Supreme Court

New South Wales

Case Name:	Duffy v Independent Liquor and Gaming Authority
Medium Neutral Citation:	[2016] NSWSC 1062
Hearing Date(s):	17 May 2016
Date of Orders:	5 August 2016
Decision Date:	5 August 2016
Jurisdiction:	Common Law
Before:	Davies J
Decision:	1. Extend time for the filing of the Summons to 1 December 2015 2. Summons dismissed. 3. The Plaintiffs are to pay the Defendant's costs.
Catchwords:	ADMINISTRATIVE LAW – judicial review – licensee of hotel with extended trading authorisation applies to surrender ETA – application not notified by Authority to owners of hotel - application approved by Authority – licensee under mistaken belief that surrender was temporary – application to Authority to rescind surrender – whether owners entitled to procedural fairness before surrender accepted – whether acceptance of surrender was a nullity - procedural fairness not denied ADMINISTRATIVE LAW – judicial review - whether licensee's mistake was analogous to fraud –– whether error in Authority's refusal to revoke surrender – whether Authority could re-exercise its power to accept surrender – power to revoke under Interpretation Act s 48 - whether provisions of Liquor Act showed contrary intention to operation of s 48 – whether acceptance of surrender could be set aside for having been made on

	a wrong factual basis – whether wrong factual basis shown – decision not made on wrong factual basis LIQUOR LAW – licensing – extended trading authorisation – surrender by licensee – whether owners entitled to procedural fairness – whether Authority entitled to deal with licensee
Legislation Cited:	Acts Interpretation Act 1901 (Cth) Interpretation Act 1987 (NSW) Liquor Act 1982 (NSW) Liquor Act 2007 (NSW) Private Health Insurance Act 2007 (Cth) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No. 1) (1991) 32 FCR 219 Dallikavak v Minister of State for Immigration and Ethnic Affairs (1985) 9 FCR 98 David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353 Hornsby Shire Council v Porter (1990) 19 NSWLR 716 Jabetin Pty Ltd v Liquor Administration Board [205] NSWCA 92; (2005) 63 NSWLR 602 Kioa v West (1985) 159 CLR 550 Leung v Minister for Immigration and Multicultural Affairs (1997) 79 FCR 400 Miller v Australian Cycling Federation Inc [2012] WASC 74 Minister of Immigration and Ethnic Affairs v Kurtovic (1990) 21 FCR 193 Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597 Minister for Immigration and Multicultural and Indigenous Affairs v Craig [2004] FCAFC 294; (2004) 141 FCR 157 O'Sullivan v Farrer (1989) 168 CLR 210 Orthotech Pty Ltd v Minister for Health [2013] FCA 230; (2013) 211 FCR 241 Parkes Rural Distributions Pty Ltd v Glasson (1986) 7 NSWLR 332 Phytologic Pty Ltd v The Secretary, Department of Health and Aging, Commonwealth of Australia [2012] FCA 1407; (2012) 209 FCR 48

	Sunset Investments Pty Limited v Casino Liquor and Gaming Control Authority [2010] NSWSC 1411 SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152 SZFDE v Minister for Immigration and Citizenship [2007] HCA 35; (2007) 232 CLR 189 The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13 Tooheys Ltd v Housing Commission of New South Wales (1953) 53 SR (NSW) 407 Vanmeld Pty Ltd v Fairfield City Council (1999) 46 NSWLR 78
Category:	Principal judgment
Parties:	Neville Ray Duffy (First Plaintiff) Noeline Elaine Duffy (Second Plaintiff) Independent Liquor and Gaming Authority (Defendant)
Representation:	Counsel: M Robinson SC & S McGee (Plaintiffs) J S Emmett (Defendant) Solicitors: Hatzis Cusack Lawyers (Plaintiffs) Crown Solicitors Office (Defendant)
File Number(s):	2015/353398

JUDGMENT

1 On 24 February 2015 the licensee of the Lakemba Hotel, Christopher Bourke completed and signed a document entitled “Surrender extended trading authorisation” and forwarded it to the Independent Liquor and Gaming Authority. As the document makes clear the form, which was a standard form of the Authority available on its website, was “for a licensee to apply to surrender an authorisation that extends standard trading hours”. (The authorisation to trade extended hours is hereafter referred to as an ETA.)

2 The Lakemba Hotel had been permitted to trade 24 hours a day since application was made in 1992 to the Licensing Court of New South Wales to do so. However, during at least 2014 the hotel generally closed at or before midnight.

3 Sometime early in 2015 Mr Bourke received a letter from the Authority saying that liquor licence fees would be payable from May 2015. The letter directed recipients to the Authority's website which made clear that the liquor fee would be $500 if the hotel did not trade beyond midnight but $5,500 if it traded beyond midnight.

4 Mr Bourke spoke to his grandfather Neville Duffy who, with his wife Noeline, owned the freehold of the hotel. Mr Bourke suggested to his grandfather that they should only pay $500 because they were not trading past midnight. Mr Duffy agreed.

5 In the middle of 2015 Mr and Mrs Duffy decided to sell the hotel. They engaged a real estate agent who, after doing some research, informed them that the hotel's ETA had been surrendered permanently.

6 Mr Bourke thought that he was only giving up the right of the hotel to trade past midnight for the year in respect of which he paid the fee of $500. He said he did not take legal advice before signing the form.

7 On 10 July 2015 solicitors for Mr and Mrs Duffy wrote to the Authority pointing out the mistake that Mr Bourke had made and asking for the reinstatement of the hotel's ETA. They attached their trust account cheque for $5,000. The letter claimed that notice ought to have been given by the Authority to the owners of the freehold because of their interest in the matter which was undoubtedly affected by the surrender of the 24 hour licence. It was asserted in that regard that procedural fairness had been denied to Mr and Mrs Duffy.

8 The Authority initially replied by saying that it needed to seek legal advice on what was asserted. It then sent a substantive reply on 23 September 2015 in these terms:

> I am writing in response to your letter of 10 July 2015 in relation to the above named hotel and the extended trading authorisation surrendered by the licensee, David Christopher Bourke.
>
> As you are aware, on 3 March 2015, Mr Bourke surrendered the extended trading authorisation (ETA) allowing 24-hour liquor sales in the Saloon Bar where the gaming machines are kept, in order to reduce fees associated with the Periodic Licensing Scheme. The application was subsequently approved on 9 March 2015.

As stated in your correspondence, you represent Mr and Mrs Duffy, premises owners of the Lakemba Hotel, who were unaware of the application to surrender the ETA. Essentially, your clients' position is that the Authority should not have approved the application without first notifying your clients of the proposed surrender, and inviting them to make submissions on this point. Your clients say that as this did not occur, the Authority's decision is void and should be treated as a nullity.

The Authority does not agree.

It is correct that in some cases, provisions of the Liquor Act 2007 (Act) expressly or impliedly require the interests of a premises owner to be taken into account when a decision is made. An example is section 59(4), cited in your letter, which gives the Authority the right to refuse an application for the transfer of a licence if it is satisfied that its removal would adversely affect the interests of the owner of the freehold premises.

However, the provisions of the Act that recognise interests of a premises holder - for example, sub sections (sic) 59, 61 and 144G - are, generally, those that involve decisions that may lead to the licence being cancelled or otherwise removed from the premises. By contrast, other provisions of the Act that enable the Authority to make decisions that affect the operation of a licence do not acknowledge any interest held by a premises-owner, or require that they be consulted. This strongly suggests that the Act does not treat a premises owner as having an interest in every decision affecting a licence that requires them to be consulted beforehand.

In the present case, section 51 - which applies to the grant or revocation of licence-related authorisations such as ETAs - does not require a premises owner to be consulted by the Authority prior to it making a decision. As a consequence, the Authority's view is that it was under no obligation to consult with your clients as freehold owners of the premises when it decided to grant the licensee's application to surrender the ETA.

The decision to approve the surrender of the ETA has not therefore been rendered a nullity on account of your clients not being consulted before it was made.

However, it is open to the licensee to submit an application for a new extended trading authorisation.

Should you need any further information, please contact Ms Allison Waring, Manager Licensing via email at allison.waring@ilga nsw.gov.au or on (t) +61 2 9842 8656.

9 Mr and Mrs Duffy thereafter filed a Summons on 1 December 2015 seeking the following relief:

1. A declaration that Hotel Licence LIQH400103344 issued pursuant to the provisions or the *Liquor Act 2007* (NSW) in respect of premises known as Lakemba Hotel situated at 146 Haldon Street Lakemba is the subject of an Extended Trading Authorisation which on Monday to Saturday of each week, authorises trading from midnight until 4:00am on the day next following.

2. A declaration that the purported decision of the Independent Liquor & Gaming Authority or its delegate on 9 March 2015, to accept the purported surrender of the Lakemba Hotel's Extended Trading Authorisation was arrived

at without affording procedural fairness to the First and Second Plaintiffs and is invalid.

3. Alternatively, a declaration that the Hotel's licensee Christopher David Bourke, validly revoked his purported application to surrender the Lakemba Hotel's Extended Trading Authorisation, on or about 21 July 2015.

4. An order in the nature of certiorari setting aside or declaring invalid the purported decision of the Defendant the Independent Liquor & Gaming Authority or its Delegate of 9 March 2015 to purport to accept the surrender of the Lakemba Hotel's Extended Trading Authorisation.

5. An order extending the time for the commencement of these proceedings to the date of filing this Summons pursuant to Rule 59.10 of the *Uniform Civil Procedure Rules 2005* (NSW).

6. Costs.

10 At the outset of the hearing an Amended Summons was sought to be filed which added as Plaintiffs the purchasers of the land and business of the hotel from Mr and Mrs Duffy. This was not opposed and the Amended Summons was filed.

11 The Summons apparently contained 16 grounds of appeal but all except five of those were factual assertions in the form of a pleading. The five grounds asserting bases for relief were these:

(1) There were jurisdictional errors and/or errors of law on the face of the record (Ground 10);

(2) The Authority constructively failed to exercise its statutory power in making "the decision" (Ground 11);

(3) The decision is void because the Plaintiffs were denied procedural fairness in not being informed before the decision was made (Ground 12);

(4) Having been apprised of the mistaken apprehension of the Plaintiffs that the application would have effect for just one year, the Authority "persisted with its decision of 9 March 2015 to approve it" (Ground 13);

(5) The Authority's decision was afflicted by legal unreasonableness (Ground 15).

12 Although the grounds directed attention solely to "the decision", being the acceptance by the Defendant on 9 March 2015 of the surrender of the ETA (ground 6), Mr Robinson of Senior Counsel for the Plaintiffs said that there

were two decisions, being the acceptance of the surrender on 9 March 2015 and the refusal to revoke the surrender on or by 23 September 2015. The connection, in administrative law terms, between them was said to be that the first decision was a nullity with the result that the failure to revoke at the later time involved legal unreasonableness and a constructive failure to exercise its power. Implicit in that submission was not so much that there was a failure to revoke (because the first decision was said to be a nullity) but rather that the Authority ought to have corrected the record so that the Plaintiffs retained the ETA: *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597 at [53].

Extension of time

13 Since the first decision being challenged was that of 9 March 2015 the Summons, which was filed on 1 December 2015, was out of time (Rule 59.10 *Uniform Civil Procedure Rules 2005* (NSW)). An extension of time was sought and was not opposed. In circumstances where a final refusal to revoke the earlier decision was not conveyed until 23 September 2015 an extension of time should be granted.

Submissions

14 In their oral submissions the Plaintiffs raised the matter alluded to at the conclusion of the judgment of the High Court in *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman (*1980) 144 CLR 13 at 35 where the following appears:

> There is one final matter. Mr. Hughes was instructed by the Tribunal to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal.

15 Mr Robinson SC said that he did not mention this matter other than to make a point. Since it was the Plaintiffs who joined the Authority and no other party, although he said that the State of New South Wales would have been an

appropriate party, and since the Authority engaged the services of the Crown Solicitor to act for it as the State would have done, the point was far from clear to me.

16 The Plaintiffs put forward two bases upon which it was said the decision of 9 March 2015 was a nullity because it was affected by jurisdictional error. The first basis was a denial of procedural fairness to the owners of the Hotel. The second basis was a fundamental mistake which the Plaintiffs submitted was akin to a fraud.

17 The Plaintiffs submitted that the ownership of a hotel licence had a value to the freehold owner, and a hotel licence with an ETA had a greater value than a hotel which could trade only in ordinary trading hours.

18 The Plaintiffs submitted that the *Liquor Act 2007* (NSW) recognised the interests of the freehold owners and recognised that they required particular protection in a number of places including ss 59, 61, 92, 140(3) and 144G. The Plaintiffs acknowledged that s 51(13) of the Act did not contain any express requirement that the Authority receive and consider submissions before it exercised its statutory power but the Authority ought to have done that as a matter of procedural fairness. Reliance was placed on what was said in *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at [87]-[90] and *Hornsby Shire Council v Porter* (1990) 19 NSWLR 716 at 718. The Plaintiffs relied on what they said the Authority had done in other cases where the freehold owner had been notified before an ETA had been permanently revoked or varied.

19 The Plaintiffs submitted that where persons were owed a duty of procedural fairness but were not accorded it, a decision such as the present is a nullity: *Bhardwaj* at [51].

20 The Plaintiffs submitted that the lodgement of the surrender application was a fundamental mistake the effect of which, by analogy with fraud or otherwise, was that the decision was a nullity. Reliance was placed on the effect on a decision by the fraud of a third party in *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35; (2007) 232 CLR 189 at [49], [51]-[52].

21 In relation to the decision of 23 September 2015 the Plaintiffs submitted that the Authority had and retains statutory powers to exercise its functions from time to time as occasion requires pursuant to s 48 of the *Interpretation Act 1987* (NSW). These provisions were said to be beneficial provisions the purpose of which was to overcome:

> [a]n inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise.
>
> (Gummow J in *Minister of Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211).

22 Even without such statutory power the Plaintiffs submitted that an implied power arises as a necessary and beneficial incident of the express power conferred on the Defendant. The Plaintiffs relied on what Beaumont J said in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No. 1)* (1991) 32 FCR 219 at 225 that where a decision has proceeded on a wrong factual basis it is appropriate, proper and necessary that the decision-maker withdraw his or her decision.

23 In any event, the Plaintiffs submitted that the Authority ought to have recognised that its decision of March 2015 was a nullity with the result that it needed to exercise its power properly the result of which would be the revocation of the surrender. At that time the Authority had a duty to remake its decision, or revisit it or set it aside or apply *Bhardwaj* and accept that the decision was erroneous and make a correct decision.

24 The Defendant submitted that the statutory framework within which a decision maker exercises statutory power is of critical importance when considering what procedural fairness requires: reference was made to *SZBEL v Minister for Immigration* [2006] HCA 63; (2006) 228 CLR 152 at [26]. The Defendant submitted that when regard is had to s 51(9)(b) of the Act the owners of the premises were not entitled to procedural fairness in relation to such a decision. That is particularly so when viewed in the light of s 51(13).

25 Further support for that is to be found in the provisions of the Act which place the obligations on the licensee for dealing with the Authority such as s 91. Further, the Act contains other express provisions where notice to owners is required such as ss 61, 92, 140 and 144G. The Defendant submitted that those

situations are where owners have an independent obligation under the Act. The Defendant said that the position arises because the owners of licensed premises will not have a sufficient interest, having regard to the scope and purpose of the Act, to have a right to be invited to make submissions before the Authority accepts a licensee's application to revoke an ETA and/or because the structure of the Act, in giving express rights in limited circumstances, implicitly excludes the right in s 51(9)(b).

26 The Defendant submitted that the two earlier decisions where the Authority gave notice to the owners, relied upon by the Plaintiffs, involved a proposed variation to an ETA over the objection of a licensee.

27 The Defendant submitted in relation to the second decision that once the surrender of the ETA had been validly accepted the Authority had no power to revoke that decision. This was for two reasons. First, the text and purpose of the Act precluded any power to revoke a revocation. Secondly, neither s 48 of the *Interpretation Act* nor any implied power was capable of operating to permit the Authority to revoke its first decision if validly made.

28 The Defendant submitted that s 48 of the *Interpretation Act* only applied unless the contrary intention appears. Under the *Liquor Act* an ETA cannot be granted without the applicant satisfying advertising requirements in the Regulation and the consideration by the Authority of submissions that might be made by any person. It would circumvent the requirements of the *Liquor Act* if the Authority simply revoked its revocation of the ETA in reliance on s 48 of the *Interpretation Act*.

29 The Defendant submitted further that the power to revoke in s 51(9)(b) of the Act was not a power to which s 48 was capable of applying. The Defendant said that the power in s 51(9)(b) was to be compared with the exercise of power in a case such as *Parkes Rural Distributions Pty Ltd v Glasson* (1986) 7 NSWLR 332. The Defendant submitted that s 48 should be contrasted with ss 43 and 47 of the *Interpretation Act*. The power given by those sections would be unnecessary if s 48 operated as broadly as contended for by the Plaintiffs.

30 The Defendant submitted that if the earlier decision was not a nullity in the sense referred to in *Bhardwaj* it must be possible to discern some statutory

intention to enable the revisiting of the decision once made. In the present case, the Defendant submitted, assuming there was no denial of procedural fairness, the earlier decision was not a nullity.

31 The Defendant submitted that the present decision was not infected by fraud or any suggestion of bad faith on anyone's part. The Defendant submitted that if the First and Second Plaintiffs did not have a sufficient interest to be notified of the application and be invited to make submissions about it, they did not have a sufficient interest to challenge the Authority's non-revocation of that decision. However, the Defendant did not submit that the Plaintiffs lacked standing in that regard.

Legislation

32 The following are the relevant provisions of the *Liquor Act*:

> **41 Statement as to interested parties**
>
> (1) An application for a licence must be accompanied by a written statement, made by a person having knowledge of the facts, specifying:
>
> > (a) that the person has made all reasonable inquiries to ascertain the information required to complete the statement, and
> >
> > (b) whether there are any persons (other than financial institutions) who will be interested in the business, or the profits of the business, carried on under the licence, and
> >
> > (c) if there are any such persons, their names and dates of birth and, in the case of a proprietary company, the names of the directors and shareholders.
>
> (2) For the purposes of subsection (1), a person is interested in the business, or the profits of the business, carried on under the licence if the person is entitled to receive:
>
> > (a) any income derived from the business, or any other financial benefit or financial advantage from the carrying on of the business (whether the entitlement arises at law or in equity or otherwise), or
> >
> > (b) any rent, profit or other income in connection with the use or occupation of premises on which the business is to be carried on.
>
> (3) The regulations may provide exceptions to this section.
>
> …
>
> **51 General provisions relating to licence-related authorisations**
>
> (1) This section applies to the following authorisations granted by the Authority under this Act:
>
> (a) (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.

…

59 Removal of licence to other premises

(1) A licensee may apply to the Authority for approval to remove the licence to premises other than those specified in the licence.

(2) An application for approval to remove a licence to other premises 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.

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

(4) The Authority may refuse an application for approval to remove a hotel licence if the Authority is satisfied that the removal of the licence would adversely affect the interest of the owner or a lessee or mortgagee of the premises from which it is proposed to remove the hotel licence, or a sublessee from a lessee or sublessee of those premises.

(5) The Authority must refuse an application for approval to remove a licence unless the Authority is satisfied that:

> (a) practices will, as soon as the removal of the licence takes effect, be in place at the premises to which the licence is proposed to be removed that ensure, as far as reasonably practicable, that liquor is sold, supplied or served responsibly on those premises and that all reasonable steps are taken to prevent intoxication on those premises, and
>
> (b) those practices will remain in place.

(6) The regulations may provide additional mandatory or discretionary grounds for refusing to approve the removal of a licence.

(7) The approval to remove a licence to other premises takes effect:

> (a) on payment to the Authority of the fee prescribed by the regulations, and
>
> (b) when the Authority endorses the licence to the effect that those other premises are the premises to which the licence relates.

…

61 Application for transfer of licence on dispossession of licensee

(1) This section applies in relation to a licence (other than a club licence) if:

> (a) the licensee is evicted from the licensed premises, or
>
> (b) the owner of the licensed premises comes into, or becomes entitled to, possession of the licensed premises to the exclusion of the licensee, or
>
> (c) the licensee is no longer employed by the owner of the business carried on under the licence (the business owner), or
>
> (d) the licensee is not complying, or does not have the capacity to comply, with the requirement under section 91 (1) to be responsible at all times for the personal supervision and management of the business of the licensed premises.

(2) An application for a transfer of the licence may be made by the owner of the licensed premises or by the business owner.

(3) The owner of the licensed premises who comes into, or is entitled to, possession of the premises, or the business owner (as the case requires), is taken to be the licensee of the premises until:

> (a) the day that is 28 days after this section becomes applicable, or
>
> (b) the day on which application is made under subsection (2),
>
> whichever first occurs.

(4) If an application is made under subsection (2) not later than 28 days after this section becomes applicable, the applicant is, until the application is determined by the Authority, taken to be the licensee under the licence to which the application relates.

(5) The Authority is not to determine an application for the transfer of a licence under this section unless:

(a) the Authority is satisfied:

(i) that notice of the application was given to the dispossessed licensee at least 3 clear days before the Authority determines the application (or that all reasonable steps necessary for giving notice were taken by or on behalf of the applicant and that failure to give notice was not due to any neglect or default of the applicant), and

(ii) if so notified, that the dispossessed licensee has been given a reasonable opportunity to make submissions in relation to the application, and

(b) the Authority is satisfied that any lessee of the licensed premises has been notified of the application for the transfer of the licence and been given a reasonable opportunity to make submissions in relation to the application, and

(c) the Authority has taken any submissions made under this subsection into consideration.

…

91 Responsibilities and liabilities in relation to licensed premises

(1) The following persons are, subject to this Act, responsible at all times for the personal supervision and management of the conduct of the business of the licensed premises under the licence:

(a) if the licensee is an individual—the licensee,

(b) if the licensee is a corporation—the manager of the licensed premises.

(1A) An approved manager (as referred to in sections 116A (2) (i) and 116I (2) (i)) is responsible for the personal supervision and management of the conduct of the business of the licensed premises under the licence at the times the manager is required to be present on the licensed premises.

(2) If an element of an offence under this Act or the regulations is an act or omission by a licensee, the manager of the licensed premises is, while responsible under subsection (1) or (1A), responsible for the offence as though that person were also the licensee and is liable for the offence accordingly.

(3) This section does not affect any liability of a licensee for a contravention by the licensee of a provision of this Act or the regulations.

92 Control of business conducted on licensed premises

(1) A licensee or a related corporation of the licensee must not:

(a) if the licensee is an individual—allow any person to have the personal supervision and management of the conduct of the business

under the licence for a longer continuous period than 6 weeks except with the approval of the Authority, or

(b) lease or sublease the right to sell liquor on the licensed premises, or

(c) lease or sublease any part of the licensed premises on which liquor is ordinarily sold or supplied for consumption on the premises or on which approved gaming machines are ordinarily kept, used or operated, or

(d) lease or sublease any other part of the licensed premises except with the approval of the Authority.

Maximum penalty: 50 penalty units.

(2) The owner of licensed premises must not:

(a) lease or sublease any part of the premises on which liquor is ordinarily sold or supplied for consumption on the premises, or on which an approved gaming machine is ordinarily kept, used or operated, to any person other than the licensee or a related corporation of the licensee, or

(b) except with the approval of the Authority, lease or sublease any other part of the licensed premises to any person other than the licensee or a related corporation of the licensee.

Maximum penalty: 50 penalty units.

(3) This section does not prevent a person who:

(a) is the licensee of any premises that are situated in a shopping centre, and

(b) is the owner of each of the premises comprising the shopping centre,

from leasing or subleasing, with the approval of the Authority, any part of the licensed premises on which liquor is sold or supplied for consumption on the premises.

(4) The person to whom any such part of the licensed premises is leased or subleased in accordance with subsection (3) is, for the purposes of this Act, taken to be an agent of the licensee.

…

140 Procedure for taking disciplinary action

(1) If a complaint in relation to a licensee, manager or close associate is made under this Part, the Authority must, before taking any disciplinary action against the licensee, manager or close associate, notify the licensee, manager or close associate in writing of the grounds on which the Authority is proposing to take disciplinary action.

(2) Any such notice is to invite the licensee, manager or close associate to show cause, by way of a written submission, as to why the Authority should not take disciplinary action against the licensee, manager or close associate.

(3) The Authority must also, before taking disciplinary action against a licensee, invite written submissions from the following persons:

(a) if the licensee occupies the licensed premises under a lease—the lessor,

(b) each person named in the written statement referred to in section 41 that accompanied the application for the licence,

(c) each person named in the information provided to the Authority (as required by section 55) who has become interested in the business, or the conduct of the business, carried out on the licensed premises concerned,

(d) if the grounds for taking the proposed disciplinary action relate to a person (other than the licensee) not being a fit and proper person—that person.

(4) The Authority may specify:

(a) the time within which a submission under this section may be made, and

(b) any other requirements that must be complied with in relation to the making of any such submission.

(5) If any written submission is made in accordance with this section, the Authority must take the submission into consideration in deciding whether or not to take disciplinary action against the licensee, manager or close associate concerned.

(6) Subsection (1) does not require the Authority to disclose any criminal intelligence.

141 Disciplinary powers of Authority

(1) The Authority may deal with and determine a complaint that is made to it under this Part.

(1A) If the Authority is satisfied that the criminal organisation associate ground applies in relation to a licensee, the Authority must do one or both of the following:

(a) disqualify the licensee from holding a licence for such period as the Authority thinks fit,

(b) cancel the licence.

(1B) If the Authority is satisfied that the criminal organisation associate ground applies in relation to a manager, the Authority must do one or both of the following:

(a) disqualify the manager from being the manager of licensed premises for such period as the Authority thinks fit,

(b) withdraw the manager's approval to manage licensed premises.

(2) If the Authority is satisfied that any of the grounds (other than a criminal organisation associate ground) on which the complaint was made apply in relation to the licensee, manager or close associate, the Authority may decide not to take any action or may do any one or more of the following:

(a) cancel the licence,

(b) suspend the licence for such period not exceeding 12 months (or, if circumstances of aggravation exist in relation to the complaint, not exceeding 24 months) as the Authority thinks fit,

(c) order the licensee or manager to pay, within such time as is specified in the order:

> (i) a monetary penalty not exceeding 500 penalty units (in the case of a corporation) or 200 penalty units (in the case of an individual), or
>
> (ii) if circumstances of aggravation exist in relation to the complaint - a monetary penalty not exceeding 1,000 penalty units (in the case of a corporation) or 400 penalty units (in the case of an individual),

(d) suspend or cancel any authorisation or other approval (other than the licence itself) held by the licensee under this Act,

(e) impose a condition to which the licence, or any authorisation or approval held by the licensee under this Act, is to be subject or revoke or vary a condition to which the licence or any such authorisation or approval is subject,

(f) disqualify the licensee from holding a licence, or from being the manager of licensed premises or the close associate of a licensee, for such period as the Authority thinks fit,

(g) withdraw the manager's approval to manage licensed premises,

(h) disqualify the manager from being the manager of licensed premises, or from holding a licence or being the close associate of a licensee, for such period as the Authority thinks fit,

(i) in the case of a limited licence held on behalf of a non-proprietary association—order that a limited licence is not, for a period of not more than 3 years from the date on which the decision takes effect, to be granted to any person on behalf of the non-proprietary association,

(j) disqualify the close associate from being a close associate of a licensee or the manager of licensed premises for such period as the Authority thinks fit,

(k) disqualify the close associate from holding a licence for such period as the Authority thinks fit,

(l) order the licensee, manager or close associate to pay the amount of any costs incurred by:

> (i) the Secretary in carrying out any investigation or inquiry under section 138 in relation to the licensee, manager or close associate, or
>
> (ii) the Authority in connection with the taking of disciplinary action against the licensee, manager or close associate under this section,

(m) reprimand the licensee, manager or close associate.

…

144G Matters to be considered by Secretary and Authority

(1) In this section:

decision-maker means the Secretary or the Authority.

(2) A decision-maker must, when making a reviewable decision in relation to a licence:

(a) notify the following persons in writing that the decision-maker is deciding the matter and invite those persons to make a submission within a specified period of at least 21 days:

(i) the licensee,

(ii) the manager (if any) of the premises to which the licence relates (the licensed premises),

(iii) if the decision is whether a second or third strike should be incurred—each interested person in the business carried on under the licence (but only if the person's name has been provided to the Authority under section 41 or 55) and the owner of the licensed premises,

(iv) if the decision is whether a third strike should be incurred—each former licensee or manager who may be adversely affected by the decision,

(v) any other person prescribed by the regulations, and

(b) take into account any submissions received before the end of the specified period from any of the following:

(i) a person referred to in paragraph (a),

(ii) the NSW Police Force,

(iii) the Office of Liquor, Gaming and Racing, Department of Trade and Investment, Regional Infrastructure and Services,

(iv) the Bureau of Crime Statistics and Research of the Department of Attorney General and Justice, and

(c) take into account each of the following to the extent that the decision-maker considers it to be relevant to the decision:

(i) whether the licensed premises were declared premises within the meaning of Schedule 4 when the offences that caused a strike are alleged to have been committed,

(ii) the size and patron capacity of the licensed premises and how this may impact on the ability of the licensee or manager to prevent the commission of prescribed offences,

(iii) the history and nature of the commission of prescribed offences by relevant persons in relation to the licence or on or in relation to the licensed premises,

(iv) the history and nature of violent incidents that have occurred in connection with the licensed premises,

(v) whether other action would be preferable,

(vi) whether there have been changes to the persons who are the licensee, manager or business owner,

(vii) whether there have been changes to the business practices in respect of the business carried on under the licence,

(viii) any other matter prescribed by the regulations.

(3) Nothing in this section prevents a decision-maker from taking into account any other matter that the decision-maker thinks is relevant to the proper making of a decision under this Part.

(4) A decision-maker must, as soon as practicable after making a decision under this Part, give notice in writing of the decision, the reasons for the decision and any right of review in respect of the decision to each person that is required to be notified by the decision-maker under subsection (2) (a) in respect of the decision.

(5) A submission provided to a decision-maker under subsection (2) (b) (i) may not be used for the purposes of prosecuting an offence under this Act.

(6) The regulations may prescribe guidelines setting out how the matters referred to in subsection (2) (c) are to be taken into account by a decision-maker.

Determination

Decision of 9 March 2015

33 The Plaintiffs essentially challenge this decision on two grounds; first, that procedural fairness was denied to the first and second Plaintiffs and, secondly, that the mistake made was analogous to the sort of fraud that could operate to nullify an administrative decision.

34 In the first place it may be accepted that a licence with an ETA would have a value to the First and Second Plaintiffs: *Jabetin Pty Ltd v Liquor Administration Board* [2005] NSWCA 92; (2005) 63 NSWLR 602 at [3]-[6]; *Tooheys Ltd v Housing Commission of New South Wales* (1953) 53 SR (NSW) 407 at 414; *Sunset Investments Pty Limited v Casino Liquor and Gaming Control Authority* [2010] NSWSC 1411 at [23]. However, I do not consider that the First and Second Plaintiffs were denied procedural fairness.

35 In the first instance, the terms of the legislation did not require such notice to be given. Section 51 deals expressly with extended trading authorisations. Section 51(9) gives power to the Authority to vary or revoke such an authorisation. Section 51(13) requires the Authority to give the licensee to whom the authorisation relates a reasonable opportunity to make submissions in relation to the proposed decision but expressly excludes a variation made on application by a licensee. That provision and others are to be understood in the

light of s 91(1)(a) which makes the licensee the person responsible at all times for the personal supervision and management of the conduct of the business of the licensed premises under the licence.

36 The position is further supported by the fact that the Act expressly requires the Authority to consider the position of interested parties, whether the owner of premises or of the business or the licensee, in other situations:

(a) Section 59(4) requires the Authority to consider whether an application by a licensee to remove a licence to premises other than those specified in the licence would adversely affect the interest of the owner of the premises from which it is proposed the licence is to be removed;

(b) Analogously, s 61 requires notice of an application for transfer of a licence by the owner of licensed premises or by the business owner where a licensee has been evicted from licensed premises. Notice must be given to the dispossessed licensee and the lessee of the licensed premises from which the transfer is to be made;

(c) Section 92 prohibits an owner from leasing or sub-leasing any part of the premises on which liquor is ordinarily sold to any person other than the licensee or a related corporation;

(d) Section 94 allows the freehold owner to apply to change the boundaries of the licensed premises and in such case the licensee is to be given the opportunity to make submissions about the change;

(e) Under s 140, before the Authority can take disciplinary action against the licensee, the lessor must be notified to make written submissions;

(f) In a similar manner s 144G requires the Authority, when making a decision about premises incurring strikes under Div 2 of Pt 9A, to notify each person interested in the business carried on under the licence and the owner of the licensed premises in particular circumstances.

37 As the Defendant submitted, the provisions requiring notice to the owners are in situations where it would be otherwise difficult for the owner to protect himself or herself through contractual arrangements with the licensee.

38 In *Kioa v West* (1985) 159 CLR 550 Mason J (as his Honour then was) said at 584:

> Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act

> fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503 Kitto J pointed out that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on "the particular statutory framework". What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting: *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-553; *National Companies and Securities Commission v The News Corporation Ltd*. (1984) 156 CLR 296 at 311, 319-321.

39 The position was reiterated in the High Court's judgment in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at 26 where it was said:

> It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case.

The Court then went on to refer to what Kitto J had said in *Mobil Oil.*

40 It is relevant in the consideration of the facts and circumstances of this particular case that s 91 makes the licensee the person responsible for the supervision and management of the conduct of the business and that the provisions of the Act mean that, ordinarily speaking, the Authority deals with the licensee of the premises.

41 The particular provision in the Act to be considered is s 51(13). That subsection provides expressly for notice to be given to, and submissions to be considered by, the licensee in all cases concerning dealings with an authorisation except a variation application made by the licensee. It does not provide for giving notice to any other person. Although there is a need for caution in applying the maxim *expressio unius est exclusion alterius* (*O'Sullivan v Farrer* (1989) 168 CLR 210 at [10] and the cases there cited) that is not to say that it has no work to do in a situation such as here where the subsection requires notice to one person but not others, and within a statute that elsewhere provides for notice to the others in different situations.

42 Unlike in *O'Sullivan v Farrer* at [11], application of the maxim does not produce curious results here. Rather, its application at s 51(13) sits well with the

scheme of the Act that points to the licensee in ordinary circumstances being the point of contact with the Authority in respect of the licensed premises.

43 Reliance by the Plaintiffs on two previous decisions of the Authority on applications under s 51(9)(b) is misplaced. In both of those decisions, concerning the Bada Bing Nightspot and La La Land, the application was made by a delegate of the NSW Commissioner of Police. The Authority in each case invited written submissions from (inter alia) the owners of the business and the premises. Affording that right to such persons was presumably made pursuant to s 51(13) because the application in each case was not made by a licensee. In both cases the application was made by a third party against the interests of the licensee and accordingly, it might be thought, against the interests of the owners.

44 The Plaintiffs relied on *Sunset Investments* but that decision is of little assistance to the Plaintiffs. It arose under a very different legislative scheme being the *Liquor Act 1982* (NSW), and the Liquor Administration Board did not follow its own procedures contained in the form for surrendering a licence. The present Act makes express provision for notification to persons other than an applicant in certain situations but not others. That statutory framework is of critical importance.

45 In my opinion, there was no requirement for notice to be given to the First and Second Plaintiffs of the licensee's application. Nothing in *Vanmeld* nor *Hornsby Shire Council v Porter* suggests otherwise. Both cases addressed the legislation relevant to those cases, both of which involved planning decisions.

46 A breach of the rules of procedural fairness has not been established.

47 The Plaintiffs' submission that the mistake made is akin to, or analogous with fraud must be rejected. Nothing in *SZFDE* suggests that what was there discussed regarding the effect of fraud on a decision went beyond the identification of what constituted fraud for administrative law purposes. There was no suggestion that mistake was sufficient to bring the matter within principles involving fraud. The significant point was whether the fraud of a third party could bring about the result that the decision made was, in law, no decision at all (at [52]). The Court held that it did bring about that result

because it stultified the operation of the legislative scheme to afford natural justice to the appellants in that case (at [49]).

48 In the present case no fraud was committed on the Plaintiffs. The evidence was that the licensee told them what he was doing although he and they apparently misunderstood the effect of what he was doing. They were not in any event, as I have held, entitled to procedural fairness because under the scheme of the Act it was the licensee who dealt with the Authority, certainly on this sort of application, and the Authority had no reason to believe that the licensee did not intend to do what the form he completed requested the Authority to do.

49 If mistake is relevant, it is relevant in relation to the second decision, when the Authority was informed of the mistake.

50 The decision of 9 March 2015 is not a nullity.

Decision of 23 September 2015

51 The Plaintiffs' submissions on this decision were put on three bases. First, when the Authority realised that a mistake had been made it had an implied power to revisit the decision. Secondly, there was power under s 48 of the *Interpretation Act* to exercise the power again. Thirdly, the Authority ought to have realised that the first decision was a nullity and exercised its power to make a proper decision. In the light of my conclusion in relation to the first decision this third point does not arise.

52 The Plaintiffs' submission concerning a decision on the basis of a mistake of fact being able to be withdrawn or revoked is dependent on a statement by Beaumont J in *Kawasaki Motors*. His Honour there said:

> Some administrative decisions, once communicated, may be irrevocable. But where it appears to a decision-maker that his or her decision **has proceeded upon a wrong factual basis** or has acted in excess of power, it is appropriate, proper and necessary that the decision-maker withdraw his or her decision. In *Rootkin v Kent County Council* [1981] 1 WLR 1186; [1981] 2 All ER 227, Lawton LJ said (at 1195; 233):
>
> "It was submitted to us on the authority of a number of cases, of which the last in order of time was *Re 56 Denton Road, Twickenham, Middlesex* [1953] Ch 51 ... that what the divisional education officer was doing was making a determination and, having once made a determination, he was not entitled to go back on it. In my judgment, that is a misconception.

> It is the law that if a citizen is entitled to payment in certain circumstances and a local authority is given the duty of deciding whether the circumstances exist and, if they do exist, of making the payment, then there is a determination which the local authority cannot rescind. That was established in *Livingston v Westminster Corp* [1904] 2 KB 109 ... But that line of authority does not apply in my judgment to a case where the citizen has no right to a determination on certain facts being established, but only to the benefit of the exercise of a discretion by the local authority. The wording of s 55(2) [of the *Education Act 1944* (UK)] is far removed from the kind of statutory wording which was considered in *Re 56 Denton Road, Twickenham* (supra) and *Livingston v Westminster Corp* (supra). I cannot, for my part, see any basis for the submission that the decision of the divisional education officer in July 1976 was irrevocable when he found out what the true facts were." (emphasis added)

53 There has been but limited adoption of Beaumont J's suggestion that a wrong factual basis is sufficient for the decision-maker to withdraw his or her decision. In *Phytologic Pty Ltd v The Secretary, Department of Health and Aging, Commonwealth of Australia* [2012] FCA 1407; (2012) 209 FCR 48 Cowdroy J said at [78] that Beaumont J' s statement,

> suggests that, at least in limited circumstances, a decision maker has the ability to rescind or amend a decision, provided that such decision is not irrevocable.

Whether it is irrevocable is, however, the matter in issue here and is likely to be in many cases.

54 In *Miller v Australian Cycling Federation Inc* [2012] WASC 74 at [114] Kenneth Martin J cited Beaumont J's remarks to say:

> There is an established body of authority in Australia supporting the scope for a body to self-correct internally recognised deficiencies, acting of its own initiative.

That decision tends to suggest that by referring to "a wrong factual basis" Beaumont J was speaking of something that might be described as an internally recognised deficiency. That is not the position here.

55 In *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 the Minister had granted citizenship to the applicant. When he later discovered that false representations had been made to obtain the citizenship the Minister revoked the decision and refused the application for citizenship. The revocation was upheld at first instance and on appeal to the Full Federal Court. Heerey J said (at 402):

> In my opinion there is no general rule or principle of administrative law that decisions based upon a wrong factual basis may be revoked by the decision-maker – still less that such decisions do not need to be revoked and may simply be ignored. The supposed general rule would necessarily extend indefinitely in time and to factual errors for which person affected by the decision were in no way responsible. Such person might have arranged their own affairs on the basis of the decision.

56 Finkelstein J said (at 411):

> *Kawasaki Motors* is another example where the implication of a power to reconsider was made. I have already cited from the reasons of Beaumont J where the relevant principle appears and it is to the effect that a decision that proceeded on a wrong factual basis should be capable of revocation. I do not consider that his Honour was seeking to lay down a principle of general application to all administrative decision-makers but was confining himself to the exercise of the power there under consideration namely the grant of a tariff concession order under Pt XVA of the *Customs Act 1901* (Cth). However, if it is to be taken as a statement of general principle to be applied whenever possible, it has much to commend it in my opinion. There is a good deal to be said for the view that an administrative decision which is plainly erroneous should not stand.

Of particular significance is the fact that Beaumont J expressly agreed (at 402) with Finkelstein J's judgment. The clear inference must be that Beaumont J was not seeking to lay down a principle of general application to all administrative decision-makers.

57 Moreover, an examination of the facts in *Kawasaki*, to the extent that they throw any light on the matter, tend to point to the decision-maker having made the error that can be described as the wrong factual basis.

58 However, a number of decisions in the migration area appear to have led Collier J to concluding in *Orthotech Pty Ltd v Minister for Health* [2013] FCA 230; (2013) 211 FCR 241 (a case under the *Private Health Insurance Act 2007* (Cth)) at [62] that:

> [t]here is clear authority to support an exercise of power to correct an original decision which proceeded on a wrong factual basis: *Dallikavak v Minister of State for Immigration and Ethnic Affairs* (1985) 9 FCR 98 at 103–104; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 218–219; *Minister for Immigration & Multicultural & Indigenous Affairs v Craig* (2004) 141 FCR 157 at [17]–[18].

59 The present case is, however, entirely different from what was discussed and decided in those judgments. In *Dallikavak v Minister of State for Immigration and Ethnic Affairs* (1985) 9 FCR 98 Northrop and Pincus JJ said (at 103):

> We would add that if the Minister, having made a deportation order, subsequently becomes aware of circumstances which lead him to doubt the correctness of his order, or to come to the view that its correctness might need lengthy re-examination, he may revoke the order.

In *Minister for Immigration and Multicultural and Indigenous Affairs v Craig* [2004] FCAFC 294; (2004) 141 FCR 157 that passage was relied upon by the Full Court against a submission that the Minister was *functus officio* when she re-visited a deportation order after the High Court over-ruled one of its previous decisions that denied the right to deport the appellant. Both of those cases allow for the revocation of an earlier decision where the correctness of the decision is doubted.

60 In the present case the decision of 9 March 2015 is not incorrect nor was it made on a wrong factual basis. It may have come about because the licensee misapprehended and misunderstood what he was doing but there were no wrong facts put before the authority. The licensee intended to surrender the ETA, albeit for a year. It is not asserted that the Authority made any mistake when it accepted and processed the surrender form. Nor did the Authority know at the time it did so that the licensee was labouring under any misapprehension as to the legal effect of the surrender.

61 The mistake cannot be described as fundamental (as the Plaintiffs described it without elucidating what that precisely meant) because the licensee knew that he was surrendering the ETA. His mistake was believing that he was doing so temporarily not permanently.

62 The Plaintiffs relied also on s 48 of the *Interpretation Act*. When it cannot be said that the decision of 9 March 2015 was made on a wrong factual basis no occasion arises for the re-exercise of the power even if s 48 enabled it. On the basis that my conclusion in that regard is in error, I will, nevertheless, consider whether s 48 applies in the present case.

63 Relevant provisions of that Act are these:

> **5 Application of Act**
>
> (1) This Act applies to all Acts and instruments (including this Act) whether enacted or made before or after the commencement of this Act.
>
> (2) This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.

…

43 Implied power to amend or repeal statutory rules and orders

(1) If an Act confers a power on any person or body to make a statutory rule, the power includes power to amend or repeal any statutory rule made in the exercise of that power.

(2) If an Act or statutory rule confers a power on any person or body to make an order (whether or not the order must be in writing), the power includes power to amend or repeal any order made in the exercise of that power.

(3) If the power of a person or body to make a statutory rule or order is exercisable only on the recommendation, or with the approval or consent, of some other person or body, the power to amend or repeal a statutory rule or order made in the exercise of that power is exercisable only on the recommendation, or with the approval or consent, of that other person or body.

…

47 Powers of appointment imply certain incidental powers

(1) If an Act or instrument confers a power on any person or body to appoint a person to an office:

(a) the power may be exercised from time to time, as occasion requires, and

(b) the power includes:

(i) power to remove or suspend, at any time, a person so appointed,

(ii) power to appoint some other person to act in the office of a person so removed or suspended,

(iii) power to appoint a person to act in a vacant office, whether or not the office has ever been filled, and

(iv) power to appoint a person to act in the office of a person who is absent from that office, whether because of illness or otherwise.

(2) The power to remove or suspend a person under subsection (1) (b) may be exercised even if the Act or instrument under which the person was appointed provides that a holder of the office to which the person was appointed shall hold office for a specified period of time.

(3) The power to make an appointment under subsection (1) (b) may be exercised:

(a) as occasion requires,

(b) in anticipation of a particular event, so as to provide that the appointment shall take effect when that event occurs, or

(c) in anticipation of a particular state of affairs, so as to provide that the appointment shall have effect while that state of affairs exists.

48 Exercise of statutory functions

> (1) If an Act or instrument confers or imposes a function on any person or body, the function may be exercised (or, in the case of a duty, shall be performed) from time to time as occasion requires.
>
> (2) If an Act or instrument confers or imposes a function on a particular officer or the holder of a particular office, the function may be exercised (or, in the case of a duty, shall be performed) by the person for the time being occupying or acting in the office concerned.

64 Section 48 is also relevant to a consideration of the second of the three decisions referred to by Collier J – *Kurtovic* (at [58] above). *Kurtovic* concerned s 33(1) of the *Acts Interpretation Act 1901* (Cth) which is in similar terms and is subject to the same qualification of "contrary intention" in s 2(2) of the Commonwealth Act as is found in s 5(2) of the State act. Section 33(1) provides:

> **33 Exercise of powers and performance of functions or duties**
>
> *Powers, functions and duties may be exercised or must be performed as the occasion requires*
>
> (1) Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires.

65 In *Kurtovic* Gummow J said (at 219):

> In the present case, there is nothing in the *Migration Act* which suggests an intention contrary to the presumption embodied in s 33(1) of the *Acts Interpretation Act 1901*, to which I have already referred. Accordingly, the power to make a deportation order is exercisable from time to time, so as to revoke or revive a deportation order previously made, whether on the same facts as before or otherwise. Even if the facts upon which the original decision was based remain constant, it may be the policy of the donee of the power which changes and thus requires a reconsideration of decisions previously made: cf *Laker Airways Ltd v Department of Trade* (1977) QB 643 at 707, 708-709, 728.

66 In the light of what was said in *Kurtovic* as well as in *Parkes Rural Distributions Pty Ltd v Glasson* (1986) 7 NSWLR 332 at 335-6 by Glass JA it is necessary to construe s 48 of the *Interpretation Act* liberally as a beneficial provision. The Defendant submitted that what was expressly contained in ss 43 and 47 suggested that s 48 could not have the wide construction for which the Plaintiffs contended. Although on one view the provisions in ss 43 and 47 might be otiose because of s 48(1) that does not justify a narrow reading of the power in s 48. What is of greater significance is whether the *Liquor Act* evinces a contrary intention as far as re-visiting the surrender of an ETA in circumstances such as the present.

67 In my opinion the scheme of the *Liquor Act* is inconsistent with a re-consideration of an application to surrender an ETA. Such a re-consideration would amount to a procedure that circumvented the requirements of Division 2 of Part 4 of the Act. Section 48(3) requires a community impact statement. Section 48(5) prohibits the authorisation unless the subsection is satisfied. Section 51 contains specific requirements for ETAs including advertising and other matters prescribed by the regulations.

68 A significant matter in this regard is that the Authority is required to be satisfied under s 48(5) that the overall social impact of the authorisation will not be detrimental to the well-being of the local or broader community. Timing is relevant to that provision as to the advertising and the community impact statement. Those matters would not need to have been considered since the surrendered ETA was put in place in 1992. If an ETA was to be put in place or back in place relevantly at July to September 2015 the Act requires the social impact to be considered and for interested parties to make submissions at that time.

69 The ETA was surrendered on 9 March 2015. The first time the Plaintiffs sought to withdraw the surrender was in a letter from the First and Second Plaintiffs' solicitor of 10 July 2015. That was some four months later. The final refusal of the Authority to accede to the Plaintiffs' request was more than six months after the surrender. Had it not been for the happenstance of an intention to sell, the matter might have languished for longer, perhaps years. It is quite inconsistent with the scheme of the Act that an ETA could simply be reinstated at some indefinite future time without the need to comply with the provisions of the Act in the light of the objects contained in s 3.

70 The provisions contained in s 58C, which provide for the reinstatement of a cancelled licence within a specified time, are a further indication that the Act does not envisage that the power in s 51 can be re-exercised or performed from time to time. In my opinion, the Act evinces a contrary intention for the purpose of s 5(2) of the *Interpretation Act.*

71 The Plaintiffs sought to rely by broad analogy on the obligations of a payee of money where the monies were paid in circumstances of a mistaken belief on

the part of the payer: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. I do not consider the analogy is either useful or helpful when an administrative decision is being considered. Notions involving money had and received or monies paid under a mistake of fact derive from very different bases such as quasi-contractual principles. Mr Robinson SC conceded that matters involved in mistakes of fact and law and the repayment of money do not sit well with public law considerations.

Conclusion

72 Despite the bases for review contained in the Amended Summons no attempt was made to show an error on the face of the record in respect of the decision of 9 March 2015. Nor was any submission made in support of the allegation that the decision of 9 March 2015 was infected with legal unreasonableness.

73 The decision of 9 March 2015 was properly made. There was no obligation to accord procedural fairness to the First and Second Plaintiffs before the decision was made. The decision was not made on a wrong factual basis. The power under s 51(9) *Liquor Act* could not be re-exercised, but even if it could be re-exercised there was no occasion for re-exercising the power.

74 Accordingly, I make the following orders:

(1) Extend time for the filing of the Summons to 1 December 2015;

(2) Summons dismissed.

(3) The Plaintiffs are to pay the Defendant’s costs.

****

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