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PUBLIC ENTERTAINMENT IN LICENSED PREMISES UPDATE AS AT 30 OCTOBER 2009

The New Legislation

On 23 October 2009 the Environmental Planning and Assessment Amendment (Entertainment Venues) Regulation 2009 was published along with the State Environmental Planning Policy (Temporary Structures and Places of Public Entertainment) Amendment (Temporary Structures) 2009. The effect of the legislation essentially is that the definition of and references to public entertainment have been removed from the legislation. Whereas the SEPP previously required development consent to be obtained by persons seeking to use a building for the purposes of conducting public entertainment, the Amendment SEPP removes any such requirement unless the building is categorised as an “entertainment venue” or as a temporary structure. Pubs, function centres, registered clubs and restaurants are not included within the definition as entertainment venues.

The requirement to obtain an approval under the Local Government Act to conduct public entertainment (or a POPE approval/licence) is no longer in place, having been dispensed with by the Transfer of Functions legislation which commenced on 26 October 2007.

The requirement to obtain development consent to enable lawful use of a premises for a particular type of use remains, however it would appear that the government has acknowledged that certain types of consents for certain primary uses (such as hotels or registered clubs) have an implied ancillary use to conduct entertainment and therefore no further development consent would need to be

obtained to conduct entertainment. Whilst the express requirement to obtain development consent to conduct public entertainment has been removed with the Amendment SEPP, it is arguable that in some circumstances, venues may be required to seek development consent in order to conduct entertainment, depending upon the nature of any development consents which apply to the venue. Operators will also be required to comply with the conditions of any existing development consent. This is a matter which will remain for individual consent authorities to interpret and control.

There may remain issues for premises operating pursuant to existing use rights, or those who are unable to rely upon an express development consent authorising the particular use of the premises. Such premises may be required to obtain a development consent specifically permitting the particular use of a premises as a pub or restaurant etc in order to rely upon an implied consent to conduct entertainment.

Fire Safety

Amendments to the Environmental Planning and Assessment Regulation 2000 which commenced on 26 October 2009 have the effect of removing the requirement for compliance with specific fire safety requirements and upgrades for existing premises other than entertainment venues and temporary structures. New buildings will remain subject to assessment consistent with the Building Code of Australia and fire safety requirements will generally remain as relevant considerations in determining development

applications for the change of use of existing premises.

Statutory Conditions

A further effect is to remove the previous statutory conditions which were imposed on development consents for the use of premises as places of public entertainment unless the premises falls within the definition of an entertainment venue or is a temporary structure used for conducting public entertainment.

The amendments also imply a condition on to any development consent for the use as an entertainment venue, function centre, pub, registered club or restaurant which effectively requires signage to be displayed stating the maximum number of persons permitted in the building.

Reviewable Conditions

Amendments to the Environmental Planning and Assessment Act in 2008 created a class of conditions imposed on development consents known as reviewable conditions. These are conditions that relate to extensions to trading hours and increases to patron capacity. The amendments to the EPA Regulation which commenced on 26 October 2009 provide that development consents for the use of premises as an entertainment venue, function centre, pub, registered club or restaurant may be the subject of a review condition. Therefore, Councils would retain some degree of control over the issues of extended trading hours and patron capacity where conditions of consent provide for trial periods, or other forms of review of such conditions.

Too Good to be True?

While it would appear that much of the regulation has been removed with the recent legislative changes, it must be said that this did not appear to be the direction which the government had indicated future regulation would take at the time that the Transfer of

Functions legislation was effected in October 2007. Indeed, a number of premises operators have been compelled to submit development applications in order to obtain specific development consent to use their premises as places of public entertainment after their previous POPE approvals had lapsed. Others still have been the subject of orders and prosecutions by Councils to upgrade premises due to fire safety issues. If the government's true intention was to remove the regulation at the time that the Transfer of Functions legislation commenced, then it raises a question as to why would it allow such circumstances to abide, and why the legislative amendments would come at the eleventh hour.

In the current climate, operators could be forgiven for being a little sceptical when it comes to an apparent reduction in operational controls and regulation.

In our view, it appears that the government has opted for a new approach to the regulation of licensed premises seeking to conduct entertainment. By removing the role of Councils in the direct assessment and regulation of use, the void can then be filled by another regulatory authority – our money is on the OLGR. As some operators are already no doubt aware, the Liquor Act provides a significant degree of power to be vested with the Director-General to impose conditions on licences be it as a result of a disturbance complaint by residents, applications by Police or the Director-General's own initiative for such reasons, or in such circumstances as the Director-General considers necessary or appropriate.

It can reasonably be expected that operational conditions will be imposed on venues seeking to conduct public entertainment which would relate to patron capacities, trading hours, security numbers and duties and those that the Director-General considers are likely to promote the responsible service of alcohol. The conduct of entertainment at the venue would constitute circumstances and a reason for the Director-General to consider the imposition of conditions

as necessary and appropriate. The recent inundation of guidelines, standards and best practice policies being generated from OLGR are likely to be imposed as benchmarks for operators seeking to conduct entertainment on licensed premises.

Whilst it may not pan out this way, the concerns raised are legitimate and the potential is real based on the current legislative provisions. A person aggrieved by the decision of the Director-General may appeal to the Casino Liquor and Gaming Control Authority, however the Authority is not a judicial entity and is not bound by the rules of evidence. At least under the regime of development consents and even Local Government Act approvals there existed a sound judicial structure with regards to appealing decisions made by local consent authorities which would be determined by a Court according to the rules of evidence.