Independent Liquor & Gaming Authority

NSW GOVERNMENT

Our ref: APP-0000233602.
Your ref: AMW2120362

Mr Andrew Wennerbom
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SYDNEY 2000

7 December 2012

By email:
awennerbom@landslegal.com.au

Dear Mr Wennerbom

Application for a Hotel Licence – Wild Rover, Surry Hills

I refer to the above mentioned application made by your client Mr James Bradey on 10 October 2012 ("the **Application**") and your submissions to the Authority dated 28 November 2012 and 4 November 2012.

As noted in the Authority's email to you dated 28 November 2012, the Authority is concerned with a jurisdictional issue that has arisen from correspondence received by the Authority from Hatzis Cusack Solicitors on 28 November 2012.

This correspondence included brief (and unhelpfully late) submissions on the adequacy of the Community Impact Statement that accompanied the Application, together with a specific factual allegation pertaining to the Applicant's compliance with the legal requirements for notification of the Application and the consequence of that for the Authority's jurisdiction to approve the Application. The specific allegation, supported by photographic evidence, was that Mr Grant Cusack, Solicitor, had observed that the notice required to be affixed to the proposed licensed premises ("**Premises**") by Clause 9 of the *Liquor Regulation 2008* ("**Regulation**") was not actually affixed to the Premises when, on 27 November 2012 and 28 November 2012, he walked past the Premises.

While, as noted in *Authority Guideline No 6*, the Authority expects that public submissions in response to a licence application shall be made to the Authority within the 30 day exposure period that follows the making of an application, the Authority nevertheless retains the discretion to receive and consider a late submission. The Authority has exercised its discretion to consider only the specific allegation made by Mr Cusack, by reason that it is in the public interest for the Authority to be appraised of matters going to the Authority's jurisdiction to grant an application.

The Authority notes that, in response to this allegation, the Applicant has provided a statutory declaration from Mr Warren Burns dated 30 November 2012, that:

- the notice was affixed to the Premises on 10 October 2002
- the notice remained affixed to the Premises until it was taken down by Mr Burns at 12.45pm Eastern Daylight Saving Time ("**EDST**") on 27 November 2012, by reason that Mr Burns and his colleague, the Applicant, had attended the Premises to clean the site, including the windows, "in the expectation that the application would be granted by the Authority on 29 November 2012"

- the notice was not affixed to the Premises again until 3.47 pm (EDST) on 28 November 2012, after Mr Burns was contacted by his solicitor requesting that he should re-post the notice, following notification of the allegation made by Hatzis Cusack.

This account has been corroborated by a statutory declaration made by the Applicant, Mr Bradey, dated 30 November 2012. Both of these statutory declarations refer to and enclose numerous time coded CCTV still images taken from an exterior CCTV camera at the Premises. These images show the notice affixed to the front window of the Premises at various times.

The Authority accepts the account provided by these Statutory Declarations as to when the notice was affixed to the Premises. The Authority accepts that the notice was taken down during the period between 12.45pm 27 November 2012 and 3.47pm on 28 November 2012 (EDST) - a total period of about 27 hours.

The issue for the Authority is whether the Applicant's non compliance with Clause 9 deprives the Authority of jurisdiction to grant the Application.

LEGISLATION

The Authority notes that clause 9 of the *Liquor Regulation 2008* is stated in the following terms:

> **9 Notice relating to application to be fixed to premises**
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> (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.
>
> [Authority emphasis]

DECISION

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 (at 388- 89 [91]), that:

> "[a]n 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."

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]).

The Authority has considered the submissions provided by the Applicant's solicitor as to why Parliament would not have intended, in an objective sense, that any non-compliance with Clause 9 should invalidate an application. The Applicant has argued that, if the Clause is interpreted as requiring "strict" compliance, removal of the notice by (for example) a malicious third party or as a consequence of an "act of God" would also invalidate the Application.

The Applicant has further submitted that pursuant to section 33 of the *Interpretation Act 1987* an interpretation of an Act or statutory rule that would promote the purpose of that Act or rule shall be preferred to a construction that would not promote that purpose or object. The Applicant refers to the objects of the *Liquor Act 2007* ("**Act**"), including section 3(1)(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.

The Applicant concludes that, when applying the *Project Blue Sky* principles, "it is open to the Authority to determine that having fixed the notice to the premises on every day since the application was lodged with the Authority, the Authority has jurisdiction to deal with it."

However, in the Authority's view the words of Clause 9 are clear. A notice in the prescribed form "must" be affixed to the proposed licensed premises not later than 2 days after the making of an application and that the notice "must remain affixed" to the premises "until such time as the application is determined by the Authority".

The Authority considers that the underlying purpose of Clause 9 of the Regulation is that an applicant provide continuous notice of the application to passers by, throughout the prescribed period, so that those in the local or broader community who may pass by the premises or land in question are alerted to the application, thus enabling them to make submissions to the Authority if they wish to do so.

The obligation imposed by Clause 9 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 that is legible to a passer by. 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 actually determines the application. The Authority has not hitherto become aware of any practical difficulties experienced by liquor applicants when complying with this legislative requirement.

While there is no binding superior court authority on the proper interpretation of Clause 9, the Authority considers that, in light of the *Project Blue Sky* principles, an application that does not comply with this clause is invalid.

Section 40(4) of the Act states:

"(4) An application for a licence must:

(a) be in the form and manner approved by the Authority, and
(b) be accompanied by the fee prescribed by the regulations and such information and particulars as may be prescribed by the regulations, and
(c) be advertised in accordance with the regulations, and
(d) comply with such other requirements as may be approved by the Authority or prescribed by the regulations."

The requirements of s 40(4)(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 s 45(1) of the Act to grant a licence, even though it is the applicant and not the Authority who is required to advertise the application. The advertising requirements are requirements of procedural fairness, determined by statute, because, together with the provision for making submissions, they give persons who may be affected by the Authority's decision to grant or refuse a licence application an opportunity to be heard.

Further, 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". Given that an application must "be advertised in accordance with the regulations" (s 40(4)(c)), this also discloses a legislative intention that the Authority may only decide to grant a licence after considering an application which has been advertised in accordance with the regulations.

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" (s 3(1)(a)). The requirement in s 40(4)(c) for a licence application 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 community's expectations and needs.

The right to make submissions about applications under section 44 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 44(2) and s 45(1) that the Authority take any submission received into account before determining whether to grant an application.

The Authority notes that, when enacting the *Liquor Act 2007*, Parliament declined to include an equivalent provision to section 15(1)(b) of the *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.

The facts of this matter are not in dispute. The Clause 9 notice was not, in fact, affixed to the Premises for a period of around 27 hours between 27 and 28 November 2012. Unfortunately, the Applicant has apparently taken down the notice on the *assumption* that a licence would be granted by 29 November 2012. The non-compliance with the obligation to continuously affix the notice during the prescribed period is attributable to the Applicant, not the intervention of any third party or an "act of God".

The underlying purpose of Clause 9 is best understood from the perspective of a passer by residing in the relevant community. If a notice is temporarily taken down by a licence applicant during the prescribed period, then a passer by living within the local or broader community may miss out on the opportunity to see the notice. That person may then, in turn, be deprived of an opportunity to make a submission to the Authority.

The Authority has considered the public inconvenience that would flow from finding that any non compliance with Clause 9 prevents it from granting an application. The Authority notes that the inconvenience will primarily flow to the applicant, with the result that the application must be re-made, observing any relevant procedural and substantive requirements of the legislation. While that may be of some considerable commercial consequence to the non complying applicant, the degree of wider *public* inconvenience will be relatively limited. Indeed the wider public convenience is best served by adhering to the legal requirements for notification so that members of the public have the best possible chance of being informed of the application.

This has been a difficult decision for the Authority to make. While the Authority is not without sympathy with regard to the commercial impact that this decision will have upon the Applicant (whose previous application proved defective by reason of the Applicant's failure to satisfy Clause 7 of the Regulation), the Authority concludes that it has no choice but to find that, as a matter of law, it cannot grant the licence by reason of the Applicant's non-compliance with Clause 9 of the Regulation. The Authority is unable to take any further action with regard to the Application.

Yours sincerely

Chris Sidoti
Chairperson
Independent Liquor and Gaming Authority