



Civil and Administrative Tribunal  
New South Wales

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Case Name:	McIntosh v Independent Liquor and Gaming Authority
Medium Neutral Citation:	[2019] NSWCATAD 101
Hearing Date(s):	1 April 2019
Date of Orders:	5 June 2019
Decision Date:	5 June 2019
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	Dr J Lucy, Senior Member
Decision:	The respondent's decision to impose a first strike upon the applicant under s 144E(1) of the Liquor Act 2007 is set aside and, in substitution for that decision, the Tribunal decides to take no action
Catchwords:	ADMINISTRATIVE REVIEW – Liquor regulation – Hotel licence – Three strike regime – Imposition of first strike upon former licensee – Where former licensee committed prescribed offence of permitting intoxication on the licensed premises – Meaning of serious harm - Whether patron vomiting constituted serious harm – Whether respondent was entitled to consider potential harm, or to speculate as to harm which might have occurred – Whether the circumstance that the applicant was no longer the licensee at the licensed premises was relevant to the decision to impose a first strike
Legislation Cited:	Administrative Decisions Review Act 1997 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Liquor Act 2007 (NSW)
Cases Cited:	Certain Lloyd's Underwriters v Cross [2012] HCA 56; (2012) 248 CLR 378 Project Blue Sky Inc v Australian Broadcasting

Authority (1998) 194 CLR 355

Texts Cited: Macquarie Dictionary Online, Macmillan Publishers Australia 2019

Category: Principal judgment

Parties: Campbell McIntosh (Applicant)  
Independent Liquor and Gaming Authority  
(Respondent)

Representation: Counsel: H El Hage (Respondent)

Solicitors: A Hatzis (Applicant)  
Crown Solicitor (Respondent)

File Number(s): 2018/00341972

Publication Restriction: Nil

## REASONS FOR DECISION

- 1 Mr McIntosh was the holder of a hotel licence under the *Liquor Act 2007* (NSW) for the Crossroads Hotel in Narrabri (“the Hotel”) from December 2011 until February 2018.
- 2 In September 2017, police officers conducted an undercover operation at the hotel. Mr McIntosh was not at the hotel at the time. Police observed a woman to be affected by alcohol, to the point where she vomited in the hotel toilets.
- 3 Mr McIntosh was issued with a penalty infringement notice for an offence under s 73(1) of the *Liquor Act* (for permitting intoxication on the licensed premises) and paid the fine of \$1,100.
- 4 The respondent (“the Authority”) then imposed a “first strike” upon him. In broad terms, this may be done when the licensee has committed a “prescribed offence” (including an offence under s 73 of the *Liquor Act*), when no other strike is in force against the licensee and when the Authority imposes the first strike because of the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence.
- 5 Mr McIntosh applied for review of the Authority’s decision to issue a first strike.

- 6 I have decided that the Authority's decision is not the correct and preferable decision in the circumstances of the case.

### **Background**

- 7 A company owned by Mr McIntosh purchased the Hotel in 2011. Mr McIntosh became the licensee of the premises on 19 December 2011.
- 8 Mr McIntosh was a committee member on the Local Liquor Accord and was treasurer for two years. The Committee met monthly and the local licensing sergeant regularly attended. The purpose of the Accord was to prevent the abuse of drugs and alcohol in hotels.
- 9 Mr McIntosh employed Mr Hungerford as a member of the bar staff at the Hotel in 2012. In September 2016, Mr McIntosh appointed Mr Hungerford as manager of the Hotel.
- 10 From about May 2016, Mr McIntosh was at the Hotel about two days per week. Every Tuesday morning there was a management meeting to discuss the operation of the Hotel, including the responsible service of alcohol.
- 11 On 17 November 2017, three licensing police officers attended the Crossroads Hotel from about 10.30pm.
- 12 Mr Hungerford was the manager on site on that night. Mr McIntosh was not present.
- 13 For about an hour and a half, the police officers observed a female patron who they considered to be affected by alcohol. One of the police officers, Sergeant Graeme Elms, took covert video footage of the female patron.
- 14 During the course of the evening, Mr Hungerford served the female patron alcohol.
- 15 At one point during the covert operation, the female patron went to the bathroom. She was followed into the bathroom by a female officer who reported that the female patron vomited in the toilet.
- 16 At around midnight, Sergeant Elms made himself known to Mr Hungerford. Sergeant Elms spoke to the female patron whilst Mr Hungerford was present. The female patron said she had had about twenty schooners of mid-strength

beer since 6pm. Both Mr Hungerford and Sergeant Elms formed the opinion that she was affected by alcohol.

- 17 Sergeant Elms then interviewed Mr Hungerford. Mr Hungerford agreed he had served the female patron and that she was intoxicated.
- 18 Mr McIntosh was issued a penalty notice for the prescribed offence of “licensee permit intoxication on licensed premises” under s 73 of the *Liquor Act*.
- 19 Mr McIntosh paid the fine on 1 January 2018. His company sold the Hotel business around the same time.
- 20 On 12 February 2018, a company associated with Mr Hungerford became the licensee of the licensed premises. Mr Hungerford continued as manager.
- 21 The Authority decided to impose a first strike against Mr McIntosh under s 144E of the *Liquor Act* on 26 September 2018. In its decision letter, the Authority described the “seriousness of the harm” as comprising “a patron being unwell as a result of the prescribed offence.” In its statement of reasons, the Authority stated that it was satisfied that “the female patron was significantly intoxicated and seriously affected by alcohol which resulted in the patron being physically ill.”
- 22 Mr McIntosh applied to this Tribunal for review of the Authority’s decision on 7 November 2018 (that is, after the 21 days provided for by s 144N(2) of the *Liquor Act*).
- 23 On 18 December 2018, by consent, the Tribunal extended the time for lodging the application to 7 November 2018.

### **Relevant law**

- 24 Part 9A of the *Liquor Act*, headed “Disciplinary Action – 3 Strikes” contains provisions concerning the imposition of strikes on certain persons, including licensees. The original Part 9A was inserted by the *Liquor Amendment (Three Strikes) Act 2011*. As it was originally enacted, a first strike was incurred automatically “in respect of a licence” if a licensee or manager committed a prescribed offence (ss 144B, 144D). Second and third strikes could only be incurred if a decision to impose the strike was made by the departmental

Secretary or the Authority. There was no right of review by a tribunal of a decision to impose a strike.

- 25 The *Liquor Amendment (Reviews) Act 2017* repealed the original provisions of Part 9A and inserted a new Part 9A. The “3 strikes” disciplinary scheme was amended so that, in the case of licensed premises other than a club, a strike was incurred by the manager or licensee, and did not attach to the licence. Under the new regime, which remains in place, a first strike is no longer incurred automatically when a licensee or manager commits a prescribed offence. It is only incurred if, in addition to this, the Authority decides to impose the first strike because of the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence (s 144E(1)(c)). A decision to impose a strike is reviewable by this Tribunal (s 144N(1)).
- 26 The “first strike” was imposed upon Mr McIntosh pursuant to s 144E of the *Liquor Act*. That section provides:

**144E Strikes incurred by licensees or managers of licensed premises**

(1) A first strike is incurred by a person who is the licensee or manager of licensed premises if:

- (a) the person commits a prescribed offence, and
- (b) no other strike is in force against the person when the offence was committed, and
- (c) the Authority decides to impose the first strike because of the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence.

(2) A second strike is incurred by a person who is the licensee or manager of licensed premises if:

- (a) the person commits a prescribed offence, and
- (b) 1 strike was in force against the person when the offence was committed, and
- (c) the Authority decides to impose the second strike because of the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence.

(3) A third strike is incurred by a person who is the licensee or manager of licensed premises if:

- (a) the person commits a prescribed offence, and
- (b) 2 strikes were in force against the person when the offence was committed, and

(c) the Authority decides to impose the third strike after taking the following into account:

(i) the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence,

(ii) any other matter that may be prescribed by the regulations.

27 The Authority must, in deciding whether to impose a first strike, take certain submissions into account, and must also take into account each of the following to the extent that the Authority considers it to be relevant to the decision (*Liquor Act*, s 144M(1)(c)):

(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 the licensee or manager,

(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.

28 The Tribunal has jurisdiction to review a decision to impose a strike under s 144N(1) (read with s 144M) of the *Liquor Act*. It conducts the review of the Authority's decision under the *Administrative Decisions Review Act 1997* (*Liquor Act*, s 144N(1)).

29 In determining an application for review under s 144N of the *Liquor Act*, the Tribunal must take into account any matter that was required to be taken into account in making the reviewable decision that is the subject of the review (*Liquor Act*, s 144N(6)).

30 When exercising functions under the *Liquor Act*, the Tribunal is also required to have due regard to certain matters in order to "secure" the objects of the *Liquor Act*. Section 3 provides:

### 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.

31 The Tribunal's task in determining the review application is to decide what the correct and preferable decision is having regard to the material before it at the time of the hearing (*Administrative Decisions Review Act*, s 63(1)).

### Hearing and evidence

32 Mr McIntosh made statutory declarations, which were before the Tribunal, but did not give oral evidence.

33 Sergeant Elms made an affidavit and was cross examined at the hearing. Annexed to his affidavit was a "COPS Event Report" concerning the events of the evening of 17 November 2017 at the Crossroads Hotel and the penalty infringement notice issued to Mr McIntosh.

34 The video evidence of the female patron was played at the hearing and Sergeant Elms was asked questions about it. Relevant extracts from the sound recording of the interview with the manager were also played.

35 The other documentary evidence before the Tribunal included Mr McIntosh's compliance records (held by the Authority), the Crossroads Hotel's compliance

detail (held by the Authority) and police records from 1 January 2016 to 19 December 2018 for the Crossroads Hotel, Mr McIntosh and Mr Hungerford (obtained under summons).

### **Construction of s 144E(1)(c)**

- 36 Mr McIntosh accepted that he committed a prescribed offence within s 144E(1)(a) of the *Liquor Act*, and that no other strike was in force against him when the offence was committed within s 144E(1)(b). He submitted, however, that the Authority erred by regarding the vomiting by the female patron in the venue's toilets as amounting to serious harm within s 144E(1)(c) sufficient to impose a first strike on Mr McIntosh.
- 37 Mr El Hage, for the Authority, submitted that "harm" in s 144E(1)(c) is not confined solely to personal harm but, consistently with the objects and scheme of the *Liquor Act*, includes social harm (such as anti-social behaviour towards other patrons) and any violent conduct. Mr El Hage said that the word "seriousness" excludes harm which is trivial. Whilst there must be an element of seriousness about harm for the power to be enlivened, Parliament had given the decision-maker wide scope for judgment.
- 38 Mr El Hage submitted that the words "may have resulted" in s 144E(1)(c) extended the operation of the provision from actual harm to include harm which could have occurred. He said that the effect of those words was that the Authority may consider likely harm or harm which was not fanciful. In Mr El Hage's submission, the Authority could consider, for example, what might have happened had the female patron walked on to the street whilst intoxicated. He also submitted that the kind of harm which "may have resulted" from the commission of the offence is other patrons feeling upset by the female patron's behaviour.
- 39 At the hearing, I suggested that a possible construction of s 144E(1)(c) is that the word "may" was not intended to convey that the harm itself could be possible rather than actual, but rather related to the consequences of the commission of the offence. In other words, on one reading, the provision requires actual harm, but only requires the Authority to be satisfied that this



harm *may* have resulted from, or been associated with, the commission of the offence.

- 40 Mr El Hage did not accept that this was the case.
- 41 Mr Hatzis, for Mr McIntosh, said that the construction of the words “may have resulted from” in s 144E(1)(c) as being concerned with causation derived support from the succeeding words “or been associated with.” The words “may have resulted from” indicated, in his submission, that a loose degree of connection was required to find that the (actual) harm was linked to the offence.
- 42 If, however, the words “may have resulted from” looked to consequential effects, Mr Hatzis submitted that the words were apt to include any direct consequences which arose and were discernible from evidence. He conceded that the words may be apt to go a little further, for example, to include circumstances which were likely to arise, based on evidence. The distinction was between speculation and conjecture on the one hand and inference on the other.
- 43 Mr Hatzis submitted that the Authority’s construction of “serious” as merely excluding trivial harm placed a gloss on section and was contrary to the legislature’s intention. In his submission, the legislative intention is that serious harm is touchstone for imposition of a strike.
- 44 Section 144E must be construed “so that it is consistent with the language and purpose of *all* the provisions of the statute”: *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [24] (emphasis in original, citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]). It is thus to be read with the objects provision, the other provisions of Division 2 of Part 9A and other relevant provisions of the *Liquor Act*.
- 45 The most relevant object of the *Liquor Act*, for the purposes of construing s 144E, is “to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community” (s 3(1)(a)).

- 46 Division 1 of Part 6 of the *Liquor Act* contains various offences which are designed to regulate and control the sale, supply and consumption of liquor in accordance with this object. Section 99(1), within that Division, provides that the regulations may make provision for or with respect to requiring or encouraging the adoption of responsible practices in the sale, supply, service and promotion of liquor. Such provisions are contained within Part 5 of the *Liquor Regulation 2018*.
- 47 The language used in s 144E(1)(c) is also used in other provisions in Part 9A. To reiterate, that paragraph provides that a first strike is incurred if, among other things, “the Authority decides to impose the first strike because of the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence.” Similar wording is used in s 144E(2)(c) and (3)(c) in respect of a second and third strike incurred by a licensee or manager of licensed premises and in s 144I(1)(c), (2)(c) and (3)(c) in respect of strikes incurred on club licences.
- 48 The power to impose strikes under s 144E, and other powers conferred under Division 2 of Part 9A, helps to achieve the object of regulating and controlling the sale, supply and consumption of liquor consistently with community expectations in a number of ways. Once a strike has been imposed upon a licensee or manager of licensed premises, the Authority may require that person to undertake courses of training or instruction for the purposes of managing or reducing the risks that contributed to the commission of the prescribed offence (*Liquor Act*, s 144F(1), (2)(a) and (3)(a)). The Authority may also impose conditions on the licence, such as a condition requiring the engagement of persons to promote the responsible service of alcohol on the licensed premises (*Liquor Act*, s 144G(1)(c)). More serious action may be taken upon imposition of a second or third strike, including disqualification of the person from being the licensee or manager of any licensed premises upon a third strike (*Liquor Act*, s 144F(3)(b)).
- 49 Read in its statutory context, s 144E is broadly concerned with achieving the objective that licensees and managers ensure that the sale of liquor is consistent with community expectations, and that they ensure that liquor is

consumed on licensed premises in a way which is also consistent with community expectations.

- 50 I accept the Authority's submission that the word "harm" in s 144E(1)(c) may include social harm, such as anti-social behaviour towards other patrons, as well as physical harm. The word "harm" is used in a broad sense elsewhere in the *Liquor Act*. Section 31(1)(b) of the *Liquor Act* uses the phrase "drink-driving or other liquor-related harm" which indicates that the legislature considers that drink-driving is a form of "harm" irrespective of whether any physical harm results. Section 116E(9) refers to "alcohol-related violence or anti-social behaviour or other alcohol-related harm" indicating that the legislature considers anti-social behaviour to be a form of alcohol-related harm. The word "harm" in its ordinary usage is a broad term which includes "injury; damage; hurt" and "moral injury" (*Macquarie Dictionary Online*). It can also be used to refer to psychological harm.
- 51 I do not accept, however, that the effect of the word "seriousness" is merely to exclude harm which is trivial, as the Authority contended. There is nothing in the provision, or in the *Liquor Act* as a whole, which indicates that the term should have anything other than its ordinary meaning. The word serious can mean "weighty or important" (*Macquarie Dictionary Online*). "Seriousness" can mean "gravity." It is used in s 141(7) of the *Liquor Act* where the "seriousness of the contravention involved" is a factor the Authority may consider when determining whether the matter of a complaint is so serious as to warrant the taking of action that is available to the Authority when circumstances of aggravation exist. The word "serious" is used elsewhere in the *Liquor Act* in the expressions "a serious breach of this Act" in s 82(2)(b) and 84(2)(c) and "serious offences" in s 82(3)(d) and 84(3)(d). In each of these instances, and in s 144E, it has, in my view, its ordinary meaning.
- 52 The next constructional issue is the meaning of the words "may have" in s 144E(1)(c) (and in the corresponding provisions, s 144E(2)(c) and (3)(c)).
- 53 The Authority's construction of those words would allow the Authority to impose a first, second or third strike on the basis of its speculation as to the harm which may have occurred as a result of, or may have been associated with, the

commission of the prescribed offence. If the Authority considered, for example, that social harm may have (in fact) occurred as a result of the offence, although it did not have any evidence of social harm, or that an intoxicated patron could have been run over by a car because of her intoxication (even though this had not in fact happened), then, on the Authority's construction of s 144E(1)(c), it would be entitled to impose a strike.

- 54 It is inherently unlikely that the legislature would have imposed a test which gave the Authority power to impose a strike on the basis of its speculation as to possible harm, in the absence of any evidence of any actual harm. A strike has potentially serious consequences for a licensee or manager, including disqualification if a third strike is issued. Given that the legislature has determined that a first, second and third strike may be imposed "because of" or "taking ... into account" the seriousness of any harm (s 144E(1)(c), (2)(c) and (3)(c)), it is more likely that "harm" was intended to mean actual harm.
- 55 Mr McIntosh's alternative construction, which required the harm to be "likely", or for an inference to arise that the harm occurred, is also problematic. There is nothing in the words of s 144E(3)(c) to indicate that the harm must be "likely." That construction involves putting a gloss on the section or reading words into it.
- 56 I consider that the more natural reading of the words in s 144E(1)(c), and one which is consistent with the statutory scheme, is that the Authority must be satisfied that actual harm occurred, but that it need only be satisfied that such harm "may have" resulted from, or been associated with, the commission of the offence. The provision therefore contemplates a situation where, for example, a licensee had sold liquor to intoxicated persons on the licensed premises in breach of s 73(2), and a brawl had subsequently erupted on the premises. In that situation, the Authority would not need to be satisfied that the harm caused by the brawl had in fact resulted from or been associated with the commission of the offence; only that it may have done so. This could be a matter of inference.

*Was the harm “serious”?*

- 57 I accept the Authority’s submission that Parliament has given the Authority wide scope for judgment in determining what is “serious” harm for the purposes of s 144E(1)(c). It would be open to the Authority to consider, as it did in this case, that a patron vomiting constituted harm sufficiently serious, in the circumstances of the case, to impose a first strike. The view the Authority needs to form is that “because of” the seriousness of the relevant harm, a first strike should be imposed. It is not legally erroneous to consider that because of the seriousness of the harm caused to a female patron (being vomiting and otherwise experiencing intoxication and its effects) a first strike should be imposed.
- 58 This does not, however, mean that I consider this to be the correct and preferable decision in the circumstances.
- 59 In order to support his submission that the harm was sufficiently serious to impose a first strike, Mr El Hage relied upon evidence that the female patron not only vomited; she could not walk straight.
- 60 Sergeant Elms’ evidence was that the female patron was so intoxicated that she appeared likely to fall off her chair. He accepted that she did not, in fact, fall off her chair. He considered that the female patron’s estimate that she had consumed twenty schooners of mid-strength beer was inaccurate. His view (which was shared by Mr Hungerford) was that she had consumed fewer drinks than that. Sergeant Elms held the opinion that the female patron was “seriously affected” by alcohol. He said she had trouble focusing her eyes and nearly vomited at her seat. When questioned about how he could tell she had trouble focusing her eyes given that he was sitting three metres away, Sergeant Elms said he observed her having trouble focusing when he moved to look directly at her.
- 61 Sergeant Elms has extensive experience observing intoxicated persons as a liquor licensing officer. He observed her in close proximity and spoke to her after the surveillance ended. I accept his evidence about his observations of the female patron and find that she was “seriously affected” by alcohol.

62 I also accept the hearsay evidence that the female police officer reported that the female patron vomited in the toilets. However, as Sergeant Elms accepted, the video footage showed the female patron walking unassisted. The female patron does appear from the video footage to be unsteady at times on her feet, but not excessively so. I accept Mr Hatzis's submission that the footage shows the female patron sitting upright on a high bar stool with no support and that a female officer is heard to say on the video words to the effect, "She does not seem too bad." From observing the female patron on the video footage, I generally agree with the female officer's observation. The female patron's degree of intoxication was not readily apparent without closely observing her.

63 I do not consider that the harm caused by the female patron vomiting was very serious. It appears to me to be harm of a relatively minor nature. There is no evidence that she upset other patrons or that anyone, other than the female police officer, observed the vomiting to occur. Apart from the evidence of the female patron vomiting, there is no evidence that she behaved in an anti-social way. However, if the harm is properly characterised as being serious, I consider that it is at the lower end of the spectrum of serious harm.

64 There is no evidence that there was any social or psychological harm which may have resulted from, or been associated with, the offence.

65 In order to determine the correct and preferable decision, it is necessary to consider the other matters to which the Authority was required to have regard.

*Whether the licensed premises were declared premises when the offence was committed (s 144M(1)(c)(i))*

66 It is common ground that the licensed premises were not declared premises.

*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 (s 144M(1)(c)(ii))*

67 Sergeant Elms' evidence was that he and his colleagues arrived at the hotel at about 10.30pm and calculated that there were about 200 patrons at the venue. Two police officers had estimated, at about 8pm, that there were 50 patrons. Notwithstanding the difference in estimates, I accept Sergeant Elms' evidence that he and his colleagues had a method for calculating the number of people

at a venue, that he used that method, and that there were about 200 people there.

- 68 Mr McIntosh's unchallenged evidence is that there were thirteen staff on duty on the night in question, all of whom were trained in the responsible service of alcohol. It is clear, from the CCTV footage, that the hotel was busy. However, there is no evidence that it was understaffed.
- 69 Mr McIntosh submitted that the size and patron capacity of the premises was immaterial to the commission of the offence. Mr El Hage made a similar submission.
- 70 The circumstance that the hotel was busy may have made it more difficult for the staff to identify that the female patron was intoxicated. However, I do not consider that the size and patron capacity of the licensed premises had a significant impact on Mr McIntosh's ability to prevent the commission of prescribed offences (and, in particular, the offence under s 73(1) of the *Liquor Act*). Mr McIntosh had taken various steps, which are discussed below, designed to avoid permitting intoxication on the premises. There is insufficient evidence to determine why the procedures he had put in place were not effective on that night in relation to the female patron.
- 71 I note that it is not necessary to consider how the size and patron capacity of the licensed premises may impact on the ability of the *manager* to prevent the commission of a prescribed offence, because there was no "manager" of the premises as that term is used in the *Liquor Act*.
- 72 A "manager" of licensed premises is, relevantly, "a person appointed by the licensee under section 66 [of the *Liquor Act*] to manage the licensed premises" (*Liquor Act*, s 4(1)). Division 4 of Part 4 of the *Liquor Act*, in which s 66 is located, applies only to corporate licensees (*Liquor Act*, s 65). Mr Hungerford had been appointed by Mr McIntosh in his capacity as an individual licensee. Thus, although he had the title of manager, he was not a "manager" for the purposes of s 144M, and there was no other "manager" as defined.

*The history and nature of the commission of prescribed offences by the licensee or manager (s 144M(1)(c)(iii))*

- 73 Mr McIntosh has committed only one prescribed offence, being the offence which gave rise to the imposition of a first strike.

*The history and nature of violent incidents that have occurred in connection with the licensed premises (s 144M(1)(c)(iv))*

- 74 There is no history of violent incidents at or in connection with the licensed premises.

*Whether other action would be preferable (s 144M(1)(c)(v))*

- 75 Mr McIntosh submits that there is no need for any further action, particularly given the absence of any evidence of serious harm having occurred. If any action were warranted, Mr McIntosh says that the action should be directed at Mr Hungerford, whose lack of judgment was the direct cause of the female patron being served alcohol whilst intoxicated. Mr McIntosh also relied upon evidence about the procedures he had in place to prevent intoxication from 2011 until the Hotel was sold.
- 76 The Authority submits that taking “other action” is not preferable to imposing a first strike.
- 77 In response to Mr McIntosh’s submission that, if any other action is taken, it should be taken against Mr Hungerford, the Authority says it cannot do this because Mr Hungerford was not a “manager” within s 144M. For reasons given above, I accept this submission.
- 78 Neither party submits that taking other action would be preferable and no other action has been proposed. I accept that taking other action is not preferable and the key question is whether the imposition of the first strike is the correct and preferable decision.

*Whether there have been changes to the person who are the licensee, manager or business owner (s 144M(1)(c)(vi))*

- 79 Mr McIntosh ceased to be the licensee in February 2018. There is now a corporate licensee and Mr Hungerford has become the “manager” as that term is used in the *Liquor Act*. There is also a new business owner.



- 80 Mr Hatzis submitted, for Mr McIntosh, that there was no practical utility, from a public protection point of view, in imposing a strike on Mr McIntosh now that he was no longer the licensee of the hotel. He said that a strike would be apt to damage his reputation for no worthwhile protective purpose.
- 81 The Authority submitted that it was not to the point that Mr McIntosh is no longer a licensee at the Hotel. Given that the strike now attaches to an individual, it submitted that it would be antithetical to the current regime in Part 9A for a decision-maker to avoid the imposition of a strike where a licensee or manager was no longer employed at the venue where the offence occurred. It also relies upon Mr McIntosh's evidence that he intends to seek a licence to hold functions at his private property.
- 82 The legislature has clearly indicated in s 144M(1)(c)(vi) of the *Liquor Act* that a change in manager, licensee or business owner may be relevant to the making of reviewable decisions under Part 9A, including the imposition of strikes. The question is how to reconcile this with the circumstance that, at least in the case of licensed premises, the strike does not attach to the licence. One possibility is that a change in manager, licensee or business owner is generally not relevant to decision to impose a strike under Division 2, but it may be relevant under Division 3 (concerning club premises, where the strike does attach to the licence). However, as Division 3 does not contain any reference to licensees, only to managers, this is not a satisfactory explanation.
- 83 Another possibility is that, although a strike is now imposed upon a licensee or manager, the legislature nonetheless intends strikes to be used as a way of indirectly regulating particular venues. Other factors which the legislature provides may be relevant to imposing a strike (or making another reviewable decision) include whether the premises are declared premises and the history and nature of violent incidents that have occurred in connection with the licensed premises (s 144M(1)(c)(i) and (iv)). This suggests that the legislature considers strikes to be a way of managing matters such as intoxication of patrons at particular licensed venues, as well as the conduct of particular managers or licensees.

84 In the second reading speech to the *Liquor Amendment (Reviews) Bill 2017* (*Hansard*, Legislative Assembly, 10 May 2017), which introduced Part 9A in its present form, Minister Paul Toole explained that one of the reasons for attaching strikes to a licensee or manager rather than the licence was that when strikes were incurred against a licence, that could jeopardise loan arrangements and diminish the value of a property. He commented that “whilst licensed venues must be held responsible for their actions ... the three-strikes scheme should not unfairly penalise new owners and operators of licensed venues who have been unable to remove strikes incurred by previous management.” This helps to explain why factors relating to the licensed premises or licence (in s 144M(1)(c)(i), (iv), (vii) and implicitly (vi)) remain relevant to the exercise of the discretion to impose a strike.

85 The circumstance that Mr McIntosh is no longer the licensee of the Hotel is thus a factor tending against affirming the decision to impose a first strike. However, I accept the Authority’s submission that Mr McIntosh’s intention to apply for a licence to hold functions at his own property suggests that a strike would (or at least might) have some utility. It is also relevant that he is not currently a licensee.

86 Whilst the change of licensee tends against a decision to impose a strike (or to affirm such a decision), this is not determinative, and factors relating to the licensee’s own conduct remain relevant (see, for example, s 144M(1)(c)(iii)).

*Whether there have been changes to the business practices in respect of the business carried on under the licence (s 144M(1)(c)(vii))*

87 There is no evidence of any change to the business practices in respect to the business carried on under the licence.

*Any other matter prescribed by the regulations (s 144M(1)(c)(viii))*

88 No other matters are prescribed by the regulations.

*The need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour)*

89 I am also required to have due regard to certain matters in order to “secure” the objects of the *Liquor Act* (*Liquor Act*, s 3(2)). The most relevant of these objects is to regulate and control the sale, supply and consumption of liquor in

a way that is consistent with the expectations, needs and aspirations of the community (*Liquor Act*, s 3(1)(a)).

- 90 The first of these matters is the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour).
- 91 Affirming the Authority's decision to impose a first strike could help to minimise harm associated with misuse and abuse of liquor by its deterrent effect. That is, it might encourage licensees and managers to take more effective measures to ensure that intoxicated persons are not served alcohol.
- 92 On the other hand, the decision to impose a first strike is discretionary and there are factors which indicate that a first strike was not needed in the circumstances of this case to minimise harm associated with the misuse and abuse of liquor. Mr McIntosh had not previously committed a prescribed offence. There was no history of violence at the licensed premises whilst he was the licensee. He had procedures in place to help prevent intoxication which are discussed below and, although those procedures were ineffective on the night in question in relation to the female patron, the police records of attendances at the Hotel indicate that they were generally effective.

*The need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor*

- 93 Another matter to which I am required to have regard in order to secure the objects of the *Liquor Act* is the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor.
- 94 In the particular circumstances of this case, I am satisfied that Mr McIntosh held responsible attitudes towards the promotion, sale, supply, service and consumption of liquor, and implemented responsible practices as a licensee.
- 95 Mr McIntosh gave the following evidence about the procedures he had in place to prevent intoxication from 2011 until the Hotel was sold:
- (1) Before engaging a staff member engaged in serving liquor, he would ensure that the staff member produced a certificate of completion of a

responsible service of alcohol (“RSA”) course from an accredited course provider;

- (2) There were periodical meetings with staff where the requirements to prevent signs of intoxication amongst patrons were discussed;
  - (3) Before a new staff member was allowed to serve alcohol, he or she was required to undertake a trial shift under Mr McIntosh’s or Mr Hungerford’s supervision to ensure that the staff member understood the principles of responsible service of alcohol and could competently apply those principles in a variety of situations;
  - (4) Staff members remained under the close supervision of Mr McIntosh or Mr Hungerford until they were satisfied that the staff member was applying RSA principles appropriately;
  - (5) Mr McIntosh or Mr Hungerford would discuss with staff any particular risk factors that related to a particular night;
  - (6) Staff members were instructed that if they detected patrons showing any signs of possible intoxication, including if the patron was approaching intoxication, the patron was to be refused service;
  - (7) There were roaming staff within the premises looking for signs of potential intoxication in patrons;
  - (8) There was always food available within the Hotel to reduce the effect of alcohol on patrons.
- 96 This evidence was unchallenged and I accept it. The Authority made no criticism of the procedures Mr McIntosh put in place to prevent intoxication of patrons.
- 97 An extract from the Hotel’s incident register indicates that patrons were asked to leave on other occasions when intoxicated or exhibiting anti-social behaviour.
- 98 Mr McIntosh’s membership of the committee of the Local Liquor Accord is indicative of a responsible attitude towards the promotion, sale, supply, service and consumption of liquor.

*The need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life*

- 99 I am satisfied, having regard to the evidence set out above, that Mr McIntosh is and was at relevant times aware of the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life. The imposition of a first strike is not necessary to

change Mr McIntosh's behaviour or attitudes. In the circumstances, I am not persuaded that it is needed to achieve this objective more generally.

### **Correct and preferable decision is to set aside the Authority's decision**

100 Taking into account all the factors and circumstances set out above, I consider that the correct and preferable decision is that a first strike not be imposed upon Mr McIntosh. The main reasons for this are that the harm caused by the offence was either not serious, or at the lower end of the scale of seriousness; Mr McIntosh has not committed any other prescribed offences; the licensed premises was not a declared premises when the offence was committed and there is no history of violent incidents at the premises; Mr McIntosh had procedures in place to prevent intoxication; and Mr McIntosh is no longer the licensee of the Hotel.

101 In all of the circumstances, I do not consider that the decision to impose a first strike is warranted because of the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence. The Authority's decision to impose a first strike should therefore be set aside.

### **Orders**

102 I make the following order:

- (1) The respondent's decision to impose a first strike upon the applicant under s 144E(1) of the *Liquor Act 2007* is set aside and, in substitution for that decision, the Tribunal decides to take no action.

\*\*\*\*\*

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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