Civil and Administrative Tribunal

New South Wales

Case Name:	Henadeck Pty Ltd v Independent Liquor and Gaming Authority; Niraula v Independent Liquor and Gaming Authority
Medium Neutral Citation:	[2020] NSWCATAD 53
Hearing Date(s):	16 December 2019
Date of Orders:	13 February 2020
Decision Date:	13 February 2020
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	L Pearson, Principal Member
Decision:	(1)Proceedings 2019/248033: the application for review of the decision of the Independent Liquor and Gaming Authority notified on 18 July 2019 to refuse the application to vary the extended trading authorisation for East Hills Hotel is dismissed. (2)Proceedings 2019/271159: the application for review of the decision of the Independent Liquor and Gaming Authority notified on 14 August 2019 to refuse the application to vary the extended trading authorisation for Penshurst Hotel is dismissed.
Catchwords:	ADMINISTRATIVE REVIEW – hotel licence - application to vary an ongoing extended trading authorisation – 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 Amendment Act 2015 Gaming and Liquor Administration Regulation 2016

	Liquor Act 2007
Cases Cited:	CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 La La Land Byron Bay Pty Ltd v Independent Liquor and Gaming Authority [2014] NSWSC 1798 Rogers v Independent Liquor and Gaming Authority (No 2) [2018] NSWSC 1177 Wilson v State Rail Authority of New South Wales (2010) 78 NSWLR 704, [2010] NSWCA 198
Texts Cited:	None cited
Category:	Procedural and other rulings
Parties:	2019/00248033: Henadeck Pty Ltd (Applicant) Independent Liquor and Gaming Authority (Respondent) 2019/00271159: Dipak Niraula (Applicant) Independent Liquor and Gaming Authority (Respondent)
Representation:	Counsel: C Ireland (Applicant) J Emmett (Respondent) Solicitors: Hatzis Cusack Lawyers (Applicant) Crown Solicitor (Respondent)
File Number(s):	2019/002480332019/00271159
Publication Restriction:	Nil

REASONS FOR DECISION

1 There are two applications for administrative review under the *Administrative Decisions Review Act* 1997 (ADR Act) before the Tribunal which raise the same jurisdictional issue.

2 In proceedings 2019/248033 Henadeck Pty Ltd applied on 9 August 2019 for administrative review of a decision of the Independent Liquor and Gaming Authority (ILGA) notified by email on 18 July 2019 to refuse an application for

an Extended Trading Authorisation (ETA) for the East Hills Hotel. That hotel has an ETA that authorises trade between 10.00am to 2.00am on Monday to Saturday, and 10.00am to 12.00 midnight on Sunday. If granted, the application would have extended the hours authorised under the ETA to 4.00am Monday to Saturday.

3 In proceedings 2019/271159 Mr Dipak Niraula applied on 30 August 2019 for administrative review of a decision of ILGA notified by email on 20 August 2019 to refuse an application for an ETA for the Penshurst Hotel. The hotel has an ETA that authorises trade between 5.00am to 2.00am Monday to Saturday, and 10.00am to 12.00 midnight on Sunday. If granted, the application would have extended the hours authorised under the ETA to 4.00am on Monday to Saturday.

4 The ILGA has applied in both proceedings to have the proceedings dismissed on the basis that the Tribunal has no jurisdiction to review the decisions. The applicants' solicitor Mr Anthony Hatzis has provided an affidavit in each proceeding, sworn 5 November 2019 in proceedings 2019/248033, and sworn 3 December 2019 in proceedings 2019/271159, annexing documents relevant to the current licence details, and the applications and supporting documents in each matter.

5 The parties have common legal representation, and the jurisdictional issue in both proceedings is the same. By consent, both applications were heard together. The following reasons apply to both proceedings.

Jurisdiction of the Tribunal

6 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 was inserted by the *Gaming and Liquor Administration Amendment Act* 2015 with effect from 29 January 2016:

> **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.

…

7 A “relevant person” is defined in s 13A(5):

(5) In this section, ***relevant person*** in relation to a prescribed application means—

(a) the applicant, or

(b) a person—

(i) who was required to be notified of the prescribed application, and

(ii) who made a submission to the Authority or the Secretary in respect of the prescribed application.

8 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,

…

(d) Liquor Act 2007,

…

9 Clause 7 of the Gaming and Liquor Administration Regulation 2016 (the GLA Regulation) as at the date of the applications to the Tribunal, provided:

7 Administratively reviewable decisions

(1) 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.

(2) An application referred to in subclause (1) is not prescribed for the purpose of section 13A of the Act if the decision of the Authority to be reviewed is a decision that the sale or supply of liquor under the licence would more appropriately be provided under a music festival licence.

(3) In this clause:

music festival licence means a licence granted in accordance with Part 4A of the Liquor Regulation 2018.

10 Clause 7 was amended from 26 September 2019, to delete subclauses (2) and (3) with consequential effect on the numbering. No substantive change was made to the review rights conferred in the former subclause (1).

11 It is not in dispute that the East Hills Hotel and the Penshurst Hotel each hold a hotel licence, referred to in cl 7(1)(a). The issue in both matters is whether the application for administrative review is in respect of "an application for an ongoing extended trading authorisation …that would result in trading after midnight", and is prescribed under cl 7(1)(b) of the GLA Regulation so that the Tribunal has administrative review jurisdiction.

12 For the following reasons, the Tribunal concludes that cl 7(1)(b) of the GLA Regulation does not include an application to vary an existing ongoing extended trading authorisation, and the Tribunal has no jurisdiction to administratively review a decision in relation to such an application.

Submissions of the ILGA

13 The ILGA's position is that each application was not an "application for an ongoing ETA", rather each application sought variation of an existing ongoing ETA that would result in trading after midnight. The word "for" should not be read as though it meant "in relation to"; that phrase is used elsewhere in cl 7 and could readily have been used in the opening words of paragraph (1)(b).

14 The ILGA submits that each hotel currently has an "ongoing" ETA: while that term is not defined, the current authorisation is for trading on a regular basis until such time as it is varied or revoked by ILGA, that is, under s 49(5)(a) of the Liquor Act, rather than an authorisation on a special occasion taking place on a specified date, or an authorisation on up to 12 occasions in any period of 12 months, under s 49(5)(b) and (c) of the Liquor Act respectively.

15 The application in each case was an application for additional hours of trading. ILGA submits that there is a material difference in the legislation between an application for the grant of an ETA and an application for its variation. That is reflected in the different requirements in s 51(2) for an application for the grant of an ETA and ss 51(9)(b), (10) and (13) in relation to a proposed variation of an ETA. Section 49(8) imposes mandatory considerations on the grant of an ETA, requirements which do not apply to a variation of an ETA: *La La Land Byron Bay Pty Ltd v Independent Liquor and Gaming Authority* [2014] NSWSC 1798.

16 The limitation of merits review to decisions made by ILGA in relation to applications that "would result in trading after midnight" reflects the legislative purpose of inserting s 13A in the GLA Act, described in the Second Reading speech for the Gaming and Liquor Administration Amendment Bill 2015, which was to introduce a merits review mechanism in relation to "contentious" liquor and gaming applications.

17 The respondent submits that the obiter comments of Schmidt J in *Rogers v Independent Liquor and Gaming Authority (No 2)* [2018] NSWSC 1177 (*Rogers No 2*), in which her Honour took a broad view of the scope of cl 7(1)(b), should not be followed, on the basis that her Honour placed undue weight on the words "would result in trading after midnight" without considering the opening words that the application be an "application for an ongoing ETA".

Applicants' submissions

18 In summary, the applicants contend that there is no implication in the use of the word "for" in cl 7(1)(b) that the application is the first application for an ETA or that it is not an application that operates on an existing ETA, for example by

seeking to vary it. The application is equally for an ETA, particularly an ongoing ETA, if it seeks to vary an existing ETA.

19 The applicants submit that the words “application for an ongoing extended trading authorisation” are capable, on their ordinary meaning, of embracing a grant of a new ETA, or a variation of an ongoing ETA, and the question is whether if granted that would result in trading after midnight. That reading would permit merits review of an application that would result in trading after midnight, which would be contentious, and thus would be consistent with the statements in the Second Reading Speech.

20 Section 51(9) of the Liquor Act expressly allows for an application to vary or revoke an ETA, and so an “application for an ongoing ETA” covers both a variation and an initial grant. That construction is consistent with the language used in s 48 of the Liquor Act, which at subsection (3B) distinguishes between an application for an ETA for a small bar (in paragraph (c)) and an application to vary an ETA for a small bar (in paragraph (d)).

21 The applicants submit that the Tribunal should follow the reasoning in *Rogers No 2*, for the following reasons. At paragraph [101] Schmidt J had noted that cl 7 draws a distinction between licences, conditions of a licence and extended trading authorisations, and that where cl 7 refers to the conditions of a licence it is not to be read as also referring in that reference to extended trading authorisations. That is because the extension of a reference to conditions of a licence to conditions of an authorisation in s 51(11) of the Liquor Act was for the purposes of that Act only, that is, not for any regulation made under it. The result of that observation is that if cl 7(1)(b) does not result in this application to vary an ETA being a prescribed application within the meaning of s 13A of the GL Act, then there would be no merits appeal right in relation to that application.

22 At paragraph [109] in *Rogers No 2*, Schmidt J reasoned that even an application to vary an authorisation for extended trading that reduced the trading hours after midnight as compared to the existing authorisation, would be an application within the meaning of cl 7(1)(b):

> 109. Contrary to the case advanced for the Commissioner, had the application been for a variation of the Hotel's authorisation for extended trading, so that it would still cease after midnight, but at some earlier time than was permitted under the existing authorisation, the application would undoubtedly have been one that "would result in trading after midnight", if granted. That under the existing authorisation, later trading after midnight was permitted, would not alter the nature of the variation application. Such an application would thus have fallen within reg 7. But that was not the application which the Commissioner made.

23 The applicants submit that that reasoning supports the proposition that an application for a new ETA and an application to vary an ETA equally fall within cl 7(1)(b). Although the reasoning at paragraph [109] was counterfactual in that the application before her Honour sought to eliminate extended trading after midnight, that does not mean that paragraph [109] was not part of her Honour's reasoning and decision. If that reasoning is not considered to be binding on the Tribunal, it is obiter of the most persuasive kind that would not be departed from unless it is clearly wrong, and furthermore, that reasoning is correct.

24 The applicants submit that the ILGA's construction would mean that the Tribunal would not have jurisdiction in relation to an application for review of a decision to vary an ETA if that application was made by a member of the community such as a neighbour, the local police, or the local consent authority, as a "relevant person" for the purposes of the review right conferred by s 13A of the GLA Act. The possibility that an application to vary an ETA which could result in a significant and substantial increase in the post-midnight hours of trade having an impact on such persons or the local community could not be the subject of a review application is unlikely to have been intended by Parliament or the drafters of the GLA Regulation.

25 The applicants submit that their construction of cl 7(1)(b) is consistent with the use of language in s 48 of the Liquor Act which imposes a requirement for the preparation of a community impact statement where an application will result in trading after midnight equally on a new or the first application for an ETA or an application to vary an existing ETA (s 48(2)(d)). There is a specific carve out in s 48(3B)(d) of an application to vary an ETA for a small bar from s 48 and its overarching obligation to prepare a community impact statement; and that is a powerful statutory indication that where the Act and Regulation refer without

qualification (as is done in s 48(2)(d)) to an application for an ETA, then unless otherwise expressly specified that reference includes an application to vary.

Discussion and findings

26 Section 12 of the Liquor Act provides that the "standard trading period" means (unless a shorter period is prescribed), for any day of the week other than Sunday, the period from 5am to midnight, and for a Sunday, the period from 10am to 10pm. There are specific provisions in subsections (1A), (1B) and (1C) for a small bar, and for certain licensed premises to which a packaged liquor licence relates, which are not relevant to the present proceedings.

27 Section 49 provides general provisions for an extended trading authorisation, relevantly as follows:

> (2) **Extended trading authorisation for consumption on premises**
>
> In the case of a relevant licence (other than a packaged liquor licence) that authorises the sale or supply of liquor for consumption on the licensed premises, the Authority may, on application by the licensee, authorise the licensee to sell or supply liquor, for consumption on the licensed premises only, during any of the following periods—
>
> > (a) in the case of a hotel licence—a specified period between midnight (other than midnight on a Sunday) and 5 am on any day of the week (other than a Monday),
> >
> > (b) in the case of a relevant licence other than a hotel licence—a specified period between midnight and 5 am on any day of the week,
> >
> > (c) in any case—a specified period between 5 am and 10 am on a Sunday,
> >
> > (d) in any case—a specified period between 10 pm and midnight on a Sunday.
>
> …
>
> (5) **Nature of extended trading authorisation**
>
> An extended trading authorisation operates to authorise the sale or supply of liquor on the licensed premises—
>
> > (a) on a regular basis (until such time as the authorisation is varied or revoked by the Authority), or
> >
> > (b) if the authorisation so provides—on a special occasion that takes place on a specified date, or
> >
> > (c) if the authorisation so provides—on up to 12 separate occasions in any period of 12 months.
>
> (6) **Extended trading period to be specified**
>
> In granting an extended trading authorisation, the Authority is to specify—

(a) the extended trading hours during which the licensee is authorised to sell or supply liquor, and

(b) the part or parts of the licensed premises to which the authorisation applies.

…

(8) **Restrictions on granting extended trading authorisation**

The Authority must not grant an extended trading authorisation in respect of licensed premises unless the Authority is satisfied that—

(a) practices are in place, and will remain in place, at the licensed premises 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

(b) the extended trading period will not result in the frequent undue disturbance of the quiet and good order of the neighbourhood of the licensed premises.

28 Section 48 makes provision for consideration of community impact:

48 Community impact

(1) The object of this section is to facilitate the consideration by the Authority of the impact that the granting of certain licences, authorisations or approvals will have on the local community, in particular by providing a process in which the Authority is made aware of—

(a) the views of the local community, and

(b) the results of any discussions between the applicant and the local community about the issues and concerns that the local community may have in relation to the application.

(2) In this section—

relevant application means any of the following—

(a) an application for a hotel licence, club licence, small bar licence or packaged liquor licence,

(b) an application under section 59 for approval to remove a hotel licence, club licence, small bar licence or packaged liquor licence to other premises,

(c) an application for an extended trading authorisation in relation to a hotel licence, club licence, small bar licence or packaged liquor licence,

(d) an application for an extended trading authorisation in relation to an on-premises licence (but only if the authorisation will result in trading at any time between midnight and 5 am),

(e) an application for an extended trading authorisation in relation to a producer/wholesaler licence (but only if the authorisation will result in retail trading at any time between midnight and 5 am),

(f) any particular application (or class of application) that is required by the Authority to be accompanied by a community impact statement,

(g) any other application of a kind prescribed by the regulations or made in such circumstances as may be prescribed by the regulations,

but does not include any application for an extended trading authorisation in relation to a special occasion (as referred to in section 49(5)(b) or (5A) or 49A(3)(b)).

(3) A relevant application must be accompanied by a community impact statement.

(3A) However, a small bar application is not required to be accompanied by a community impact statement if—

(a) development consent is required under the Environmental Planning and Assessment Act 1979 to use the premises to which the application relates as a small bar or to sell liquor during the times to which the application relates, and

(b) the local police and the Secretary are, no more than 2 working days after the application for the required development consent, or any variation to that application, is made, notified by the applicant of the making of the application for development consent or of the variation to that application.

(3B) For the purposes of subsection (3A), a small bar application means any of the following—

(a) an application for a small bar licence,

(b) an application for approval to remove a small bar licence to other premises,

(c) an application for an extended trading authorisation for a small bar,

(d) an application to vary an extended trading authorisation for a small bar.

…

(4) The community impact statement must—

(a) be prepared in accordance with the regulations and any requirements of the Authority, and

(b) be in the form approved by the Authority.

(5) The Authority must not grant a licence, authorisation or approval to which a relevant application relates unless the Authority is satisfied, after having regard to—

(a) the community impact statement provided with the application, and

(b) any other matter the Authority is made aware of during the application process (such as by way of reports or submissions),

that the overall social impact of the licence, authorisation or approval being granted will not be detrimental to the well-being of the local or broader community.

…

29 Section 51 makes further provision for licence-related authorisations, which include an extended trading authorisation:

…

(2) An application for an authorisation to which this section applies must—

(a) be in the form and manner approved by the Authority (or, in the case of an application for an extended trading authorisation for a small bar, by the Secretary), 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 required by the regulations to be advertised—be advertised in accordance with the regulations, and

(d) comply with such other requirements as may be approved by the Authority (or, in the case of an application for an extended trading authorisation for a small bar, by the Secretary) or prescribed by the regulations.

(3) In determining an application for an authorisation, the Authority has the same powers in relation to the application as the Authority has in relation to an application for a licence. The Authority may determine the application whether or not the Secretary has provided a report in relation to the application.

…

(5) Any person may, subject to and in accordance with the regulations, make a submission to the Authority in relation to an application for an authorisation.

(6) If any such submission is made to the Authority, the Authority is to take the submission into consideration before deciding whether or not to grant the authorisation.

…

(9) An authorisation—

(a) is subject to such conditions—

(i) as are imposed by the Authority (whether at the time the authorisation is granted or at a later time), or

(ii) as are imposed by or under this Act or as are prescribed by the regulations, and

(b) may be varied or revoked by the Authority on the Authority's own initiative or on application by the licensee, the Secretary or the Commissioner of Police.

(10) Any such application by a licensee to vary or revoke an authorisation (including any conditions to which the authorisation is subject that have been imposed by the Authority) must be accompanied by the fee prescribed by the regulations.

(11) For the purposes of this Act, any condition to which an authorisation is subject is taken to be a condition of the licence to which the authorisation relates.

> (12) An authorisation has effect only while all the conditions to which it is subject are being complied with.
>
> (13) The Authority must not impose a condition on an authorisation, or revoke or vary an authorisation, other than a variation made on application by a licensee, unless the Authority has—
>
> > (a) given the licensee to whom the authorisation relates a reasonable opportunity to make submissions in relation to the proposed decision, and
> >
> > (b) taken any such submissions into consideration before making the decision.
>
> (14) This section does not authorise the revocation or variation of a condition to which an authorisation is subject if the condition is imposed by this Act or is prescribed by the regulations.

30 The hotels the subject of these proceedings require an ETA in order to trade after the standard trading period specified in s 12 of the Liquor Act, that is, after midnight on Monday to Saturday.

31 The Penshurst Hotel was granted an ETA from 1 July 2008 authorising trade until 2am on Monday to Saturday. The application submitted by Mr Niraula on 28 November 2018 for a change to 4am on those days used the ILGA Extended Trading Authorisation form, which applies to both an authorisation to extend trading hours and a variation of extended trading hours already allowed.

32 The East Hills Hotel was granted an ETA for trade until 2am on Monday to Saturday from 27 September 2018. The application lodged by Henadeck Pty Ltd on 26 November 2018 to change the hours to 4am Monday to Saturday was made using a similar form, which also applied to both an application for an ETA and a variation of extended trading hours already allowed.

33 Based on the liquor licence details records annexed to the affidavits of Mr Hatzis, the ETA granted to each hotel did not specify a special occasion, or a number of special occasions, on which sale or supply of liquor on the licensed premises was authorised. Accordingly, each ETA was of a kind specified in s 49(5)(a) of the Liquor Act, that is, it operates to authorise sale or supply of liquor on the licensed premises on a regular basis until such time as it is varied or revoked by ILGA. The Tribunal prefers and accepts the submissions of the ILGA that as an authorisation that meets the description in s 49(5)(a), each ETA was an “ongoing” ETA. The Tribunal does not agree with the applicants

that that label adds reinforcement to an interpretation of cl 7(1)(b) that it applies both for new applications and for variations.

34 Section 51(9)(b) of the Liquor Act confers power on ILGA to vary or revoke an ETA, either on its own initiative, or on application by the licensee, the Secretary or the Commissioner of Police.

35 *Rogers No 2* was a challenge by the owner and the licensee of a hotel to a decision of ILGA, acting on its own initiative, to vary the hotel's ETA to reduce trading hours after midnight on Monday to Saturday. Before the disputed decision the hotel had an ETA permitting it to trade until 5am on Monday to Saturday and until midnight on Sunday, but it actually traded only until 3am on Monday to Saturday because of its development approvals. The Commissioner of Police had applied to have the ETA revoked. Submissions were provided by the Commissioner, and the applicants. The ILGA then notified its decision not to revoke the hotel's ETA, but to act on its own initiative to vary the authorisation under s 51(9)(b) of the Liquor Act, so that trading could not extend beyond 1.30am on Monday to Saturday.

36 The applicant challenged the decision, first, in an application to this Tribunal for administrative review under s 13A of the GLA Act, and subsequently in judicial review proceedings in the Supreme Court. The Tribunal proceedings were dismissed. In the Supreme Court proceedings, the issues were whether, in order for it to validly exercise the power under s 51(9)(b) in acting of its own initiative to vary the ETA, ILGA first had to comply with the requirements of s 51(13) of the Liquor Act to provide an opportunity for submissions and take those submissions into account; whether it had complied with those requirements, and if it had not, the consequences given the contention that no practical injustice had resulted; and whether there were rights to merits review of which the applicant licensee had been deprived by ILGA's decision to act on its own initiative.

37 Schmidt J concluded that ILGA had failed to comply with mandatory prerequisites to the exercise of its s 51(9)(b) powers imposed on it by s 51(13), and that failure rendered the disputed decision invalid, stating:

> 34. The consequence of holding a failure to comply with the requirements expressly imposed on the Authority in the situations specified in s 51(13) as rendering the Authority's purported decision to impose a condition on, or to revoke or vary an authorisation void, is that valuable statutory rights which the Authority had earlier granted are not interfered with, if the Authority does not adhere to the prerequisites to the exercise of the s 51(9)(b) powers imposed upon it by the legislature.
>
> 35. The public interest may undoubtedly be affected by that conclusion. Given all that the Authority is required to consider, before deciding whether to impose a condition on an existing authorisation, or to revoke or vary such an authorisation, there will no doubt be some members of the community who may thereby be disadvantaged. That would include those who would support the Authority's decision to impose a condition on, or to revoke or vary the authorisation. Those who would oppose such a decision being made would, however, be likely to be in a different position
>
> 36. These consequences of the conclusion that the Authority's failure to comply with the statutory prerequisites imposed by s 51(13) on the exercise of its s 51(9)(b) powers renders its decision invalid must be considered, however, in the context of the entire statutory scheme. It deals at various points with matters of public interest and imposes other obligations on the Authority to take certain matters into account, before making a decision, including when it decides to act on its own initiative.
>
> 37. It is also relevant to take into account that having done so, it is only in limited situations to which I will return, that the Authority's decisions are made subject to merits review. That, too, supports the conclusion that a failure to comply with the prerequisites s 51(13) imposes, renders the Authority's decision invalid.

38 In her detailed analysis of the statutory scheme supporting that conclusion, Schmidt J noted (at [62]) that s 51(13) limited ILGA's exercise of its powers conferred by s 51(9)(b) to impose conditions on or to vary or revoke authorisations once they had been granted, in the circumstances in which it applied, whether it was acting on application or of its own initiative. Section 51(13) was a part of the balance which the legislature had sought to achieve between potentially competing interests by prohibiting ILGA from making decisions in the circumstances to which it applied until it had complied with the prerequisites imposed. At [66] her Honour stated that the conclusion that failure to do so rendered invalid the decision flowed not only from the directory words used in s 51(13) and that nature of those prerequisites, but also from the purpose for which they were imposed; from the other provisions of the Act where other relevant limitations were imposed on ILGA's powers; and by the limited merits reviews provided for ILGA's decisions.

39 The consideration of the extent of the merits review rights conferred by s 13A in *Rogers No 2* arose in that context. After concluding that the decision was invalid and the relief sought by the applicants had to be granted, Schmidt J turned to that question:

> **Was the licensee wrongly deprived of a merits review?**
>
> 92. Despite these conclusions, given the cases which the parties advanced, I should also deal with this question.
>
> 93. The significance of a failure to reveal that the Authority was considering acting of its own initiative to vary the Hotel's extended trading authorisation was identified to be that thereby, Mr Rogers and Mr Boland had been wrongly deprived of the opportunity to pursue a merits review of its decision. That was submitted to flow from s 13A of the Gaming and Liquor Administration Act.
>
> 94. Before NCAT the Authority apparently accepted that while under this legislative scheme a review of its decision to vary the licence would have been available, if it had been made on the Commissioner's revocation application, because it had made the decision acting of its own initiative, there was no such right. The Commissioner did not appear before NCAT, but in these proceedings contended that there was no right to a merits review, in either case.
>
> 95. This depends upon the proper construction of provisions of the Gaming and Liquor Administration Act and the Gaming and Liquor Administration Regulation.

40 Her Honour referred to the objects of the GLA Act in s 2, to s 13A of the GLA Act, and to cl 7 of the GLA Regulation, and continued:

> 101. What 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.
>
> 102. Regulation 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.
>
> 103. It 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.

104. 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.

105. From what was advanced at the hearing by the Commissioner, “on instructions” from the Authority, albeit no appearance was entered for the Authority, its decision to act on its own initiative was made “in relation to” the Commissioner’s application. That is because that term is wide enough to encompass the circumstances which arose in this case, where the Authority took the view that while under s 51(9)(b) it could have resolved the Commissioner’s application by varying, rather than revoking the Hotel’s extended trading authorisation, because there was some doubt about that construction of the Liquor Act, it was preferable for it to act on its own initiative, there then being no question as to its power to vary the Hotel’s authorisation.

106. The bona fides of the Authority acting in that way were questioned, it being submitted for example in written submissions, that the distinction between dealing with applications and acting of its own initiative was “one which the Authority carefully sought to exploit in the present case”.

107. The criticism should not be too readily accepted. It is not apparent that in proceeding as it did that the Authority sought, wrongly, to preclude Mr Rogers and Mr Boland from exercising a right of review which the legislature intended them otherwise to have, when the Authority dealt with the application made to it by the Commissioner, for revocation of the Hotel’s extended trading hours authorisation.

108. Regulation 7 is concerned with “applications”. On its face the Commissioner’s application was not one, however, that “would result in trading after midnight”, if granted and so it did not fall within the regulation.

109. Contrary to the case advanced for the Commissioner, had the application been for a variation of the Hotel’s authorisation for extended trading, so that it would still cease after midnight, but at some earlier time than was permitted under the existing authorisation, the application would undoubtedly have been one that “would result in trading after midnight”, if granted. That under the existing authorisation, later trading after midnight was permitted, would not alter the nature of the variation application. Such an application would thus have fallen within reg 7. But that was not the application which the Commissioner made.

110. What the Authority did when it decided not to revoke the Hotel’s authorisation, but to vary its extended trading hours acting on its own initiative, certainly resulted in trade after midnight, that being what the varied authorisation permitted. Given why the Authority acted of its own initiative so to vary the authorisation, that the Authority’s decision was one which it made “in relation to” the Commissioner’s revocation application, is also apparent. That

> follows from the wide import of those words and what the Authority in fact did, as the result of its consideration of that application.
>
> 111. What, however, the course which the Authority pursued did not alter was, contrary to the case advanced for Mr Rogers and Mr Boland, the nature of the Commissioner's application, which resulted in the Authority deciding to act of its own initiative. That application sought the revocation of the Hotel's authorisation to trade after midnight. It was thus not an application which "would result" in such trade, if it was granted. If it failed, the Hotel's existing authorisation was left unaffected. If it succeeded, the authorisation would be brought to an end.
>
> 112. It follows that even if the Authority's decision to vary the authorisation had not been made on its own initiative, it was not reviewable by NCAT under s 13A, because the Commissioner's application did not come within reg 7.

41 As noted by Schmidt J at paragraph [101], cl 7 draws a distinction between licences, conditions of licences, and extended trading authorisations. It was not in dispute that the present applications are not, by virtue of s 51(11) of the Liquor Act, concerned with a condition of a licence, and that cl 7(1)(c) accordingly does not apply.

42 In support of the argument that cl 7(1)(b) applies, the applicants rely on paragraph [109] of *Rogers No 2*. That paragraph supports the proposition that had the ILGA been determining the Commissioner's application, there may have been a right for the licensee to seek merits review if, for example, that application had sought to restrict the hours authorised under the ETA to 2am, instead of revocation of the ETA so that trade reverted to the standard trading period. However, the decision under challenge in that case was made by ILGA in the exercise of the power conferred by s 51(9)(b) to vary or revoke an ETA of its own initiative. It was accepted (at [104]) that there was no right of review in that scenario; and the relevance of the consideration of whether there was any merits review avenue in respect of the Commissioner's application was in addressing the applicants' argument that they had been wrongly deprived of an opportunity to pursue merits review because ILGA had decided to act on its own initiative. As [112] confirms, there were two reasons why merits review would not have been available to the applicants in those proceedings: first, because the decision was one made by ILGA of its own initiative, and not in response to an application; and secondly, because the Commissioner's application would not in any event have been an application that "would result in trading after midnight".

43 Having regard to the context, and way in which the issues for determination in *Rogers No* 2 were framed, the Tribunal considers that the reasoning in *Rogers No 2* is distinguishable in these proceedings. As Schmidt J noted at paragraph [108], cl 7 is concerned with "applications". The focus of her Honour's analysis in *Rogers No 2* was on whether the application "would result in trading after midnight" if granted. The question in these proceedings is whether cl 7(1)(b) can be read so as to include in the phrase "an application for an ongoing extended trading authorisation" an application to vary an existing ongoing extended trading authorisation.

44 To answer that question the Tribunal is required to 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].

45 The objects of the GLA Act are:

> **2A Objects of Act**
>
> The objects of this Act are as follows—
>
> (a) to ensure the probity of public officials who are engaged in the administration of the gaming and liquor legislation,
>
> (b) to ensure that the Authority is accessible and responsive to the needs of all persons and bodies who deal with the Authority,
>
> (c) to promote fair and transparent decision-making under the gaming and liquor legislation,
>
> (d) to require matters under the gaming and liquor legislation to be dealt with and decided in an informal and expeditious manner,
>
> (e) to promote public confidence in the Authority's decision-making and in the conduct of its members.

46 The definition of "gaming and liquor legislation" in s 4 of the GLA Act confirms that the Liquor Act is part of the regulatory scheme which provides the context for the review rights conferred by s 13A of the GLA Act. The objects of the Liquor Act are:

> **3 Objects of Act**
>
> (1) The objects of this Act are as follows—

> (a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,
>
> (b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,
>
> (c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.
>
> (2) In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following—
>
> (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),
>
> (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,
>
> (c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

47 An expansive interpretation of cl 7(1)(b) of the GLA Regulation, and thus the review rights conferred by s 13A of the GLA Act, would be consistent with the object stated in s 2(c), (d) and (e) of the GLA Act.

48 However, 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.

49 The Liquor Act distinguishes between an application for the grant of an ETA and an application to vary an ETA, in terms of who can make such an application; the formal requirements for an application; and the relevant considerations to be taken into account in determining an application. An application for an extended trading authorisation is made by the licensee (s49(2), (2A), (4)); an application to vary an ETA may also be made by the Commissioner of Police (s 51(9)(b)). Section 51 distinguishes between an application for an authorisation, specifying in s 51(2)-(8) the formal requirements, including provision for the making of submissions, and an application to vary an authorisation in s 51(9)(b), which specifies that such an application made by a licensee must be accompanied by the prescribed fee (s 51(10)). As discussed in *La La Land Byron Bay Pty Ltd v Independent Liquor and Gaming Authority* [2014] NSWSC 1798 at [69]-[70], while s 49(8) of the Liquor Act restricts the ILGA's power to grant an ETA by requiring that it be satisfied of the matters in (a) and (b), it does not so operate in relation to a variation of an ETA; the matters in s 49(8), while relevant, are not a constraint on the exercise of power under s 51.

50 The Tribunal does not accept the applicants' submission that the requirement for provision of a community impact statement sheds light on how cl 7(1)(b) should be construed. Section 48(2) of the Liquor Act identifies the applications that fall within the term "relevant application" for the purposes of the requirement in s 48(3) that such an application must be accompanied by a community impact statement. Subsection 48(2) includes "an application for" an ETA in relation to a hotel licence (s 48(2)(c)), and in relation to an on-premises licence "(but only if the authorisation will result in trading at any time between midnight and 5am)" (s 48(2)(d)). Subsection 48(2)(f) also includes "any particular application (or class of application) that is required by the Authority to be accompanied by a community impact statement". Each of the applications in these proceedings was accompanied by a community impact statement, as directed on the front page of the Extended Trading Authorisation: Hotel Licence

form completed by each applicant. Both forms state that they are to be used by the licensee of a hotel who is applying for an authorisation to extend trading hours, or who is applying to vary the extended trading hours already allowed. Neither form states the legislative basis for the requirement for a community impact statement. The form completed by Henadeck Pty Ltd states on the front page:

> A Category B Community Impact Statement must be completed before you can lodge this application for an extended trading authorisation. The ILGA has determined that this includes variations to an existing ETA.

51 It is not clear from the documents before the Tribunal whether the request for a community impact statement in these applications was based on s 48(2)(c) or s 48(2)(f) of the Liquor Act. In that context, the Tribunal does not regard the provision of a community impact statement as supporting the applicants' contention that cl 7(1)(b) should be read so as to apply both to an application for a new ETA and for an application to vary an existing ETA.

52 Clause 7(1)(b) of the GLA Regulation refers to "an application for an ongoing extended trading authorisation"; in contrast, cl 7(1)(c) refers to "an application to vary or revoke" a condition. The applicants contend that those words can be read into cl 7(1)(b). The Tribunal is of the view that to read the words "application for an ongoing extended trading authorisation" as if they include a variation of an existing authorisation is unduly strained, and prefers the construction urged by ILGA. The word "for" in cl 7(1)(b) should not be read as though it meant "in relation to". The application made by each applicant was not an "application for" an outcome specified in cl 7(1)(b), in the sense that the end or outcome sought was not already permitted. The hotels already had an "ongoing extended trading authorisation in relation to a licence referred to in paragraph (a)" that permitted trading after midnight. Had cl 7(1)(b) been intended to include an application to vary an existing ETA that had authorised, and thereby resulted in, trading after midnight, it could have been so drafted.

Conclusion

53 The Tribunal concludes that when read in their ordinary and grammatical sense, the words used in cl 7(1)(b) do not include an application by a licensee to vary an ongoing extended trading authorisation, and there is no basis in the

legislative scheme for reading those words so as to include such an application. The Tribunal acknowledges the force in the applicants' submission that that conclusion would deprive a "relevant person" as defined in s 13A(5) of the GLA Act from seeking review of a decision to approve a variation of an ETA; however, in the context of a complex legislative scheme, that may be the consequence of the clearly confined provisions for merits review.

54 An application under s 51(9)(b) of the Liquor Act by the licensee to vary an authorisation is not included in the prescribed applications in relation to which a person aggrieved by ILGA may apply for administrative review. As a consequence, the Tribunal does not have jurisdiction to review the decision made by ILGA in each of the proceedings before the Tribunal.

55 The Tribunal orders:

(1)In proceedings 2019/248033: the application for review of the decision of the Independent Liquor and Gaming Authority notified on 18 July 2019 to refuse the application to vary the extended trading authorisation for East Hills Hotel is dismissed.

(2)In proceedings 2019/271159: the application for review of the decision of the Independent Liquor and Gaming Authority notified on 14 August 2019 to refuse the application to vary the extended trading authorisation for Penshurst Hotel is dismissed.

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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