a broad discretion in every application would mean that the "statutory regime set out under the GM Act could be set to nought" as an applicant could fulfill all the statutory and regulatory requirements, but an application might be refused entirely in the exercise of a wide overriding discretion.

7. On appeal this decision was set aside, and the Court of Appeal confirmed the width of the discretion available to ILGA in every case.

8. In relation to GME transfer, the Court found that the Section 19 power to approve a GME transfer is an unconfined discretion limited only by the objects of the legislation. It was legitimate for ILGA to take into account potential gaming harm minimisation factors in deciding to refuse the application. The Court of Appeal emphasised that the objects of the GM Act (particularly the gaming harm minimisation object) strongly suggested that the regulator could take into account harm minimisation in determining all applications under the GM Act.

9. The applicant had argued that where there was a previous LIA approval (which is informed by harm minimisation principles) there should be no subsequent discretion by the Authority considering a GME transfer. That argument was rejected by the Court: paras. 85-88. The Court referred to the delay that may occur between an LIA approval and the subject GME transfer. Circumstances might change during that period, which affirmed the Courts view that a wide discretion was intended.

10. The same conclusion applied to GME leases under Section 25, which was drafted very similarly to the transfer provisions in Section 19.

11. In relation to the White Bull LIA, the White Bull Group had argued that the discretion to grant or refuse a GMT was limited in circumstances where (as here) ILGA had approved the LIA. The Court affirmed that ILGA has a wide discretion to approve or refuse a GMT application regardless of its approval of an LIA.

Power to impose conditions under Section 53 Liquor Act

12. The primary judge had found that the conditions imposed on the White Bull Hotel and Area Hotel, purportedly under Section 53 Liquor Act, were invalidly imposed as the exercise of a power under Section 53 Liquor Act was beyond the scope of the application made to ILGA under the GM Act.

13. The Court of Appeal referred to provisions in the Liquor Act which require ILGA to consider matters relevant to gaming. In light of that it could not be said that considerations of potential harm caused by gaming machines were outside the scope and purpose of the Liquor Act and that it would be surprising if ILGA could not act to address gaming-related concerns by exercising its power under Section 53.

14. The conditions imposed by ILGA were held to be within power. The absence of any express power in Sections 19 & 25 GMA (dealing with transfers and leases) may be reconciled with a wide discretion to impose conditions conferred by Section 53 Liquor Act.

15. It was said that the GM Act and the Liquor Act are “intimately linked” in terms of their subject matter and are “symbiotic”.

16. No further appeal was filed.

Granville

Granville Hotel Operations Pty Limited v ILGA [2023] NSWCA 248

This was an application to ILGA to approve a reduced gaming shutdown period (6.00 am to 9.00 am) on weekends/public holidays, in lieu of the standard shutdown period (4.00 am to 10.00 am).

Section 40 permits the Authority to approve a reduced shutdown period. Authority approval may be given only if ILGA "has taken into consideration such guidelines as may be approved by the Minister".

The Guidelines stated that ILGA approval may be given if ILGA is satisfied that:

"The venue falls within an area where other hospitality and entertainment venues are open to 6.00 am on Saturdays or Sundays or public holidays".

The Guideline does not contain a definition of "area".

The Hotel put forward an "area" within a 5k radius which included 30 venues. ILGA defined the "area" in a more limited way (SLA) which included 4 venues, only one of which traded till 6.00 am.

ILGA determined that the application did not meet the requirements of the Guideline as there were not "venues" (plural) in the SLA trading until 6am. ILGA refused the application. ILGA also determined that it would refuse the application in exercise of its discretion as research had shown that a 3-hour shutdown period had a minimal impact on minimising problem gambling.

The issue before the primary judge in the Court of Appeal was whether a single venue trading to 6.00 am amounted to "other hospitality and entertainment venues" for the purposes of the Guideline.

The Guideline did not bind the exercise of the Authority's discretion on 27. It articulates matters which the Authority must consider but does not limit other matters that it may consider it was intended to be a practical guide: 27. If an applicant satisfies the material of the Guideline that is to be taken as a factor militating in favour of approval, but it is neither necessary or sufficient for approval to be granted: 28.

The Court of Appeal then considered whether Section 8(c) Interpretation Act applies. A reference to a word or expression in the plural form includes a reference…in the singular form (and vice versa).

That applies except insofar as the contrary intention appears: sec. 5(2) Interpretation Act.

The text suggested that multiple venues needed to be open to 6.00 am ("other venues" not "another venue") which was not the case here. As to context, it was said that clause 1.2 of the Guideline involves areas having a character where people gather together to engage in socialising and recreation into the early morning. An area would be more likely to have that character if there is more than one hospitality or entertainment venue in the area.

Therefore, the presence of only one venue of the requisite kind in the area did not suffice to establish that the applicant's venue was within clause 1.2 of the Guideline.

The challenge failed.

Four Boys

4 Boys Pty Limited v ILGA [2023] NSWCA 210

Seaview Tavern, Coffs Harbour had a GMT of 20.

Seaview Tavern was located in a Band 2 LSA.

Seaview Tavern applied to increase its GMT from 20 to 24. Seaview Tavern lodged a Class 1 LIA.

The Class 1 LIA and GMT application were both approved, and a condition imposed on the licence requiring payment of a community benefit payment of $402,000 by 5 equal annual instalments, the first due 6 months after the date of approval.

Shortly after the owners of the Seaview Tavern bought a pub in the adjoining SLA, Coutts Crossing Tavern. Coutts Crossing Tavern had 7 GMEs.

Applications were made to transfer 1 x GME (country to country single – no forfeiture) to the Seaview Tavern and 6 x GMEs (country to country transfer of last 6 – no forfeiture) to the Seaview Tavern.

These transfer applications would not have required have a GMT threshold increase (and community benefit payment) because the transfers were made from a pub in an adjoining SLA.

The transfers were approved on 6 & 7 December 2021, resulting in the Seaview Tavern having a GMT of 27 and 27 GMEs.

On 14 December the Seaview's lawyers wrote to ILGA effectively requesting that the previous GMT threshold increase be revoked such that the condition of a community benefit payment no longer apply.

ILGA refused that request stating that, in ILGA's view, ILGA did not have power to revoke its approval of the LIA and GMT increase. ILGA subsequently demanded payment of the first instalment of community benefit payment.

The question was therefore whether ILGA had power to revoke its previous decision. This turned on Section 48 Interpretation Act 1987:

"If an Act…confers or imposes a function on any person or body, the function may be exercised (or in the case of a duty, shall be performed) from time to time as the occasion requires".

Section 6 Interpretation Act says that definitions occurring in an Act apply "except insofar as the context or subject matter otherwise indicates or requires".

The primary judge found that ILGA did have a power to revoke its LIA approval and GMT approval, based on Section 48 Interpretation Act.

The Court of Appeal reversed the decision of the primary judge.

After reviewing all of the authorities the Court found that Section 48 does not imply into every statutory provision a power on the part of the decision-maker to revoke a previous decision.

The Court of Appeal held that under this statutory scheme there are particular consequences that cannot be undone once an approval is granted. For example, on approval of a transfer the transfer block and forfeiture requirements take effect and in all cases the ILGA is obliged to reduce the gaming machine threshold of the transferor: [106].

These considerations militate against there being implied powers to revoke decisions under the statutory scheme of the Gaming Machines Act.

Alternative reasoning – alternatively the GM Act manifests a contrary intention to a conclusion that a decision can be revoked. The GM Act contains other powers which expressly enable revocation. Allowing the threshold increase to be revoked would undermine the operation of the 2 year rule or 5 year rule which place a time limit on obtaining GMEs after a threshold increase is granted.

Penplay

A hotel licence was held by Penplay Pty Limited. A hotel employee was charged with serving liquor to a minor. A Penalty Infringement Notice was posted to that employee, who then paid the fine.

Section 149 provides that if in contravention of the Liquor Act an employee sells or supplies liquor on the licensed premises, the licensee is guilty of an offence and liable to the punishment specified for the contravention.

Part 9A (Demerit Offences – formerly known as Strikes) may be imposed where a licensee commits a demerit offence.

Section 144C provides that a person commits a demerit offence if a Court convicts a person of the offence, an amount is paid under a penalty notice in relation to the offence or a penalty notice enforcement order is made against the person in respect of the offence.

Penplay Pty Limited was never issued with a penalty notice or Court Attendance Notice. ILGA formed the view that because the employee had paid the penalty notice Penplay was automatically liable for the commission of the same offence. ILGA formed the view that Penplay Pty Limited had committed a demerit offence and proceeded to incur 2 demerit points against the licence and impose remedial conditions. This also attracted significant additional licence fees in the following year's assessment.

Penplay sought review of this decision before NCAT. The issue was whether the licensee can commit a demerit offence even though the licensee has not itself faced proceedings for that offence.

Under the Part 9A regime, if Penplay had received a penalty notice or Court Attendance Notice Penplay could have Court-elected and no demerit points would have been incurred if Penplay were found not guilty by a Court or, even if found guilty, if Penplay had succeeded in obtaining a non-conviction order.

NCAT held that a person only commits a demerit offence if that person (Penplay in this case) is convicted, pays the penalty notice or incurs a penalty notice enforcement order.

It was said that this is consistent with the object of Part 9A to target irresponsible operators and to limit the operation of Part 9A to licensees and approved managers. The seriousness of the offence (selling liquor to a minor) and its consequences make it unlikely that Parliament would have intended to dispense altogether with processes otherwise available to licensees for defending against the offences.

Section 149 should not be read as dispensing with the need to issue a process against the licensee, as doing so would deprive licensees of due process, and the opportunity to be heard on the underlying offence and the appropriate consequences for them.

Taphouse

Taphouse Investments Pty Limited v ILGA [2023] NSWCATAP 171

- **Taphouse was the licensee of a hotel at Wetherill Park.**
- **Taphouse made application for extended trading authorisation which was refused by ILGA.**
- **Taphouse sought merits review before a single member of NCAT.**
- **Merits review application refused.**
- **Taphouse commenced an appeal to the Appeal Panel of NCAT.**
- **In the meantime, Taphouse sold the freehold and business to another hotel group and the licence was transferred.**
- **Deed of Indemnity signed between Taphouse and purchaser requiring Taphouse to continue to prosecute the appeal in Taphouse's name.**

- Appeal Panel dismisses the appeal as being a “moot” appeal, having no practical consequences for the parties to the appeal.
- Appeal would not determine any current legal controversy between the appellant (Taphouse) and respondent.
- Appeal Panel emphasised provisions in the Liquor Act by which an ETA is granted to “the licensee” on application made by “the licensee”.
- This did not mean the licensee from time to time.
- Some dicta from Appeal Panel that a licence and ETA do not “run with the premises” because of provisions treating a transfer as effectively the grant of a new licence. That dicta is inconsistent with earlier authority.
- The Deed of Indemnity did not give Taphouse sufficient interest in the outcome of the appeal. Rejection of the appeal as ‘moot’ would not result in a breach of the Deed of Indemnity.
- Takeaway: make sure licensee remains in place throughout any appeal process.

Laundy Hotels (Quarrymans)

Laundy Hotels v Dyco Hotels

Contract for Sale of Hotel (Quarrymans Hotel Pyrmont)

- **Contract obliged vendor to "carry on the business in the usual and ordinary course as regard to its nature, scope and manner"(cl 50.1)**
- **COVID-19.**
- **Public Health Orders require hotel to substantially close and sell takeaway liquor and food only. Thereafter Public Health Orders severely restrict access and patronage to hotel.**
- **Vendor (Laundy) serves Notice to Complete.**
- **Purchaser (Dyco) seeks declaration that contract was frustrated and/or vendor was not ready, willing and able to complete, and that the vendor was not entitled to issue Notice to Complete.**
- **Laundy terminates contract.**
- **Dyco claims that Laundy's termination is a repudiation, which Dyco accepted.**
- **Darke J holds contract not frustrated and that Laundy was required to only carry on the business "in the usual and ordinary course" as far as it remains possible to do so.**
- **In the Court of Appeal, no appeal against the frustration point, but Dyco argues that Laundy was in breach of Laundy's obligation to "carry on the business in the usual and ordinary course as regards to its nature, scope and manner".**

- Majority in the Court of Appeal hold that Laundy's obligation was not limited to conducting the business to the extent permitted by law.
- High Court overturned decision of the Court of Appeal.
- High Court held that the obligation to "carry on the business in the usual and ordinary course as regards to its nature, scope and manner" incorporates an inherent requirement to do so only in accordance with law.
- The vendor (Laundy) was obliged to carry on the business in the manner it was being conducted at the time of contract, to the extent that doing so was lawful. No obligation could be imposed on the vendor to carry on the business unlawfully.
- This conclusion was emphasised by other provisions of the contract, by which the parties made careful provision to transfer to the purchaser all lawful authorities to conduct the business.
- Conclusion was further reinforced by the dynamic nature of the regulatory environment of the business under the Liquor Act. That made it harder to argue that the vendor might be in breach of cl. 50.1 because of any change in law .
- It followed that the vendor was complying with cl 50.1. Held that the vendor was ready, willing and able to complete and was entitled to issue the Notice to Complete. It followed that the Vendor was thereafter entitled to terminate the contract, forfeit the deposit and sue for damages.