



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	DPR v Independent Liquor and Gaming Authority [2018] NSWCATAD 251
Hearing dates:	4 October 2018
Date of orders:	30 October 2018
Decision date:	30 October 2018
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	L Pearson, Principal Member
Decision:	(1) The application for review of the decision of the Independent Liquor and Gaming Authority on 27 September 2018 not to approve an application for transfer of a hotel licence is dismissed. (2) The stay granted on 4 October 2018 is lifted.
Catchwords:	ADMINISTRATIVE REVIEW – transfer of hotel licence – refusal of application - whether decision administratively reviewable
Legislation Cited:	Administrative Decisions Review Act 1997 Civil and Administrative Tribunal Act 2013 Gaming and Liquor Administration Act 2007 Gaming and Liquor Administration Regulation 2016 Liquor Act 2007
Cases Cited:	Auld v Independent Liquor and Gaming Authority [2018] NSWCATAD 25 CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 Independent Liquor and Gaming Authority v Auld [2018] NSWCATAP 184 Racing NSW v Lewin [2018] NSWCA 93 Rogers v Independent Liquor and Gaming Authority (No 2) [2018] NSWSC 1177 Sidgreaves v Chief Commissioner of State Revenue [2018] NSWCATAP 20 Wilson v State Rail Authority of New South Wales (2010) 78 NSWLR 704, [2010] NSWCA 198
Texts Cited:	Nil

Category:	Principal judgment
Parties:	DPR (Applicant) Independent Liquor and Gaming Authority (Respondent)
Representation:	Counsel: M Heath(Applicant) D Birch (Respondent) Solicitors: Law Australia (Applicant) Crown Solicitor's Office (Respondent)
File Number(s):	2018/00299540
Publication restriction:	Pursuant to s 64 of the Civil and Administrative Tribunal Act 2013 (NSW), the publication or broadcast of the name of the applicant or its director, the premises, the licence and previous licensee, is prohibited until further order of the Tribunal.

REASONS FOR DECISION

- 1 On 2 October 2018 DPR applied to the Tribunal for administrative review of a decision made on 27 September 2018 by the Independent Liquor and Gaming Authority (ILGA) not to approve its application under the *Liquor Act* 2007 for transfer to it of a hotel licence for premises in Regional NSW (the Premises). The applicant also applied for a stay or interim order, seeking an order that the decision of 27 September 2018 not commence until after determination of the administrative review application.
- 2 At the hearing of the application for an interim order on 4 October 2018 ILGA opposed the grant of the order sought on two grounds: first, that the decision is not one of the prescribed decisions reviewable by the Tribunal and accordingly the Tribunal has no jurisdiction to review it; and secondly, the circumstances do not warrant an unconditional stay under s 60 of the *Administrative Decisions Review Act* 1997 (the ADR Act). The parties reached agreement on a conditional stay, and consent orders were made on that basis.
- 3 The jurisdictional issue raised by ILGA was the subject of oral submissions. ILGA provided written submissions at the hearing on 4 October 2018 in support of its contention that the Tribunal has no jurisdiction to review the decision. The applicant was given an opportunity to provide written submissions in response, and for ILGA to provide any written submissions in reply. Written submissions were received from the applicant on 9 October 2018, and from ILGA on 11 October 2018. On 18 October 2018 the parties advised the Tribunal that they were seeking to have the decision set aside and the matter remitted. At a directions hearing on 25 October 2018 to clarify what orders the parties were seeking and whether the jurisdictional issue would be a barrier

to the making of any orders, the respondent sought an order that the proceedings be dismissed for want of jurisdiction. The parties confirmed that they relied on their written submissions on the question of jurisdiction.

- 4 The issue for determination is whether the Tribunal has jurisdiction to review ILGA's decision of 27 September 2018. For the reasons that follow, the Tribunal concludes that the decision to refuse the application for transfer of the hotel licence to the applicant is not an administratively reviewable decision and the Tribunal has no jurisdiction to review it.

Background

- 5 The applicant applied on 18 May 2018 for transfer of the hotel licence for the Premises (the Licence) from the former licensee.
- 6 On 24 May 2018 the applicant was advised that the transfer had been approved on a provisional basis and that unless objections were received within the period for which the application was exposed for submissions the transfer would be confirmed. On 31 May 2018 NSW Police objected to the application, referring to information regarding persons associated with the applicant company. Confidential and non-confidential submissions were provided, and the applicant made submissions in response.
- 7 On 12 September 2018 the application was considered by the board of ILGA. On 27 September 2018 the applicant was advised that the provisional approval was not confirmed, on the ground that ILGA was not satisfied that the applicant is a fit and proper person to hold a hotel licence. The notice of the decision, which foreshadowed that reasons would be provided as soon as practicable, stated that the decision take effect at 5pm on 4 October 2018. The notice included the statement that there is no express right of review by the Tribunal of a decision on an application to transfer a licence.
- 8 As noted above, the operation of that decision has been stayed until further order of the Tribunal, subject to the conditions requested by ILGA and agreed to by the applicant.
- 9 On 25 October 2018 the applicant requested, and the respondent did not oppose, that orders be made under s 64 of the *Civil and Administrative Tribunal Act 2013* (the NCAT Act). For reasons given orally at the time the Tribunal was satisfied that it was appropriate to do so, and orders were made.
- 10 The Tribunal notes that an application to be joined as a party to the proceedings has been made by the owner of the Premises, stating that it is the freehold owner of the hotel premises and the owner of the reversionary goodwill and licence attaching to the premises. Given the conclusion reached on the question of jurisdiction, that application need not be considered further.

Jurisdiction of the Tribunal

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The Tribunal has administrative review jurisdiction over a decision, or class of decisions, of an administrator if enabling legislation provides that applications may be made to the Tribunal for administrative review: s 9(1) ADR Act. The relevant enabling legislation in this matter is s 13A of the *Gaming and Liquor Administration Act 2007* (the GLA Act), which states:

13A Review by NCAT of certain decisions of Authority

(1) A relevant person who is aggrieved by a decision of the Authority in relation to an application made under a provision of the gaming and liquor legislation prescribed by the regulations for the purposes of this section (a prescribed application) may apply to NCAT for an administrative review under the Administrative Decisions Review Act 1997 of that decision.

...

- 12 The term “gaming and liquor legislation” is defined in s 4 of the GLA Act:

4 Meaning of “gaming and liquor legislation”

In this Act:

gaming and liquor legislation means any of the following Acts or specified parts of Acts and the regulations and other instruments made under those Acts or parts:

- (a) this Act,
- (b) Casino Control Act 1992,
- (c) Gaming Machines Act 2001,
- (d) Liquor Act 2007,
- (e) Registered Clubs Act 1976,
- (f) Gaming Machine Tax Act 2001 (Part 4 and Schedule 1).

- 13 Clause 7 of the Gaming and Liquor Administration Regulation 2016 (the GLA Regulation) provides:

7 Administratively reviewable decisions

For the purposes of section 13A of the Act, the following applications made on or after 1 March 2016 are prescribed:

- (a) an application for the granting or removal under the Liquor Act 2007 of:
 - (i) a hotel licence, or
 - (ii) a club licence, or
 - (iii) an on-premises licence that relates to a public entertainment venue (other than a cinema or a theatre), or
 - (iv) a packaged liquor licence (other than a packaged liquor licence that is limited to the sale of liquor only by means of taking orders over the telephone, by facsimile or mail order, or through an internet site),
- (b) an application for an ongoing extended trading authorisation in relation to a licence referred to in paragraph (a) that would result in trading after midnight,
- (c) an application to vary or revoke a condition of a licence imposed by the Authority that would result in trading after midnight, in relation to a licence referred to in paragraph (a) (i)–(iii),
- (d) an application to increase a gaming machine threshold under section 34 of the Gaming Machines Act 2001 that is required to be accompanied by a class 2 LIA under section 35 of that Act,

(e) an application specified in clause 6 in respect of which a delegation given by the Authority to a designated Public Service employee to exercise the Authority's decision-making function is in force.

- 14 It is not in dispute that the application made by the applicant to ILGA on 18 May 2018 was an application under s 60 of the *Liquor Act* 2007 for transfer of the existing hotel licence from the previous licensee to the applicant. It was common ground that none of paragraphs (b), (c), (d) or (e) of cl 7 apply. The question is whether the application is prescribed pursuant to paragraph (a)(i) of cl 7, so that the Tribunal has administrative review jurisdiction.
- 15 The answer to that question depends on the interpretation of s 60, in the context of the regulatory scheme under the *Liquor Act*. The relevant provisions in s 60 are:

60 Transfer of licence

(1) The Authority may, on application made in accordance with this section, approve the transfer of a licence to a person who, in the opinion of the Authority, would be entitled to apply for the same type of licence in relation to the licensed premises.

(2) An application for approval to transfer a licence may be made by the licensee or the person to whom the licence is proposed to be transferred.

...

(4) An application for approval to transfer a licence must:

(a) be in the form and manner approved by the Authority, and

(b) be accompanied by the fee prescribed by the regulations and such information and particulars as may be prescribed by the regulations, and

(c) if made by a person other than the licensee—be accompanied by the written consent of the licensee to the proposed transfer, and

(d) comply with such other requirements as may be approved by the Authority or prescribed by the regulations.

(5) An application for approval to transfer a licence to another person is to be dealt with and determined by the Authority as if it were an application for the granting of a licence to the other person and the other person was the applicant for the licence. Accordingly, the provisions of Division 1 apply in relation to an application under this section.

...

(7) The Authority may provisionally approve the transfer of a licence to another person if the Authority is satisfied that:

(a) there is nothing that would preclude the Authority from approving the transfer of a licence, and

(b) the circumstances of the case justify giving the approval on a provisional basis.

(8) A provisional approval to transfer a licence is sufficient authority for the transfer of the licence. However, any such provisional approval ceases to have effect unless it is confirmed by the Authority before the end of the period specified by the Authority when provisionally approving the transfer (or such later period as may be allowed by the Authority before the expiration of the specified period).

(9) If a provisional approval to transfer a licence ceases to have effect because of the operation of subsection (8), the Authority may make such orders in relation to the licence as the Authority considers appropriate, including any of the following orders:

(a) an order that the licence is to revert to the transferor,

(b) an order treating a person (with the person's consent) as licensee until a transfer of the licence is effected,

(c) an order that the licence cannot be exercised until specified conditions are met or the Authority orders otherwise.

(10) Any such order has effect according to its terms.

(11) The Authority must not approve or provisionally approve the transfer of a licence unless satisfied:

(a) that practices will be in place at the licensed premises of the transferee as soon as the licence is transferred that ensure as far as reasonably practicable that liquor is sold, supplied and served responsibly on the premises and that all reasonable steps are taken to prevent intoxication on the premises, and

(b) that those practices will remain in place.

(12) The transfer of a licence has effect as if the licence had been granted to the transferee.

16 Section 60(5) refers to Div 1 of Part 4. Division 1 specifies the requirements for a licence application (s 40), which include a requirement for a written statement (s 41); the process for consideration of a licence application including investigations, inquiries and referrals (s 42), requests for further information (s 43), and submissions (s 44); the duration of licences (s 46); suspension (s 46A); and the granting of a licence (s 47).

17 Section 45 confers power on ILGA to grant a licence:

45 Decision of Authority in relation to licence applications

(1) The Authority may, after considering an application for a licence and any submissions received by the Authority in relation to the application, grant the licence or refuse to grant the licence. The Authority may determine the application whether or not the Secretary has provided a report in relation to the application.

(2) The Authority may, in such circumstances as the Authority considers appropriate, treat an application for a licence as having been withdrawn.

(3) The Authority must not grant a licence unless the Authority is satisfied that:

(a) the applicant is a fit and proper person to carry on the business or activity to which the proposed licence relates, and

(b) practices will be in place at the licensed premises as soon as the licence is granted that ensure, as far as reasonably practicable, that liquor is sold, supplied or served responsibly on the premises and that all reasonable steps are taken to prevent intoxication on the premises, and that those practices will remain in place, and

(c) if development consent is required under the Environmental Planning and Assessment Act 1979 (or approval under Part 3A or Part 5.1 of that Act is required) to use the premises for the purposes of the business or activity to which the proposed licence relates—that development consent or approval is in force.

Note.

Section 48 also requires the Authority to be satisfied of certain other matters before granting a hotel, club or packaged liquor licence.

(4) The regulations may also provide mandatory or discretionary grounds for refusing the granting of a licence.

(5) Without limiting subsection (3) (a), a person is not a fit and proper person to carry on the business or activity to which a proposed licence relates if the Authority has reasonable grounds to believe from information provided by the Commissioner of Police in relation to the person:

(a) that the person:

(i) is a member of, or

(ii) is a close associate of, or

(iii) regularly associates with one or more members of,

a declared organisation within the meaning of the Crimes (Criminal Organisations Control) Act 2012, and

(b) that the nature and circumstances of the person's relationship with the organisation or its members are such that it could reasonably be inferred that improper conduct that would further the criminal activities of the declared organisation is likely to occur if the person is granted a licence.

(5A) Without limiting subsection (3) (a), in determining whether an applicant is a fit and proper person to carry on the business or activity to which the proposed licence relates, the Authority is to consider whether the applicant:

(a) is of good repute, having regard to character, honesty and integrity, and

(b) is competent to carry on that business or activity.

(6) The Authority is not, under this or any other Act or law, required to give any reasons for not granting a licence because of subsection (5) to the extent that the giving of those reasons would disclose any criminal intelligence.

Respondent's submissions

- 18 ILGA submits that the application for transfer is not in terms an "application for the granting or removal" of the hotel licence. An application for a transfer of a licence is a distinct application under the *Liquor Act*. Further, pursuant to ss 40(4)(a) and 60(4)(a) ILGA has approved separate application forms, and pursuant to ss 40(4)(b) and 60(4)(b) there are different fees, prescribed in Sch 1 of the Liquor Regulation 2018. Section 60(5) does not assist the applicant, as it does not provide that an application for transfer of a licence *is* an application for the granting of a licence, but requires ILGA to treat the former *as if it were* the latter, expressly stipulating that they are separate applications. An application for transfer is not required to be accompanied by a community impact statement (s48(5)), nor does it require consideration of social impact (s48(2)), and the legislation has effectively narrowed the scope of a transfer application compared to an application for a new licence or a licence removal.
- 19 In reply ILGA submits that s 60(1) emphasises that an application for transfer of a licence is a different application to an application for the grant of a licence. Section 60(5) provides for how ILGA is to deal with and determine the application and does not provide that a transfer application is an application for the granting of a licence to the other person, and s 60(12) provides for the effect of approval of a transfer: the use of the phrase "as if" in both s 60(5) and 60(12) draws attention to the fact that the applications are distinct.

Applicant's submissions

- 20 The applicant submits that in the legislative context of the *Liquor Act* and cl 7 of the GLA Regulation the granting of a licence encompasses a transfer application of a licence, for the following reasons:
- (1) section 13A of the GL Act and cl 7(a)(i) of the GLA Regulation do not go so far as to specifically reference specific provisions of the *Liquor Act* but refer generally to any application for the granting of a hotel licence;

- (2) section 13A(1) permits review of a decision of ILGA "...in relation to an application ..." prescribed for the purposes of the section. An application for a transfer is "in relation to" the granting of a licence;
- (3) section 60(1) allows ILGA to approve the application for transfer if the applicant would be entitled to the same type of licence subject to the transfer;
- (4) section 60 calls into operation Div 1 of Part 4, and s60(5) expressly directs ILGA to treat the transfer application as a grant of a hotel licence. The first limb of s60(5) requires ILGA to deal with and determine the application as if it were an application for the granting of a licence, and the second limb expressly requires ILGA to apply the provisions of Part 4 Div 1 in relation to an application under the section;
- (5) section 60(12) provides that the transfer of a licence has effect as if the licence had been granted to the transferee, the use of the word "granted" demonstrating the intention of the legislature that the effect of an approved transfer application is to grant a licence to the applicant;
- (6) the structure of the *Liquor Act* does not draw a distinction between an application for a transfer of a licence and a licence, and a transfer application is not treated as a distinct application;
- (7) the requirement for a community impact statement (CIS) for certain applications has no bearing on the characterisation of a transfer licence application. The only relevance of the lack of a requirement for a CIS is that ILGA has an existing awareness of the impact on a local community of a licence;
- (8) the object of the legislation is to provide a merit review mechanism in respect of certain types of applications before ILGA, and to conclude that there is no jurisdiction would be to sidestep the object of the legislation. If the legislation was to preclude merit review of a transfer application the legislations would specifically make that clear; and
- (9) the relevant forms provided by ILGA represent that the application is for the granting of a licence, stating "If the application is granted, the applicant will become the licensee".

Reasoning and Decision

- 21 Neither party was able to identify any authority directly on the point raised in this application. The task of the Tribunal is to construe cl7 of the GLA Regulation by reference to accepted principles of statutory interpretation. The Tribunal must consider the ordinary and grammatical sense of the words used in cl 7, having regard to their context and legislative purpose: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Wilson v State Rail Authority of New South Wales* (2010) 78 NSWLR 704, [2010] NSWCA 198 at [12]-[14].
- 22 The regulatory scheme of the licensing provisions of the *Liquor Act* was considered by the Appeal Panel in *Independent Liquor and Gaming Authority v Auld* [2018] NSWCATAP 184 at [28]-[80]. Schmidt J also provided an overview of the regulatory scheme in *Rogers v Independent Liquor and Gaming Authority (No 2)* [2018] NSWSC 1177 at [38]-[61]. Both commenced with recognition of the objects of the *Liquor Act* as specified in s 3. In *Auld* the Appeal Panel noted:

30. The object of the *Liquor Act* set out in s 3(1)(a) emphasises that the regulation and control of the supply and consumption of liquor is to be "consistent with the expectations, needs and aspirations of the community" (s 3(1)(a)). The object in s 3(1)

(b) indicates that the regulatory system established by the *Liquor Act* should be “flexible and practical ... with minimal formality and technicality”. In construing the *Liquor Act*, a construction that would promote these objects is to be preferred to one that does not – s 33 of the Interpretation Act 1987 (NSW).

31. In addition, under s 3(2), each person exercising functions under the *Liquor Act* is required to have due regard to:

- (1) the need to minimise harm associated with the misuse and abuse of liquor;
- (2) the need to encourage responsible attitudes and practices towards the promotion, sale and supply of liquor, among other things; and
- (3) the need to ensure that the sale, supply and consumption of liquor contributes to and does not detract from the amenity of community life.

23 Relevantly for the present application, there are seven types of licences that may be granted under the *Liquor Act*, which authorise the licensee to sell or supply liquor in accordance with that Act and the conditions of the licence (s10(1), (2)):

- (a) hotel licence,
- (b) club licence,
- (b1) small bar licence,
- (c) on-premises licence,
- (d) packaged liquor licence,
- (e) producer/wholesaler licence,
- (f) limited licence.

24 In addition to the different types of licences, the *Liquor Act* establishes various authorisations that may be approved, for example an extended trading authorisation authorising consumption on licensed premises during specified periods (s 49(2)). Section 51 provides the general provisions for five such licence-related authorisations, including the form of any application.

25 Division 1 of Part 4 of the *Liquor Act* deals with licence applications and the granting of licences. Division 3 of Part 4 deals with licence removals and transfers. While the terms “removal” and “transfer” are not defined, s59(1) makes it clear that removal is a process whereby a licence is removed to premises other than those specified in the licence, whereas s 60(1) relates to the transfer of a licence to a person other than the licensee. There are additional provisions for transfer in particular circumstances including on dispossession of a licensee (s 61 – at issue in *Sidgreaves v Chief Commission of State Revenue* [2018] NSWCATAP 20) or the death of a licensee (ss 63, 64), which are not relevant in the present circumstances.

26 That the processes of removal and transfer are distinct is confirmed by s59(3), which states that an application to remove a licence to other premises “is to be dealt with and determined by the Authority as if it were an application for the granting of a licence in respect of those other premises”, when contrasted with s 60(5) which states that an application for approval to transfer “is to be dealt with and determined by the Authority as if it were an application for the granting of a licence to the other person and the other

person was the applicant for the licence". The former focusses on the premises, while the latter focusses on the suitability of the person to whom the licence is proposed to be transferred.

27 Clause 7 of the GLA Regulation identifies specific licence and authorisation decisions that might be made by ILGA as being administratively reviewable decisions. For example, cl 7(a) permits review of decisions in relation to the granting or removal of only four of the seven types of licences referred to in s 10, and cl 7(b) permits review of decisions in relation to an application for only one of the types of authorisation which ILGA could consider.

28 The proposition that only limited rights of merits review were intended to be created under s13A of the GLA Act is supported by the Second Reading speech on the introduction of the Gaming and Liquor Administration Amendment Bill 2015 (Legislative Assembly Hansard, 27 October 2015), in which the Minister stated (emphasis added):

The current regulatory model does not include a merit review mechanism of decisions made by the Independent Liquor and Gaming Authority. The absence of a review mechanism particularly in relation to contentious matters that have a strong public interest, such as a new hotel licence, has been problematic for both business operators and local communities. For business operators there has been no low-cost non-technical recourse available for review of a decision to refuse an application that has involved significant investment over a period of time. For local communities there has been no low-cost, non-technical recourse available for residents and others opposed to a new liquor licence being approved in their neighbourhood. In fact, the problems that led to the 2008 creation of the Independent Liquor and Gaming Authority have been replicated in the current system; that is, the pre-2008 system was legalistic, adversarial, complex and slow.

The bill provides for licensing decisions to be reviewed *in certain circumstances*. For decisions made by the Independent Liquor and Gaming Authority, a review will be available from the NSW Civil and Administrative Tribunal [NCAT] *in relation to contentious liquor and gaming applications, such as the grant of a new hotel or packaged liquor licence*. The types of applications determined by the Independent Liquor and Gaming Authority that can be reviewed by NCAT will be prescribed by regulation prior to the commencement of the bill. Those seeking a review of a decision made by the authority will be limited to the applicant and those who made a submission and who were required to be provided with notification of the application.

29 The reference to "contentious liquor and gaming applications" is consistent with the specification in cl 7(a) of "granting" and "removal" of licences, that is, applications for approval of a new or altered licence in a location or for premises not previously licensed.

30 Clause 7(a) in terms refers only to "granting" and "removal", and does not refer to "transfer". In support of the submission that that means that a refusal of a transfer application is excluded from merits review, the respondent relies on *Racing NSW v Lewin* [2018] NSWCA 93, in which the Court of Appeal considered whether a decision by Racing NSW to refuse to issue a licence, on a renewal application, could be the subject of appeal to the Racing Appeals Tribunal under cl 5(2) of the Racing Appeals Tribunal Regulation 2015. That regulation stated:

(2) An appeal may be made to the Tribunal under section 15(1)(d) only in respect of a decision:

(a) to disqualify or warn off a person, or

- (b) to suspend any licence, right or privilege granted under the rules, or
- (c) to revoke the licence of any person under the rules, or
- (d) to impose on any person a fine of \$200 or more, or
- (e) to disqualify a horse, if the disqualification is made in conjunction with the imposition of a penalty on the appellant or any other person.

31 The question was whether the refusal could be characterised as a decision to “revoke the licence” which had been issued to Mr Lewin. Basten JA, with whom Bathurst CJ and Macfarlan JA agreed, held that it could not be so characterised:

33 In any event, the statutory language is clear: s 14(2)(b) of the Thoroughbred Racing Act confers on the applicant powers to licence, refuse to licence, cancel a licence and suspend a licence of a bookmaker. Clause 5 of the Regulation expressly refers only to revocation and suspension of a licence; it does not refer to refusal to license. (Nor, indeed, does it provide a right of appeal in the case of the conferral of a licence, but subject to conditions.) It is contrary to the ordinary meaning of the term “revoke” to expand it to encompass a refusal to licence, whether by way of initial licence or renewal.

32 There was no submission in this application that the word “transfer” should be read into cl 7(a). Rather, the applicant seeks to distinguish *Lewin*, submitting that in the legislative context of the *Liquor Act* and cl 7, the “granting” of a licence does encompass a transfer application. In support of that submission the applicant refers to the decision of Schmidt J in *Rogers*, where at [104] her Honour said:

Under s 13A NCAT is not expressly empowered to review decisions of the Authority, when acting of its own initiative, even if trade at such times results. It is empowered, however, to review decisions which the Authority makes under the Liquor Act, in the case of a hotel, “in relation to” applications specified in reg 7, namely those made in relation to:

- (1) its licence;
- (2) an ongoing extended trading authorisation that would result in trading after midnight; and
- (3) variation or revocation of license conditions imposed by the Authority which would result in trading after midnight.

33 The applicant submits that therefore on the proper construction of s 13A and cl 7(1)(a), an application for a transfer is “in relation to” the granting of a licence.

34 In the Tribunal’s view that submission does not have sufficient regard to the issue that was before the court in *Rogers*. ILGA had refused an application by the Commissioner of Police for the revocation of the extended trading hours authorisation for a hotel, and, acting on its own initiative, had varied the extended trading authorisation to reduce the trading hours after midnight. The owner and the licensee brought proceedings in the Supreme Court seeking declaratory relief and orders setting aside the decision, on grounds that the decision was invalid for failure to comply with mandatory statutory conditions precedent in s 51(13) of the *Liquor Act*; denial of procedural fairness; and that they had been wrongly deprived of a contestable argument on merits review of the decision to deal with the revocation application by ILGA’s decision to act of its own initiative.

Schmidt J held that the failure by ILGA to comply with the mandatory prerequisites to the exercise of its powers rendered the disputed decision invalid, and the orders sought should be granted. In concluding that the failure lead to invalidity, her Honour held that it was relevant to take into account:

61....that the legislature has provided for a merits review of the Authority's decisions in only limited circumstances, which do not include cases where the Authority decides to act of its own initiative, as it did in this case.

- 36 Schmidt J considered whether the licensee had rights to merits review of which he had been deprived by ILGA's decision to act on its own initiative, and at [101]-[103] held:

101What is immediately apparent is that reg 7, like the Liquor Act, draws a distinction between licences, conditions of a licence and extended trading authorisations. But under this regulation, a "condition of a licence" does not include either an authorisation, or conditions which may be imposed on an authorisation. That is because s 51(11) of the Liquor Act provides only that it is for the purposes of that Act, that any condition to which an authorisation is made subject, is taken to be a condition of the licence.

102Regulation 7(b) is concerned with applications for an ongoing extended trading authorisation and reg 7(c) with applications to vary or revoke a licence condition, which in either case, "would result" in trading after midnight. In understanding what this term means, it is apparent that the regulation is concerned with applications which, if granted, would have the specified result. That is because account must be taken of the fact that under the Liquor Act, the grant of an authorisation or condition which permits trade to be pursued after midnight, does not require a licensee to exercise the permission to trade so given.

103It is apparent that the merits review of the Authority's decisions which reg 7(b) and (c) permit are in respect of applications which, if granted, are valuable and the regulation thus assumes that they would be availed of by the licensee, if granted. That explains the use of the words "would result" in trade after midnight.

- 37 The statement by Schmidt J at [104] (at [32] above) on which the applicant relies should be read in the context of those immediately preceding comments. *Rogers* does not support the proposition that cl 7 encompasses any application at all in relation to a hotel licence, rather her Honour was contrasting those applications which, if granted, are valuable and are likely to be availed of, with the circumstance where the regulatory authority of its own initiative decides to vary existing entitlements which may or may not be exercised.
- 38 The applicant further relies on ss 60(5) and 60(12). The applicant submits that s60(5) expressly directs ILGA to treat the transfer application as a grant of a licence, by requiring ILGA to deal with and determine the application as if it were an application for a licence, and by requiring ILGA to apply the provisions of Part 4 Div 1 to an application under s 60.
- 39 In support of that submission, the applicant relies on the decision of the Appeal Panel in *Independent Liquor and Gaming Authority v Auld* [2018] NSWCATAP 184. The decision under appeal in *Auld* was a decision of the Tribunal to set aside ILGA's refusal of Mr Auld's application under s 59 of the *Liquor Act* to remove a hotel licence to other premises, being an ALDI store, and to approve that application providing for licence conditions that in effect limited the activities carried out under that licence to the supply of packaged liquor for consumption off the premises: *Auld v Independent Liquor and Gaming Authority* [2018] NSWCATAD 25. There was no issue as to the jurisdiction of

the Tribunal to review the decision, because a decision in relation to an application for the removal of a hotel licence is prescribed under cl7(a) of the GLA Regulation, and is thus an administratively reviewable decision under the ADR Act. The challenge was to the decision of the Tribunal that the licence could be removed and converted to a packaged liquor licence at the new premises.

40 The applicant in these proceedings relies on the discussion in *Auld* of s 59(3) of the *Liquor Act*, which is in similar terms to s 60(5):

(3) An application for approval to remove a licence to other premises is to be dealt with and determined by the Authority as if it were an application for the granting of a licence in respect of those other premises. Accordingly, the provisions of Division 1, in particular, extend to an application for the removal of a licence to other premises as if it were an application for a licence.

41 The Appeal Panel held:

113. The Authority submitted that s 59(1) was the operative provision and s 59(3) was merely “mechanical”. We do not agree with that submission. As explained above, s 59(1) does not confer any power on the Authority. Nor, on its proper construction, does it expressly or impliedly limit any power conferred on the Authority by other provisions of the *Liquor Act*.

114. Contrary to the Authority’s submission, s 59(3) does not provide the mechanism for making an application under s 59(1). Section 59(2) sets out how an application is to be made and might be seen as a mechanical provision supplementing s 59(1). In our view, s 59(3) is the operative provision. It imposes a duty on the Authority to deal with and to determine a removal application:

(1)“as if it were an application for the granting of a licence in respect of those other premises”; and,

(2)the provisions of Div 1 of Pt 4 of the *Liquor Act* “extend to an application for the removal of a licence to other premises as if it were an application for a licence”.

115. Part 4 Div 1 includes s 45(1) which expressly empowers the Authority to grant or refuse to grant a new licence after considering the application and any submissions received.

116. As to the other provisions of Pt 4 Div1, it was not suggested on this appeal that any of those provisions, apart from s 45(3)(c), had not been complied with. Section 45(3)(c) will be examined in more detail when we deal with grounds 2 and 3.

117. When s 59(3) is read with s 45, it can be seen that the Authority’s power and duty is to determine whether to grant or refuse a removal application in the same way that it would determine “an application for the granting of a licence in respect of those other premises”. The use of “a licence” in s 59(3) is, however, ambiguous.

42 *Auld* does not support the applicant’s contention that s 60(5) has the effect that an application for approval of a transfer is to be regarded as an application for the granting of a licence. While s 59(3) and s 60(5) are in similar terms, a significant difference between the determination of an application for transfer and an application for removal is that s 59(1) does not itself confer power on ILGA to approve an application to remove a licence. In *Auld* the Appeal Panel relied on s 45(1), in Part 4 Div 1, as the source of power for ILGA to grant or refuse a licence. At [117] the Appeal Panel concluded that reading s 59(3) with s 45, ILGA’s power and duty “is to determine whether to grant or refuse a removal application in the same way that it would determine ‘an application for the granting of a licence in respect of those premises’”. That is not a statement that approval of a removal application *is* the granting of a licence. In contrast, s 60(1)

confers power on ILGA to approve an application for the transfer of a licence, and there is no need to rely on the power conferred by s 45(1) to confer that power. Section 60(5) should be read in its terms, that is, as a requirement that ILGA comply with the requirements of Part 4 Div 1 that would have to be met in dealing with an application for a new licence, but not as deeming an application for transfer to be an application for a new licence.

- 43 Section 60(12), which has no equivalent in the case of a removal under s 59, does not take the matter further. It does not state that the transfer of a licence is a grant of a licence to the transferee, rather that once granted it “has effect as if” the licence had been granted to that person.
- 44 The direction in s60(5) (and in s59(3)) is not limited to procedural matters. Section 60(4) (and s 59(2)) enable prescription of the applicable form, fee, and required information for each type of application. In that context, the approval of separate forms and differential fees for applications for a licence and for a transfer, on which the respondent relied, is not determinative.
- 45 The power to approve an application for transfer is qualified by the requirement that the transfer must be to a person who, in the opinion of ILGA, would be entitled to apply for the same type of licence in relation to the licensed premises. In dealing with an application for transfer of a licence, ILGA is required to satisfy itself of all the matters that would have to be satisfied if it were considering whether to grant a new licence to the proposed transferee. The identity and characteristics of the proposed transferee are clearly relevant, and the application of the provisions of Part 4 Div 1 has the effect of identifying the criteria which ILGA is to apply in determining the application, namely those specified in s 45(3)(a), (5) and (5A).
- 46 In contrast, the criteria for determining an application for removal of a licence require in addition consideration of the impact on the local community. An application under s 59 for approval to remove a licence to other premises is a “relevant application” as defined in s 48(2), which is intended to facilitate consideration of the impact the granting of certain licences authorisations or approvals will have on the local community, and under which an application must be accompanied by a community impact statement. An application for approval of a transfer is not such an application.

Conclusion

- 47 There is no basis for reading the words used in cl 7(a) other than in their ordinary and grammatical sense. Clause 7(a) refers only to an application for the granting or removal of a licence, and does not refer to an application for the transfer of a licence. The transfer of a licence to a person other than the licensee is a separate process to that encompassed by the granting of a new licence or the removal of a licence from one premises to another. An application for transfer of a hotel licence is not included in the

prescribed applications in relation to which a person aggrieved by a decision of ILGA may apply for administrative review. The Tribunal does not have jurisdiction to review the decision to refuse the application for transfer of the licence.

48 The Tribunal orders:

- (1) The application for review of the decision of the Independent Liquor and Gaming Authority on 27 September 2018 not to approve an application for transfer of a hotel licence is dismissed.
- (2) The stay granted on 4 October 2018 is lifted.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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Decision last updated: 30 October 2018