



Mr and Mrs Craig and Loretta Coote
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Dear Mr Watts

**Decision on Application for an Extended Trading Authorisation –
Gladstone Hotel, Dulwich Hill**

The Independent Liquor and Gaming Authority has considered further an application first made by Mr Craig Coote on 2 July 2014 for the approval of an extended trading authorisation under section 49(2) of the *Liquor Act 2007* in respect of the Gladstone Hotel, located at 572 Marrickville Road, Dulwich Hill.

The Application was initially refused by the Authority in a decision dated 31 March 2015 by reason that the Authority was not satisfied that the overall social impact of granting the Application would not be detrimental to the local community for the purposes of section 48(5) of the Act (**Purported Decision**).

On 27 May 2015, the Applicant applied to the Supreme Court of New South Wales for judicial review of the Purported Decision pursuant to section 69(1) of the *Supreme Court Act 1970*, seeking that the Application be remitted to the Authority for consideration according to law. On 26 June 2015, the Purported Decision was set aside by consent and the matter was remitted to the Authority.

As part of the Authority's preparation for the Application to be determined by the Authority, Authority staff observed that the notice required to be displayed by an applicant on the site of a licensed premises under clause 9 of the *Liquor Regulation 2008* was not displayed on the Premises.

In a letter dated 22 September 2015, the Applicant was advised of the Authority's view that an application that does not comply with clause 9 of the Regulation is invalid. The Applicant was invited to remake the Application or alternatively, to provide further submissions as to why the Authority has jurisdiction to consider the merits of the Application, notwithstanding the apparent non-compliance with the Regulation.

Following the receipt of further submissions from the Applicant's solicitors on this jurisdictional issue, the Authority reconsidered the matter at its meeting on 25 November 2015 and decided that it does *not* have jurisdiction to consider the merits of the Application by reason of the Applicant's non-compliance with clause 9 of the Regulation.

This letter attaches a statement of the Authority's reasons for the decision, which has been prepared in the context of a high volume liquor jurisdiction.

If you have any enquires about this letter please contact the Authority's Manager of Licensing, Ms Allison Waring via email to allison.waring@ilga.nsw.gov.au

Yours faithfully

A handwritten signature in blue ink, appearing to read 'M Brodie', with a stylized flourish at the end.

Micheil Brodie
Chief Executive

06 JAN 2016

STATEMENT OF REASONS

BACKGROUND

1. On 2 July 2014, the Independent Liquor and Gaming Authority (**Authority**) received an application (**Application**) made by Mr Craig Coote (**Applicant**) seeking approval of an extended trading authorisation under section 49(2) of the *Liquor Act 2007* (**Act**) in respect of the Gladstone Hotel, located at 572 Marrickville Road, Dulwich Hill (**Premises**).
2. The Gladstone Hotel is currently licensed to sell or supply liquor for consumption *on* the Premises throughout the entire period of standard trading hours available under section 12 of the Act, that is, between 5:00am and 12:00 midnight Monday through Saturday and between 10:00am and 10:00pm on Sunday.
3. Being a hotel licensed venue, the Premises is also licensed to sell or supply liquor for consumption *off* the Premises. The *OneGov* licence record dated 14 January 2015 indicates that the Premises is currently licensed to sell takeaway liquor during the same hours as for on-premises consumption. However, while the hotel may have previously enjoyed those off-premises licensed hours, amendments to the Act that commenced during February 2014 prevent the sale or supply of liquor for consumption off any licensed premises in New South Wales after 10:00pm on any evening.
4. Therefore, the hotel is currently licensed to sell or supply liquor for consumption *off* the Premises between 5:00am and 10:00pm on Monday through Saturday and between 10:00am and 10:00pm on Sunday.
5. The Application seeks the following:
 - (i) That the Sports Bar area of the Premises be permitted to engage in licensed on-premises trading until **1:00am** on the morning after Thursday, Friday and Saturday evening trade.
 - (ii) That the remainder of the Premises, excluding the Beer Garden and Sports Bar areas, be permitted to engage in licensed trading until **3:00am** on the morning after Thursday, Friday and Saturday evening trade, and until **12:00** midnight on Sunday evenings.
6. The Authority notes, by way of background, that the Application was accompanied by two further applications relating to the hotel business in respect of which the Applicant sought simultaneous consideration by the Authority:
 - (i) An application made by the Applicant on 2 July 2014 to change the boundary of the licensed area of the Premises under section 94 of the Act (**Boundary Application**) to excise an area that may otherwise operate as the hotel's packaged liquor store.
 - (ii) An application made by Ms Loretta Coote on 3 July 2014 under section 40 of the Act seeking the grant of a new packaged liquor licence in respect of premises located next door to the hotel at 412 New Canterbury Road, Dulwich Hill, to be known as the "Dulwich Hill Drive-In Bottle Shop" (**PLL Application**).

7. The PLL Application explains that the purpose of that application is to separate the bottle shop from the hotel Premises. It is proposed that the Gladstone Hotel licence be encumbered with a condition that would prevent a bottle shop from operating from within the hotel Premises, and that any takeaway liquor sales from the hotel be limited for so long as the proposed new packaged liquor licensed premises next door remains trading as a licensed business. This proposal is consented to by the licensee of the hotel. The Boundary Application would reduce the licensed area of the Gladstone Hotel such that it no longer covers the area formerly occupied by the hotel bottle shop.
8. The Authority considered the Boundary Application, the PLL Application and the Application at its meeting on 4 March 2015.
9. The Authority:
 - decided to *grant* the Boundary Application under section 94 of the Act;
 - decided to *grant* the PLL Application under section 45 of the Act; and
 - purportedly decided to *refuse* the Application under section 49(2) of the Act (**Purported Decision**).

Further consideration of the Application

10. The outcomes of the three applications before the Authority were notified to the Applicant in a detailed decision letter dated 31 March 2015.
11. The Purported Decision to refuse the Application was made on the basis that the Authority was not satisfied that the overall social impact of granting the Application would not be detrimental to the local community for the purposes of section 48(5) of the Act.
12. On 27 May 2015, the Applicant filed a Summons in the Supreme Court of New South Wales seeking judicial review of the Purported Decision pursuant to section 69(1) of the *Supreme Court Act 1970* and seeking orders, *inter alia*, that the Application be remitted to the Authority for consideration according to law.
13. On 26 June 2015, by consent of the parties, his Honour Justice Beech-Jones set aside the Purported Decision, ordering that the part of the Purported Decision refusing the Application for an extended trading authorisation pursuant to section 49(2) of the Act be quashed, and that the matter be remitted to the Authority.
14. On 26 June 2015, the Applicant's counsel, Mr Michael Heath advised the Authority's solicitor in the judicial review proceedings, the New South Wales Crown Solicitor that the Applicant would soon be writing to the Authority setting out "in detail" its concerns in relation to the Purported Decision.
15. On 11 September 2015, the Applicant's solicitors, *Slater and Elias Lawyers* filed the foreshadowed 16 page submission letter with the Authority, which focussed upon the merits of the Application and responded to the various findings made by the Authority in the Purported Decision. The Applicant attached 16 annexures to this submission, much of it new material that was not before the Authority when it made the Purported Decision (discussed in more detail below).
16. As part of the Authority's preparation for the Application to be resubmitted to the Authority, Authority staff inspected the Premises of the hotel and observed that the

notice required to be displayed by a liquor applicant on the site of a licensed premises (**Site Notice**) under clause 9 of the *Liquor Regulation 2008* (**Regulation**) was not displayed on the Premises. Authority staff took photographs of the exterior of the Premises evidencing the absence of the Site Notice.

17. On 22 September 2015, the Authority's Chief Executive wrote to the Applicant's solicitors informing them that the Site Notice was not displayed on the Premises when inspected on 21 September 2015 and providing photographs taken by staff.
18. The Chief Executive advised the Applicant of the Authority's view that an application that does not comply with clause 9 of the Regulation is invalid. The Applicant was invited to withdraw the Application and begin the process anew or alternatively, to provide further submissions as to why the Authority has jurisdiction to consider the Application, notwithstanding the Applicant's apparent non-compliance with the Regulation.
19. Following the receipt of further submissions from the Applicant's solicitors on this jurisdictional issue dated 20 October 2015, the Authority reconsidered this matter at its meeting on 25 November 2015 and decided that the Authority does *not* have jurisdiction to consider the merits of the Application by reason of the Applicant's non-compliance with clause 9 of the Regulation.

MATERIAL BEFORE THE AUTHORITY

Material before the Authority as at 4 March 2015

20. As at the date of the purported determination of the Application on 4 March 2015, the Authority had before it the Application, the accompanying Category B Community Impact Statement (**CIS**), further submissions and other relevant material, including:
21. **Application Form and Community Impact Statement filed with the Authority on 2 July 2014.** In the CIS, the Applicant provides a one and a half page submission on social impact. It is submitted that the Gladstone Hotel has been a family run business for 36 years. The Applicant contends that the local Dulwich Hill community will benefit from the proposed extension of trading hours. The Premises is a place used by the community to view live sporting events and has a function room available to host events such as "birthday parties, engagement parties and anniversaries". The hotel will provide alcohol responsibly pursuant to the *RSA Policy*. Staff are RSA trained and a security officer is engaged on Thursday, Friday and Saturday nights. The hotel has not come under the adverse attention of Police and this is evidenced by the Police response to the Application. The Applicant proposes the imposition of new licence conditions requiring the maintenance of doors and windows in a closed position, that live entertainment be conducted inside the hotel only during late hours, that no flashing or strobing lights be used, that signage be used to warn patrons about disturbance to neighbours and that the licensee observe NSW Police *Crime Scene Preservation Guidelines*.
22. The Applicant contends that granting the Application will enable patrons to depart the Premises in a staggered manner, placing less strain on public transport and this, it is contended, will lessen the impact on the neighbourhood. The security officer on duty will monitor the vicinity of the hotel with a view to directing patrons to public transport and reducing noise in the immediate vicinity of the hotel Premises. The Applicant

submits that the hotel is part of the Australian Hotels Association (AHA) Game Care and Code of Conduct program and that its staff are also RCG trained.

23. The Applicant contends that positive benefits will include that patrons may have a safe night out in closer proximity to their home and that patrons on the Premises at midnight will be able to consume their drinks without the pressure of doing so before closing time. The Applicant submits that there will also be employment benefits to staff from the additional trading hours, should the Application be granted.
24. **Copies of stakeholder notices** in respect of the Application.
25. **AHA "Game Care" Problem Gambling Counselling and Self-Exclusion Scheme and Hotel Gaming Code of Conduct.** This document is undated but is signed by Mr Paul Nicolau (the former CEO of the NSW AHA) and countersigned by the licensee, Mr Coote. It is apparently submitted in support of the Application and certifies the participation of the Gladstone Hotel in this Industry Scheme and Code of Conduct that is designed to serve as a self-regulatory harm reduction initiative for problem gambling in hotels.
26. **Determination on Development Application number 76/97 by Marrickville Council (Council) dated 11 April 1997 (DA) for the Premises.** This document records development consent for use of the Premises as a hotel under the *Environmental Planning and Assessment Act 1979*. It includes a condition limiting the hours of operation of the Premises (for planning purposes) to between 9:00am and 3:00am the morning after Monday through Saturday evening trade, and between 10:00am and 12:00 midnight on Sundays. The DA also specifies conditions pertaining to, *inter alia*, noise emissions, amplified music and signage.
27. **Report to Authority dated 9 December 2014 from a delegate of the Secretary of the NSW Department of Trade and Investment (Secretary) via the Compliance Branch of OLGR addressing the Application.** OLGR notes that the venue has been recorded as below all three levels of assessment for reported incidents of violence. [The Authority notes that in the scheme administered by the Secretary pursuant to Schedule 4 to the Act, venues with over 19 recorded incidents of violence on premises during a 12 month period (the financial and calendar year) are classified as "Level 1" venues and subject to the imposition of special licence conditions. Licensed premises with between 12 and 19 acts of violence on premises are classified as "Level 2" venues and subject to special licence conditions. Premises with between 9 and 11 incidents of violence are classified by OLGR as "Level 3" premises and while notified of this assessment, are not subject to special licence conditions.]
28. OLGR submit that its compliance records disclose that the Premises has been the subject of complaints in 2009, 2010, 2013 and 2014 during the tenure of the current licensee, Mr Coote. There have been "no recent compliance breaches" detected in relation to the hotel, with the most recent breaches detected by OLGR being for gaming related issues in 2011.
29. OLGR notes that in view of the late hours sought and the business model (a hotel), the business type is assessed as a "high risk" operation. OLGR submits that the radial density of all licensed premises within the suburb of Dulwich Hill is "on par with the State average".

30. OLGR submits that crime mapping data from the NSW Bureau of Crime Statistics and Research (**BOCSAR**) records that the venue is located within a low density “hotspot” for the concentration of *alcohol related assault* incidents. The rate of alcohol related assaults (both domestic and non-domestic) for the period from October 2013 to September 2014 was **269** per 100,000 persons of population, below the figure of **321** per 100,000 persons of population for NSW as a whole. The rate of *alcohol related disorderly conduct* incidents for the suburb was zero compared to the State rate of **105** per 100,000 persons of population. OLGR does not object to the Application.

31. **Submission on the Application from Sergeant James Walters of Marrickville LAC dated 7 July 2014.** This brief submission notes that it follows lengthy consultation with the Applicant’s solicitors, *Slater and Elias Lawyers*, and attaches an email dated 26 June 2014 from Sergeant Walters to the Applicant’s solicitors which advises the final proposed conditions as agreed by Police and the Applicant on 26 May 2014. Police do not object to the Application, subject to the imposition of the following conditions on the licence “in an effort to maintain the quiet and good order of the neighbourhood”:

- No live music or DJ entertainment in external areas;
- No flashing or blinking lights after midnight;
- All windows and doors opening to exterior footpaths and car parks must be kept in the closed position after midnight;
- The licensee must comply with the NSW Police *Crime Scene Preservation Guidelines*; and
- The licensee must use signage reminding patrons of disturbance to neighbours.

32. **Resident email submission from a local resident of Dulwich Street, Dulwich Hill dated 25 May 2014.** In this email, the local submitter states as follows:

I would like to submit an objection to the Gladstone Hotel at 570-572 Marrickville Road applying to extend their hours. I live diagonally across from the premises...and already hear noise from the premises, particularly patrons standing outside smoking or leaving or entering the premises. By the business extending their trading hours this will extend the times that noise will come from the premises. There are substantial residential dwellings nearby and this will disturb the area and encourage noise from drunk patrons around the direct vicinity. I view that the current hours before the extension are sufficient.

33. **Email from the solicitor for the Applicant, Mr Ryan Watts of the law firm Slater and Elias Lawyers, dated 28 May 2014 to the writer of the resident submission dated 25 May 2014** stating that the Applicant was “surprised and concerned” to receive the complaint about noise from patrons standing outside and entering and leaving in that the licensee “has not noted this to be the case”. The Applicant offers a meeting with the submitter.

34. **Submission to the Authority from Mr Watts dated 19 December 2014.** In this letter, the Applicant provides a signed Certificate of Advertising and confirms that the Application seeks licensed extended trading from 9:00am until 1:00am on the morning after Thursday through Saturday evening trade and from 10:00am until 12:00 midnight on Sunday in the Sports Bar. The Beer Garden is proposed to have licensed trading from 9:00am until 12:00 midnight Monday through Saturday and from 10:00am until 10:00pm on Sunday. Extended trading will occur in areas other than the Sports Bar and Beer Garden from 9:00am until 3:00am on the morning after Monday through Saturday evening trade and from 10:00am until 12:00 midnight on Sunday. Takeaway sales from the hotel will occur from 9:00am until 10:00pm Monday through Saturday

and from 10:00am until 10:00pm on Sunday. The Applicant notes the conditions proposed by and agreed with Police and notes, in response to the report from OLGR dated 9 December 2014, that the applicant in this matter is not the licensee of the packaged liquor licence for Dulwich Hill Cellars, being Mr Michael Efstratiou. The licensee states that he is "not aware" of any complaints against the hotel licence during 2013 and 2014.

35. Email from the Applicant's solicitors to the Authority dated 21 January 2015.

This brief submission provides amended plans for the Premises indicating the areas proposed to be licensed to trade until 1:00am or 3:00am, as the case may be; and also confirms the Applicant's agreement to Police conditions that there be no amplified or live music or entertainment provided anywhere within the whole of the Premises after 12:00 midnight until Council consent is obtained and that the words "Bottle Shop" be removed from the areas of the hotel that are licensed for on-premises consumption of liquor.

36. Diagrams of the hotel Premises provided by the Applicant indicating areas of the Premises proposed to have 3:00 am, 1:00am or standard trading, as the case may be.

37. OneGov liquor licence record for the Premises as of 14 January 2015 noting the trading hours, the licensee (the Applicant, Mr Coote), the business owner (Coote Hotels Pty Ltd) and the premises owner (also Coote Hotels Pty Ltd).

38. Authority licensing records indicating the addresses of other hotel, on-premises and other nearby licensed businesses in the suburbs of Dulwich Hill, Marrickville and Hurlstone Park.

39. Authority licensing data indicating that liquor licence density per 100,000 persons of population in postcode 2203 (which contains only the State suburb of Dulwich Hill) was slightly above the NSW rates for club licences, well above the NSW rate for hotel licences and very well above the NSW rate for on-premises licences. The rate was almost the same as the State wide rate for packaged liquor licences. The Marrickville local government area (LGA), by comparison, had a substantially lower rate of hotel and club licences than the State wide rate, a rate well below the State average for on-premises licences and a rate substantially lower than the State average for packaged liquor licences.

40. BOCSAR crime mapping data for October 2013 to September 2014 indicating that the Premises is located within a low density hotspot and close to a medium density hotspot for the concentration of *non-domestic assault* offences; within a high density hotspot for *domestic assault* offences and within a high density hotspot for *malicious damage* offences.

41. BOCSAR crime data for calendar year 2013 detailing rates of offences for the Marrickville LGA compared to NSW as a whole. This data indicates that for calendar year 2013, the rate of *alcohol related assault* Police incidents in the Marrickville LGA was substantially above the NSW rate per 100,000 persons of population. The rate of *alcohol related domestic assault* was above the NSW rate. The rate of *alcohol related non-domestic assault* was at about the NSW rate, while *prescribed concentration of alcohol* offences in the Marrickville LGA were above the NSW rate. The rate of *alcohol related offensive conduct* in the LGA was well below the NSW rate.

42. BOCSAR Report on Crime for the Marrickville LGA for calendar year 2013.

43. **BOCSAR Report on Crime by LGA and Alcohol Related Status for calendar year 2013.**
44. **BOCSAR Report on Crime for New South Wales for calendar year 2013.**
45. **Socio-Economic Index for Areas (SEIFA) data published by the Australian Bureau of Statistics (ABS)** indicating that the suburb of Dulwich Hill ranked in the 7th decile within the State, while the Marrickville LGA ranked in the 9th decile within the State on the Index of Relative Socio Economic Advantage and Disadvantage (with a decile ranking of 10 being the most advantaged).
46. **Decision Letter from the Authority dated 31 March 2015** advising the Purported Decision to refuse the Application and grant the Boundary Application and PLL Application.

New material before the Authority

47. **Summons for Judicial Review of the Purported Decision filed by the Applicant in the Supreme Court of New South Wales on 27 May 2015.**
48. **Email dated 26 June 2015 from Ms Jessica Kavanagh, NSW Crown Solicitor's Office** to the Authority setting out the orders made by Justice Beech-Jones of the New South Wales Supreme Court, by consent of the parties on 26 June 2015:
 1. *Pursuant to section 69 of the Supreme Court Act 1970 (NSW) ("the Act") order that that part of the decision of the Independent Liquor and Gaming Authority dated 31 March 2015 ("the decision") refusing the Plaintiff's application for extended trading authorisation pursuant to section 49(2) of the Liquor Act 2007 (NSW) be quashed.*
 2. *Pursuant to section 69 of the Act order that the decision be remitted to the Independent Liquor and Gaming Authority.*
 3. *The Defendant pay the Plaintiff's costs of the proceedings up to and including 11 June 2015.*
49. **New submission on the merits of the Application from the Applicant's solicitors, Slater and Elias Lawyers dated 11 September 2015.** The Applicant submits that, in the circumstances of this case, the appropriate approach by the Authority is to consider the Application afresh, give notice to the Applicant of any adverse matters that the Authority considers relevant to the consideration of the Application and give the Applicant an opportunity to address any matter the Authority may consider is adverse to the Application for an extended trading authorisation.
50. The Applicant submits that the Purported Decision identified three matters adverse to the Application being granted, as follows:
 1. The insufficient substantiation of the positive benefits that will flow to the local or broader community;
 2. The alleged increased scope for crime and alcohol related crime in the local and broader community is a negative incident of the Application; and

3. Alternatively, the patron migration to or from the Premises, or remaining in the vicinity of the Premises during late hours will contribute to adverse impacts on local amenity.
51. Briefly, the Applicant contends that the Application meets the objects of section 3 of the Act in that positive benefits will flow to the local and broader community, including:
- the provision of access to international news and current affairs from overseas;
 - telecast of international and sporting events not involving Australia;
 - a late night function room;
 - the provision of employment opportunities for late night shift workers;
 - the provision of food, gaming and entertainment services to local patrons; and
 - supporting the development of related industries through employing local residents, hiring and promoting local artists and hosting visiting tourists.
52. The Applicant contends that the majority of the patronage of the Gladstone Hotel is from the local community and that the proposed extended operation of the hotel will not contribute to migration between the local and broader community.
53. While the Applicant accepts that the BOCSAR statistics for the Marrickville LGA are of concern, the Applicant submits that these statistics are influenced by the Newtown entertainment precinct and it is "inappropriate" for the Authority to use statistics for the entire LGA when assessing this Application in view of the hotel's "history of good compliance" and the "relatively low" BOCSAR statistics for Dulwich Hill.
54. The Applicant provides updated BOCSAR statistics for the State suburb of Dulwich Hill for the period from July 2014 to June 2015 and submits that the rates per 100,000 persons of population of incidents of *non-alcohol related domestic assault, non-alcohol related non-domestic assault, alcohol related assault Police, alcohol related non-domestic assault, alcohol related domestic assault, malicious damage to property, disorderly conduct and liquor offences* recorded as occurring in the suburb of Dulwich Hill are "not problematic given the rate of incidents in relevant categories are well below State average".
55. The Applicant further submits that Marrickville Police do not object to the Application and that the Applicant provided its consent to a number of licence conditions proposed by Police.
56. In relation to the issue of patron migration and resident complaints, the Applicant submits that it has consented to the conditions proposed by Police requiring:
- that there be no live music or DJ entertainment in the Sports Bar;
 - that windows and doors are to remain closed during the extended trading period;
 - that permanent signage directing patrons to keep noise and disturbance to a minimum when leaving the Premises is erected both internally and externally;
 - that a 1:30am lockout be maintained;
 - that two uniformed security guards are to be present during the extended trading period; and
 - that the extended trading authorisation for the Sports Bar will cease at 1:00am.
57. The Applicant also makes the following further submissions with regard to this issue:

- Excluding extended trading in the Sports Bar area beyond 1:00am will significantly reduce the area where liquor may be consumed on the Premises.
- “Public transport” will be accessible during the extended trading period, reducing the possibility of any disturbance to the neighbourhood.
- The implementation of the hotel's *Prevention of Intoxication and RSA Plan* will reduce the scope for the hotel business operating on the Premises to contribute to adverse impacts upon local amenity.

58. In response to the concerns raised in a submission to the Authority by a local resident regarding noise emanating from the hotel Premises during late hours should the Application be granted, the Applicant attaches statutory declarations from two local residents who state that they live in the same apartment block as this complainant. The submitters state that they have “never had any problems with the venue, noise, patrons or disturbances of any kind, day or night” and comment that the hotel is a “very valuable addition” to the community.
59. The Applicant attached 16 annexures to its submission dated 11 September 2015, most of which were not before the Authority as at the date of the Purported Decision. Following is a brief summary of these annexures:
60. **Annexure 1 to the Applicant’s submission dated 11 September 2015** – this is a copy of a letter from Ms Kavanagh of the Crown Solicitor’s Office to the Applicant’s solicitors dated 11 June 2015 (discussed above).
61. **Annexure 2 to the Applicant’s submission dated 11 September 2015** – this is an email from the Applicant’s solicitors to the Authority’s Manager of Licensing dated 24 August 2015 enquiring as to the process whereby the Application is to be reconsidered by the Authority.
62. **Annexure 3 to the Applicant’s submission dated 11 September 2015** – this is an email from the Authority’s Manager of Licensing to the Applicant’s solicitors dated 25 August 2015 advising the Applicant that after the Applicant provides the detailed further submissions on the Application that were foreshadowed by the Applicant in June 2015, the matter will be relisted before the Authority for further consideration.
63. **Annexure 4 to the Applicant’s submission dated 11 September 2015** – this is a copy of the OLGR Report provided in response to the Application dated 9 December 2014 (discussed above).
64. **Annexure 5 to the Applicant’s submission dated 11 September 2015** – this is an email from Mr Jeff Norman, Town Planner from Marrickville Council dated 16 July 2014 attaching the Council Notice of Application and notifying that development consent with respect to the proposed use of the Premises (for planning purposes) is required and is in place.
65. **Annexure 6 to the Applicant’s submission dated 11 September 2015** – this is a copy of the submission made by Marrickville Police in response to the Application dated 7 July 2014 (discussed above).

66. **Annexure 7 to the Applicant's submission dated 11 September 2015** – this is a copy of development consent application No. 76/96 as approved by Marrickville Council in respect of the Premises.
67. **Annexure 8 to the Applicant's submission dated 11 September 2015** – this is a copy of the Gladstone Hotel *Prevention of Intoxication and RSA Plan*, which was not before the Authority at the time the Purported Decision was made.
68. **Annexure 9 to the Applicant's submission dated 11 September 2015** – this is a copy of the *OneGov* liquor licence record for the Vegas Hotel in Hurlstone Park as at 21 August 2015.
69. **Annexure 10 to the Applicant's submission dated 11 September 2015** – this is a copy of the Gladstone Hotel *Char-Grill Menu*, which was not before the Authority at the time the Purported Decision was made.
70. **Annexure 11 to the Applicant's submission dated 11 September 2015** – this is a copy of the AHA NSW "Game Care" Problem Gambling Counselling and Self-Exclusion Scheme and Hotel Gaming Code of Conduct (2015). This document is signed by Mr John Whelan (the current CEO of AHA NSW) and countersigned by the licensee. This document was not before the Authority at the time the Purported Decision was made.
71. **Annexure 12 to the Applicant's submission dated 11 September 2015** – Google map indicating the closest bus stop to the hotel Premises, which was not before the Authority when the Purported Decision was made.
72. **Annexure 13 to the Applicant's submission dated 11 September 2015** – BOCSAR hotspot crime maps for the 12 month period from April 2013 to March 2014. This data was not before the Authority when the Purported Decision was made.
73. **Annexure 14 to the Applicant's submission dated 11 September 2015** – BOCSAR hotspot crime maps for the 12 month period from April 2014 to March 2015. This data was not before the Authority when the Purported Decision was made.
74. **Annexure 15 to the Applicant's submission dated 11 September 2015** – BOCSAR statistics for alcohol related assaults from July 2013 to June 2015. This data was not before the Authority when the Purported Decision was made.
75. **Annexure 16 to the Applicant's submission dated 11 September 2015** – statutory declarations from close neighbours of the Premises, Ms Maria Christodoulou and Mr Brandon Jay Christodoulou dated 5 August 2015, which were not before the Authority when the Purported Decision was made.
76. **Letter from the Authority's Chief Executive to the Applicant's solicitors dated 22 September 2015** informing them that the site notice required to be affixed to licensed premises in accordance with clause 9(2) of the *Liquor Regulation 2008* could not be located when the site was inspected by Authority staff on 21 September 2015, and providing photographs evidencing the absence of the site notice from the Premises.
77. **Further submission letter from Slater and Elias on clause 9 Liquor Regulation 2008 dated 20 October 2015** focussing upon the jurisdictional issue identified by the

Authority's Chief Executive on 22 September 2015. The Applicant submits that the following are "agreed facts" in this matter:

1. Section 40(4)(c) of the Act provides that "*an application for a licence must...be advertised in accordance with the regulations*".
2. Clause 9(2) of the Regulation provides that "*the notice must be fixed to the premises until such time as the application is determined by the Authority*" [Applicant's emphasis].
3. On 4 March 2015, the Authority determined three applications made by Mr Craig Coote and Mrs Loretta Coote.
4. The three applications were the Boundary Application, the PLL Application and the Application for an extended trading authorisation.
5. The Boundary Application and the PLL Application were granted on 4 March 2015.
6. The Applicant had, as at 4 March 2015, complied with the Regulation.
7. On 26 June 2015, the Supreme Court quashed the decision in respect of the Application for an extended trading authorisation and his Honour Justice Beech-Jones made orders by consent of the parties (as discussed above).
8. The Applicant's solicitors wrote to the Authority on 24 August 2015 concerning the further procedure for dealing with the Application.
9. The Authority replied on 25 August 2015 indicating that "it is a matter for your client, but the sooner the Applicant provides its foreshadowed long letter the sooner the Authority will consider listing the matter for further consideration by the Authority".
10. On 11 September 2015, the Applicant's solicitor supplied detailed submissions to the Authority.
11. On 22 September 2015, the Authority wrote to the Applicant's solicitors asserting that "the site notice was not displayed".
12. On 16 October 2015, the "Site Notice and Notice to Neighbouring Premises and Other Stakeholders" (notice of Application) was reaffixed to the hotel Premises.

78. The Applicant's submissions on the jurisdictional issue are as follows:

Our client instructs that the subject site notice was physically removed from the premises shortly after the Authority made its decision on 4 March 2015 ("the date of determination") refusing the application for an extended trading authorisation.

As at that time, there was a purportedly valid legislative determination and the legislative requirement for the Applicant to affix (and retain) a notice of the Application to the Premises, pursuant to clause 9 of the Regulation, had been fulfilled. Accordingly, the Applicant was lawfully able to remove it. The decision of the Authority (as at that point in time) had full legal effect and the Application had been "determined" for the purposes of clause 9(2) of the Regulation.

On 26 June 2015, by order of the Supreme Court of NSW, the decision was quashed and the Application was remitted to the Authority for redetermination. From this date, the Purported Decision was determined to be void and it had no legal effect from then onwards: Minister for Immigration v Bhardwaj [2002] 209 CLR 597 at [152]; Roads and Maritime Services v Porret (2014) 86 NSWLR 467.

The common law position is that in most situations (in the absence of a plain jurisdictional error which the decision maker immediately accepts), statutory decisions have legal effect unless and until they are set aside by a Court as well as acts done under them and in reliance on them (see: Macksville & District Hospital v Mayze {1987} 10 NSWLR 708; Minister for Immigration v Bhardwaj [2002] 209 CLR 597, Hayne J at [151] to [157]).

There is also the presumption of regularity that applies to statutory decisions until such time as they are set aside (see: Lee v Napier (2013) 301 ALR 663 at [68] et seq, Katzmann J).

The Authority's decision here was valid until it was set aside by the Supreme Court.

The notice of Application was lawfully removed from display (as it were) from that point onward.

We are instructed it has now been reinstated in its proper place and it is on full public display on and from 16 October 2015.

Our client should not have to be required to furnish a new application to the Authority. Its original Application has not yet been lawfully determined. The Supreme Court has exercised its supervisory jurisdiction to that effect.

Given that the relevant period of the Authority's deliberation has now recommenced, it is appropriate for the Authority to construe the regulations lawfully and to regard the notice of application as still being on display within the meaning of clause 9(2) of the Regulation.

If this were not the case, there would be little point on troubling the Supreme Court to set aside a past decision.

Regulation 9 is and has been fully complied with and therefore our client requests that the Authority proceed with its determination of the Application as soon as possible.

79. Updated BOCSAR crime mapping data for July 2014 to June 2015 provided by Authority staff to the Authority indicating that the Premises is located:

- within a high density hotspot for the occurrence of incidents of *domestic assault*;
- within a high density hotspot for the occurrence of incidents involving *malicious damage to property*;
- within a medium density hotspot for the occurrence of incidents of *non-domestic assault*; and
- within a low density hotspot for the occurrence of incidents of *alcohol related assault*.

80. BOCSAR Report on Crime for the Marrickville LGA for calendar year 2014. This data indicates that for calendar year 2014 in the Marrickville LGA:

- the rate of *assault Police* incidents was **40.0** per 100,000 persons of population, above the NSW rate of **34.0** per 100,000 persons of population;
- the rate of incidents involving *domestic assault* was **312.6** per 100,000 persons of population, below the NSW rate of **392.3** per 100,000 persons of population;
- the rate of incidents involving *non-domestic assault* was **465.3** per 100,000 persons of population, above the rate for NSW as a whole of **425.5** per 100,000 persons of population; and
- the rate of incidents involving *offensive conduct* was **65.4** per 100,000 persons of population, below the rate of **86.2** per 100,000 persons of population for NSW as a whole.

81. This report also indicates that the proportion of incidents involving *alcohol related assault* recorded as occurring within the broader community of the Marrickville LGA across the week is elevated on Saturday, Sunday and Monday evenings between the hours of 6:00pm and 12:00am and peaks on Sunday mornings between 12:00am and 6:00am.

82. **BOCSAR Report on Crime by LGA and Alcohol Related Status** based on data from July 2010 to June 2015. This data indicates that for the period between July 2014 and June 2015 in the Marrickville LGA:

- the rate of *alcohol related assault Police* incidents was **25.2** per 100,000 persons of population, above the NSW rate of **18.2** per 100,000 persons of population;
- the rate of incidents involving *alcohol related domestic assault* was **112.8** per 100,000 persons of population, slightly below the NSW rate of **122.6** per 100,000 persons of population;
- the rate of incidents involving *alcohol related non-domestic assault* was **212.3** per 100,000 persons of population, well above the rate for NSW as a whole of **144.0** per 100,000 persons of population; and
- the rate of incidents involving *alcohol related offensive conduct* was **78.0** per 100,000 persons of population, below the rate of **88.2** per 100,000 persons of population for NSW as a whole.

83. **BOCSAR Report on Crime for New South Wales** for calendar year 2014.

STATUTORY OBJECTS AND CONSIDERATIONS

84. In reconsidering this Application, the Authority has considered relevant provisions of the Act, including the objects and considerations that are prescribed by section 3, which states as follows:

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.*

85. The power to grant an extended trading authorisation to a licensed premises is provided by section 49 of the Act, which states, relevantly to the Application:

49 Extended trading authorisation – general provisions

(1) **Application of section**

*This section applies in relation to the following types of licences (referred to in this section as **a relevant licence**):*

- (a) *a hotel licence,*
- (b) *a club licence,*
- (c) *an on-premises licence (other than an on-premises licence that relates to a vessel),*
- (d) *a packaged liquor licence,*
- (e) *a producer/wholesaler licence.*

(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.*

(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.

86. General provisions relating to licence-related authorisations are set out in section 51 of the Act, which states as follows:

51 General provisions relating to licence-related authorisations

- (1) This section applies to the following authorisations granted by the Authority under this Act:
 - (a) an extended trading authorisation,
 - (b) a drink on-premises authorisation,
 - (c) any other authorisation that may be granted by the Authority under Part 3 (other than a licence),
 - (d) a minors area authorisation,
 - (e) a minors functions 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.
- (4) If, before an application for an authorisation is determined by the Authority, a change occurs in the information provided in, or in connection with, the application (including information provided under this subsection), the applicant must immediately notify the Authority of the particulars of the change.

Maximum penalty: 20 penalty units.

- (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.*
- (7) *The regulations may prescribe, or provide for the determination of, a fee in respect of the granting of an authorisation. If any such fee is prescribed or determined, the authorisation does not take effect unless the fee has been paid.*
- (8) *The Authority may, in granting an authorisation, specify requirements that are to be complied with before the authorisation takes effect. The authorisation does not take effect until such time as any such requirements have been complied with.*
- (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.*

87. Section 45 of the Act provides the decision making power pursuant to which the Authority may grant, or refuse to grant, an application for a new liquor licence. Noting that section 51(3) provides that the Authority has the same powers in relation to an application for an authorisation that it has in relation to an application for a licence, section 45 states as follows:

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.

88. Part 3, Division 1 of the Regulation contains provisions relating to advertising requirements of “applications”. Relevantly to this matter, clauses 6 through 9 of the Regulation state as follows:

6 Definitions

(1) In this Division:

“application” means any of the following:

- (a) an application for a licence,
- (b) an application by a licensee for the revocation or variation of a condition of the licence or a condition of a licence-related authorisation (other than a revocation or variation that would result in reduced trading hours),
- (c) an application to vary the business or activity, or the kind of premises, specified in an on-premises licence,
- (d) an application for approval to remove a licence to other premises,
- (e) an application by a licensee for a licence-related authorisation or for the variation of a licence-related authorisation (other than a variation that would result in reduced trading hours),
- (f) an application to carry on business on temporary premises.

“neighbouring premises”, in relation to an application, means:

- (a) any building situated on land that is within 50 metres of the boundary of the premises to which the application relates, or
- (b) if a category B CIS (as referred to in clause 10(3)) is required to accompany the application – any building situated on land that is within 100 metres of the boundary of the premises to which the application relates, or
- (c) any building situated on land adjoining the boundary of the land on which the premises to which the application relates are or will be situated (or that would be land adjoining that boundary if it were not for a road separating the land).

(2) In this Division, a reference to the premises to which an application relates is, in the case of an application for approval to remove a licence to other premises, a reference to the premises to which it is proposed to remove the licence.

7 Occupiers of neighbouring premises to be notified of application

(1) The occupier of neighbouring premises must be notified by an applicant of the making of an application.

- (1A) *The notice may be given before the making of the application but must be given no later than 2 working days after the application is made.*
- (2) *The notice must be in the form, and be given in the manner, approved by the Authority.*
- (3) *This clause applies in relation to a licence-related authorisation only if it is:*
 - (a) *an extended trading authorisation (other than a special occasion extended trading authorisation), or*
 - (b) *a drink on-premises authorisation, or*
 - (c) *an authorisation under section 24(3) of the Act.*
- (4) *This clause does not apply in relation to an application for:*
 - (a) *a producer/wholesaler licence, or*
 - (b) *a limited licence.*

8 Other persons to be notified of application

- (1) *Each of the following must be notified by an applicant of the making of an application:*
 - (a) *the local police,*
 - (b) *the local consent authority,*
 - (c) *if the premises to which the application relates are, or will be, situated within 500 metres of the boundary of another local government area – the local consent authority for that other area,*
 - (d) *if the premises to which the application relates are, or will be, situated on Crown land within the meaning of the Crown Lands Act 1989 – the Minister administering that Act,*
 - (e) *if the application is a relevant application as referred to in section 48(2) of the Act – each of the other relevant stakeholders referred to in clause 11(2) or (3) (as the case requires),*
 - (f) *any other person or body (including any class of person or body) that the Authority has advised the applicant must be notified.*
- (1A) *The notice may be given before the making of the application but must be given no later than 2 working days after the application is made.*
- (2) *The notice must be in the form, and be given in the manner, approved by the Authority.*
- (3) *This clause does not apply in relation to an application that is of a class determined by the Authority as a class of application that may be made by means of an electronic system approved by the Authority.*

9 Notice relating to application to be fixed to premises

- (1) *If an application is made to the Authority, a notice relating to the application that is in the form approved by the Authority must, within 2 working days of making the application, be fixed by the applicant to the premises to which the application relates.*
- (2) *The notice must be fixed to the premises until such time as the application is determined by the Authority.*
- (3) *If premises have not been erected, the requirement to fix a notice relating to an application may be satisfied by fixing the notice to a notice board erected on the land on which it is proposed to erect the premises.*
- (4) *A notice is not fixed to premises or land in accordance with this clause unless:*
 - (a) *it is fixed to the premises or land in such a position that it is legible to members of the public passing the premises or land, and*

- (b) *if the Authority has directed that it also be fixed in another specified position – it is also fixed in that other position.*
- (5) *This clause applies in relation to a licence-related authorisation only if it is:*
 - (a) *an extended trading authorisation, or*
 - (b) *a drink on-premises authorisation, or*
 - (c) *an authorisation under section 24(3) of the Act.*
- (6) *This clause does not apply in relation to an application for a limited licence.*

COMMUNITY IMPACT TEST

89. Under section 48(5) of the Act, the Authority *must not* grant a licence, authorisation or approval of a kind prescribed by section 48(2) of the Act unless the Authority is satisfied, having regard to the CIS and any other matter the Authority is made aware of during the application process, that the overall social impact of the licence, authorisation or approval in question being granted *will not be detrimental* to the local or broader community.
90. Section 48(5) of the Act states as follows:
- 48 Community impact**
- (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.*
91. The CIS usually provides the Authority with information about the views of relevant stakeholders and other aspects of the local community in which the proposed licensed premises is to be located. This includes, for example, the proximity of the licensed premises to hospitals or health facilities, nursing homes, schools, places of worship and other potentially sensitive locations for alcohol related impacts such as public parks, etc.
92. The Authority's *Guideline 6* places applicants on notice as to the aspects of a proposal upon which the Authority will usually focus when considering an application that requires an assessment of the overall social impact. These factors include the type of licensed premises at issue, the location of the licensed premises, the licensed trading hours sought and any measures proposed by the applicant, over and above the minimum requirements of the legislation, to manage or minimise the risk of alcohol related harm and adverse impact on amenity.
93. *Guideline 6* also places applicants on notice of the usual sources of information to which the Authority will refer, in addition to the application material and submissions in response to the application, when applying the overall social impact test. These sources include, *inter alia*, Authority licence density information, BOCSAR crime data and crime mapping data, Department of Health data, RMS road accident data and ABS sociodemographic data for the local and broader community in question.

94. Applying the overall social impact test requires a degree of speculation, albeit speculation informed by the particular proposal and the prevailing circumstances in the relevant local and broader community.
95. While this Application for an extended trading authorisation is a “relevant application” for the purposes of section 48(2) of the Act, the Authority has not reached the point where it can make findings on the community impact test prescribed by section 48(5) of the Act by reason that the Application is not valid on the basis of the Applicant’s non-compliance with clause 9 of the Regulation, as discussed below, and so the Authority lacks jurisdiction to deal with it on its merits.

REASONS

96. The principles governing the circumstances in which failure to comply with conditions regulating the exercise of a statutory power will lead to invalidity were set out by the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (**Project Blue Sky**). A majority of the High Court (McHugh, Gummow, Kirby and Hayne JJ) observed the following, at 388-389 [91]:
- ...an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment.*
97. Their Honours also observed that, where “public inconvenience would be a result of the invalidity of the act”, it is “unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid” (at 392 [97]).
98. In the Authority’s view, the words of clause 9 of the Regulation are clear. A notice in the prescribed form “must” be affixed to the proposed licensed premises not later than two days after the making of an application and the notice “must remain affixed” to the premises “until such time as the application is determined by the Authority”.
99. The Authority considers that the underlying purpose of clause 9 is to ensure that an applicant provides continuous notice of an application to passers-by, throughout the prescribed period, so that those in the local or broader community who may pass by the premises or the land in question are alerted to the application, thus enabling them to make submissions to the Authority if they wish to do so.
100. The obligation imposed by clause 9 of the Regulation is not a particularly onerous one to comply with in a practical sense. It will, in most instances, involve affixing the prescribed notice to the inside of a window of the relevant premises, in a position where it is legible to a passer-by.
101. The notice must be affixed not later than two days after an application has been made to the Authority and then remain affixed until such time as the Authority validly determines that application.
102. While there is no binding superior Court authority on the proper interpretation of clause 9 of the Regulation, the Authority considers that, in light of the *Project Blue Sky* principles, an application that does not comply with this clause is invalid and the

Authority does not have jurisdiction to grant that application. The Authority has acted on this basis in relation to a significant number of applications over the years and its interpretation has not been the subject of judicial challenge or review.

103. Relevantly to this Application for an extended trading authorisation, section 51(2) of the Act states:

(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.*

104. The requirements of section 51(2)(c) of the Act and clauses 7 to 9 of the Regulation are, in the Authority's view, properly characterised as "conditions" regulating the exercise of the Authority's power under section 51 of the Act to grant a licence-related authorisation, even though it is the applicant and not the Authority who is required to advertise the application.

105. The advertising requirements are requirements of procedural fairness, determined by statute, because, together with the provisions for making submissions, they give persons who may be affected by the Authority's decision to grant or refuse an application for a new licence or a licence-related authorisation an opportunity to be heard.

106. Pursuant to section 45(1) of the Act, the Authority may only decide to grant a licence "after considering an application for a licence and any submissions received by the Authority in relation to the application". Further, pursuant to sections 51(5) and 51(6) of the Act, 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; and 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.

107. Given that an application of this kind must "be advertised in accordance with the regulations" (section 51(2)(c)), this also discloses a legislative intention that the Authority may only decide to grant a licence-related authorisation after considering an application which has been advertised in accordance with the regulations.

108. The Authority has considered all of the objects and considerations prescribed by section 3 of the Act. In the present case, an object of the Act is "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" (section 3(1)(a)).

109. The requirement in section 51(2)(c) for an application for a licence-related authorisation to be advertised in accordance with the regulations helps to achieve the object of ensuring that the sale and supply of liquor occurs consistently with the expectations and needs of the community.

110. The right to make submissions about applications for licence-related authorisations under section 51(5) would be rendered ineffectual if persons were not made aware of the existence of applications, by compliance with the advertising requirements. The importance of such submissions is underlined by the requirement in sections 51(6) and 45(1) of the Act that the Authority take into account any submission received before determining whether to grant an application for a licence or a licence-related authorisation.
111. The Authority notes that, when enacting the *Liquor Act 2007*, Parliament declined to include an equivalent provision to section 15(1)(b) of the former *Liquor Act 1982*, which gave the former Licensing Court a discretion, with respect to documents, to “disregard any omission, error, defect or insufficiency in respect of the giving, serving, affixing, keeping affixed, advertising or publishing of the document or any other matter or thing not going to the substance of the matter before the Court”. That is a further indication that Parliament intended that there be full compliance with the advertising requirements prescribed by the current Act and Regulation.
112. The Authority accepts the Applicant’s advice that the Site Notice was not, in fact, affixed to the site of the Premises from shortly after the date of determination of the Application on 4 March 2015 and that the Site Notice was not reaffixed to the site of the Premises until 16 October 2015 after the Authority wrote to the Applicant’s solicitor advising its concerns as to the Applicant’s non-compliance with the Regulation.
113. The Authority accepts the Applicant’s submissions that the Authority’s Purported Decision was valid until such time as it was set aside by the New South Wales Supreme Court on 26 June 2015.
114. However the Applicant, advised by specialist liquor and gaming solicitors, must have been aware that it was seeking to have the Purported Decision set aside by the Supreme Court of New South Wales. It should also have been apparent to the Applicant that were the Applicant successful in this regard, once the Purported Decision was set aside, the Application would be back on foot and pending a valid and final determination by the Authority.
115. The Applicant was well placed to restore the Site Notice to the Premises once the Purported Decision was set aside and for the Site Notice to remain posted until such time as the Authority finally and validly determined the Application.
116. While clause 30(2) of the Regulation provides a right of any person to make a submission to the Authority within 30 days of the date on which an application is made (or such shorter exposure period as the Authority may determine) clause 30(2) makes clear that the Authority may, in such cases as the Authority thinks fit, extend the period in which persons may make submission in relation to any particular application or class of applications. In practice and as indicated in its published decisions, the Authority frequently exercises its discretion to receive community submissions made outside of the 30 day period.
117. The underlying statutory purpose of clause 9 of the Regulation is best understood from the perspective of a passer-by residing in the relevant community. In this case, a practical consequence of not restoring the Site Notice following the Supreme Court’s order to set aside the Purported Decision is that a passer-by residing in either the local or broader community would have been unaware that this Application was once again

under consideration for several months prior to the Site Notice being belatedly restored.

118. A reasonably informed member of the local or broader community would have information (from the Authority's liquor applications notice board, and the Authority's published decisions) that the Application had been (purportedly) refused by the Authority, with no indication that the Application was now pending consideration.
119. By not reaffixing the Site Notice for several months following the restoration of the Application and then retaining it until the Authority reconsidered the matter on 25 November 2015, those stakeholders have been substantially denied the opportunity to also make further submissions on the proposal for this hotel to trade until up to 3 am in the morning, were they minded to do so.
120. The Authority considers that community consultation is fundamental to the operation of the licensing scheme. On the other hand, the extent of inconvenience that would flow from the Authority finding that an application that does not comply with clause 9 is invalid will primarily flow to the private interests of the Applicant, and that inconvenience is confined to having to remake the Application and observe the advertising requirements. The Authority is not satisfied that there is any significant *public* inconvenience that will flow to the community from the invalidation of a non-compliant application.
121. The Authority is satisfied that the Application is invalid by reason of non-compliance with the requirement of clause 9 of the Regulation and the Authority does not have jurisdiction to consider the grant of the Application for an extended trading authorisation. For this reason, the Authority has not considered the merits of the Application, including the overall social impact of granting the Application.



Micheil Brodie
Chief Executive

for and on behalf of the **Independent Liquor and Gaming Authority**

DATED: 06 JAN 2016