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The Chairperson
Liquor Law Review
GPO Box 7060
SYDNEY NSW 2001

Attention: The Chairperson

By Email: liquorlawreview@justice.nsw.gov.au

Our Ref: BAB:999550

4 April 2016

Dear Sir/Madam

**Submission in respect of Independent Review of the 1:30am Lockout & related restrictions applying to the Sydney CBD Entertainment Precinct and the Kings Cross Precinct**

## 1. Preliminary

1.1 I wish to provide this Submission in respect of the Independent Review of the 1:30am lockout and other restrictions applying to the Sydney CBD Entertainment Precinct and the Kings Cross Precincts (**Liquor Law Review**). I note the Terms of Reference for this Review are published on the Department of Justice website.

1.2 I am a solicitor with a liquor and gaming practice and am familiar with the introduction of the 1:30am lockout and related restrictions applying to the Sydney CBD Entertainment Precinct and the Kings Cross Precinct. I am also the author/editor of the legal text "Liquor Licensing Law and Practice NSW" as published by Thomson Reuters.

1.3 I do not support the 1:30am lockout, as well as the other restrictions imposed at the same time. I am of the view that the lockout and the other restrictions should be removed.

## 2. Requirement for equity, efficiency and transparency

2.1 All legislation in the Commonwealth and States and Territories of Australia should be equitable, efficient, simple and transparent and not produce unintended negative consequences, particularly to those who have not directly caused the "evil" which required legislative intervention. The Final Report to the so-called Henry Tax Review, presented a "21st century vision" of the Australian Tax System, as being to meet the purpose of the legislation "efficiently, equitably, transparently and effectively" (Executive Summary, Final Report, Australian Future Tax System).

2.2 The 1:30am lockout and its related restrictions, fail this four part test. Moveover, the lockout and its related restrictions are "lazy legislation", in terms of being a lazy



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legislative response, to a complex series of factors which have led to the often repeated calls for something to be done to stem the (perceived) rising tide of alcohol-fuelled violence in Kings Cross and the Sydney CBD Precinct. An examination of the recorded crime statistics published by BOCSAR, indicate that the tide had already turned, in respect of this violence.

2.3 The lockout laws and the related restrictions imposed by the *Liquor Amendment Act* 2014 and the Regulations enacted as a consequence, are inefficient because they do not specifically target the irresponsible licensed venues which I believe have caused the problems arising in the first place. Instead, all venues classified as "subject premises" for the purposes of cl.53C and cl.53Y of the Liquor Regulation, are the subject of a 1:30am lockout. No regard has been applied by the NSW Parliament or the Executive Council, as to whether or not any particular venue has contributed to alcohol-fuelled violence.

2.4 This legislation has also ignored the already existing mechanisms in the Act to weed-out the so-called rogue operators. How many Disciplinary Complaints have been brought against Kings Cross and CBD Precinct licensees? The answer is hardly any at all, according to the published decisions on Disciplinary Complaints, available on the Liquor & Gaming NSW (**L&GNSW**) website.

2.5 The lockout laws and other restrictions are inequitable, in that they have distorted the marketplace for the provision of hospitality services between venues which fall on either side of the arbitrarily defined dividing line between the Kings Cross and CBD Precincts and other areas close by. How is it fair and equitable that comparable venues close by have different operating restrictions? Venues in parts of Surry Hills do not have the lockout, where others do.

2.6 The legislation fails the competitive neutrality obligations under the *National Competition Principles Agreement* 1995. While this Agreement is technically directed at Government business enterprises, its underlying principles are equally applicable to this legislation. See for example the *National Competition Policy Liquor Amendments (Commonwealth Financial Penalties) Bill* 2004. This lead to the abolition of the "needs objection" in the previous Liquor Act.

2.7 The lockout laws and other restrictions are also inequitable because they have produced quite devastating consequences on many businesses within these precincts, particularly the Kings Cross Precinct. Many businesses such as take-away food shops are not even a part of the NSW liquor industry. The media has often reported how these businesses have suffered since the lockout.

## 3. The Exemption Application process is arbitrary, opaque & lacking in certainty

3.1 The Liquor Regulations applying to the Kings Cross and Sydney CBD Entertainment Precincts, both contain powers for affected licensees to make an application to the Secretary of the Department of Justice, for an exemption from all or part of the Kings Cross or CBD Precinct restrictions. The exemption powers are found in cl.53P and 53ZI of the Liquor Regulation applying to the Kings Cross Precinct and CBD Precinct, respectively.

3.2 The decision-maker is the Secretary of the Department of Justice, rather than the primary decision-maker in this liquor and gaming jurisdiction, the Independent Liquor & Gaming Authority of NSW (**ILGA**).

3.3 While the Secretary has power to make many determinations under the Liquor & Gaming legislation of NSW, such determinations are usually minor in nature and/or are fully reviewable by ILGA, because they are "reviewable decisions" within the meaning of s.36A *Gaming and Liquor Administration Act* 2007 (**GL&AA**). Section 36A of the GL&AA provides an exhaustive list of those reviewable decisions. Notably absent is a determination by the Secretary under clauses 53P and 53ZI of the Liquor Regulation dealing with exemption applications.

3.4 Normally, applications made under the Liquor & Gaming legislation are publicly identified on the "Liquor and Gaming Application Noticeboard" maintained on the L&GNSW website. Notably absent from the list of applications to be published on the Liquor & Gaming Application Noticeboard, are exemption applications.

3.5 Recently, the Minister in his speech to Parliament, mentioned the need for the Liquor & Gaming legislation to "*promote fair and transparent decision-making*" (Second Reading Speech to the *Gaming & Liquor Administration Amendment Bill* 2015, Legislative Assembly, 27 October 2015).

3.6 As a consequence of this 2015 amendment to the Act, there are a number of decisions of ILGA, as well as by "designated Public Service employees", to publish their reasons on the L&GNSW website. This is said to promote transparency and therefore confidence in the decision making process. Notably absent from the list of determinations to be published on the L&GNSW website, is the Secretary's determinations of exemption applications.

3.7 Instead, the L&GNSW website only contains a list of exemption applications approved and briefly describing the conditions of those approvals. There is not any transparency in this decision making process. This lack of transparency undermines confidence in the decision making process.

3.8 Moreover, my experience of exemption applications, is that those who are charged with making a recommendation to the Secretary and thus steering the direction of the Secretary's determination, embark upon "policy engineering" not sanctioned by the legislative provisions. In mid-2014, a small number of venues including a venue belonging to a client, applied for lockout exemptions for just their hotel gaming rooms. On the information shared between myself and the solicitors acting for these other applicants, there was a common consensus that our clients' applications had merit and should be favourably determined. Instead of determining these applications on their merits, the (then) Secretary of Trade & Investment, required these applicants to modify their applications, so that the lockout applied to the whole of the licensed premises and required the applicants to surrender the right to provide alcohol after 1:30am. The requirement for this alteration was said to be on the basis of so-called Crown Solicitor's advice to the Department, which was never provided, despite requests to provide that advice. There was in effect, a substantial denial of procedural fairness to these applicants.

3.9 If "bracket creep" is a recognised term in relation to Income Tax Law, then the term "lockout creep" would be applicable to describe what has happened to these exemption applications, a problem which is continuing to the present day. The extent of this initial "lockout creep" can be seen on the L&GNSW website, in respect of the lockout determinations for the Great Southern Hotel, the Star Hotel, Charlie Chan's Bar & Bottleshop and Scruffy Murphys, all determined between the dates 29 September 2014 and 27 October 2014. The same tendency can be seen in the recent determinations in respect of the Albion Hotel determined on 4 November 2015 and the Chamberlain Hotel determined on 27 October 2015.

**4. Was the lockout and other restrictions really necessary in the circumstances?**

4.1 Recently, some media focus seems to have been in respect of the fall in reported crime statistics since the introduction of the lockout.

4.2 As BOCSAR's September 2012 Quarterly Report graphically demonstrates, there was already in place, a significant downward trend in alcohol-related incidents, long before the lockout was introduced. The BOCSAR Report KG12-10676 records crime statistics for assaults in the suburb of Kings Cross, the Sydney Local Government Area and the Sydney Statistical Division, between the period April 2002 to March 2012. Over the 10 year period, the level of assaults in Kings Cross were in decline at an average rate of 3.3%. The five year rate however, is more dramatic, indicating a downward trend in the order of 37%. The public debate has overlooked this important consideration.

4.3 So what lead to the 37% downward trend? In my view, it was a trend established by the Liquor Harm Minimisation Principles, inserted into the prior Act in 1997. In my view as an experienced liquor licensing solicitor and commentator on the legislation, the importance of this legislative change cannot be under estimated. The crime statistics reported by BOCSAR clearly indicate that Kings Cross licensees were already "doing the right thing" long before the lockout was introduced.

**5. The actual utility of many of the Kings Cross and CBD Precinct restrictions**

5.1 I also question the utility of many of the Kings Cross and CBD Precinct restrictions. What is the point served by the requirement to record on an hourly basis, alcohol sales data (cl.53O of the Regulation)? How can this be linked in any meaningful way, to the reduction of alcohol related crime, occurring either inside or outside licensed premises? It is a useless information gathering exercise and should be removed from the legislation.

5.2 ID scanning for Kings Cross Precinct venues is another example. As I understand, most public concern is about alcohol-related violence in public places. How can the requirement to scan patron ID's, before entering a venue after 9:00pm, be a solution to this public concern?

5.3 ID scanning is also inefficient legislation, as it does not permit any discretion to permit entry to a person, who obviously is not going to cause alcohol-related violence either inside or outside the venue. Is the average female in the 30 plus age bracket going to cause violence in a public place? If ID scanning is to remain, then it ought to contain an

exemption for a licensee, on reasonable grounds, to exempt people from the ID scanning requirement. If a licensee abuses this privilege, then it can be taken away.

5.4 The same level of scrutiny should be applied to the other measures applying to Kings Cross Precinct and CBD Precinct venues. There must be a direct and definite link to the objective of reducing alcohol related harm and the measure under examination. If any measure fails this test, then it should be removed.

**6. The so-called risk based licence fee assessment regime**

6.1 The so-called risk based licence fee regime, also needs to be critically viewed. It does not immediately deter irresponsible liquor service practices, due to the 12 month lag time between the "relevant prescribed offence" being incurred (see cl.5E of the Regulation) and the compliance history risk loading element being assessed by the Secretary and notified to licensees.

6.2 Currently this part of the licence fee collection regime has been deferred to the 2017 licence fee year. The licence fee collection regime also does not distinguish between different operators of a venue which are at arm's length. Why must an arm's length operator have to "pay for the sins" of its predecessor?

**7. Conclusion**

7.1 The Chairperson of the Liquor Law Review is respectfully requested to examine the lockout and other Kings Cross and Sydney CBD restrictions, with a critical eye. Do they pass any objective test of efficiency, equity, transparency and not providing adverse consequences to those which are innocent of the wrong-doing complained about?

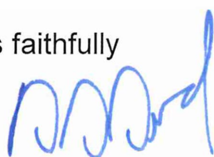
7.2 Unfortunately, the word limit required for this Submission precludes me from going into further detail as to why the Kings Cross and CBD restrictions, fail this test.

7.3 The exemption application process also lacks the required transparency necessary to foster confidence in the decision making process. The determinations of the Secretary must also be fully reviewable by ILGA.

7.4 The lockout and related restrictions have inflicted a significant level of harm on the liquor industry and other industries in the precinct areas. I suspect that individual licensees and business operators will be making their own submissions as to the economic harm caused.

7.5 I have no objection to this submission being published on the Department of Justice website.

Yours faithfully



**Bruce Bulford**
**Director**

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