

EXTENDED TRADING HOURS:

UNLOCKING GREATER PROFITABILITY

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Standard trading hours for a hotel licence are until 12.00 midnight Monday to Saturday, and until 10.00pm Sundays. For after-midnight trading Monday - Saturday (or trading from 10.00pm -12.00 midnight Sundays), an Extended Trading Authorisation (ETA) must be approved by the Independent Liquor and Gaming Authority (ILGA). Development approval (DA) from Council may also be required.

In this article, we look briefly at the process for obtaining an ETA.

Overview

If the hotel has a DA which limits trading hours, it will be necessary to modify the existing DA to extend hours.

If the hotel operates under existing use rights, then enlarging the span of trading hours will also be likely to require DA approval.

Once a DA is obtained, if needed, for the hours the hotel wishes to trade, an application is then made to ILGA for an ETA.

If the hotel is located in a "freeze" precinct (i.e. in Sydney CBD or Kings Cross) an ETA cannot be granted. Nor can council grant a DA for extended hours in the freeze precinct.

Obtaining Planning Approval

If a DA is required, council will consider whether the hours sought are consistent with council's planning instruments, the likely social and economic impacts upon the locality, the suitability of the site for later trading and the overall public interest. Issues that commonly come into play include noise impacts, parking and the behaviour of patrons during the extended hours.

If council refuses consent (or if council fails to determine the application within 40 days of lodgement), the applicant may appeal to the Land and Environment Court. Council has the ability to "stop the clock" on the 40-day period by requesting information from an applicant.

Applicants have six months in which to lodge an appeal following an actual or deemed refusal.

After an appeal is lodged, the Land and Environment Court will usually order the applicant and council engage in mediation, with a view to finding a negotiated solution. If that process fails, then the matter is set down for hearing. At present, it is taking several months for matters to be listed for mediation, as there is a long backlog of cases.

At the hearing, the court conducts a merits review of the application for DA and stands in the shoes of council. The court has power to grant the DA itself.

The principles generally applied by the court in hearing an application for extended hours were stated in *Vinson v Randwick Council* [2005] NSWLEC 142. Broadly, these principles are as follows.

Is the impact of the existing operation on residential amenity acceptable? If the answer is no, the application will be refused unless there is no overall increase in impact or there are

measures proposed which would mitigate the existing impact. If the answer is yes, is the impact of the proposed extension of hours still acceptable? This requires an applicant to address the following:

- What will be the adverse impacts of the proposed trading hours, permitted number of patrons and permitted activities?
- What measures are in place to address those impacts?
- How are those measures documented?
- Have those measures been successful?
- What additional measures are proposed by the applicant or might otherwise be required?

If an extension of trading hours is likely to be acceptable only subject to additional measures to reduce noise or anti-social behaviour, a trial period may be appropriate.

Indeed, many councils (such as the City of Sydney) have policies which require that extensions of trading hours only ever be granted on rolling trial periods, for say, one, two and five years respectively.

If extended hours are granted on a trial period basis, the applicant should ensure that a further modification application is made within time to further extend the trial period, or to make the trial hours permanent. Otherwise, the extended trading hours will be lost.

The social/economic impact of gaming machines is an irrelevant consideration before council and the Land & Environment Court. Questions of gaming impacts are reserved exclusively for ILGA: sec. 209 Environmental Planning and Assessment Act.

In our experience, councils are relying more upon social planning and social impact considerations in considering (or opposing on appeal) applications for extended hours. For example, councils may require further details to address any pockets of disadvantage in the locality, which may render parts of the local population more vulnerable to liquor-related harms.

The Application to ILGA

Once a DA is obtained, an application can be made to ILGA for the issue of an ETA.

An ETA application requires the preparation and lodgement of a full-scale Community Impact Statement (CIS) with the application.

Preparing the CIS requires a period of community consultation before lodgement. This involves notifying neighbours and various community groups of the proposed application. When the CIS is lodged, the CIS must give details of any feedback received. In addition, the CIS must address the general impact of the proposed ETA on the local community, including the specific impacts of the hotel's gaming machines and the measures in place for responsible gambling.

In considering whether to grant the application, ILGA must be

satisfied the overall social impact of granting the ETA will not be detrimental to the local and broader communities (meaning the suburb and LGA in which the hotel is located, respectively).

As part of its assessment of ETA applications, ILGA now usually requires applicants to provide the following information, if the hotel operates gaming machines:

- Patron capacity of the venue.
- Overall floor space of the hotel, and also of the ETA area.
- Comparison of food, liquor and gaming sales for the past six months.
- Gaming figures for the venue and LGA.
- Any relevant incidents, including self-exclusion.
- Applicant's assessment of gaming impacts on the local community.
- Any benefit/donations that will flow to the local community.
- The patron profiles for the venue.
- Demographic, social and economic data on the suburb and LGA.
- An evaluation of positive and negative impacts of gaming flowing from the grant of the ETA application.

Since 2011, applicants for an ETA have the option of "going dry" after midnight. Before midnight, the 'hotel primary purpose test' requires that the primary purpose of a hotel business must continuously be the sale and supply of liquor. That test does not apply after midnight. An ETA applicant can therefore offer a condition restricting the sale of liquor for all (or only some of) the extended hours.

Offering a 'go dry' condition may help to dispel concerns about possible alcohol-related impacts. However, such a condition also

tends to focus attention on gaming-related impacts during the extended hours.

If ILGA refuses the application, an applicant may have a right of merits review to the Civil and Administrative Tribunal (NCAT). To summarise, at the time of writing:

- There definitely is a right of merits review for ETAs which grant the right to trade after midnight on an ongoing basis for the first time;
- There is definitely not such a right for an ETA only applying to Sunday nights; and
- There appears not to be such a right where the applicant's hotel can presently trade after midnight (say until 1.00 am) but is seeking to extend its hours further (say until 2.00am).

EXAMPLES OF RECENT GRANTS

In the Authority's more recent published decisions, new ETAs or variations of existing ETAs have been granted to at least part of the premises of The Marrickville Ritz Hotel for trading until 2.00am Monday-Saturday (May 2018); The Lakes Hotel at The Entrance for trading until 2.00am Monday-Saturday (March 2018); The Panania Hotel for trading until 2.00am Monday-Saturday for the gaming room (February 2018); Cookie's Lounge Bar for trading until 2.00am Monday-Saturday (May 2018); and The East Hills Hotel for trading until 2.00am Monday-Saturday and until 12.00 midnight Sunday (August 2018).

Some ETAs have also recently been granted, in the published decisions, alongside the grant of a new hotel licence, to The SOP Pub at Sydney Olympic Park for trading until 3.00am Mondays to Saturdays (May 2018); The Marsden Hotel at Marsden Park also for trading until 3.00am Monday-Saturday (August 2018); and The Huntlee Hotel at Branxton for trading until 1.00am Thursday-Saturday (August 2018).

