Our ref: L247
Your ref:

The Review Applicant
[name and address not published]

By email:
[email address not published]

11 January 2012

Dear Madam

Application for Review regarding a decision made by a delegate of the Director General of the Department of Trade and Investment, Regional Infrastructure and Services on a disturbance complaint against the First Empire Hotel, Kings Cross.

BACKGROUND

1. I refer to a purported application for review dated 6 October 2011 ("**Review Application**") made by you under section 153 of the *Liquor Act 2007* ("**Act**"). The Review Application concerns a decision (the **Reviewable Decision**") made by Ms Elizabeth Tydd, a delegate of the Director General ("**Delegate**") under section 81 of the Act.

2. In the Reviewable Decision the Delegate determined to take no action in response to a complaint dated 5 April 2011 that you had filed ("the **Complaint**") alleging that the First Empire Hotel ("the **Hotel**") that is located at 32 Darlinghurst Road, Kings Cross, nearby a residential property that is owned by you, was causing undue disturbance to the quiet and good order of the neighbourhood.

DETERMINATION

3. The Authority considered this matter at its meeting convened on 21 December 2011. The Authority has determined that it does not have jurisdiction to consider the merits of the Review Application by reason that the Review Application was made outside the 21 days period prescribed by clause 76(1)(a) of the *Liquor Regulation 2008* ("**Regulation**"). Accordingly, the Authority can take no further action with respect to the Review Application.

LEGISLATION

Objects of the Act

4. When considering the Review Application the Authority has had regard to the statutory objects and considerations provided by section 3 of the Act:

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.

Statutory basis for making a disturbance complaint

5. Section 79 of the Act states:

79 Making of complaint

(1) A person may complain to the Director-General that the quiet and good order of the neighbourhood of licensed premises are being unduly disturbed because of:

   (a) the manner in which the business of the licensed premises is conducted, or
   (b) the behaviour of persons after they leave the licensed premises (including, but not limited to, the incidence of anti-social behaviour or alcohol-related violence).

(2) Such a complaint must be in writing and be made or verified by statutory declaration.

(3) A complaint under this section may only be made by any of the following persons (referred to in this Division as ***the complainant***):

   (a) a person authorised in writing by 3 or more persons residing in the neighbourhood of the licensed premises or a person who is such a resident and is authorised in writing by 2 or more other such residents,
   (b) the Commissioner of Police,
   (c) a person authorised by the local consent authority in relation to the licensed premises,
   (d) a person who satisfies the Director-General that his or her interests, financial or other, are adversely affected by the undue disturbance to which the person's complaint relates.

Director General's power to determine a disturbance complaint

6. Section 81 of the Act prescribes the Director General's powers when determining a complaint, which in turn prescribes the limits of what the Authority may do upon review if the Authority is minded to vary the Reviewable Decision:

> **81 Decision by Director-General in relation to complaint**
>
> (1) The Director-General may, after dealing with a complaint in accordance with section 80, decide to do any one or more of the following:
>
> (a) impose a condition on the licence for the licensed premises the subject of the complaint,
> (b) vary or revoke a condition to which the licence is subject,
> (c) if a conference has been convened in relation to the complaint—adjourn the conference subject to implementation and continuation of undertakings given by the licensee,
> (d) issue a warning to the licensee,
> (e) take no further action in relation to the complaint.
>
> (2) The conditions that may be imposed on a licence include, but are not limited to, conditions relating to any one or more of the following:
> (a) noise abatement,
> (b) prohibition of the sale or supply of liquor before 10 am and after 11 pm,
> (c) prohibition of, or restriction on, activities (such as promotions or discounting) that could encourage misuse or abuse of liquor (such as binge drinking or excessive consumption),
> (d) restricting the trading hours of, and public access to, the licensed premises,
> (e) requiring the licensee to participate in, and to comply with, a liquor accord.
>
> (3) The Director-General is to take the following matters into consideration before making a decision under this section:
> (a) the order of occupancy between the licensed premises and the complainant,
> (b) any changes in the licensed premises and the premises occupied by the complainant, including structural changes to the premises,
> (c) any changes in the activities conducted on the licensed premises over a period of time.
>
> (4) For the purposes of subsection (3), ***complainant*** does not include a complainant who is the Commissioner of Police or a person authorised by the local consent authority.

The Authority's powers upon Review

7. Section 153 of the Act confers upon the Authority its jurisdiction to review certain types of decisions made by the Director General, including, per subsection 153(1)(c):

> (c) a decision under section 81 (Decision by Director-General in relation to complaint).

8. Section 153(4) provides the Authority's powers when determining a review:

> (4) In determining an application for review under this section, the Authority may:

(a) confirm the decision the subject of the application, or
(b) vary the decision, or
(c) revoke the decision.

Legislative requirements for making an Application for Review

9. Clause 76 of the Regulation prescribes legislative requirements for making an application for review:

> **76 Application for review by Authority of Director's decisions**
>
> (1) An application to the Authority under section 153 of the Act for a review of a decision of the Director must:
>
> (a) be made within 21 days of the day on which the decision was made, and
> (b) specify the grounds on which the application for review is made, and
> (c) be accompanied by a copy of the decision of the Director (if the decision was provided in writing to the person making the application), and
> (d) be accompanied by a fee of $250.
>
> (2) The applicant for review must provide the Director with a copy of the application as soon as practicable after making the application to the Authority.

MATERIAL BEFORE THE AUTHORITY

10. Shortly after receiving the Review Application the Authority requested officers working within the disturbance complaints unit of the Office of Liquor Gaming and Racing ("**OLGR**") compliance section to provide the Authority with a copy of all material that was before the Delegate at the time that the Reviewable Decision was made. OLGR officers have provided the Authority with three volumes of files relating to the Complaint and the Reviewable Decision ("the **OLGR File**").

THE REVIEWABLE DECISION

Dates specified on the Reviewable Decision

11. A copy of the Reviewable Decision correspondence that was sent by the Delegate to the Review Applicant is before the Authority.

12. There are three dates indicated in the Reviewable Decision correspondence, with one of those dates noted twice.

    (a) A one page cover letter is endorsed "Elizabeth Tydd, Executive Director". It bears the Delegate's signature and the handwritten date: "***12.9.11***".

    (b) Enclosed with that cover letter is a seven page document that comprises the Delegate's statement of reasons. Page 1 of this document includes the typed words: "Date of Decision: **22 August 2011**".

(c) At page 7 the Delegate has signed the statement of reasons with the following endorsement:

> "Elizabeth Tydd
> Executive Director, Office of Liquor, Gaming and Racing
> Delegate of the Director General of the Department of Trade and Investment, Regional Infrastructure and Services"

Relevantly to the discussion that follows, that endorsement appears directly below the following words, accompanied by the following (handwritten) dates:

> "Date: ***12.9.11***"
> "Date decision is effective: ***16.9.11***"
>
> [Emphasis added]

Notice of review rights

13. At the end of the statement of reasons, at the bottom of page 7, there is a box of text printed in bold type that states:

> "Should you be aggrieved by this decision, you may seek a review by the Casino, Liquor and Gaming Control Authority by application within 21 days of the date of this decision. Further information can be obtained from the Authority's guideline 02/09 published at: www.clgca.nsw.gov.au"

14. Enquiries made of the express post letter tracking section of Australia Post on 5 December 2011 by the Authority's General Counsel indicate that an envelope containing the Reviewable Decision correspondence was delivered to the Review Applicant's mailing address on 14 September 2011.

THE REVIEW APPLICATION

15. The Review Application was made in an informal manner. It comprises a six page typed cover letter bearing the date "6 October 2011", and enclosing and referring to some material relating to the Hotel that was apparently downloaded from the internet.

16. The Review Application letter was not actually addressed to the Authority. The letter quotes the OLGR File reference for the Complaint and the OLGR document reference number for the Reviewable Decision letter.

17. The top of the Review Application letter identifies the Review Applicant's name and commences with the words "I wish to seek a review of Section 81 Decision".

18. No application for review form was provided by the Review Applicant and the letter was not accompanied by the $250 application fee that is prescribed by clause 76(1)(d) of the Regulation.

19. A copy of the Review Application letter before the Authority has been date stamped "Received Compliance: 10 October 2011". This is the date that the letter was apparently received internally by the compliance section of OLGR.

20. The Authority shares a common reception desk with OLGR. In the usual course of events, an application for review that is addressed to the Chief Executive or Chairperson of the Authority would be received by OLGR reception, date stamped, scanned and electronically recorded by OLGR staff on the Government Licensing System against the file of the relevant licensed premises. The document will then be forwarded to staff assisting the Authority.

21. The Authority's enquires with OLGR's licensing section indicates that in this case, by reason of the informal nature of the Review Application letter and the fact that it was not addressed to the Authority, nor accompanied by any application form nor application fee, the document was treated as an ordinary piece of correspondence addressed to OLGR. It was accordingly forwarded internally to the relevant disturbance complaints unit that forms part of the OLGR compliance section.

CONSULTATION WITH THE REVIEW APPLICANT

22. On 17 November 2011 the Authority's General Counsel wrote to the Review Applicant noting that the Reviewable Decision was apparently made by the Delegate on 12 September 2011 yet the Review Application is dated 6 October 2011 – i.e. an intervening period of 24 days.

23. The Review Applicant's attention was drawn to clause 76 of the Regulation. The Review Applicant was invited to make preliminary submissions on whether the Review Application had been made outside the 21 day review period allowed by the Regulation.

24. On 29 November 2011 the Review Applicant sent a submission by email to the Authority's General Counsel, which included the following text:

> "Please find attached photo of documents.
>
> The document on the left of photo is from the delegate of the Director General, Elizabeth Tydd, date is 12.9.11. Date decision effective is 16.9.11.
>
> 16.9.11 was a Friday, and I believe thus pertains correctly to the decision letter Expressed Post delivered to my office Tuesday September 20, also the day I received a telephone call to same office advising of the correspondence. (It is likely the correspondence arrived the previous day to the mailing address mail room, and delivered to my office the following day.)

I thus noted timeframe for application for review in my calendar and ensured delivery within 21 days of 16.9.11, being Oct 7 2011. The document on the right photo includes the dated RECEIVED stamp I requested at time of lodgement, on this date.

If the photo is not clear please advise and I will resend.

In regard to a $250 fee for making this application;

I submitted the Section 79 application to the OLGR on the insistence of City of Sydney council officers that it was required to resolve major, verified, breach of compliance, and associated issues, that was of extreme impact on residents. "

[The Review Applicant then makes further submissions regarding the merits of the Complaint.]

25. Later on 29 November 2011 the Authority's General Counsel sent an email to the Review Applicant distinguishing the date that the Reviewable Decision was apparently "made" and the date that the Reviewable Decision was stated to "take effect", noting that, subject to any further submissions, it would appear that the Review Application has been made out of time and that the Authority does not have jurisdiction to entertain the review.

26. Following a further email from the Review Applicant dated 29 November 2011 expressing concern with the prospect that the Authority may not have jurisdiction, the Review Applicant was advised that she may make any final legal submissions on the jurisdictional question by 9 December 2011 and that the Authority would determine whether or not it had jurisdiction at its meeting scheduled for 21 December 2011. No further submissions were received by the Authority.

COMMENT

27. The Review Applicant makes two key contentions on the timing of the Review Application.

28. The first is that the Review Application - while dated 6 October 2011 - was actually filed by the Review Applicant at the OLGR/Authority reception desk on 7 October 2011.

29. When delivering her letter, the Review Applicant had the foresight to request OLGR desk staff to date stamp a "with compliments" slip that she has retained along with her copy of the Review Application letter. A photograph of that document, bearing the date stamp "Received CLGCA: 7 October 2011" has been provided to the Authority by email along with the Review Applicant's abovementioned submission dated 29 November 2011.

30. The Authority accepts that the Review Application was – for the purposes of clause 76(1)(a) of the Regulation – "made" on 7 October 2011. It is not relevant that the Review Application was subsequently directed internally to OLGR's compliance section

and not brought to the attention of staff assisting the Authority until 11 October 2011. It is also not relevant to the validity of the Review Application that the application was made in an informal manner, was not addressed to the Authority and was not on the review form that has been published by the Authority via the "forms" section of the OLGR website www.olgr.nsw.gov.au. While the legislation requires certain types of liquor and gaming applications to be made in an approved form, that is not the case in this instance.

31. The second contention is more controversial. The Review Applicant notes that the "effective date" is stated at page 7 of the Delegate's statement of reasons to be "16.9.11". As the Review Application was filed on 7 October 2011, this was 21 days after the stated *effective date* of the Reviewable Decision.

32. In the Authority's view, it is entirely understandable that anyone - not least a lay person, without the benefit of legal advice - who has received an administrative decision bearing

    - a date on the cover letter (12 September 2011)
    - another date at the commencement of the statement of reasons (22 August 2011)
    - a "date" of decision at the conclusion of the statement of reasons (12 September 2011) and
    - an "effective date" of decision at the conclusion of the statement of reasons (16 September 2011)

    would be somewhat perplexed when trying to reckon the review period. It is equally understandable were they simply to conclude that the most recent of these dates (i.e. the "effective date") is the date from which the 21 days review period is to be calculated. This is particularly so in the circumstances of this matter where, as the Review Applicant will have known, there was nothing else to which the "effective date" could logically apply (i.e. the Reviewable Decision made no changes to the regulatory arrangements applicable to the Hotel).

33. Nevertheless, the words of clause 76(1)(a) of the Regulation are clear. An application for review must be made "within 21 days of **the day on which the decision was made**".

34. On the material before it, the Authority is satisfied that 12 September 2011 is the day upon which the Reviewable Decision was "made". This was the date when the Delegate signed the covering letter that formally notified the decision to the Review Applicant and other interested parties.

35. While the Act provides no specific definition of what constitutes a "decision", in *Australian Broadcasting Tribunal* v *Bond* (1990) 170 CLR 321 Mason CJ of the High Court of Australia explained the general law concept of a "decision" (for the purposes of judicial review) in the following terms at para 32 of the judgment:

> "a reviewable decision is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact calling for consideration."

36. While it appears that the Delegate may have concluded drafting her statement of reasons on 22 August 2011, it was not until 12 September 2011 that the Reviewable Decision was actually signed off and hence became "final" or "operative" in the relevant sense. Up until that point, it would have been open to the Delegate to reconsider or amend the Reviewable Decision.

37. The Delegate has indicated the "date" of the decision twice. First, the cover letter bears the handwritten date *"12.9.11"* next to the Delegate's signature. Page 7 of the statement of reasons also expressly identifies the "date" of the decision as *"12.9.11".*

38. Nevertheless, page 7 of the statement of reasons indicates the Delegate's determination that the Reviewable Decision shall not be "effective" until "16.9.11". It is apparent that prescribing an "effective" date that is later than the date that a decision is made will be administratively prudent in circumstances where (for example) new licence conditions have been imposed by a decision maker, in order to give interested parties time to comply and for a licensee to notify their staff of new compliance arrangements. This measure will also allow time for interested parties to receive notice of a decision that has been sent by post. However, where a decision maker has determined to take no action against licensed premises and hence these practical considerations do not arise, it is not at all apparent what beneficial purpose is served by specifying a separate, later, "effective date" on the face of a reviewable decision.

39. The Authority is satisfied that the Review Application does not comply with the requirement of clause 76(1)(a) of the Regulation in that it was made (i.e. on 7 October 2011) more than 21 days after the day upon which the Reviewable Decision was "made" (i.e. on 12 September 2011). The legislation does not expressly confer upon the Authority any discretion to extend the time for making a review application. But that is not the end of the matter.

40. A failure by an applicant to observe a legislative requirement does not automatically have the result of depriving an administrative decision maker of jurisdiction to consider the application in question.

41. As discussed by the High Court of Australia in *Project Blue Sky* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at 390:

> "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… There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.
>
> Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling with the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory…
>
> In our opinion, the Court of Appeal of New South Wales was correct in *Tasker* v *Fullwood* in criticising the continued use of the elusive distinction between directory and mandatory requirements."

42. The issue is not only whether Parliament intended that applicants comply with the requirements of clause 76, but whether Parliament also intended that the Authority should not have jurisdiction to entertain a non-compliant application for review.

43. The Authority is unaware of any superior Court authority on the meaning or operation of section 153 of the Act or clause 76 of the Regulation. While the matter is not beyond doubt, the Authority considers that the better view is that Parliament did not intend for the Authority to have jurisdiction to entertain an application for review that has been made out of time.

44. First, the legislature's use of mandatory language (an applicant "must" make their application within 21 days from the day on which a reviewable decision is made) is a significant textual indicator and entitled to be accorded substantial weight. Second, the requirements of clause 76(1) are stated to apply at the time of making an application, not to the course of the decision making process itself. Third, decisions of the kind that are deemed to be reviewable under section 153(1) of the Act are matters of some commercial importance to licensees, and the outcome would be of significant commercial value to them. Fourth, reviewable decisions are of considerable importance both to those making complaints about licensed premises, and licensing compliance officers within the NSW Police Force and the OLGR (agencies that bear a significant responsibility for the enforcement of the Act). Fifth, the imposition of a 21 day time limit, without any express discretion conferred upon the Authority to extend that time, may be seen as voicing a legislative policy to the effect that applications for review of decisions of the Director-General ought to be resolved in an expeditious manner.

45. In conclusion, the Authority finds that the Review Application is invalid and that the Authority does not have jurisdiction to entertain a review of the Reviewable Decision.

46. The Authority observes that a complainant who has failed to make a valid application for review is not without remedy should they experience undue disturbance from the manner in which a licensed business is conducted or the behaviour of persons after they

leave licensed premises. Without making any observation on the merits of the Complaint, it would be open to a person in the position of the Review Applicant to make a fresh complaint to the Director General, who has the power to receive and consider disturbance complaints from certain eligible complainants under section 79 of the Act from time to time. As a practical matter, a repeat complaint may need to be supported by fresh evidence or other material, or demonstrate a change of circumstances, in order to move a decision maker to reach a different conclusion from that which was reached in a recent decision.

47. While the Authority does not need to decide whether the Review Applicant's non-payment of the $250 application fee provides a separate basis for finding that the Review Application is invalid, the Authority is of the view that the prescribed application fee must be paid by the time that the Authority considers a purported application for review, or that application may be refused by reason of non-payment of the fee. While the Authority considers that Parliament has intended that an application for review should be "accompanied" by the fee (that is, the application should be accompanied by a cheque, money order or credit card details enabling the prescribed fee to be charged at the time that the application is received by the Authority), the separate and later payment of the fee may not necessarily deprive the Authority of jurisdiction to hear the matter, provided that the fee has been paid before the Authority considers an otherwise valid application for review.

48. Finally, the Authority observes that the Director General has provided a helpful standard form notice to interested parties at the conclusion of reviewable decisions, referring to the Authority's power to review the decision and the 21 day review period. This notice also refers to the Authority's "Guideline 02/09" (now replaced by Guideline 02/11).

49. In order to avoid misunderstandings of the kind illustrated by this case, the Authority will write separately to the Director General noting that it may be of assistance to interested parties for any reviewable decisions issued by the Director General to specify the date upon which any application for review must be filed (with such date to be calculated and noted at the same time that a decision maker signs off and dates a decision) and for the application for review fee to be specified. The notice of review rights could be amended along the following lines:

> "Should you be aggrieved by this decision, you may seek a review by the Casino, Liquor and Gaming Control Authority by an application which must be lodged with the Authority within 21 days of the date of this decision, that is, by no later than _____[date]. A $250 application fee applies. Further information can be obtained from the Authority's Guideline 02/11 published at: www.clgca.nsw.gov.au"

Yours faithfully

Chris Sidoti
Chairperson