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The Directors All Liquor Wholesale Pty Ltd Licensee/ Business Owner / Premises Owner Smithfield Cellars Pty Ltd 170 Polding Street SMITHFIELD NSW 2164 <a href="mailto:awennerbom@amwlawyers.com.au">awennerbom@amwlawyers.com.au</a>	

12 August 2020

Dear Mr Herron

<b>Complaint reference No.</b>	DOC20/029029
<b>Matter</b>	Disciplinary Complaint
<b>Licence name</b>	Smithfield Cellars Pty Ltd
<b>Licence No.</b>	LIQP700352388
<b>Complainant</b>	Mr Darren Duke, A/Director of Compliance Operations, Liquor and Gaming New South Wales
<b>Premises</b>	170 Polding Street Smithfield NSW 2164
<b>Issue</b>	Whether the grounds of the complaint have been established
<b>Legislation</b>	Part 9 of the <i>Liquor Act 2007</i> (NSW)

**Notice of Disciplinary Action and Statement of Reasons on Complaint to the Independent Liquor and Gaming Authority in relation to Clarke Herron, approved manager of Smithfield Cellars Pty Ltd under Part 9 of the Liquor Act 2007 (NSW)**

On 10 October 2018, Mr Darren Duke ("Complainant"), Acting Director of Compliance Operations, Liquor and Gaming New South Wales, as a delegate of the Secretary of the Department of Industry (the responsible department now being the Department of Customer Service), submitted to the Independent Liquor and Gaming Authority ("Authority") a disciplinary complaint ("Complaint").

The Complaint was made in relation to Mr Clarke Herron, the approved manager of Smithfield Cellars Pty Ltd - a business with a packaged liquor licence LIQP700352388 located at 170 Polding Street, Smithfield New South Wales 2164 ("Premises").

The Complaint is made under Part 9 of the *Liquor Act 2007* (NSW) ("Act") and specifies three grounds of complaint ("Grounds") that are available under section 139(3) of the Act. The Authority has considered the Complaint material and all submissions received in relation to the Complaint and has decided to make the following orders, by way of disciplinary action:

1. **Impose** a monetary penalty of \$5,000 on the manager, Mr Clarke Herron, pursuant to section 141(2)(c)(i) of the Act to be paid to the Secretary of the Department of Customer Service within 28 days from the date of this decision letter.
2. **Order** the manager, Mr Clarke Herron, to pay the Secretary of the Department of Customer Service \$10,000, being a portion of the costs incurred by the Secretary in conducting the investigation, pursuant to section 141(2)(l)(i) of the Act. Costs shall be paid to the Secretary of the Department of Customer Service within 60 days from the date of this decision letter.
3. **Issue** Mr Clarke Herron with a reprimand, conditional on the total costs being paid within 60 days of the final decision letter being issued pursuant to section 141(2)(m) of the Act.

Information about review rights regarding this decision is provided at the end of the attached statement of reasons. If you have any questions about this letter, please contact

[ilga.secretariat@liquorandgaming.nsw.gov.au](mailto:ilga.secretariat@liquorandgaming.nsw.gov.au)

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Philip Crawford', is enclosed in a rectangular box.

Philip Crawford  
Chairperson

For and on behalf of the **Independent Liquor & Gaming Authority**

## STATEMENT OF REASONS

### INTRODUCTION

1. On 10 October 2018, Mr Darren Duke ("Complainant"), the Acting Director of Compliance Operations for Liquor and Gaming New South Wales ("L&GNSW") as a delegate of the Secretary of the New South Wales Department of Industry (the responsible department now being the Department of Customer Service), made a disciplinary complaint ("Complaint") to the Independent Liquor and Gaming Authority ("Authority") under Part 9 of the *Liquor Act 2007* (NSW) ("Act"). The Complaint was made in relation to Mr Clarke Herron, the approved manager of Smithfield Cellars Pty Ltd ("Smithfield Cellars"), a packaged liquor licence LIQP700352388 located at 170 Polding Street, Smithfield New South Wales ("NSW") 2164 ("Premises").

### GROUND OF COMPLAINT

2. The Complaint specifies three grounds ("Grounds") that are available under section 139(3) of the Act.
3. Ground 1 is stated to be based upon section 139(3)(b) of the Act and alleges that the approved manager, Mr Clarke Herron, has failed to comply with the conditions to which the licence is subject, being:
  - (a) Particular 1 – breaches of section 9(1)(b) of the Act – A licensee or an employee or agent of a licensee must not sell or supply liquor, or cause or permit liquor to be sold or supplied otherwise than in accordance with the authority conferred on the licensee by or under this Act.
  - (b) Particular 2 – breaches of section 9(3) of the Act – A licensee must not sell, or employ or permit another person to sell, liquor on premises other than premises in which the licensee is authorised by the licence or this Act to sell the liquor.
4. Ground 2 is specified in the alternative to Ground 1 and is based upon section 139(3)(d) of the Act. It alleges that the approved manager, Mr Clarke Herron, has failed to comply with any other requirement under this Act or the regulations (or under the former Act) relating to the licence or the licensed Premises. The particulars are the same as those set out in respect of Ground 1 – alleging breaches of sections 9(1)(b) and 9(3) of the Act respectively.
5. Ground 3 is based upon section 139(3)(i) of the Act and alleges that the approved manager, Mr Clarke Herron, is not a fit and proper person to be the manager of the licensed Premises. In Ground 3 Particular 1 the Complainant refers to Clarke Herron's involvement in the alleged "scheme" outlined in Ground 1 and in Ground 3 Particular 2, involving the "disguising" of "unlawful sales" of packaged liquor made beyond the scope of the Smithfield Cellars licence.

### BACKGROUND

#### Licence records

6. Copies of the OneGov licence record for Smithfield Cellars, licence number LIQP700352388 as at 23 February 2017 (Exhibit E06 to the Complaint) and 25 September 2018 (Exhibit E33 to the Complaint) indicate that:
  - This packaged liquor licence has a recorded start date of 23 January 1963.
  - All Liquor Wholesale Pty Ltd ("ALW") commenced the role as the corporate licensee ("Licensee") on 30 September 2015.
  - ALW commenced as business owner in respect of the licence from 30 September 2015.
  - Mr Clarke Herron commenced the role as the approved manager of the licence on 30 September 2015.
  - The premises address recorded on the licence record is 170 Polding Street, Smithfield NSW 2164.
7. The Authority has obtained a more current copy of the licence record as at 22 August 2019, which indicates no change to the status of those parties. These records are referred to collectively as the "OneGov Licence Records".

#### Relevant Corporations

8. The allegations made in the Complaint concern several corporations, some of which involve businesses based outside of NSW. The Authority notes the following, by way of background:

9. Complainant Exhibit E01 of the Complaint is an Australian Securities and Investments Commission ("ASIC") Company Extract for ALW as at 12 February 2018 ("ALW ASIC Extract") which indicates that this company was registered in NSW on 28 July 2015 with Mr Gregg Herron identified as the sole secretary/director of that company (from 23 January 2016) and having commenced those positions on 28 July 2015.
10. Complainant Exhibit E02 of the Complaint is an ASIC Company Extract for Smithfield Cellars as at 12 February 2018 ("Smithfield ASIC Extract") which indicates that this company was registered in NSW on 28 July 2015 with Mr Gregg Herron identified as the sole secretary/director of that company (from 23 January 2016) and having commenced those positions on 28 July 2015.
11. Complainant Exhibit E03 of the Complaint is an ASIC Company Extract for Liquor Licence Distributors Pty Ltd ("LLD") as at 12 February 2018 ("LLD ASIC Extract") which indicates that this company was registered in Queensland on 28 September 2015 with Mr Kenneth Lewis identified as the sole director/secretary of that company since 28 September 2015.
12. Complainant Exhibit E04 of the Complaint is an ASIC Company Extract for International Network Consultants Pty Ltd ("INC") as at 29 May 2018 ("INC ASIC Extract") which indicates that this company was registered in Queensland on 9 October 1995 with Mr Kenneth Lewis identified as the sole director/secretary since 10 September 2017. This entity's status was recorded as "Under External Administration And/Or Controller Appointed" with appointed Liquidator (Creditors Voluntary Winding Up), Mr David Hambleton, commencing in that role on 23 February 2018.
13. Complainant Exhibit E05 of the Complaint is an ASIC Company Extract for Prudential Investment Corporation Pty Ltd ("PIC") as at 12 February 2018 ("PIC ASIC Extract") which indicates that this company was registered in Queensland on 28 November 2013 with Mr Kenneth Lewis identified as the sole director since 2 December 2016. This entity's status was recorded as "Under External Administration And/Or Controller Appointed", with an appointed Liquidator (Creditors Voluntary Winding Up), Ms Anne-Marie Barley, commencing in that role on 4 January 2017. The Complaint notes that the PIC ASIC Extract identified PIC as the entity, previously Shannon Grove Estate ("Shannon Grove"). Exhibit E04 provides a notice of resolution for change of company name from PIC to Shannon Grove Estate Wines Pty Limited in 2014.
14. Complainant Exhibit E31 of the Complaint is an ASIC Company Extract for Inn Security Pty Ltd ("Inn Security") as at 30 May 2018 ("Inn Security ASIC Extract") which indicates that this company was registered in Queensland on 1 March 1999 with Ms Elisa Lewis identified as the sole director (from 2 December 2016) having commenced that role on 31 December 2014 and sole secretary (from 2 December 2016) having commenced that role on 2 December 2016.

### **The Alleged Scheme**

15. In paragraphs 1 to 6 of the Complaint, the Complainant describes a "sophisticated business plan" that is referred to thereafter as "the Scheme" ("Scheme"), said to involve the following individuals:
  - Mr Clarke Herron, who according to the OneGov Licence Records has been the approved manager of the Smithfield Cellars licensed business since 30 September 2015. Information provided by Clarke Herron on 16 January 2018 in response to a L&GNSW Notice to Produce at Exhibit E17 ("Response to Notice to Produce") establishes that Clarke Herron is the son of Mr Gregg Herron.
  - Mr Gregg Herron, who according to the OneGov Licence Records and the ALW ASIC Extract is the sole company director/secretary of ALW, the corporate Licensee and licensed business owner for the Smithfield Cellars enterprise.
  - Mr Kenneth Lewis, described at paragraph 2 of the Complaint as a close associate of the corporate Licensee, who is the director/secretary of a company (LLD) that leases a warehouse at 58-60 Banna Avenue Griffith NSW ("Griffith Warehouse"). The Authority notes that the below evidence establishes that Mr Lewis has the following roles:
    - Director/secretary of LLD, as indicated by the LLD ASIC Extract; and
    - Director/secretary of INC, as indicated by the INC ASIC Extract; and
    - Director of PIC, as indicated by the PIC ASIC Extract; and

- Director/secretary of Fortress Connected Pty Ltd (“Fortress Connected”) as indicated by the ASIC Person Extract for Mr Lewis as at 23 November 2016 at Exhibit E10 (“Lewis ASIC Extract”).
  - Mr Roy Agresta, described at paragraph 2 of the Complaint as a sales consultant based in Griffith, NSW.
16. At paragraph 2 the Complainant contends that the Scheme involved:
- “an agreement between Mr Greg Herron, director of the corporate Licensee, his son Mr Clarke Herron as the Manager identified on the licence, and Mr Kenneth Lewis, a close associate of the Licensee who, through his warehouse in Griffith (‘the warehouse’), advertised and sold liquor in Griffith through local sales consultant Mr Roy Agresta”.*
17. At paragraph 3 the Complainant further contends that between February and December 2016, the Scheme was orchestrated to:
- “conceal unlicensed sale of liquor through the Licensee, filtering the proceeds via the Licensee’s bank account to the accounts operated by Mr Lewis and a number of other entities located across three states”.*
18. The Complainant contends that the Scheme involved the following elements:
- The sale and supply of packaged liquor in Griffith when the Licence attaches to the Premises located in Smithfield.
  - Use of the Griffith Warehouse to store and distribute liquor for the Licensee.
  - Leasing of the Griffith Warehouse by LLD, whose director/secretary is Mr Kenneth Lewis.
  - The Employment of Mr Agresta by Mr Lewis’ Queensland-based consultancy firm, INC, on behalf of the Licensee.
  - Advertising and sale of packaged liquor in Griffith using the Victorian liquor licence held by Shannon Grove.
  - The sale of liquor in Griffith by the Licensee’s agent Mr Roy Agresta.
  - Sales of packaged liquor being invoiced under the name “Smithfield Cellars” with such invoices identifying the Queensland business address of INC.
  - Use of the Licensee’s business name in an attempt to legitimise the Scheme.
  - Mr Lewis’ involvement as a close associate of the Licensee and a director of Shannon Grove.
  - Filtering the proceeds of packaged liquor sales through Smithfield Cellars’ bank account into the account of Fortress Connected, a company controlled by Mr Lewis.
19. At paragraphs 4 and 5 of the Complaint (and as specified in the Grounds of Complaint) the Complainant makes the following allegations of liquor sales made outside the scope of the Smithfield Cellars packaged liquor licence:
- A review (performed by L&GNSW) of Smithfield Cellars’ bank account for the period February to December 2016 identified that over \$400,000 was transferred to the account of Fortress Connected, which represents 85% of Smithfield Cellars’ total revenue of this bank account for that period.
  - This review identified that 50 of those liquor sales transactions, totalling \$101,094.10, were made to licensees in Griffith. A number of those licensees have advised inspectors that they *purchased liquor directly from Mr Agresta as a representative of Smithfield Cellars.*
20. At paragraph 6 it is contended that Messrs Gregg and Clarke Herron advised L&GNSW inspectors that they have ceased all dealings with Mr Lewis, his business partners and the Scheme. L&GNSW inspectors were unable to interview Mr Lewis due to him being overseas. Mr Lewis remains under investigation by a number of state and federal agencies, while Mr Agresta has declined to be interviewed by inspectors.

#### **Related Complaint Against Gregg Herron**

21. On 10 October 2018 the Authority also received from the Complainant a separate but related disciplinary complaint (“Related Complaint”) in relation to Mr Gregg Herron, the sole director/secretary for ALW (the corporate Licensee).

## COMPLAINT MATERIAL

22. Schedule A provides a list of all evidence or material comprising the initial Complaint, including a one-page cover letter, a seventeen page Complaint submission specifying the Grounds of Complaint (accompanied by a chronology of events and a list of exhibits) and thirty-three Exhibits referred to in the Complaint submission (collectively, the "Complaint Material").

## CONSULTATION

### Show Cause Notice dated 31 January 2019

23. On 31 January 2019 the Authority's Reviews and Secretariat Unit ("Authority Secretariat") sent a letter to Mr Clarke Herron and the directors of ALW ("Respondents"), inviting them to show cause or make submissions as to why disciplinary action should not be taken on the basis of the Grounds of Complaint.

### Submission on Merits of Complaint dated 18 April 2019

24. Solicitors for Mr Clarke Herron, AMW Lawyers, provided a nine-page legal submission dated 18 April 2019 addressing the merits of the Complaint ("Merits Submission"), supported by a 6-page statutory declaration from Mr Clarke Herron dated 18 April 2019 ("Clarke Herron Declaration").
25. Without repeating this material the Authority has considered all of the contentions and submissions made in relation to the Complaint.

### Further Licensed Premises Records and Information Sourced by Authority Secretariat

26. Schedule B to this letter provides a list of additional licensing records sourced by the Authority Secretariat in relation to this Complaint and before the Authority.

## FINDINGS ON COMPLAINANT SUMMARY OF FACTS

27. A disciplinary complaint under Part 9 of the Act is an administrative matter and findings are made to the civil standard of proof. However, in accordance with the principle enunciated by the High Court of Australia in *Briginshaw v Briginshaw* (1938) 60 CLR 336, the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are matters that are relevant to deciding whether an allegation has been proved on the balance of probabilities.
28. At paragraphs 53, 67 and 82 of the Complaint, in respect of Grounds 1, 2 and 3 respectively, the Complainant refers to and relies upon the "Summary of Facts" specified in paragraphs 7 to 23 of the Complaint. The Authority makes the following findings on these background matters.

### Acquisition of Smithfield Cellars by All Liquor Wholesale Pty Ltd

29. As contended at paragraph 7, OneGov Licence Records establish that ALW operates a packaged liquor business with licence number LIQP700352388 (licence name "Smithfield Cellars Pty Ltd") from premises at 170 Polding Street, Smithfield NSW. As submitted by the Complainant, pursuant to section 29 of the Act, this type of licence authorises the licensee to sell liquor by retail in sealed containers *on the licensed premises*, for consumption away from the licensed premises only, and to sell liquor by wholesale, at any time *on the licensed premises*, to persons authorised to sell liquor (whether by wholesale or by retail).
30. On the basis of Smithfield Cellars Company Structure and Sales Advice provided at Exhibit E07 and the ALW ASIC Extract, the Authority accepts the Complainant's contentions at paragraph 8 that ALW purchased this business from Smithfield Cellarbrations Pty Ltd for \$284,000. ALW is an Australian proprietary company registered on 28 July 2015. Mr Gregg Herron (who is Mr Clarke Herron's father) is the sole company director and secretary.
31. The OneGov Licence Records establish the Complainant's contention at paragraph 9 that Mr Clarke Herron commenced as approved manager of the Smithfield Cellars licence on 30 September 2015. The Complainant here further alleges that Mr Herron did not have any prior experience acting as an approved manager of licensed premises. The Authority accepts this on the basis of paragraph 24 of the Clarke Herron Declaration, where Mr Clarke states that prior to working with his father, he "did not have prior experience in managing a licensed business" but did work as a bar manager and bar attendant.

## Complainant Account of Gregg Herron's Business Relationship with Kenneth Lewis

32. The Complainant contends at paragraph 10 of the Complaint that Gregg Herron has been acquainted with Mr Kenneth Lewis for over 10 years, and that Lewis approached Herron in late 2014 when Gregg was working for the Paul Irvin Hotel Group.
33. The Authority notes that in the Related Complaint, Gregg Herron has stated in a statutory declaration dated 17 April 2019 that this is "not correct" and that he first met Mr Lewis in 2014.
34. The Authority accepts, on the basis of Gregg Herron's responses to Questions 56 and 57 of his interview with L&GNSW dated 22 June 2017 that is Exhibit E08 ("Gregg Herron Interview"), that Mr Herron "met Ken's family about ten years ago" and "didn't have really anything to do with them until about um, three years ago" when he "ran into him" (Ken) whilst working for "the Paul Irvine, Irvin Hotels".
35. As contended at paragraph 11 and evidenced by the LLD ASIC Extract, the Authority is satisfied that Mr Lewis' company, LLD, was registered with ASIC on 28 September 2015. The Complainant further alleges, and the Authority accepts on the basis of the lease advice for the Griffith Warehouse at Exhibit E09 ("Griffith Warehouse Lease Advice") that LLD, a company controlled by Mr Lewis, commenced a three-year lease of the Griffith Warehouse on 1 November 2015.
36. The Authority accepts, as further contended, that the stated purpose of this occupation was storing liquor at the Griffith Warehouse. The Griffith Warehouse Lease Advice specifies use of the premises for "Storage of Alcohol/Liquor & associated products only". As contended at paragraph 11, Special Condition 3 of the Griffith Warehouse Lease Advice states that the "lease is subject to the lessee successfully obtaining a Producer/wholesale Licence from The NSW Office of Liquor, Gaming and Racing (OLGR) within 60 days from signing the lease agreement". Noting that the Respondents do not contest this allegation, and that the Complainant has access to NSW licensing records, the Authority accepts that no such producer wholesaler licence was obtained in respect of those premises.
37. Paragraph 12 of the Complaint alleges that Gregg Herron allowed Mr Lewis and INC (a company controlled by Lewis) to become involved with the management of sales, finances and human resources for Smithfield Cellars. The Authority accepts these contentions on the basis of Gregg Herron's statements at Questions 146 to 161 of the Gregg Herron Interview:

Q146      *Ah hmm.*

A            *And um, he said no, if we, so he went and saw a solicitor and he came back with a letter from the solicitor saying, no if you do this, it's similar to doing when you're doing um, internet sales. So um, what would happen is Roy would um, go and see the people. He would take an order. Write the order out. He would then send that order to the girls in Queensland. They would then raise an invoice. They would send that down and then Ken would deliver the stock from the invoice once they're filled.*

Q147      *O.K.*

A            *And then they would pay, they would pay back into Smithfield and then he would draw, draw the money back out of Smithfield back on his card, so - - -*

Q148      *O.K. All right.*

...

Q149      *So who, who were the girls in Queensland you're referring to?*

A            *The, that's the um, international consultants which was um, um, Alyssa Lewis and um, Janine and then I had a, a girl that worked out of our office as well, which did my, my other things. And her name was Ros, Ros Chaplain. But she only worked for three months.*

...

Q150      *O.K. What I'll do is, I'm just going to get a document Greg, and just show it to you. If you can just have a look at it and just tell me what that relates to?*

A            *That relates to the employment of Roy Agrestor.*

Q151 Ah hmm.

A Which was put together by Alyssa Lewis, who was someone who was a, um, HR person.

Q152 O.K. O.K. And no that document it describes Roy's position as being Business Development Manager, Griffith for Smithfield Cellars Retail Sales role, regarding to yourself being the direct manager and to Alyssa Lewis being Payroll. Would you agree is that, is that what happened?

A That's how it was structured. But I didn't have as far as um, I didn't have a lot to do with Roy 'cause it was being done down in Griffith.

Q153 O.K. Now I just want to go back, when you were explaining the process with me, if you can just explain the process or what your understanding of what Roy was doing in Griffith and how the sales were created generally?

A Yeah. Well Roy was a person that's been in liquor for quite a while and um, renting in that area. So he had a lot of, a lot of contacts. So um, he was going out and calling on hotels, clubs, bottle shops and taking orders and then sending it, sending them um, back to us and then we'd supply it, buy stock.

Q154 O.K. And just to reiterate when you were, so you said Roy would generate an invoice.

A Ah hmmm.

Q155 O.K.

A Like a handwritten um, like docket.

Q156 Ah hmm. O.K. And then what would happen with that?

A He would then send that to the girls to draw a, a proper invoice out of Smithfield.

Q157 O.K.

A Through our MYOB system.

Q158 Yes.

A And um, and then that would be sent, sent back down. And then the stock would be on forwarded.

Q159 O.K. O.K. What I'm going to do is I'm just going to show you some documents now just in relation to what you've just discussed. So I'll only just show you one or two, just so we can cover off on it. O.K. It's a little difficult to read, but I'm just going to give you a copy of an invoice and what can you tell me about that?

A That is an invoice that um, Roy would have, a delivery docket - - -

Q160 Ah hmm.

A - - - that he um, raised and then that would have been sent to um, Queensland.

Q161 Ah hmm.

A And then the girls would have punched and created an invoice off that, off the MYOB system.

38. The Authority notes that the INC ASIC Extract and Lewis ASIC Extract establish that INC was registered with ASIC on 9 October 1995 and that Mr Lewis held positions of company director and secretary between 2002 and 2010. The Lewis ASIC Extract also indicates, as alleged at paragraph 13, that on 7 February 2014 Mr Lewis was reappointed director of INC, and appointed as secretary on 10 June 2014.

39. At paragraph 13 the Complainant contends that Mr Lewis' daughter, Ms Elisa Lewis, has been listed as the "manager" of INC since 2014. The Authority accepts this on the basis of Exhibit E11, where Ms



Lewis' "LinkedIn" social media profile indicates that she has held the role of "Management" since May 2014.

40. The Authority further accepts, as contended in paragraph 13, that an employment contract between INC and Mr Roy Agresta dated 22 January 2016 that is Exhibit E12 ("Agresta Employment Contract") establishes that INC employed Mr Agresta in the role of *"Business Development Manager – Griffith for Smithfield Cellars – Retail Sales Role ("your role") reporting to Gregg Herron (Direct Manager) and/or Elisa Lewis (Payroll)"* effective from 1 February 2016.

### **Allegations of Unlawful Liquor Sales At Griffith**

41. At paragraph 14 of the Complaint it is alleged that, from February to December 2016, Mr Agresta visited licensed premises throughout the Griffith area and advertised liquor for sale.
42. At paragraph 15 the Complainant refers to the definition of "sell" in section 4 of the Act, which is extracted below. Paragraph 16 includes the contention that L&GNSW's investigation identified **384** invoices that were handwritten by Mr Agresta, **121** of which totalled **\$180,709.72** in value (which the Authority notes is established by Exhibit E13) and represented liquor sales to licensed premises in Griffith. L&GNSW inspectors reconciled **50** of those transactions, to the value of **\$101,094.10**.
43. As discussed further below, the Authority finds that these 50 transactions are established by Exhibit E14, which provides relevant sales transaction records, including the computer-generated invoices, handwritten invoices and Westpac bank account records ("Reconciled Transactions").
44. The Complainant further contends that on the basis of L&GNSW analysis, supported by the evidence of Gregg Herron at Questions 146 to 223 of the Gregg Herron Interview and Mr Clarke Herron's response to Question 8 of the Response to Notice to Produce, the following matters are established:
- Mr Agresta's handwritten invoices of liquor sales from Smithfield Cellars to licensed premises located in and around Griffith, were issued in the following terms: "Smithfield Cellars, P.O. Box 1847 Southport, Qld 4215". The invoices were sent to the Queensland office of INC by Mr Agresta, this postal box is for INC.
  - Mr Ken Lewis' daughter, Eliza Lewis, and others in the Queensland office would prepare a Smithfield Cellars invoice for the sale by Mr Agresta. The Smithfield Cellars invoices which are included in Exhibit E14 have a Queensland phone number (07 5596 6098) and an email address of 'admin@lld.net.au'. 'Lld' is Liquor Licence Distributors Pty Ltd. This 'lld' email address is the same email address used by Ken Lewis (ken@lld.net.au) and Roy Agresta (roy@lld.net.au).
  - The Smithfield Cellars' invoices (with their Queensland contact details) were then sent from the Queensland office to the relevant Griffith debtors/customers.
  - Deposits were then made by the relevant Griffith debtor/customer into Smithfield Cellars' bank account (Westpac BSB 032326 Acc. No. 2110660, being the bank account number on the Smithfield Cellars invoice).
  - Withdrawals were then made from Smithfield Cellars' bank account by the Queensland office and deposited to Fortress Connected's Westpac bank account, and those withdrawal amounts from Smithfield Cellars account deposited to Fortress Connected account can also be reconciled against Griffith debtor/customer invoices. Mr Gregg Herron explained this process during his coercive interview with [L&GNSW] Inspectors.
  - INC's recording of Mr Agresta's invoices into their accounting software and emailing a copy to those Griffith debtors.
45. The Authority accepts, on the basis of *some* (not all) of the handwritten invoices at Exhibit E14, that Mr Agresta would, on certain occasions, include the address "Smithfield Cellars P O Box 1847 Southport QLD 4215" on his handwritten invoices.
46. The Complainant's account of people in the Queensland office preparing the computer-generated Smithfield Cellars' invoices and depositing and withdrawing money into Smithfield Cellars and Fortress Connected's bank accounts is established by Questions 146 to 161 of the Gregg Herron Interview, extracted above.
47. On the basis of the computer-generated invoices in Exhibit E14, the Authority is satisfied that some of these invoices issued by Smithfield Cellars included a Queensland phone number and an email address for LLD (@lld.net.au), which was also used by Mr Lewis and Mr Agresta in the Shannon Grove monthly advertising flyers depicted in Exhibit E18.

48. At paragraph 17 the Complainant contends that on 14 December 2016, NSW Police inspected the Griffith Warehouse and seized a stocktake record confirming their observations that the warehouse contained over 176,000 bottles of beer, wine and spirits. The Authority notes that the stocktake record provided at Exhibit E15 ("Stocktake Record") confirms the Complainant's contentions regarding what Police discovered.
49. At paragraph 18 the Complainant contends that when interviewed by Police, Mr Agresta stated that he was *employed by Smithfield Cellars* and was *selling liquor* from the Griffith Warehouse *for Smithfield Cellars*. The Authority accepts that Mr Agresta made these admissions on the basis of Pages 61-65 of a notebook entry from Sergeant Brett Ryan of NSW Police, provided at Exhibit E16 ("Police Notebook"). The Authority accepts those admissions as reflecting the reality of what Mr Agresta was doing.
50. The Complainant contends at paragraph 19 that on 18 January 2017 L&GNSW inspectors attended the Griffith Warehouse, which was then vacated and empty. The inspectors were later advised by Police that Mr Lewis had left the country, with the whereabouts of the liquor unknown. In the absence of any dispute about these matters, the Authority accepts that Police have advised L&GNSW to this effect.
51. At paragraph 20 the Complainant contends that L&GNSW officers have obtained three statements from licensees in Griffith who had purchased liquor from Mr Agresta, confirming that Agresta's conduct included:
  - offering to sell them liquor
  - entering into an agreement for sale
  - delivery of liquor by Mr Agresta to them
  - completion of invoices by Mr Agresta, who then accepted payment for the sale of that liquor in Griffith, as an agent of Smithfield Cellars.
52. The Authority notes that the following statements were obtained from Hanwood Sports Club, Yenda Hotel and Yoogali Club:
  - NSW Police witness statement of Mr Roger Bertacco, the approved manager of Hanwood Sports Club, dated 3 May 2017 in the matter of Ken Lewis at Exhibit E19 ("Bertacco Witness Statement");
  - NSW Police witness statement of Mr Reginald Gilbert, the freehold owner of Yenda Hotel, dated 1 May 2017 in the matter of Ken Lewis at Exhibit E22 ("Gilbert Witness Statement"); and
  - NSW Police witness statement of Ms Sophia Snaidero, the approved manager of Yoogali Club, dated 18 January 2017 in the matter of unlicensed sale of alcohol at Exhibit E24 ("Snaidero Witness Statement").
53. On the basis of these statements and the accompanying information, the Authority finds that Mr Agresta engaged in the conduct that is alleged in paragraph 20 of the Complaint. The Authority is satisfied that this conduct involved the sale of liquor, in the Griffith local government area – that is, these sales that did not occur on the Smithfield Cellars Premises.

#### **Complainant Account of L&GNSW Enquiries with Clarke Herron**

54. The Authority accepts, as contended at paragraph 21 of the Complaint, that on 16 January 2017 Mr Clarke Herron provided a response to a coercive notice issued by L&GNSW inspectors that included his statement: *"Roy Agresta is our Business Development Manager in Griffith"*. This response is apparent from Clarke Herron's response to Question 4 of the Response to Notice to Produce
55. At paragraph 22 it is contended that Clarke Herron provided L&GNSW with details of those financial dealings with Mr Agresta, including the parties involved. The Authority notes that at Question 18 of the Response to Notice to Produce, Clarke Herron advised L&GNSW that:

*"Smithfield Cellars invoices the stock sold by Roy Agresta held by Liquor Licence Distributors in Griffith and when payment is received it is paid into the Smithfield Cellars bank account. The money is then drawn from the Smithfield Cellars account and used to pay for the Liquor Licence Distributors stock supplied."*
56. In the Clarke Herron Declaration, Mr Herron contends that he did not ever meet Mr Agresta nor had any personal dealings with him. He recalls seeing the Response to Notice to Produce at some time,

and reading it, but claims he now does “not now have an independent recollection of how that reference came to be in the document”.

57. Mr Herron has not provided a satisfactory explanation why the specific and direct statements regarding Mr Agresta’s dealings were made by him in response to a compulsory Notice to Produce, subject to penalties for the provision of false or misleading information, as recently as 16 January 2017. The Authority finds that Mr Herron’s initial response to the regulator is a more direct and reliable account and is preferred over the claimed absence of recollection as to those matters now indicated in the Clarke Herron Declaration. The Authority accepts that Mr Herron provided the information in Questions 4 and 18 of the Response to Notice to Produce.
58. The Complainant further contends at paragraph 23 that Clarke Herron declined to be formally interviewed by L&GNSW inspectors.
59. The Authority has considered Mr Herron’s statements in the Clarke Herron Declaration that he co-operated “with inspectors as much as possible” although because of his “work commitments”, Mr Clarke Herron “could not go to Griffith”. The Authority accepts that Mr Herron has co-operated with L&GNSW to a limited degree by providing information in the Response to Notice to Produce, but accepts the information provided by the Complainant that Mr Herron declined to be formally interviewed by L&GNSW Inspectors. Mr Herron has made statements about not making himself available to local Police in Griffith, by reason of his work commitments in Sydney, but the allegation here is that Mr Herron declined a formal interview with L&GNSW and there is no clear response to that. The Authority accepts this contention.

#### **The Current Status of Smithfield Cellars**

60. At paragraph 24 the Complainant contends that the corporate Licensee of Smithfield Cellars continues to trade from the Premises at Smithfield, under the same management structure, with Mr Clarke Herron as Approved Manager and Mr Gregg Herron as the sole company director. The Authority accepts this on the basis of the OneGov Licence Records and in the absence of any information to the contrary from the Respondents.
61. The Complainant further contends that Gregg Herron advised L&GNSW inspectors during his interview on 22 June 2017 that the Scheme had ceased in December 2016 and that Smithfield Cellars had terminated all business dealings in Griffith, including with INC, Mr Lewis and Mr Agresta. NSW Police advise that Mr Lewis is still overseas and remains the focus of a Police investigation.
62. The Authority notes that Gregg Herron stated at Questions 222-223 of the Gregg Herron Interview that:

Q222	When did your relationship with International Network Consultants, when, is that still continuing or is that - - -
A	Um, they are doing a couple of things for me ‘cause they’ve still been paying my um, wages. So my shop wages. Um, and um, and that’s, that’s, that’s about it.
Q223	O.K.
A	And now that ceased, they stopped, apart from paying my staff um, it was, I basically pulled out of there in December.
63. The Authority accepts the uncontested information that Police have advised L&GNSW that Mr Lewis was overseas and is the subject of Police investigation.
64. The Complainant alleges at paragraph 25 of the Complaint that in February 2018, L&GNSW inspectors conducted an onsite audit of Smithfield Cellars including a detailed review of their accounts and other relevant business records. That review did not identify evidence to indicate the ongoing conduct of the Scheme or a continued commercial relationship with Mr Lewis’ business in Griffith. The Complainant states that Clarke and Gregg Herron maintain that any commercial arrangements with Mr Lewis, Mr Agresta, Shannon Grove, Fortress Connected, or any other Griffith-based business ceased in January 2016 and any dealings with INC ceased at the end of the 2016-2017 financial year. They advised L&GNSW that Mr Lewis is still living overseas and they haven’t heard from him for some time.
65. The Authority accepts that the Complainant did find no further evidence of participation in the Scheme during its February 2018 inspection and notes that in the Clarke Herron Declaration Mr Herron states that “All dealings with Lewis ceased in about November or December 2016 and I have no contact with

him since that time” and that Smithfield Cellars “does not deal with Lewis or any entity related to him since the date mentioned above”.

66. However, at paragraph 26 the Complainant refers to Exhibit E28 and contends that this inspection identified a contract for the lease of a Mercedes Benz Van between Smithfield Cellars (lessee) and Ms Elisa Shannon Lewis (lessor), Mr Lewis’ daughter. The contract was drafted by JHK Legal [who the Authority notes appear to be the Sydney based solicitors for Mr Kenneth Lewis], although it has not been signed by either party. The contract commencement date is stated to be 1 September 2017, ending 24 October 2020.
67. The Complainant contends, and the Authority accepts, that this agreement indicates that Smithfield Cellars is still conducting some business with, or associated with, the Lewis family. Three invoices, provided at Exhibit E29 were also obtained further supporting this assertion evidencing this transaction between Smithfield Cellars and Inn Security. The Authority is satisfied, on the basis of the Inn Security ASIC Extract, that Inn Security is a Queensland registered company with Ms Elisa Lewis the sole director/secretary.
68. At paragraph 27 of the Complaint it is alleged, by reference to a contract provided at Exhibit E30, that a lease of a Toyota forklift from Inn Security to Smithfield Cellars was also obtained during the February 2018 L&GNSW inspection. The Inn Security ASIC Extract shows that Mr Lewis was a director of the company until 2 December 2016, when his daughter, Ms Elisa Lewis commenced as director on 31 December 2014, and secretary on 2 December 2016. Again, the contract has been drafted by JHK Legal (although not signed by either party), with a commencement date of 1 September 2017 but ending on 30 November 2018.
69. The Authority accepts the Complainant’s contention that this lease agreement was made between the parties and this adds further weight to the Complainant’s assertion of some ongoing business relationship between Smithfield Cellars and the Lewis family. The Authority also accepts, as contended at paragraph 27, that two invoices were obtained relating to this contract (provided at Exhibit E32) indicating that Smithfield Cellars pays a monthly lease to Inn Security for a Forklift.
70. In the Clarke Herron Declaration, Mr Herron claims that he is not aware how the forklift and Mercedes Sprinter vehicles were acquired by Smithfield Cellars and does “not understand” how the purchase of these vehicles means that Smithfield Cellars has any ongoing dealings with Mr Lewis or any company that he is involved with.
71. Notwithstanding Mr Herron’s claimed lack of understanding of these matters, the agreement documents and invoices at Exhibits E28, E29, E30 and E32 indicate some significant level of ongoing business relationship between Smithfield Cellars and Inn Security, a company previously run by Mr Lewis and now managed by his daughter, Ms Elisa Lewis.

## **FINDINGS ON GROUNDS OF COMPLAINT**

### **The Proper Statutory Basis for Claims in Grounds 1 and 2**

72. Grounds 1 and 2 specify the same Particulars but are based upon different statutory bases provided by the Act. The Particulars of Ground 1 specify alleged breaches by Clarke Herron of sections 9(1)(b) and 9(3) of the Act respectively. Ground 1 refers to and relies upon the matters alleged in the Summary of Facts specified in paragraphs 7 to 23 of the Complaint.
73. Ground 1 refers to section 139(3)(b) of the Act and alleges that Mr Herron, as manager of Smithfield Cellars, failed to comply with the *conditions to which the licence* is subject.
74. Section 139(3)(b) states:
  - (3) *The grounds on which a complaint in relation to a licensee, manager or close associate may be made are as follows:*  
  
...
    - (b) *that the licensee or manager has failed to comply with any of the conditions to which the licence is subject,*
75. Ground 2 is specified in the alternative to Ground 1, but refers to section 139(3)(d) of the Act - alleging that Mr Herron, as manager of Smithfield Cellars, has failed to comply with *any other requirements*

*under this Act or the regulations (or under the former Act), relating to the licence or the licensed premises.*

76. Section 139(3)(d) states:

(3) *The grounds on which a complaint in relation to a licensee, manager or close associate may be made are as follows:*

...

(d) *that the licensee or manager has failed to comply with any other requirement under this Act or the regulations (or under the former Act), relating to the licence or the licensed premises,*

77. At paragraph 66 the Complainant states that the particulars relied upon in respect of Ground 2 are the same as the particulars specified for Ground 1.

78. The Authority considers that the correct statutory basis for the allegations in Grounds 1 and 2 is section 139(3)(d) of the Act, that is, the allegations as framed in Ground 2.

79. Ground 1 is *not* established.

## **Ground 2 – Approved Manager Failed to Comply with a Requirement Under the Act Relating to the Licence or the Licensed Premises**

80. As noted above, the OneGov Licence Records establish that at all relevant times Smithfield Cellars has operated with a packaged liquor licence, number LIQP700352388. The licensed premises has at all relevant times been the Premises situated at 170 Polding Street, Smithfield NSW 2164.

81. At paragraph 29 the Complainant makes the uncontroversial contention that the supply of liquor must be conducted in accordance with the authorisation conferred on the licence by the Act. Section 29 of the Act states:

### **29 Authorisation conferred by packaged liquor licence**

#### **(1) Retail sales**

*A packaged liquor licence authorises the licensee to sell liquor by retail in sealed containers on the licensed premises, for consumption away from the licensed premises only:*

...

#### **(3) Selling liquor by wholesale or to employees**

*A packaged liquor licence also authorises the licensee:*

(a) *to sell liquor by wholesale, at any time on the licensed premises, to persons authorised to sell liquor (whether by wholesale or by retail), and*

... (Authority emphasis)

82. The Authority notes that section 7(1) of the Act provides that a person must not sell liquor unless the person is authorised to do so by a liquor licence. Furthermore, section 9 states:

### **9 Sale or supply of liquor contrary to licence**

(1) *A licensee or an employee or agent of a licensee must not sell or supply liquor, or cause or permit liquor to be sold or supplied:*

(a) *in contravention of the conditions to which the licence is subject, or*

(b) *otherwise than in accordance with the authority conferred on the licensee by or under this Act.*

...

(3) *A licensee must not sell, or employ or permit another person to sell, liquor on premises other than premises on which the licensee is authorised by the licence or this Act to sell the liquor.*

*Maximum penalty: 100 penalty units or imprisonment for 12 months, or both.*

## **Sales of Packaged Liquor Must Occur on the Relevant Licensed Premises**

83. At paragraph 30 of the Complaint, the Complainant alleges that any sale of liquor made on the basis of a packaged liquor licence must occur “on the licensed premises”. The Complainant refers to the definition of licensed premises in section 4 of the Act as “the premises to which a licence relates”.
84. As noted above, the OneGov Licence Records establish that the licensed premises for licence number LIQP700352388 has at all relevant times been the Premises situated at 170 Polding Street, Smithfield NSW 2164.

### **Liquor Sales Not Transacted on the Smithfield Cellars Premises**

85. At paragraph 31 of the Complaint it is alleged that the matters specified in Particulars 1 and 2 of the Grounds and the supporting evidence establish that:

“Mr Agresta, on behalf of the Licensee, *sold liquor to licensed premises in and around Griffith* and those sales were unlawful, in that, *those sales did not occur on the licensed premises* and contrary to that authority”.

86. Paragraph 32 of the Complaint refers to the definition of “sell” in section 4 of the Act:

***sell*** includes any of the following:

- (a) *barter or exchange,*
- (b) *offer, agree or attempt to sell,*
- (c) *expose, send, forward or deliver for sale,*
- (d) *cause or permit to be sold or offered for sale.*

### **Ground 2 Particular 1 – Breach of Section 9(1)(b) of the Act**

87. At paragraph 33 the Complainant notes that section 9(1)(b) of the Act states:

#### ***9 Sale or supply of liquor contrary to licence***

- (1) *A licensee or an employee or agent of a licensee must not sell or supply liquor, or cause or permit liquor to be sold or supplied:*
- ...
- (b) *otherwise than in accordance with the authority conferred on the licensee by or under this Act.*

88. At paragraph 34 the Complainant contends that on 30 September 2015 Mr Clarke Herron commenced the role of manager at Smithfield Cellars and that section 91(1)(b) of the Act provides:

#### ***91 Responsibilities and liabilities in relation to licensed premises***

- (1) *The following persons are, subject to this Act, responsible at all times for the personal supervision and management of the conduct of the business of the licensed premises under the licence:*
- ...
- (b) *if the licensee is a corporation—the manager of the licensed premises.*

89. It is alleged at paragraph 35 of the Complaint, that from 30 September 2015 Mr Clarke Herron, as the approved manager, was responsible at all times for the personal supervision and management of the conduct of the business of the licensed Premises. The Complainant contends that Mr Herron is therefore accountable and/or answerable for the activities in relation to the Smithfield Cellars licence.
90. The Complainant contends at paragraph 36 that on 22 January 2016, Mr Agresta was employed as Business Development Manager, Griffith for Smithfield Cellars with his employment contract detailing that he was responsible for the sale and distribution of liquor, building a new customer base and exploring new sales opportunities.
91. The Complainant alleges at paragraph 37 that Mr Agresta resides at an address in Griffith.
92. At paragraph 38 the Complainant contends that between February and December 2016, Mr Agresta visited licensed premises throughout the Griffith area, offering to sell liquor on behalf of Smithfield Cellars. These allegations are specified as follows.

### **Attempted Sale of Liquor by Agresta to Area Hotel, Griffith**

93. The Complainant alleges at paragraph 39, that on 1 December 2016, Mr Agresta emailed advertising to the licensee of the Area Hotel Griffith, Mr Jason Torresan, which contained a digital copy of a

Shannon Grove's December Specials liquor advertisement and included Shannon Grove's Victoria licence number 33765324.

#### Sale of Liquor to Hanwood Sports Club

94. At paragraph 40 of the Complaint it is contended that in a Police statement dated 3 May 2017, the Secretary of Hanwood Sports Club, Mr Rodger Bertacco, advised that Mr Agresta had approached the Hanwood Sports Club and presented the club with a two-sided advertisement, offering to sell liquor from Shannon Grove. The Complainant further contends at paragraph 41 that the club placed several orders with Mr Agresta, which he delivered and produced a handwritten invoice.
95. At paragraph 42 of the Complaint, it is contended that Mr Agresta's handwritten invoices "detailed the date, name of the recipient, a reference to Smithfield Cellars and/or Shannon Grove Estate, INC's address (being the Southport PO Box address), products purchased, total invoice amount and settlement terms".
96. At paragraph 43, the Complainant contends that L&GNSW inspectors performed a reconciliation of 50 of those liquor sales, six of which are invoiced to the Hanwood Sports Club and the proceeds of sales were paid into Smithfield Cellars bank account. The Complainant relies upon Exhibit E21, comprising handwritten invoices, computer generated tax invoices and Westpac bank account statements for Smithfield Cellars and Fortress Connected.
97. The Complainant further contends at paragraph 44 of the Complaint that at paragraph 5 of the Bertacco Witness Statement Mr Bertacco stated that he "saw Roy deliver the liquor to the Club in a white van" a "couple of times".

#### Sales of Liquor to Yenda Hotel

98. At paragraphs 45 and 46 of the Complaint it is contended that in a statement dated 1 May 2017 Mr Reginald Gilbert, the owner of the Yenda Hotel, states that he was approached by Mr Agresta who showed him some pamphlets for alcohol and that Mr Agresta agreed to sell and deliver liquor to him.
99. At paragraph 47 it is contended that L&GNSW "inspectors conducted a reconciliation of 50 such liquor sales, two of which are invoiced to Yenda Hotel and the proceeds of those sales were paid into the Smithfield Cellars bank account".

#### Sale of Liquor to Yoogali Club

100. The Complainant contends at paragraphs 48 and 49 of the Complaint, that in her statement dated 18 January 2017 Ms Sophia Snaidero, Secretary of the Yoogali Club at Griffith, outlined her dealings with Mr Agresta and confirmed that Mr Agresta had agreed to sell and deliver liquor to her.
101. At paragraph 50 of the Complaint it is contended that L&GNSW "inspectors conducted a reconciliation of 50 such liquor sales, one of which is invoiced to Yoogali Club and the proceeds of that sale was paid into Smithfield Cellars bank account".

#### Sales of Liquor in and around Griffith

102. The Complainant contends at paragraph 51 that L&GNSW inspectors analysed a total of **384** handwritten invoices, written by Mr Agresta and of those, **121** (which totalled \$180,709.72) were sales that occurred in Griffith on behalf of Smithfield Cellars with licensed premises located in and around Griffith. It is alleged that those licensed premises paid the invoices by cash, cheque or bank deposit.
103. At paragraph 52 the Complainant contends that the remaining **263** liquor sales (of the total 384 noted above as being analysed by L&GNSW) were also evidenced by handwritten invoices from Mr Agresta, but were all made out to 'cash' or under an individual's name.
104. At paragraph 54, the Complainant contends that although the remaining **263** invoices cannot be directly linked to sales occurring in and around Griffith, on the balance of probabilities - since they were written by Mr Agresta in the same invoice book and during the same period - these 263 invoices represent liquor sales conducted in and around Griffith.
105. At paragraph 55 the Complainant contends that L&GNSW sampled **50** of those **121** liquor sales, totalling \$101,094.10. These sales were conducted in Griffith and have been reconciled back to the Smithfield Cellars' bank account.

106. The Complainant alleges at paragraph 56 that on 14 December 2016, Police inspected the Griffith Warehouse and saw Mr Agresta conducting a stocktake. Police seized stocktake records that identified over 176,000 bottles of beer wine and spirits.
107. It is contended at paragraph 57 of the Complaint, that when interviewed by Police Mr Agresta stated he was *employed by Smithfield Cellars* and was selling liquor from the Griffith Warehouse for Smithfield Cellars.
108. The Complainant contends in paragraphs 58 and 59, that on 16 January 2017 Clarke Herron responded to a coercive Notice to Produce from L&GNSW inspectors stating that “Mr Roy Agresta is our (Smithfield Cellars) business development manager in Griffith” and that “Smithfield Cellars invoices the stock sold by Roy Aresta ... in Griffith and when payment is received it is paid into the Smithfield Cellars bank account”.

Complainant Conclusion on Ground 2 Particular 1

109. The Complainant draws the following conclusions at paragraphs 60 and 61 of the Complaint:
- Mr Agresta was employed to sell liquor to licensed premises from the Griffith Warehouse by Smithfield Cellars, under the personal supervision of Mr Clarke Herron.
  - Police found Mr Agresta conducting a stocktake of the liquor located in the Griffith Warehouse and Mr Agresta advised Police that he was selling liquor from the Griffith Warehouse for Smithfield Cellars.
  - Mr Agresta offered to sell liquor, sold liquor and delivered that liquor to licensed premises in Griffith.
  - L&GNSW has reconciled Mr Agresta’s handwritten invoices to bank deposits for 50 sales and have statements corroborating those sales.
110. At paragraph 61 the Complainant contends that, on the balance of probabilities, Smithfield Cellars sold liquor from premises other than licensed Premises for which they were authorised to sell from.

Clarke Herron’s Submissions on Grounds 1 and 2 of Complaint

111. In the Merits Submission Mr Clarke makes a number of broad submissions on the Complaint through his solicitor, including:
- The Complaint cannot be made out. The underlying facts specified do not always support the conclusions that the Complainant seeks to draw from them. The central ground is an “alleged licence breach” and the Complainant has not opted to bring a prosecution in relation to that breach (of section 9 of the Act).
  - There is “some considerable ambiguity” surrounding the events the subject of Complaint. The Complainant alleges a “premeditated circumvention” of a licence condition but Mr Herron submits that there is “no such premeditation open on the facts as set out in the Complaint”.
  - There was “no agreement, or scheme to conceal unlicensed sales of liquor” and “no evidence of any written agreement” establishing the alleged Scheme. At its highest, the Complaint seeks to “imply an agreement” from the facts and circumstances alleged.
112. The Merits Submission refers to the accompanying Clarke Herron Declaration and makes the following contentions regarding the Smithfield Cellars business and its business associates:
- Gregg Herron owns the “economic interest” in the Smithfield Cellars business and Clarke Herron is an “employee only”.
  - Clarke Herron did not have any “substantive association” with Mr Lewis. Clarke Herron’s dealings with Lewis were conducted “via email and limited to the issue of stock”.
  - The “implication” that Clarke Herron “did not co-operate” with L&GNSW inspectors “is not correct”.
  - Any association between Smithfield Cellars and INC was “a matter dealt with by his father Mr. Gregg Herron”.
  - Clarke Herron’s knowledge of any arrangements with Mr Lewis was “based on conversations with his father and his relaying of the advice of the conference with JHK Legal”.
  - In February 2018 L&GNSW inspectors conducted an on-site audit of the Smithfield Cellars business that included a detailed review of its accounts. The Complaint indicates, as noted by



the Complainant, that this inspection did not identify any “ongoing conduct” regarding the earlier Scheme or any “continued commercial relationship” with Mr Lewis.

113. On the central issue of whether the alleged sales of takeaway liquor by Smithfield Cellars did not occur on its licensed Premises, Mr Herron refers to sections 4 and 29 of the Act and makes the following legal submissions:

- Statutory construction must begin with a consideration of the text and the text must be considered in its context which includes legislative history and extrinsic materials, citing *Thiess v Collector of Customs (2014) 250 CLKR 664, 671 at [22] citing Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503 at 519 at [39]*. This reflects a purposive approach.
- On a proper construction of section 29(1) and/or (3) of the Act, what is required is that the “sale” of liquor take place on licensed premises. The liquor does not have to be *stored or delivered* from those same premises. A “sale” can take place other than where the actual liquor sold is physically stored or delivered from. The liquor “does not have to physically pass through the licensed Premises as the Complaint ground assumes”.
- There is no direct authority that bears on the interpretation of section 29 as contended in this Complaint. Resort must be had to first principles when determining where a sale occurs. Attention must focus on where a sale takes place. Provided that a sale is “processed” on the licensed premises there is no contravention of section 29.
- The definition of “sell” in section 4 of the Act does not further inform the interpretation other than adding to the scope of what is encompassed by a sale.
- While section 152(3) of the Act provides that “... evidence of delivery or supply of liquor is evidence of a sale of the liquor”, this is only relevant to proceedings for an offence against the Act and is a rebuttable presumption. This does not further inform what constitutes a “sale” for the purposes of section 29 of the Act.
- The *Sale of Goods Act 1923 (NSW)* does not provide any further assistance. While there is a definition of sale in section 5 and reference to what constitutes an agreement to sell in section 6, neither matter advances the statutory interpretation of “sale” in the Liquor Act.
- Mr Agresta apparently forwarded his handwritten invoices to INC. This was because INC was “handling back office administration” for Smithfield Cellars. INC would then generate an invoice to Gregg Herron with all the details of Smithfield Cellars’ Sydney address, being the address of the licensed Premises. Payment was made into Smithfield Cellars’ Westpac Bank account. The sale was “processed” on the licensed premises, within the meaning of section 29.

114. Mr Herron also refers to principles of contract law, submitting that an “invitation to treat” is where offers are invited, and a person can either accept or reject the offer. Acceptance takes place where the offer of acceptance is actually received and a contract is formed there *Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA (No 4) [2009] FCA 522 at [25]*. Mr Herron contends that this occurred when it was “processed” by Smithfield Cellars.

#### *Alternative Submission – Honest and Reasonable Belief*

115. Alternatively, should the Authority determine that the *sale and dispatch* of liquor must take place on the licensed premises for the purpose of section 29 of the Act, Mr Herron submits that he acted in the “honest and reasonable belief” that the matters set out in the Complaint were “within the law”, because of advice Clarke Herron received at JHD Legal [the Authority assumes this to be JHK Legal]. While conceding that reliance upon legal advice does not excuse or absolve a breach of the law, he submits that this is a “powerful mitigating factor” in this case.

116. Mr Herron also speculates whether any issues of statutory interpretation surrounding section 29 of the Act explain why no prosecution has been commenced against Smithfield Cellars in relation to the alleged contravention of its licence.

#### *Further Contentions in the Clarke Herron Declaration*

117. In his declaration Mr Herron denies ever having entered into any agreement with his father and Mr Lewis to conduct the alleged Scheme; that all of Mr Herron's dealings with Lewis ceased in about November or December 2016 and he had no contact with him since; that to the best of his knowledge, Smithfield Cellars has not dealt with Mr Lewis or any entity related to Mr Lewis since that time and that Mr Herron did not meet and never had any dealings with Mr Agresta.
118. Mr Herron further details his dealings with Mr Lewis, contending that he only met him once, he never met Ms Elisa Lewis and he would usually only deal with Mr Lewis if his father was away or not available. His first knowledge of any arrangement with Mr Lewis followed a discussion with his father "some time in 2016" in which Gregg Herron said "something to the effect" that there were going to be some "wholesales of booze in Griffith using our licence".
119. Mr Herron states that when he asked his father "whether this was ok" and recalls his father saying words to the effect that "he [meaning Gregg] had had a meeting with a lawyer", which Mr Herron understood to be *Mr Lewis' lawyer*. His father said words to the effect that this arrangement had been "approved" by the lawyer and while his father "did not really go into any detail" Mr Herron understood that "what was proposed was ok".
120. Mr Herron further describes his understanding as that wholesale sales of liquor were to be made by Smithfield Cellars for distribution in Griffith, with the sales being made using the Smithfield Cellars licence. He "did not take the matter any further" with his father after that discussion. Mr Herron describes his role in this sales process as follows:

*"20. In terms of my function, I simply recall having an email from either Lewis or possibly his daughter Elisa. The email had a description of particular items that were requested. I then generally placed the order through SC's account with ILG, the Independent Liquor Group depending upon which product was requested.*

*21. After placing the order, I told my father the order details, and once I received the invoices from ILG I then gave them to my father. After that I do not know what he did with it. When the stock arrived at Smithfield I then told my father, and then stock would be picked up for distribution.*

*22. I would send my time sheets for work at SC by email to a company that I understood from my father did back office administration functions for SC."*
121. Mr Herron makes statements about his previous experience in the industry and his cooperation with L&GNSW inspectors, which are noted above.
122. As also noted above, Mr Herron refers to the answers he gave in response to Questions 4 and 18 of the Response to Notice to Produce and states that he recalls seeing the document but "does "not now have an independent recollection" of how the statements made in response to Questions 4 and 18 came to be in the document.
123. Mr Herron denies that Mr Agresta was employed to sell liquor from the Griffith Warehouse by Smithfield Cellars and this occurred under the personal supervision of himself. He contends that he "never met" Mr Agresta nor did he communicate with him in "any way".

#### Authority's Conclusion on Ground 2 Particular 1

124. As contended in paragraph 33 of the Complaint, the Authority accepts that section 9(1)(b) of the Act provides that a licensee or an employee or agent of a licensee must not sell or supply liquor, or cause or permit liquor to be sold or supplied otherwise than in accordance with the authority conferred in the licensee by or under this Act.
125. The Authority accepts, as noted in paragraph 34 and evidenced by the OneGov Licence Record, that on 30 September 2015 Mr Clarke Herron commenced the role of manager at Smithfield Cellars.
126. The Authority also accepts, as stated in paragraph 34 of the Complaint, that section 91(1)(b) of the Act provides that the manager of licensed premises (if the licensee is a corporation) is responsible at all times for the personal supervision and management of the conduct of the business of the licensed premises under the licence.
127. On the Complainant's contention in paragraph 35 regarding the responsibility of Clarke Herron as the approved manager, the Authority finds that as the approved manager, Clarke Herron was responsible

at all times for the personal supervision and management of the conduct of the licensed business conducted on the Premises.

128. The Authority further accepts, as contended in paragraph 36 of the Complaint, on the basis of term "1.0" of the Agresta Employment Contract, that Mr Agresta was employed by INC as a role described as "Business Development Manager – Griffith for Smithfield Cellars". Term "2.0" of this contract states that Mr Agresta's employment was effective from 1<sup>st</sup> February 2016" while Term "3.0" provides that Mr Agresta was responsible for *inter alia* the sale and distribution of liquor, building a new customer base and exploring new sales opportunities.
129. The Authority accepts the contention made at paragraph 37 that Mr Agresta resides at an address in Griffith, noting that an entry in the Police Notebook specifies Mr Agresta's address, while Clarke Herron's response to Question 5 of the Response to Notice to Produce also provides the same address in Griffith.
130. The Authority further accepts, as contended in paragraph 38, that between February and December 2016 Mr Agresta visited licensed premises throughout the Griffith area, offering to sell liquor to them on behalf of Smithfield Cellars.

#### *Attempted Sale to Area Hotel*

131. On the contention in paragraph 39 that Mr Agresta attempted to sell liquor to the Area Hotel in Griffith, the Authority is satisfied that this attempt to sell occurred. Exhibit E18 contains an email from Mr Torresan to L&GNSW dated 20 December 2016 which states: "As requested please see attached pricing email from, Smithfield cellars". Mr Torresan forwarded an email from Mr Lewis (which appears to be sent to himself but at a different email address) with Mr Agresta copied, dated 1 December 2016 with the subject of this email "SGE-LLD Monthly Specials Flyer – DEC". This email contains a two-page flyer advertising the Shannon Grove December Specials which appears to be signed off by Mr Agresta under the business name Shannon Grove, being an address in Victoria with licence number 33765324.
132. Although this email appears to be signed off by Mr Agresta in the name of "Shannon Grove" and the flyer names "Shannon Grove", the Authority notes that this email was sent during December 2016, while Agresta was employed by INC as Business Development manager *for Smithfield Cellars*.
133. The Authority finds that paragraph 39 of the Complaint is established.

#### *Sale of Liquor to Hanwood Sports Club*

134. On the contention in paragraph 40 that Mr Agresta sold liquor to the Hanwood Sports Club in Griffith, the Authority finds that these allegations are established on the basis of the Bertacco Witness Statement. At paragraphs 4-6 of that document Mr Bertacco, who describes himself as the approved manager of the club, states:
  4. *About [a] year ago a board member presented a brochure at a board meeting. From memory it was two-sided brochure from Shannon Grove Estate. We discussed the prices and the board gave authority to my wife Karen to purchase some liquor from this company. The sales representative was Roy Agresta some of the board members and myself knew of Roy Agresta as I have grown up in the area.*
  5. *My wife Karen has placed a number of orders with Roy Agresta for liquor from 30<sup>th</sup> March until the 28<sup>th</sup> of October 2016. Karen would place an order for the Club and they would drop off the order. A couple of times I saw Roy deliver the liquor to the Club in a white van. I remember signing at least 1 of the invoices.*
  6. *After the order was delivered an invoice was left at the Club. My wife Karen would then pay the invoice. This was always paid for by direct debt. Some of the invoices were payable to Shannon Grove Estate and some were Smithfield Cellars.*
135. The Authority further notes that one of the invoices attached to the Bertacco Witness Statements includes a handwritten note which states:

*"Rang Roy stated Smithfield Cellars is Shannon Grove".*

136. Paragraphs 5 and 6 of the Bertacco Witness Statement support the contentions in paragraph 41 of the Complaint that the club placed several orders with Mr Agresta, which he delivered and produced a hand written invoice.
137. At paragraph 42, the Complainant makes further contentions about the details that were provided in the hand written invoices. The Authority finds that paragraph 42 is established, on the bases of the copies of hand written invoices, addressed to Hanwood Sports Club, that are Exhibits E20 and E21. These documents detail the date, name of recipient, make reference to either Smithfield Cellars or Shannon Grove and indicate either a PO Box address in Griffith or an address in Southport QLD. They also indicate the products purchased, total invoice amount and the Bank account details for payment.
138. On the contention in paragraph 43 regarding six L&GNSW reconciled transactions involving the Hanwood Sports Club (located in the suburb of Hanwood and the Griffith local government area), the Authority finds that Exhibit E21 (comprising handwritten invoices, computer generated tax invoices and Westpac bank account statements for Smithfield Cellars and Fortress Connected) establish the following:
- (i). On 15 April 2016 Smithfield Cellars provided a computer-generated invoice No 00000034 to Hanwood Sports Club for 5 Carlton Dry Stubbies indicating a "Cash Sale". The total amount of \$200 was "Paid Today" with a balance of \$0.00 owing. The Authority also notes that this invoice contains a phone number starting with an (07) area code (North East Queensland) and an email address @lld.net.au. A handwritten invoice of the same date for the same product and amount of money has been provided to Hanwood Sports Club from Shannon Grove with the address of PO Box 1765, Griffith NSW 2680 specified. Westpac bank records for Smithfield Cellars indicate a debit of \$200 occurred on 19 April 2016 with the description "Withdrawal Online 1086673 Pymt Shannon Gr Smith Inv10118". Westpac account details for The Secretary Fortress Connected indicate that on 19 April 2016 this account received a credit of \$200.00 with the description "DEPOSIT ONLINE 2086673 PYMT SMITHFIELD CELLA SGE inv 10118". The Authority finds that the computer-generated and handwritten invoices establish that Hanwood Sports Club paid \$200.00 to Smithfield Cellars for the purchase of 5 Carlton Dry Stubbies on 15 April 2016.
  - (ii). On 1 April 2016 Smithfield Cellars provided a computer-generated invoice No 00000018 to Hanwood Sports Club for 6 Carlton Dry Bottles indicating a "Cash Sale". The total amount of \$250.20 was "Paid Today" with a balance of \$0.00 owing. The Authority also notes that this invoice contains a phone number starting with an (07) area code (North East Queensland) and an email address @lld.net.au. A handwritten invoice dated 30 March 2016 for the same product and amount of money has been provided to Hanwood Sports Club from Shannon Grove with the address of PO Box 1765, Griffith NSW 2680 specified. Westpac bank records for Smithfield Cellars indicate a debit of \$250.20 occurred on 10 May 2016 with the description "Withdrawal Online 1796618 Pymt Shannon Gr Sge Inv 127223". Westpac account details for The Secretary Fortress Connected indicate that on 10 May 2016 this account received a credit of \$250.20 with the description "DEPOSIT ONLINE 2796619 PYMT SMITHFIELD CELLA Smith Inv 127223". The Authority finds that the computer-generated and handwritten invoices establish that Hanwood Sports Club had paid \$250.20 to Smithfield Cellars for the purchase of 6 Carlton Dry Bottles in April 2016.
  - (iii). On 6 May 2016 Smithfield Cellars provided a computer-generated invoice No 00000005 to Hanwood Sports Club for 2 x Smirnoff 700 ml, 2 x Jim Beam 700 ml, 1 x Johnnie Walker 700 ml Red, 1 x Canadian Club 700 ml, 1 x Frangelic[o] 700 ml, 1 x Alize Blue 700 ml and 1 x Ctn Jim Beam & Cola Cans indicating a "Cash Sale". The total amount of \$338.40 was "Paid Today" with a balance of \$0.00 owing. The Authority also notes that this invoice contains a phone number starting with an (07) area code (North East Queensland) and an email address @lld.net.au. A handwritten invoice of the same date for the same products and amount of money has been provided to Hanwood Sports Club from Smithfield Cellars with the address of PO Box 1847, Southport QLD 4215 specified. Westpac bank records for Smithfield Cellars indicate a debit of \$338.40 occurred on 1 June 2016 with the description "Withdrawal Online 1296216 Pymt Shannon Gr Sge Inv 1710082". Westpac account details for The Secretary Fortress Connected indicate that on 1 June 2016 this account received a credit of \$338.40 with the description "DEPOSIT ONLINE 2296216 PYMT SMITHFIELD CELLA Smith Inv1710082". The Authority finds

that the computer-generated and handwritten invoices establish that Hanwood Sports Club had paid \$338.40 to Smithfield Cellars for the purchase of the above listed alcohol on 6 May 2016.

- (iv). On 5 August 2016 Smithfield Cellars provided a computer-generated invoice No 00000005 to Hanwood Sports Club with no description of the alcohol provided indicating this was a "Cash Sale". The total amount of \$400.00 was "Amount Applied" with a balance of \$0.00 owing. The Authority notes that this invoice does not specify any telephone number or email address. A handwritten invoice of the same date and for the same amount of money has been provided to Hanwood Sports Club from Smithfield Cellars with the address of PO Box 1847, Southport QLD 4213 specified. This invoice indicates that the products sold were 5 x ctns Carlton Dry Stubbs, 1 x ctn Red Bull, 2 x bottles Fernet Blanca 700 ml and 2 x bottles of Johnnie Walker Red 700 ml. Westpac bank records for Smithfield Cellars indicate a debit of \$400.00 occurred on 18 August 2016 with the description "Withdrawal Online 1823483 Pymt Shannon Gr Sge Inv 98". Westpac account details for The Secretary Fortress Connected indicate that on 18 August 2016 this account received a credit of \$400.00 with the description "DEPOSIT ONLINE 2823483 PYMT SMITHFIELD CELLA Smith Inv 98". The Authority finds that the computer-generated and handwritten invoices establish that Hanwood Sports Club had paid \$400.00 to Smithfield Cellars for the purchase of the above listed products on 5 August 2016.
- (v). On 24 August 2016 Smithfield Cellars provided a computer-generated invoice No 00000248 to Hanwood Sports Club with the description of "Hanwood Sports Club Inv 36" with no description of the alcohol provided, while indicating that it was a "Cash Sale". The total amount of \$295.40 was "Amount Applied" with a balance of \$0.00 owing. The Authority notes that this invoice does not specify any telephone number or email address. A handwritten invoice of the same date and for the same amount of money has been provided to Hanwood Sports Club from Smithfield Cellars with the address of PO Box 1847, Southport QLD 4213 specified. This invoice indicates that the products sold were 6 x ctns Carlton Dry Stubbs and 1 x bottle of Fernet. Westpac bank records for Smithfield Cellars indicate a debit of \$295.40 occurred on 1 September 2016 with the description "Withdrawal Online 1148581 Pymt Shannon Gr Sge Inv 12148". Westpac account details for The Secretary Fortress Connected indicate that on 1 September 2016 this account received a credit of \$295.40 with the description "DEPOSIT ONLINE 2148581 PYMT SMITHFIELD CELLA Smith Inv 12148". The Authority finds that the computer-generated and handwritten invoices establish that Hanwood Sports Club had paid \$295.40 to Smithfield Cellars for the purchase of the above listed products on 24 August 2016.
- (vi). On 8 September 2016 Smithfield Cellars provided a computer-generated invoice No 00000289 to Hanwood Sports Club for a total amount of \$531.30 with the description of "Hanwood Sports Club- Invoice 59" but no description of the alcohol provided, also indicating this was a "Cash Sale". This invoice indicated that the total amount of \$531.30 was "Amount Applied" with a balance of \$0.00 owing. The Authority notes that this invoice does not specify any telephone number or email address. A handwritten invoice dated 7 September 2016 for the same amount of money has been provided to Hanwood Sports Club from Smithfield Cellars with the address of PO Box 1847, Southport QLD 4213 specified. This handwritten invoice indicates that the products sold were 8 x ctns Carlton Dry Long Necks, 1 x ctn Strongbow, 1 x ctn Jim Beam and Cola 24 pkt, 1 x ctn Canadian Club and Dry and 4 x ctns 12 pkt Mount Everest Water. Westpac bank records for Smithfield Cellars indicate a debit of \$531.30 occurred on 13 September 2016 with the description "Withdrawal Online 1559852 Pymt Shannon Gr Sge Inv 1135262". Westpac account details for The Secretary Fortress Connected indicate that on 13 September 2016 this account received a credit of \$531.30 with the description "DEPOSIT ONLINE 2559853 PYMT SMITHFIELD CELLA Smith Inv 1135262". The Authority finds that the computer-generated and handwritten invoices establish that Hanwood Sports Club had paid \$531.30 to Smithfield Cellars for the purchase of the above listed products in September 2016.

139. The Authority notes that the Westpac bank records generally contain different dates (for credit and debit) to the date of the computer-generated invoices and that a different invoice number was used in the description of the transactions on the bank records to that recorded on the computer-generated

invoices. However, on the basis of Gregg Herron's description of how transactions occur at Questions 146 to 161 of the Gregg Herron Interview (discussed above) and Clarke Herron's response to Question 18 of the Response to Notice to Produce (also above), the Authority accepts the reconciliation of these six transactions as contended by the Complainant.

140. The Authority further accepts the contention in paragraph 44 of the Complaint that at paragraph 5 of the Bertacco Witness Statement (extracted above) Mr Bertacco stated that he "saw Roy deliver the liquor to the Club in a white van" a "couple of times".

#### *Sale of Liquor to Yenda Hotel*

141. The Authority considers that paragraph 4 of the Gilbert Witness Statement establishes the contentions in paragraphs 45 and 46 of the Complaint, regarding Mr Gilbert's dealings with Mr Agresta, stating:

4. *I have known Roy AGRESTA for the past 40 years through social activities. Over 12 months ago I was approached by Roy AGRESTA who showed me some pamphlets for alcohol. He told me that if we wanted alcohol for the Hotel we could purchase it by pallet or box deals. Over about 12 months the Hotel purchased between 30 and 35 thousand dollars' worth of alcohol from him. When I was running low I would ring Roy. On every occasion I personally rang Roy and ordered it through him. He would then personally deliver the alcohol which was usually by the pallet.*

142. The Authority understands the contentions in paragraph 47 of the Complaint to concern the 50 transactions established by the Reconciled Transactions at Exhibit E14.
143. In relation to the two contended sales of liquor to the Yenda Hotel (located in the suburb of Yenda and the Griffith local government area), the Complainant relies upon Exhibit E23 - which comprises handwritten invoices, computer-generated tax invoices and Westpac bank account statements for Smithfield Cellars and Fortress Connected. The Authority finds that this material establishes the following:

- (i). On 13 May 2016 Smithfield Cellars provided a computer-generated invoice No 00000012 to Yenda Hotel for 1 x pallet (78 cartons) Carlton Dry Stubbies, 1 x pallet (100 cartons) Carlton D[r]y Cans and 2 x 24 Bottles Johnnie Walker Red indicating a "Cash Sale". This invoice indicates that the amount of \$7,994.80 was "Paid Today" with a balance of \$0.00 owing. The Authority also notes that this invoice contains a phone number starting with an (07) area code (North East Queensland) and an email address @lld.net.au. A handwritten invoice of the same date for the same product and amount of money has been provided to Yenda Hotel from Smithfield Cellars with the address of PO Box 1847, Southport QLD 4215 specified. Westpac bank records for Smithfield Cellars indicate a debit of \$7,994.80 occurred on 17 May 2016 with the description "Withdrawal Online 1015670 Pymt Shannon Gr Sge Inv 207101". Westpac account details for The Secretary Fortress Connected indicate that on 17 May 2016 this account received a credit of \$7,994.80 with the description "DEPOSIT ONLINE 2015671 PYMT SMITHFIELD CELLA Smith Inv 207101". The computer-generated and handwritten invoices establish that Yenda Hotel had paid \$7,994.80 to Smithfield Cellars for the purchase of the above listed products on 13 May 2016.
- (ii). On 21 October 2016 Smithfield Cellars provided a computer-generated invoice No 00001374 to Yenda Hotel with the description "Yenda Hotel Inv 66 19/10/2016" and no description of the alcohol provided, indicating a "Cash Sale". The "Amount Applied" was \$4,400.00 with a balance of \$0.00 owing. The Authority notes that this invoice does not specify any telephone number or email address. A handwritten invoice dated 19 October 2016 for the same amount has been provided to Yenda Hotel from Smithfield Cellars with the address of PO Box 1847, Southport QLD 4215 specified. This handwritten invoice indicates that the products sold were 100 ctns Carlton Dry Cans. This handwritten invoice stated "PAID CHQ Roy Agresta". Westpac bank records for Smithfield Cellars indicate a debit of \$4,400.00 occurred on 21 October 2016 with the description "Withdrawal Online 1957392 Pymt Shannon Gr Sge Invoice". Westpac account details for The Secretary Fortress Connected indicate that on 21 October 2016 this account received a credit of \$4,400.00 with the description "DEPOSIT ONLINE 2957393 PYMT SMITHFIELD CELLA Smith Invoice". The Authority finds that the computer-generated and handwritten invoices establish that Yenda Hotel had paid \$4,000.00 to Smithfield Cellars for the purchase of the above listed products in October 2016.

### *Sale of Liquor to Yoogali Club*

144. The Authority notes that paragraph 3 of the Snaidero Witness Statement establishes that Ms Snaidero is the approved manager of the Yoogali Club. The Authority accepts the contentions in paragraphs 48 and 49 of the Complaint regarding Ms Snaidero's dealings with Mr Agresta, on the basis of paragraphs 5 and 6 of the Snaidero Witness Statement:
5. *Whenever I had a big function I would give Roy a go. I think it was the Muso ball last year that I first dealt with Roy. I think this was the first time I put an order in for alcohol from Roy. I asked him for a price list for certain drinks, He would then ask his boss what the best price was that he could do for us. I don't know who Roy's boss was I have never met his boss. When orders were done it was always inside the Yoogali Club. Mostly it was me who ordered off Roy but sometimes I asked other staff to order for me.*
  6. *I didn't buy much off him and haven't bought anything since November last year. On the 26<sup>th</sup> of November 2016 I bought \$1214.40 worth of alcohol. He brought the alcohol into the Club and I paid him cash \$1214.40 in cash from the Yoogali Clubs. This was then recorded as expenses for the Yooga[l]i Club. He gave me a Tax Invoice statement which I placed into the till. About once a month Roy would also drop off brochures for specials he might be selling. I have known Roy for a number of years and I thought it was all licensed and Roy though[t] it too.*
145. The Authority understands the contentions in paragraph 50 of the Complaint to concern the 50 transactions supported by the Reconciled Transactions at Exhibit E14.
146. In relation to the one sale to Yoogali Club (located in the suburb of Yoogali and the Griffith local government area), the Complainant relies upon Exhibit E25, comprising a handwritten invoice, a computer-generated tax invoice and a Westpac bank account statement for Smithfield Cellars. The Authority finds that this material establishes the following:
- (i). On 13 April 2016 Smithfield Cellars provided a computer-generated invoice No 00000043 to Yoogali Club for 36 x Johnnie Walker Black 700 ml, 24 Smirnoff 700 ml, 24 Alize Blue 700 ml and 48 x Johnnie Walker Red 700 ml for a total amount of \$4,680.00, indicating this was a "Cash Sale". This invoice indicates that the amount of \$4,680.00 was "Paid Today" with a balance of \$0.00 owing. The Authority also notes that this invoice contains a phone number starting with an (07) area code (North East Queensland) and an email address @lld.net.au. A handwritten invoice of the same date for the same product and amount of money has been provided to Yoogali Club from Shannon Grove Estate with the address of PO Box 1765, Griffith NSW 2680 specified. Westpac bank records for Smithfield Cellars indicate a debit of \$4,680.00 occurred on 19 April 2016 with the description "Withdrawal Online 1095719 Pymt Shannon Gr Sge Inv 101199". The Authority finds that the computer-generated and handwritten invoices establish that Yoogali Club had paid \$4,680.00 to Smithfield Cellars for the purchase of the above listed products on 13 April 2016.

### *Further Sales of Liquor in and around Griffith*

147. At paragraphs 51, 52, 54 and 55 of the Complaint, the Complainant makes the following key contentions:
- L&GNSW inspectors analysed a total of **384** handwritten invoices written by Mr Agresta;
  - **121** of those invoices totalling \$180,709.72 were sales that occurred in Griffith on behalf of Smithfield Cellars with licensed premises located in and around Griffith who paid by cash, cheque or bank deposit;
  - L&GNSW sampled 50 of those 121 liquor sales totalling \$101,094.10 and those 50 sales conducted in Griffith have been reconciled back to Smithfield Cellars' bank account.
  - The remaining 263 liquor sales are also evidenced by handwritten invoices by Mr Agresta but were all made out to cash or under an individual's name.
  - Although the remaining 263 invoices cannot be directly linked to sales in and around Griffith, it is submitted on the balance of probabilities that as they were written by Mr Agresta in the same invoice book and during the same period, the remaining 263 invoices represent liquor sales conducted in and around Griffith.

148. Although the Complainant does not provide supporting evidence of its analysis of all **384** of Mr Agresta's handwritten invoices, the Authority accepts that this analysis was performed by L&GNSW. These claims are not opposed by Clarke Herron.
149. In support of the Complainant's that 121 of the invoices amounted to \$180,709.72 in sales that were performed by Agresta on behalf of Smithfield Cellars, with the purchasers being licensed premises located in and around Griffith, the Complainant relies upon Exhibit E13, which contains a schedule specifying 121 handwritten invoices that L&GNSW have matched with computer generated invoices, dated between March 2016 and December 2016. The Authority notes that this schedule provides information regarding:
- "Bill to" (the party paying the invoice – although most state "Cash Sale")
  - Date of invoice
  - Invoice number
  - Description of goods invoiced
  - Amount of invoice
  - Name of business that is purchasing the products
  - Month and year of the transaction.
150. The Authority notes that the Complainant has not provided all 121 of the handwritten invoices referred to in Exhibit E13. Instead, L&GNSW has sampled 50 of those liquor sales and has provided evidence reconciling those transactions back to the Smithfield Cellars bank account.
151. The Authority further notes that Exhibit E14 comprises a schedule of the said 50 transactions, with the relevant sales records including computer-generated invoices, the handwritten invoices and Westpac bank account records. While the Authority does not here repeat the detail of these transactions, it is satisfied, on the basis of the Reconciled Transactions and Mr Gregg Herron's description of how these transactions occur (at Questions 146 to 161 of the Gregg Herron Interview) that these 50 transactions may be reconciled in a similar manner to those noted above in respect of the Hanwood Sports Club, the Yenda Hotel and the Yoogali Club.
152. In conclusion, the Authority is satisfied that the 121 transactions recorded in the Exhibit E13 schedule represents liquor sales totalling \$180,709.72 in respect of sales made by Mr Agresta in or around Griffith on behalf of Smithfield Cellars.
153. The Authority also accepts the contention made at paragraph 54 that although the remaining **263** invoices cannot be directly linked to sales occurring in and around Griffith, on the balance of probabilities these also represent sales made by Mr Agresta in and around Griffith. This finding is made on the uncontested Complainant contentions that these transactions were written up by Mr Agresta in the same invoice book and during the same period of time. The Authority further notes the evidence of Mr Agresta's location and evidence of his sales activities on behalf of Smithfield Cellars with respect to licensed businesses in the Griffith area of NSW.
154. The Authority further accepts, as contended in paragraph 56 of the Complaint that Police inspected the Griffith Warehouse on 14 December 2016 and saw Mr Agresta conducting a stocktake and seized the stocktake records provided at Exhibit E15 that identified over 176,000 bottles of beer, wine and spirits. The Authority accepts this allegation on the basis of the Stocktake Record at Exhibit E15.
155. The Police Notebook further establishes, as contended at paragraph 57, that when interviewed by Police Mr Agresta stated he was *employed by Smithfield Cellars* and was selling liquor from the Griffith Warehouse for Smithfield Cellars. Mr Agresta told Police "I work for Smithfield Cellars" and "I sell for them". When asked which liquor licence he is selling alcohol under, Mr Agresta told Police "Gregg Herron from Smithfield Cellars".
156. The Authority also accepts, as contended at paragraph 58, that on 16 January 2017 Mr Herron responded to a coercive Notice to Produce from L&GNSW inspectors. The Authority accepts, on the basis of Mr Herron's responses to Questions 4 and 18 of the Response to Notice to Produce (quoted above) that Mr Herron gave that account of the relationship between Smithfield Cellars and Agresta and how the transactions involving Smithfield Cellars, Kenneth Lewis and Roy Agresta were handled. This is notwithstanding Clarke Herron's claimed absence of recollection as to those matters in the Clarke Herron Declaration.
157. The Authority finds that the evidence of Mr Agresta's employment agreement (at Exhibit E12) establishes that Mr Agresta was legally employed by INC, not ALW trading as Smithfield Cellars.



However, that agreement states that he was employed for the express purpose of selling liquor on behalf of Smithfield Cellars.

158. Notwithstanding that Mr Agresta's employment was structured so that his contractual employer was INC, he was in fact acting at relevant times as an agent of the Smithfield Cellars licensed business, selling liquor in Griffith, away from the Smithfield Cellars Premises, in purported reliance upon the Smithfield Cellars licence.
159. The Authority further accepts, on the analysis of evidence set out in respect of the Hanwood Sports Club, Yenda Hotel and Yagooli Club noted above, that the contention in paragraph 61 of the Complaint, that Mr Agresta did offer to sell, actual sold and delivered liquor to licensed premises in Griffith.
160. The Authority does not accept Mr Herron's submissions that the relevant sales were "processed" on the Smithfield Cellars Premises. As found above, Mr Agresta, was actually working as a business development manager or an agent for the Smithfield Cellars business. He actually engaged in conduct, in Griffith, which fell within the section 4 definition of "selling" liquor.
161. As a matter of substance, this liquor was not sold on the Smithfield licensed Premises. The evidence and material relied upon in support of Grounds 1 and 2 establishes that Mr Agresta offered liquor for sale in person at prospective customers' own premises and reached agreement with them about the purchase in Griffith. He prepared a handwritten invoice and gave it to them. When Mr Agresta was asked, he did not know where Smithfield Cellars was located and neither Clarke Herron nor Gregg Herron had any direct dealings with Mr Agresta.
162. The Authority notes that according to Mr Kenneth Lewis and as recorded in the Police Notebook, Mr Agresta was a "rep" for a "bottle shop in Sydney" and "they draw stock out of my warehouse. I deliver".
163. While Mr Herron appears to state in the Clarke Herron Declaration that the liquor was delivered first to Smithfield Cellars and then dispatched to its customers, this is not consistent with Gregg Herron's answers in the Gregg Herron Interview, where he describes the process at paras 185 to 190 as follows:
- Q185 O.K. All right. So as you're aware we're making inquiries into the sales that have taken place down in Griffith between the 15<sup>th</sup> of April, 2016 and the 1<sup>st</sup> of December, 2016. We've identified fifty transactions similar to what we've just presented you with there. So we've got them all itemised in relation to what we've identified. What can you tell me about that?
- A The same transactions as this one? Um, as that?
- Q186 Yes.
- A Yeah. Well exactly the same. So Roy as doing a, um, he'd write that out, sell the stock, then that would go to Queensland, they would raise an invoice - - -
- Q187 Ah hmm.
- A - - - and the invoice would then be sent down and the stock would get delivered to them.
- Q188 O.K. And whose stock was that that Roy was selling?
- A Well I believe it was um, Thirsty Camel owned the stock.
- Q189 O.K. Thirsty Camel owned the stock.
- A So it was, it was, basically, the way it was put to me that um, he was, for the licence to work properly that he was freight, he was like freight forwarder and so then it was fine for the stock to sit in the freight forwarding depot for him to then to um, sell out from there.
- Q190 O.K.

A Because that was the one question I asked, you know, hang on the stock's not, not in Smithfield. He said, no it's in freight forwarding and that's what the solicitor came back and said that's, that's how it worked.

164. Notwithstanding these inconsistent accounts, the Authority accepts the ultimate conclusion asserted by the Complainant at paragraph 61 that Smithfield Cellars sold liquor from premises other than the licensed Premises from which this licensed business was authorised to make sales.
165. As for Mr Herron's stated reliance upon legal advice, the Authority accepts the concession made by Mr Herron that this does not provide an excuse for the sale of liquor outside the scope of the licence. Contrary to Mr Herron's submissions, the Authority cannot give great weight to this as a mitigating factor when assessing Mr Herron's fitness in the circumstances of this case. First, Clarke Herron does not provide any specific account of the advice he claims to have relied upon in his response to the Complaint. Second, on his own account, the lawyers providing this advice were acting for Mr Lewis, not engaged by Smithfield Cellars. Third, Mr Herron did not even receive this advice directly. He relied upon a very basic understanding of the advice being relayed to him by his father.
166. Section 91 of the Act provides that as approved manager, Clarke Herron was responsible for the personal supervision and management of the conduct of the business of the licensed Premises under the licence at the times the manager is required to be present on the licensed Premises.
167. The Authority does not accept Mr Herron's disavowal of the admissions that he made in response to Questions 4 and 18 in the Response to Notice to Produce. He has not provided a credible explanation as to how or why he gave or permitted those responses to be made to L&GNSW. The Authority finds that Mr Herron is trying to minimise his knowledge of Mr Agresta's involvement with the Smithfield Cellars business.
168. The Authority is satisfied that Mr Agresta was ultimately selling liquor for or on behalf of Smithfield Cellars in Griffith. The sales did not actually occur on the licensed Premises and this sales conduct fell outside the scope of authority conferred upon the Smithfield Cellars licence. It is difficult to see how Mr Clarke Herron, as the approved manager, could have asserted responsibility at all times, as he was required to do, for the personal supervision and management of the sale and supply of liquor occurring in Griffith under this arrangement.
169. The Authority is satisfied that Mr Clarke Herron breached section 9(1)(b) of the Act, having regard to his responsibility for the licence conferred by section 91 of the Act. As an agent or employee of the Licensee, he permitted liquor to be sold in Griffith, having regard to the extended definition of "sell" provided by section 4 of the Act.

Ground 2 Particular 1 is established.

## **Ground 2 Particular 2**

170. Ground 2 Particular 2 relies upon a breach of section 9(3) of the Act which states:

### ***9 Sale or supply of liquor contrary to licence***

...  
*(3) A licensee must not sell, or employ or permit another person to sell, liquor on premises other than premises on which the licensee is authorised by the licence or this Act to sell the liquor.*

*Maximum penalty: 100 penalty units or imprisonment for 12 months, or both.*

171. Ground 2 Particular 2 relies upon the same Particulars specified for Particular 1.
172. The Complainant alleges at paragraph 63 the "elements of this offence are satisfied".
173. At paragraph 64 the Complainant specifies that the Licensee has employed or permitted Mr Roy Agresta to sell liquor on premises other than premises on which the Licensee is authorised by the licence or the Act to sell liquor. The Complainant contends that Mr Agresta is selling liquor in and around Griffith and there is no connection with the licensed Premises at 170 Polding Street, Smithfield. The Complainant re-iterates that pursuant to section 91 of the Act, Mr Clarke Herron is responsible for such activities.

174. At paragraph 65 the Complainant specifically refers to, relies upon and repeats the Summary of Facts specified at paragraphs 7-23 of the Complaint. The Authority repeats its findings on these allegations, which are discussed above.

#### Mr Clarke Herron's submission

175. In the Merits Submission, Mr Clarke Herron's legal representative contends that "[o]ther than restating the facts relied there is merely a bald assertion that the '*elements of the offence are satisfied*'. The Merits Submission simply states that for the "reasons previously sales take place on the licensed premises. If this interpretation is correct then any contravention of s9(3) is not made out".

#### Conclusion

176. The Authority notes that section 9(3) of the Act focuses on the requirement that "a licensee" not sell, employ or permit another person to sell, liquor on premises other than premises on which the licensee is authorised by the licence or this Act to sell the liquor.
177. According to the Onegov Licence Records Clarke Herron is the *approved manager* of the Smithfield Cellars licence, while ALW is the actual Licensee.
178. It follows that a breach of section 9(3) of the Act is not established in relation to Mr Herron.
179. Ground 2 Particular 2 is *not* established.

#### **Ground 3 – Approved Manager Not Fit and Proper**

180. Ground 3 is based on section 139(3)(i) of the Act and alleges that Mr Herron, as manager of Smithfield Cellars, is not a fit and proper person to be the manager of the licensed premises.
181. Section, 139(3)(i) of the Act states:

(3) *The grounds on which a complaint in relation to a licensee, manager or close associate may be made are as follows:*

...

- (i) *that the licensee is not a fit and proper person to be the holder of a licence (whether for the same reason as that set out in section 45 (5) or otherwise) or the manager is not a fit and proper person to be the manager of the licensed premises (whether for the same reason as that set out in section 68 (4A) or otherwise),*

182. Ground 3 specifies two Particulars. Particular 1 concerns Mr Clarke Herron's alleged "complicit involvement" in the Scheme while Particular 2 concerns his alleged "disguising" of the unlawful sales.
183. At paragraphs 68 and 69 the Complainant submits, by reference to *Hughes & Vale Pty Limited (no2) (1955) 93 CLR 127*, that in determining whether a person is "fit and proper" to be the approved manager of licensed premises, an assessment is to be made of the person's honesty, knowledge and ability to carry out such a function. Consideration may also be had to a person's character and integrity, as this affects the likelihood of future improper conduct (*Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321*).
184. At paragraphs 70 and 71 the Complainant concludes that the conduct of Clarke Herron as manager of Smithfield Cellars establishes that he does not have the requisite honesty, character or integrity to carry out the functions of an approved manager. ALW has been the corporate Licensee of Smithfield Cellars since 30 September 2015 with Clarke Herron the manager, holding a position of authority in relation to the licence.
185. At paragraph 82 of the Complaint the Complainant "refers to, relies upon and repeats" the Summary of Facts specified in paragraphs 7-23 of the Complaint. The Authority repeats its findings on these allegations, set out above.

#### **Fitness and Propriety at General Law**

186. It is well established at common law for the purposes of licensing that to be "fit and proper" a person must have a requisite knowledge of the Act (or Acts) under which he or she is to be licensed and the obligations and duties imposed thereby: *Ex parte Meagher (1919) 36 WN 175* and *Sakellis v Police (1968) 88 WN (Pt 1) (NSW) 541*. Being fit and proper normally comprises the three characteristics of "honesty, knowledge and ability": *Hughes & Vale Pty Ltd v NSW (No 2) (1955) 93 CLR 127*.

187. Where a person has been convicted of offences, the decision maker must consider the circumstances of those convictions and the general reputation of the person apart from the convictions and the likelihood of repetition – *Clearihan v Registrar of Motor Vehicle Dealers in the ACT* (1994) 117 FLR 455
188. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, the High Court of Australia has held that:
- The expression 'fit and proper person' standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of those activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides an indication of likely future conduct) or reputation (because it provides an indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.*
189. Furthermore, sections 45(5A) and 68(4C) of the Act prescribe certain non-exhaustive statutory considerations to which the Authority must have regard when determining the fitness and propriety of an applicant for a licence or approved manager, including whether that person:
- (a) Is of good repute, having regard to character, honesty and integrity; and
  - (b) Is competent to carry on that business or activity, being the relevant licensed business in question; or in the case of an approved manager is competent to manage licensed premises.

### **Ground 3 Particular 1 – Mr Clarke Herron’s “Complicity” in the Scheme**

190. The Complainant submits at paragraph 72 that the evidence obtained throughout the L&GNSW investigation unveiled a well-planned Scheme designed to subvert the objects of the Act. The sale of liquor was concealed by utilising different companies across different states designed to misrepresent the licence used for the sales and distance Smithfield Cellars from the unlawful conduct.
191. At paragraph 73 the Complainant contends that Mr Agresta was specifically employed by Smithfield Cellars for the unlawful sale and supply of liquor, while it is alleged that Mr Clarke Herron, as approved manager of the licensed business, “permitted that employment and the subsequent unlawful sales”.
192. The Complainant contends at paragraph 74 that the unlawful sales made by Agresta amounted to 85% of the total sales received by Smithfield Cellars [between February to December 2016] with over \$400,000 transferred between associated entities. According to the Complainant, a reconciliation of Smithfield Cellars’ bank accounts identified 50 sales conducted by Mr Agresta with licensees in Griffith totalling \$101,094.10. That evidence is corroborated by statements from licensees in Griffith who confirm that they purchased liquor directly from Mr Agresta with the understanding that he represented Smithfield Cellars.
193. The Complainant contends at paragraphs 75 and 76 that Mr Clarke Herron provided information and records to L&GNSW inspectors which directly concerned this unlawful conduct, specifically his response to Question 4 in the Response to Notice to Produce.
194. The Complainant further contended in paragraph 77, that Mr Clarke Herron provided details of the financial dealings and the parties involved, at Question 18 of the Response to Notice to Produce. Mr Herron’s response is noted above.
195. The Complainant alleges at paragraph 78 that Mr Herron was offered the opportunity to be interviewed regarding his involvement in the Scheme, which he declined.

### **Ground 3 Particular 2 – Disguising Unlawful Sales**

#### **INC**

196. At paragraph 79 the Complainant contends that INC is a finance consultancy company located in Southport, Queensland.

197. The Complainant further alleges in this paragraph that Smithfield Cellars utilised INC to distance themselves from employment contracts and management of debtors.
198. The Complainant alleges at paragraph 80 that when issuing handwritten invoices to licensed premises purchasing liquor in Griffith, Mr Agresta noted the supplier details as:

*Smithfield Cellars  
P.O. Box 1847 Southport QLD 4215*

199. The Complainant alleges at paragraph 81 that this Southport PO Box is the business address for INC; that Mr Agresta forwarded all handwritten invoices to INC in Queensland and upon receipt INC would create an invoice forwarded to the applicable venue that purchased the liquor from Mr Agresta.
200. The Complainant contends at paragraph 83 of the Complaint that by utilising the Southport address for all handwritten invoices, Smithfield Cellars led purchasers to believe that the stock was coming from a licensed premises in Queensland. It is further contended at paragraph 83, that when looking at the handwritten invoices in isolation, a level of acceptance would be given for sales of liquor from a licensed premises located in Queensland.

#### Shannon Grove

201. At paragraph 84 the Complainant alleges that Shannon Grove was a “pre-retail” licensed premises located in Highett, Victoria. The Authority notes that this is the Victorian equivalent of a producer/wholesaler licence.
202. The Complainant contends at paragraph 85 that on 14 December 2016, NSW Police conducted an inspection of the Griffith Warehouse and identified over 176,000 bottles of liquor. Police seized A4 flyers advertising the sale of liquor from “Shannon Grove Estate”.
203. The Complainant further contends at paragraph 86 that Mr Agresta offered the sale of liquor utilising this marketing material and statements obtained by L&GNSW identify that in each instance, these advertising flyers assisted Mr Agresta with these sales.
204. At paragraph 87 the Complainant contends that by utilising advertising from a licensed premises in Victoria, Smithfield Cellars was able to mislead purchasers to believe that the liquor was coming from a licensed premises in Victoria.
205. At paragraph 88 the Complainant makes the broader contention that, on the balance of probability, Mr Clarke Herron permitted the Smithfield Cellars liquor licence to be used for the purpose of supplying liquor from the Griffith Warehouse throughout the Griffith area. By reason of this conduct, the Complainant submits that Mr Herron lacks the requisite knowledge, ability and character to hold a position of authority and responsibility within the liquor industry, particularly as the approved manager of a current liquor licence.
206. At paragraph 89 the Complainant contends that Mr Herron either allowed, or was recklessly indifferent to, or wilfully blind to, the Smithfield Cellars liquor licence being used and abused for sales of liquor being made in the Griffith area, in a location well away from and with no connection to the Smithfield Cellars licensed Premises at 170 Polding Street, Smithfield. The Smithfield Cellars licence was used as a “practical legitimising conduit” for Mr Lewis’ business interests, to the extent that Mr Lewis controlled the bank account of Smithfield Cellars.
207. The Complainant submits at paragraph 90 that Mr Clarke Herron was responsible for those activities by the operation of section 91 of the Act.
208. The Complainant contends at paragraph 91 that despite Mr Herron having now severed his association with the business practices in the Griffith area, there is a *risk* he will re-enter that business arrangement or Scheme with Mr Lewis, Mr Lewis’ associates or other persons, and sell and supply liquor contrary to the authorisation of the Smithfield Cellars licence again.
209. The Complainant submits at paragraph 93 that the conduct of Mr Herron in the Scheme demonstrates (at best) a lack of knowledge and ability and (at worst) a total disregard for his obligations to operate the licensed business lawfully and responsibly.
210. At paragraph 94, the Complainant concludes that Mr Herron lacks the requisite knowledge and ability to act as a licensee, manager or close associate of a licensee.

211. Finally, the Complainant further contends at paragraph 95 (which the Authority accepts on the basis of the OneGov Licence Records), that a check of the licence at 25 September 2018 confirms that ALW remains the Licensee and Clarke Herron the approved manager of Smithfield Cellars.

### **Mr Herron's Submission on Fitness and Propriety**

212. After briefly citing some common law on fitness and propriety to hold a licence, Mr Herron refers to section 68(4C) of the Act and the non-exhaustive statutory considerations to which the Authority must have regard when determining the fitness and propriety of an approved manager.

213. Mr Herron submits that:

- No dishonesty is identified or specified by reference to either the facts set out or any dealings with L&GNSW inspectors.
- No character deficiency is identified or specified by reference to either the facts set out or any dealings with L&GNSW inspectors.
- No integrity deficiency is identified or specified by reference to the facts set out or any dealings with inspectors save as to a reference to complicity.

214. Mr Herron refers to the statements he has made about his involvement with Mr Lewis in the Clarke Herron Declaration.

215. Mr Herron submits that, should his conduct be found to have contravened section 29 or other provisions of the Act, as alleged, then in the light of the discussions he had with his father about the dealings in Griffith, any "culpability" on his part is "both unintentional and limited".

216. Mr Herron describes INC as a "consultancy" business performing "back office" work for Smithfield Cellars, being "payroll, tax and administration work". The fact that its address in Queensland is where Mr Agresta sent the orders "makes sense", if INC was generating invoices in the name of Smithfield Cellars (as it was) and forwarding the same to Smithfield Cellars for "processing".

217. Mr Herron contends that he co-operated with the authorities at all times and there is no suggestion in the Complaint that he lied to authorities, not cooperated or was otherwise delinquent in any way.

218. Mr Herron further submits that the Complainant does not call into question his *ability* to run a liquor store and there is "no proper basis" for him to be considered not fit and proper to be an approved manager of the Smithfield Cellars Premises.

219. As to his general character, Mr Herron submits that he is a "young man with an unblemished record" with nothing in the evidence demonstrating that he had knowledge of and knowingly sought to breach the Act. He submits that it "cannot sensibly be suggested" that he, Clarke Herron, will re-enter any business arrangement with Mr Lewis as the Complainant suggests.

220. In the Clarke Herron Declaration, Mr Herron denies that he declined an offer to be interviewed, contending that when approached by a person who identified himself as a police officer from Griffith, the request was made for him to attend the next day. This he says "would have been a 4 hour drive and required me not to be available for work". Mr Herron adds that when asked to attend a local Police station he advised that he could not attend due to a work commitment. He recalls a female officer visiting him [presumably at his workplace], speaking with him and requesting that he sign her notebook following the questions she asked him and recorded.

221. Mr Herron submits that he "fully co-operated" with L&GNSW inspectors on all occasions when requested including the provision of documents and information and remains ready to do so.

222. In the Clarke Herron Declaration, Mr Herron also denies that he permitted Smithfield Cellars liquor licence to be used for the purpose of supplying liquor from the Griffith Warehouse through the Griffith area. He states that his role in the Griffith sales was informed by an "understanding" from a conversation he had with his father about the matter (recounted above in relation to Ground 2).

223. Mr Herron submits that his entire livelihood is his role in the Smithfield Cellars business and that he carried out his tasks based upon an understanding with his father, the owner of the business.

224. He contends that if he is unable to be an approved manager of the business his employment opportunities will be limited. He has spent "considerable time" with his father building up the business and has "no infractions" against the licence other than the matters specified in this Complaint.

### **Conclusion on Fitness and Propriety**

225. The Authority has taken into account that Mr Herron has acted as approved manager since 30 September 2015 and accepts that there is no information indicating contraventions of the licence, or the commission of other offences by Mr Herron than the matters alleged in this Complaint. However, the unlawful off premises sales established by this Complaint commenced in around February 2016, only five months after he assumed responsibility for the licence.
226. The Authority notes the contention at paragraph 72 that a well-planned Scheme was in place (designed to subvert the objects of the Act) with the sale of liquor concealed by utilising different companies across different states designed to misrepresent the licence used for the sales and distance Smithfield Cellars from the unlawful conduct.
227. The Authority has also considered Clarke Herron's denial that there was any scheme utilising different companies across different states and his explanation as to why the Southport address of INC was relevant.
228. The Authority is not satisfied, on the material before it, that there is sufficient evidence to establish that the Scheme *concealed* the sale of liquor in Griffith. Rather, the arrangements between Smithfield Cellars and Mr Agresta were relatively *open and brazen* - demonstrating either a complete lack of understanding of the basic requirement of section 29 that a packaged liquor licensee *only sell packaged liquor from the defined licensed premises* - or a complete disregard for that requirement. The Authority does not find that Mr Clarke Herron *deliberately* attempted to conceal the sales, but he participated in the Scheme on the basis of a perverted understanding of the Act, of which he had only a cursory understanding, on the basis of legal advice given to a third party, Lewis, that had been related to him by his father Gregg Herron.
229. The Authority accepts, as contended in paragraph 73 of the Complaint, on the basis of the Agresta Employment Contract, that Mr Agresta was employed by INC in the role of Business Development Manager for Smithfield Cellars and that at all relevant times he was based in Griffith.
230. The Authority finds that Mr Clarke Herron had an honestly held but perverse construction of the legislation that was based on a conversation with his father who had had a meeting with what Clarke describes as "Lewis's lawyer". This is adverse to an assessment of Mr Herron's knowledge, ability, character and judgement. Clarke Herron states in the Clarke Herron declaration that he "I did not speak to a lawyer myself".
231. Some question as to Mr Herron's honesty arises from the responses that he gave to Questions 4 and 18 in the Response to Notice to Produce and the subsequent change in position, in response to this Complaint, apparent from the Clarke Herron Declaration. The Authority does not find credible his later change in position, which gave no adequate explanation as to why his clear and exacting responses to Questions 4 and 18, made in response to a compulsory Notice to Produce, were wrong.
232. What is now at issue is Mr Clarke Herron's ability to adhere to matters of regulatory compliance and to appropriately manage the licensed business in accordance with the legislative requirements. Mr Herron had responsibilities as approved manager under section 91 of the Act for the personal supervision and conduct of the business. It is adverse to an assessment of Mr Herron's knowledge, ability and judgement that he thought it consistent with the responsible sale of liquor for a third party, Mr Agresta, to be storing and selling Smithfield Cellars liquor, in purported reliance upon the Smithfield Cellars licence, when Mr Herron had little idea of the ways in which Mr Agresta was promoting, selling, supplying or securing that liquor. Mr Herron specifically admits in the Clarke Herron Declaration that "he did not deal with" and has "never met" Mr Agresta.
233. It is a very poor reflection on Clarke Herron's judgment and character that he appears to think (as set out in the Merits Submission and Clarke Herron Declaration) it is exculpatory for him to say he knew liquor was being sold in Griffith, using the Smithfield Cellars licence, yet he has never met Mr Roy Agresta and, by implication, knew little of the circumstances in which that valuable part of the licensed business was being conducted
234. The Authority further accepts, as alleged in paragraph 73 of the Complaint, on the basis of the Authority's findings in Ground 2 Particular 1 above, that in his position as manager Mr Herron knew of and permitted the employment of Mr Agresta as a Business Development Manager and Mr Agresta's role in making sales in the Griffith area that were not being made on the licensed Premises.
235. On the contention in paragraph 74 that Mr Agresta's unlawful sales in Griffith amounted to 85% of the money received by the Smithfield Cellars bank account during the period from February to December

2016, the Authority notes that in submissions provided in response to the Related Complaint Mr Gregg Herron contests this, claiming that the proportion would be more like less than 4%.

236. While the Authority accepts that there is a dispute over this point, Mr Gregg Herron's account is not assisted by any supporting documentation or independent analysis. The Authority is nevertheless satisfied, on the basis of the Reconciled Transactions, that L&GNSW has identified at least 50 sales of liquor that were affected by Mr Agresta in Griffith, to licensees in and around Griffith, totalling **\$101,094.10**. These sales are also evidenced by the Bertacco Witness Statement, Gilbert Witness Statement and Snaidero Witness Statement which confirm that the Hanwood Sports Club, Yenda Hotel and Yoogali Club purchased liquor directly from Mr Agresta with the understanding that he represented Smithfield Cellars. That alone is a substantial sum of revenue from unlawful sales.
237. The Authority further accepts, as contended in paragraph 75, that Mr Clarke Herron provided information and records to L&GNSW inspectors, which directly related to the alleged unlawful conduct.
238. The Authority accepts, as alleged in paragraphs 76 and 77, that at Question 4 of the Response to Notice to Produce Clarke Herron stated:

*"Roy Agresta is our Business Development Manager in Griffith".*

239. The Authority further accepts, as alleged at paragraph 77, that at Question 18 of the Response to Notice to Produce Clarke Herron stated:

*"Smithfield Cellars invoices the stock sold by Roy Agresta held by Liquor Licence Distributors in Griffith and when payment is received it is paid into the Smithfield Cellars bank account. The money is then drawn from the Smithfield Cellars account and used to pay for the Liquor Licence Distributors stock supplied."*

240. On the contention in paragraph 78 about Mr Clarke Herron declining to be interviewed, the Authority has considered Mr Herron's claims that he could not attend an interview in Griffith due to work commitments. The Authority accepts that it was inconvenient to attend Griffith. The Authority is satisfied that Clarke Herron cooperated with L&GNSW investigators to a limited extent – responding to a Notice to Produce but declining a formal interview with L&GNSW Inspectors.
241. On the contention in paragraph 79 that Smithfield Cellars used INC to distance itself from employment contracts and the management of debtors, the Authority is satisfied that Smithfield Cellars utilised INC to avoid having a direct employment relationship with Mr Agresta. Smithfield Cellars used INC in the manner of a labour hire company, so that INC, not Smithfield Cellars, would be Mr Agresta's contractual employer - while Agresta was *in reality* working for the benefit of and reportable to Smithfield Cellars while selling liquor to licensed businesses in Griffith.
242. On the contention in paragraphs 80 and 81 that Agresta used a Queensland address for INC for the supplier details on hand written invoices, the Authority is satisfied, on the basis of *some* of the handwritten invoices at Exhibit E14, that Mr Agresta would, on certain occasions, specify "Smithfield Cellars P O Box 1847 Southport QLD 4215" on the handwritten invoices. For the sake of completeness, the Authority notes that the INC ASIC Extract indicates that the contact address for the business is now a PO Box in *Robina*.
243. At paragraph 81 the Complainant contends that Mr Agresta forwarded all handwritten invoices to INC in Queensland, upon receipt of these handwritten invoices from Mr Agresta, INC would create an invoice which was forwarded to the applicable venue that had purchased the Liquor from Mr Agresta. The Authority is satisfied that the alleged process of the Queensland office of INC preparing computer-generated Smithfield Cellars' invoices and depositing/withdrawing money into Smithfield Cellars and Fortress Connected bank accounts is established by the responses of Mr Gregg Herron to Questions 146 to 161 of the Gregg Herron Interview, extracted above.
244. On the contention at paragraph 83 that by referring to the Southport address in handwritten invoices, Smithfield Cellars led customers to believe the stock was coming from Queensland, the Authority accepts that customers *may have* been led to believe this from reading these invoices on their face.
245. On the contention at paragraph 84 that Shannon Grove was a pre-retail licensed premises in Victoria, the Authority notes that Mr Agresta signed off an email at Exhibit E18 bearing a business name "Shannon Grove Estate" and the address "3 Thistle Grove, Highett, VIC 3190", licence number "33765324".



246. At paragraph 85 the Complainant contends that during the 14 December 2016 Police inspection of the Griffith Warehouse Police discovered over 176,000 bottles of liquor and advertising flyers for “Shannon Grove Estate”. The Authority accepts that this occurred on the basis of the Stocktake Record and the advertising flyers at Exhibit 26.
247. The Complainant contends at paragraph 86 that Mr Agresta offered the sale of liquor utilising this marketing material and statements obtained by L&GNSW identify that in each instance, these advertising flyers assisted Mr Agresta with these sales. The Authority finds that the Bertacco Witness Statement, Gilbert Witness Statement and the Snaidero Witness Statement together establish that Mr Agresta provided either “brochures” or “pamphlets” and accepts that this marketing material was used by him while acting on behalf of Smithfield Cellars.
248. While the Complainant alleges at paragraph 87 that the licensee was “able” to mislead consumers that the liquor was sourced in Victoria, there is no evidence of customers who have actually been misled. The Authority is satisfied that this advertising material was likely to mislead customers to believe that the liquor was coming from a licensed premises in Victoria and accepts this contention to that extent.
249. The Authority accepts the contention in paragraph 88 that on the balance of probability, Mr Clarke Herron *permitted* the Smithfield Cellars liquor licence to be used for the purpose of supplying liquor from the Griffith Warehouse throughout the Griffith area. This finding is made on the basis of Clarke Herron’s awareness of Mr Agresta’s role and the Scheme as evidenced by his response to Questions 4 and 18 in the Response to Notice to produce and his responsibilities as the approved manager under section 91(1) of the Act.
250. The Authority further accepts the contention in paragraph 89, on the same basis, that Mr Herron allowed the Smithfield Cellars liquor licence to be used (and abused) for sales of liquor made in the Griffith area, and this occurred well away from and with no connection to the Smithfield Cellars licensed Premises at Smithfield. This finding is also made on the basis of the Reconciled Transactions and the evidence provided in the Bertacco Witness Statement, Gilbert Witness Statement and the Snaidero Witness Statement.
251. As contended by the Complainant, the Authority accepts that Smithfield Cellars licence was to some extent used as a conduit for Mr Lewis’ business interests, to the extent that Mr Lewis controlled the bank account of Smithfield Cellars. This is also evidenced by Gregg Herron’s responses to Questions 146 to 161 of the Gregg Herron Interview and Clarke Heron’s response to Question 18 of the Response to Notice to Produce.
252. The Authority accepts as alleged in paragraph 90, that Mr Clarke Herron is responsible for such activities pursuant to section 91 of the Act.
253. The Authority has considered Mr Herron’s submissions (detailed above) on why there is no foundation for the assertion that he will re-enter a business arrangement with Mr Lewis. The Authority accepts the contention at paragraph 91 that there is a *risk* that he might embark on similar conduct, involving the sale of liquor through an agent off the Premises but places it no higher than that. The Authority accepts that Mr Herron will, through the course of this Complaint, have had it brought home to him the regulatory consequences of selling liquor off the licensed premises and outside the scope of the licence.
254. The Authority cannot yet *rule out* that Smithfield Cellars might resume a business enterprise with Mr Lewis or entities associated with him when Smithfield Cellars has continued to do business with Lewis related entities, evidenced by the leasing arrangements established by Exhibits E28, E29, E30 and E32. While Mr Herron claims that he is not aware how the forklift and Mercedes Sprinter vehicles were acquired by Smithfield Cellars and does “not understand” how the purchase of these vehicles means that Smithfield Cellars has any ongoing dealings with Mr Lewis or any company that he is involved with, the Authority considers them to be relevant to questions of whether he has *completely* cut ties with Mr Lewis, his associates or related entities. The leases are significant ongoing commercial arrangements.
255. The Complainant submits at paragraph 93 that the conduct and involvement of Mr Clarke Herron in the Scheme demonstrates a lack of knowledge and ability at best and at worst a total disregard of his obligations to operate the licensed business lawfully and responsibly.
256. At paragraph 94, the Complainant makes the “ultimate submission” that Mr Clarke Herron lacks the requisite knowledge and ability to act as a licensee, manager or close associate of a licensee.

257. The Authority accepts that Clarke Herron's participation in the Scheme, that resulted in the sale of liquor off the premises in Griffith, demonstrates (at best) a lack of knowledge and ability with respect to licensing matters and (at worst) a total disregard for his obligations to operate the licensed business lawfully and responsibly.
258. Section 29 is less complex than Mr Herron makes out in his legal submissions. Put simply, a packaged liquor licensee is only authorised to sell liquor from their designated licensed premises. Mr Clarke Herron's reliance upon advice from his father, who did not obtain his own legal advice resulted in Clarke Herron relying on a perverse interpretation of his responsibilities.
259. It is clear that Mr Clarke Herron, as approved manager, was responsible for the exercise of the licence through the operation of section 91(1) of the Act. The Authority is satisfied that he permitted Mr Agresta to enter into substantial sales of liquor, in Griffith, well away from the licensed Premises.
260. The Authority has taken into account Mr Clarke Herron's involvement in the liquor industry as an approved manager since 2015 and as a bar manager and bar attendant between 2009 to 2011 and 2013 to 2015. The Authority has taken into account his apparently unblemished record aside from the matters specified in this Complaint, while noting that the unlawful sales commenced in 2016 shortly after Mr Herron becoming approved manager, and extending for a substantial period of time. The Authority is satisfied that Clarke Herron has not demonstrated the knowledge, ability, character and competence expected of an approved manager.
261. Ground 3 is established.

### **PRELIMINARY SUBMISSIONS ON DISCIPLINARY ACTION**

262. The Complainant has made a preliminary submission at paragraph 92 that should the Authority find any or all of the Grounds are established, sanctions should serve as a specific and general deterrent for those industry participants who may be contemplating similar conduct to that established by this Complaint.
263. The Complainant submits that disciplinary action may include:
- The imposition of a condition upon the licence.
  - A monetary penalty.
  - Withdrawal of the approved manager's approval to manage licensed premises.
  - Disqualification of the manager from being the manager of licensed premises, or from holding a licence or being the close associate of a licensee.
264. In the Merits Submission Mr Herron submits that his age, co-operation with inspectors, prior good record, circumstances of his contact and involvement with Mr Lewis be taken into account by the Authority. There is no reason for any disciplinary action and that any punishment would be punitive. In the alternative, that any action be confined to a reprimand and /or monetary penalty.
265. Mr Herron contends that there was no "specific harm" to the public arising from the conduct alleged in the Complaint and there is no basis to disqualify him in any capacity.

### **FINAL SUBMISSIONS ON DISCIPLINARY ACTION**

266. On 21 February 2020 the Authority issued detailed letters to Messrs Gregg and Clarke Herron specifying their findings on the Grounds of Complaint ("Findings Letters") while inviting the Complainant and the Respondents to make any final submissions, confined to the question of what, if any disciplinary action should be taken.
267. In a three-page submission dated 28 February 2020, the Complainant submits that the Authority should take the following action in respect of the Complaint against Clarke Herron:
- Pursuant to Section 141 (2) (h) of the Act, disqualify Mr Clarke Herron from being the manager of a licensed premises, or from holding a licence or being the close associate of a licensee for such a period the Authority deems fit;
  - Pursuant to Section 141 (2) (c) (i) of that Act, order the manager, Mr Clarke Herron, to pay a penalty as the Authority deems appropriate.
  - Pursuant to Section 141 (2) (l) (i) of the Act, order the manager, Mr Clarke Herron, to pay the amount of **\$26,167.27** being the costs incurred by the Secretary of the Department of Customer Service in carrying out the investigation.

268. With respect to the proposed disqualification of Clarke Herron, the Complainant emphasises the seriousness of the conduct established and the need to send a strong message to industry participants that such egregious conduct will attract harsh regulatory sanctions.
269. The Complainant submits that the ongoing uncertainty surrounding the re-emergence of Mr Lewis in the operation of the Smithfield Cellars business gives rise to concerns that the potential risk to the community of ongoing conduct will not be mitigated without strong sanctions. The Complainant submits that the Authority impose a substantial period of disqualification that reflects the seriousness of the conduct.
270. The Complainant had regard to action available under section 141(2)(g) of the Act (to withdraw the manager's approval to manage licensed premises) but considers that this would not "adequately address" the findings in the matter with the "more appropriate action" being to disqualify Mr Herron under section 141(2)(h) given the seriousness of the conduct of which the Authority has found.
271. With regards to the ordering a penalty, the Complainant submits that the "purported Scheme" utilised by Smithfield Cellars in this matter occurred with the knowledge of Mr Clarke Herron, who did not take all reasonable steps to ensure that the licence was being exercised in accordance with the legislation. Ultimately, the exercising of that licence in all matters was the responsibility of Mr Clarke Herron and as such, the Complainant submits that the Authority impose a monetary penalty that reflects the seriousness of the conduct noting that the maximum penalty available is \$22,000.
272. The Complainant provides a breakdown of its heads of costs on the investigation which arrive at a total cost of \$73,488.81 in respect of both Gregg and Clarke Herron – primarily departmental officer and internal legal costs with some travel and accommodation costs given the regional aspects of the investigation. The Complainant attributes \$47,321.54 to Gregg Herron and \$26,167.27 to Clarke Herron.
273. In response to the Findings Letter Mr Clarke Herron relies upon a three pages statutory declaration dated 12 March 2020. This was accompanied by a three pages statutory declaration from Mr Gregg Herron (which included two Annexures – Annexure A being a Tax Invoice 00088241 issued by Inn Security to Smithfield Cellars dated 10 October 2017 and Annexure B being Westpac Bank statements for Smithfield Cellars from February 2016 to December 2016) and a four pages statutory declaration (with a two pages Annexure A attached containing a cash flow analysis) from Mr Raymond Kazzi, accountant, dated 12 March 2020 detailing the financial position of Mr Herron and the Smithfield Cellars business.
274. Briefly, Mr Clarke Herron makes the following contentions or submissions going to the question of disciplinary action:
- He is 29 years of age, employed as the approved manager of Smithfield Cellars, is single and has no dependents.
  - His sole source of income is from Smithfield Cellars.
  - He has worked in the industry for 9 years, commencing the role of approved manager at Smithfield Cellars in 2015.
  - He has no other qualifications and a "strong desire" to remain in the liquor industry – being the industry in which he has primarily worked during his working life.
  - Any employment in an alternative industry is likely to require disclosure of his past employment and the findings of the Authority. This is likely to exclude him from a number of occupations and make it very difficult to be employed by another employer.
  - He is concerned about his ability to be employed in the future in another liquor business other than Smithfield Cellars. Future employers may be very hesitant to engage him, certainly as an approved manager or licensee if he has been found to be not fit and proper to have an interest in the industry.
  - Mr Herron would accept the imposition of conditions on the licence requiring that he not have any personal or business association with Mr Lewis or any close associate of Mr Lewis.
  - He does not have a financial interest in the exercise of the licence or business of Smithfield Cellars. When Clarke Herron entered the business, the systems to run the business such as invoicing, hire purchase agreements in respect of the motor vehicle and forklift, stock ordering and purchasing processes were all in place. He understood from his father Gregg Herron that those systems were legal and Clarke Herron did not second-guess him.
  - There is no risk that the business will be conducted in that manner in the future nor is there any risk that he will have a relationship, social or business or otherwise with Mr Lewis and any close associate of Mr Lewis.

- At no stage did he deliberately attempt to conceal sales. Whilst Clarke Herron accepts that he inherited a business model in relation to sales at Griffith, and did not seek to change it and did not make further enquiries than those made by his father about the operation and did not meet Mr Agresta, Clarke Herron submits that he has learnt through this process that his understanding of the business and those sales were wrong. Clarke Herron wishes to stress that he did not deliberately and knowingly conduct the business in that manner.
- The percentage of business sales that took place in Griffith was a “small percentage of the business, not a significant part of the business”.

275. In a five pages legal submission dated 13 March 2020 through his solicitor, Mr Wennerbom, Mr Clarke Herron submits that:

- Ground 1 of the Complaint has not been established.
- Only particulars 1 of Ground 2 and Ground 3 were established.
- The Authority does not consider that Mr Clarke Herron deliberately concealed the Griffith sales.
- There is no longer involvement with Mr Lewis (or his daughter) and any risk could be addressed with a licence condition.
- Sales from Griffith accounted for under 4% of turnover, not 85% of total sales.
- Any risk is must be negligible because there was no deliberate conduct by Clarke Herron; Clarke Herron, as accepted by the Authority, would have had it brought home to him the regulatory consequences of selling liquor off the licensed premises and outside the scope of the licence; Clarke Herron has severed all association with Mr Lewis; Clarke Herron is willing to accept a condition prohibiting any association with Mr Lewis or a close associate; and no invoicing is now outsourced to a third party.
- In the absence of deliberate conduct, a disqualification is not justified with the practical effect being the destruction of the livelihood of Clarke Herron and the imposition of significant financial penalty both in terms of fines and costs.
- Disqualification must be reserved for extreme cases which must involve deliberate premeditated conduct – that is not this case.
- Mr Herron has an unblemished record.
- A finding that Clarke Herron is not fit and proper does not mandate disqualification of Mr Herron should follow. The Authority has a discretion to take disciplinary action under section 141(2) of the Act.
- The disqualification of Clarke Herron is “not appropriate in the circumstances” due to the lack of deliberate conduct on the part of Clarke Herron; the lack of circumstances of aggravation; the lack of evidence of actual harm; the positive steps that have been taken to eliminate future risk; and the capacity to impose suitable conditions to mitigate risk.
- The appropriate action is a “strong reprimand” combined with any or all: a licence condition preventing any involvement with Mr Lewis and any associate of his; an order to pay a monetary penalty of around \$11,000.00; and an award for costs that is discounted by reason that Ground 1 and Particular 2 of Ground 2 was not established.
- Disqualification is not appropriate, but if imposed, should be for a period of three months and not more than six months.

## DECISION ON DISCIPLINARY ACTION

276. In deciding whether any disciplinary action is appropriate the Authority has taken into account all of the statutory objects and considerations in section 3 of the Act, which states:

### **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.*

277. The Authority's disciplinary jurisdiction provided by Part 9 of the Act is protective, rather than punitive in nature. As held by the New South Wales Supreme Court in *Seagulls Rugby League Football Club Ltd v Superintendent of Licences* (1992) 29 NSWLR 357 (at paragraph 373):

*The over-riding purpose of the jurisdiction is the protection of the public, and of members of clubs by the maintenance of standards as laid down in the Act.*

278. Nevertheless, as observed by Basten JA of the New South Wales Court of Appeal in *Director General, Department of Ageing, Disability and Home Care v Lambert* (2009) 74 NSWLR 523 ("*Lambert*"), while disciplinary proceedings are protective, that is not to deny that orders made by disciplinary bodies may nonetheless have a *punitive effect*. His Honour observed that a Court (and hence a regulatory decision maker such as the Authority) should be mindful that a protective order is reasonably necessary to provide the required level of public protection.

279. At paragraph 83 of the judgment in *Lambert*, Basten JA states that the "punitive effects" may be relevant to the need for protection in that:

*...in a particular case, there may be a factual finding that the harrowing experience of disciplinary proceedings, together with the real threat of loss of livelihood may have opened the eyes of the individual concerned to the seriousness of his or her conduct, so as to diminish significantly the likelihood of repetition. Often such a finding will be accompanied by a high level of insight into his own character or misconduct, which did not previously exist.*

280. At paragraph 85 of the judgment, Basten JA observes that:

*...the specific message of the disciplinary cases explaining that the jurisdiction is entirely protective is to make clear that the scope of the protective order must be defined by the reasonable needs of protection, as assessed in the circumstances of the case.*

281. The Authority further notes that when determining the nature of the appropriate disciplinary action, the conduct of the respondent to a complaint *up until its final determination* is relevant and should be taken into account: *Sydney Aussie Rules Social Club Ltd v Superintendent of Licences* (SC (NSW) Grove J, No. 16845 of 1990, unreported BC9101830).

282. The Authority does not accept that there was no harm to the public interest from selling liquor other than in accordance with the Act. This is a moderately serious matter and the non-compliance established by the Complaint involved liquor sales that amounted to a significant retail value.

283. The fact that the sales only amounted to a small portion of the total revenue of the business is an unpersuasive argument. The retail value of the unlawful sales was objectively significant and conduct of this kind has the clear potential to undermine the integrity of the licensing regime, while providing an unfair advantage over compliant packaged liquor licensees. The unsupervised sale of liquor through an agent operating in a remote regional town without licensee supervision of the sales poses an obvious risk to the harm minimisation objects of the Act (even if no harm actually transpired). It is conduct that is contrary to the responsible development of the industry.

284. The Authority has taken into account Mr Clarke Herron's involvement in the industry and good personal record. Disciplinary action has been reduced from what would otherwise be a stronger regulatory response to the non-compliance, which arose out of a lack of knowledge and ability with respect to a basic obligation with respect of the sale and supply of takeaway liquor, deferring to arrangements instigated by a third party, Mr Lewis.

285. While there is no specific breakdown of how costs were attributed, it is apparent that the Complainant is electing to attribute 2/3 of the proposed costs order to Gregg Herron and 1/3 to Clarke Herron. The Authority considers that this approach reflects the relative culpability of the two men for the conduct that has been established. Nevertheless, the costs order has been substantially reduced by reason that the Complainant did not establish Ground 1 and Particular 2 of Ground 2. Ground 1 accounted for a good deal of the complexity of this matter.

286. The Authority has decided to order that Clarke Herron, the approved manager, pay \$10,000.00 to the Secretary of the Department of Customer Service within 60 days from the date of this letter, being consistent with the time afforded in the Related Complaint to make payment for costs.
287. The Authority is also satisfied that some monetary penalty should be paid by Clarke Herron as a matter of specific and general deterrence to others who manage a packaged liquor licence. Clarke Herron's conduct demonstrated a moderately serious lack of knowledge and ability.
288. The Authority notes that pursuant to section 141(2)(c)(i) of the Act, the maximum penalty that may be ordered for an individual is 200 penalty units (\$22,000) and for a corporation is 500 penalty units (\$55,000). In all the facts and circumstances of this case the Authority is satisfied that Clarke Herron should be required to pay the Secretary a monetary penalty of \$5,000.00 within the usual 28 days from the date of this letter.
289. The Authority taken into account the cumulative value of costs orders and monetary penalties issued in relation to this matter (including the related complaint against ALW and Mr Gregg Herron) and has taken this action on the understanding that these obligations to pay will be observed, in a timely manner, given the significant public resources that were required to investigate the conduct giving rise to this Complaint.
290. Finally, the Authority accepts the submission from Mr Clarke Herron that a condition be imposed upon the licence (which has been ordered in determining the Related Complaint) preventing any further dealings with Mr Lewis or his close associates and that a reprimand be issued against Clarke Herron.

## ORDERS

291. The Authority has determined to take the following action:
- **Impose** a monetary penalty of \$5,000 on the manager, Mr Clarke Herron, pursuant to section 141(2)(c)(i) of the Act to be paid to the Secretary of the Department of Customer Service within 28 days from the date of this decision letter.
  - **Order** the manager, Mr Clarke Herron, to pay the Secretary of the Department of Customer Service \$10,000, being a portion of the costs incurred by the Secretary in conducting the investigation, pursuant to section 141(2)(l)(i) of the Act. Costs shall be paid to the Secretary of the Department of Customer Service within 60 days from the date of this decision letter.
  - **Issue** Mr Clarke Herron with a reprimand, conditional on the total costs being paid within 60 days of the final decision letter being issued pursuant to section 141(2)(m) of the Act.

## REVIEW RIGHTS

292. Pursuant to section 144 of the Act, an application for review of the Authority's decision to take disciplinary action may be made to the NSW Civil and Administrative Tribunal ("NCAT") by the person against whom any disciplinary action is taken by the Authority in relation to the Complaint or the Complainant, by no later than 28 days of the Authority's decision.
293. For more information, please visit the NCAT website at [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au) or contact the NCAT Registry at Level 9, John Maddison Tower, 86-90 Goulburn Street, Sydney.

Yours faithfully



Philip Crawford  
Chairperson

For and on behalf of the **Independent Liquor and Gaming Authority**

## **Schedule A – Complaint Material before the Authority**

1. One-page cover letter from Mr Darren Duke, A/Director Compliance Operations (“Complainant”) of Liquor and Gaming New South Wales (“L&GNSW”) to the Independent Liquor and Gaming Authority (“Authority”) dated 29 August 2018.
2. A 17-page submission particularising the three grounds of complaint (“Complaint”) including a chronology of events and exhibit list.
3. Exhibit E01: Australian Securities and Investments Commission (“ASIC”) Company Extract for All Liquor Wholesale Pty Ltd (“ALW”) extracted on 12 February 2018.
4. Exhibit E02: ASIC Company Extract for Smithfield Cellars Pty Ltd (“Smithfield Cellars”) extracted on 12 February 2018.
5. Exhibit E03: ASIC Company Extract for Liquor Licence Distributors Pty Ltd extracted on 12 February 2018.
6. Exhibit E04: ASIC Company Extract for International Network Consultants Pty Ltd (“INC”) extracted on 29 May 2018 and ASIC notification of resolution – change of company name in relation to Prudential Investment Corporation Pty Ltd to Shannon Grove Estate Wines Pty Limited dated 15 July 2014.
7. Exhibit E05: ASIC Company Extract for Prudential Investment Corporation Pty Ltd extracted on 12 February 2018.
8. Exhibit E06: OneGov key liquor licence details for Smithfield Cellars, LIQP700352388, as at 23 February 2017.
9. Exhibit E07: Smithfield Cellars company structure and sales advice from Kazzi & Associates Pty Limited and Manenti Quinlan & Associates Pty Limited dated 2015.
10. Exhibit E08: Transcript of the interview between L&GNSW inspectors and Mr Gregg Herron dated 22 June 2017.
11. Exhibit E09: Advice on the lease of part of a warehouse at 58-60 Banna Avenue, Griffith NSW 2680 provided by Elders Commercial Griffith dated 29 September 2015.
12. Exhibit E10: ASIC Person Extract for Kenneth Lewis extracted on 23 November 2016.
13. Exhibit E11: LinkedIn profile of Elisa Lewis extracted on 27 March 2017.
14. Exhibit E12: Employment offer – contract of employment between INC and Mr Roy Agresta dated 22 January 2016.
15. Exhibit E13: Schedule of 121 handwritten invoices matching computer-generated invoices.
16. Exhibit E14: A schedule of 50 transaction occurring in 2016 including the relevant transaction records for each of these 50 transactions comprising hand written invoices, computer-generated invoices and Westpac bank account records for Smithfield Cellars and Fortress Connected Pty Ltd (“Fortress Connected”).
17. Exhibit E15: Stocktake record conducted by Mr Agresta.
18. Exhibit E16: Photocopy of entries from the notebook of Sergeant Brett Ryan of NSW Police.
19. Exhibit E17: Mr Clarke Herron’s response to a section 21 notice to produce dated 16 January 2016.
20. Exhibit E18: Email from Jason Torresan to the then Office of Liquor Gaming and Racing (now L&GNSW) forwarding an email from Ken Lewis dated 1 December 2016.
21. Exhibit E19: NSW Police Force witness statement of Mr Roger Bertacco, approved manager of the Hanwood Sports Club, in the matter of Ken Lewis dated 3 May 2017. This statement is accompanied by the following material:
  - (a) Notice to produce issued by Sergeant Brett Ryan of NSW Police to Mr Bertacco of Hanwood Sports Club dated 3 May 2017 seeking all sales records from Shannon Grove and Smithfield Cellars.
  - (b) 12 tax invoices issued to Hanwood Sports Club in 2016, two of which were from Shannon Grove, two of which were from Sharron Grove Estate and the remaining 8 were from Smithfield Cellars.

- (c) Shannon Grove application for credit dated 30 March 2016.
22. Exhibit E20: Handwritten invoice to Hanwood Sports Club dated 15 April 2016.
23. Exhibit E21: Records for six reconciled transactions relating to Hanwood Sports Club that occurred in 2016 comprising hand written invoices, computer-generated invoices and Westpac bank account records for Smithfield Cellars and Fortress Connected.
24. Exhibit E22: NSW Police Force witness statement of Reginald Gilbert, freehold owner of the Yenda Hotel, in the matter of Ken Lewis dated 1 May 2017. This statement is accompanied by the following material:
- (a) Notice to produce issued by Sergeant Brett Ryan of NSW Police to Mr Gilbert of Yenda Hotel dated 1 May 2017 seeking all sales records relating to Roy Agresta.
  - (b) Yenda Hotel purchase register between 1 January 2015 to 1 May 2017 with the supplier identified as Smithfield Cellars.
  - (c) 8 tax invoices issued to Yenda Hotel in 2016, 1 of which is from Hill River Estate and the remaining 7 were from Smithfield Cellars.
  - (d) Fortress Freight Services consignment note 219 for a delivery from Smithfield Cellars to Yenda Hotel dated 10 March 2016 with the driver of the Truck identified as "Roy".
25. Exhibit E23: Records for two reconciled transactions relating to Yenda Hotel that occurred in 2016 comprising hand written invoices, computer-generated invoices and Westpac bank account records for Smithfield Cellars and Fortress Connected.
26. Exhibit E24: NSW Police Force witness statement of Sophia Snaidero, approved manager of the Yoogali Club, in the matter of unlicensed sale of alcohol dated 18 January 2017.
27. Exhibit E25: Records for one reconciled transaction relating to Yoogali Club that occurred in 2016 comprising a hand written invoice, a computer-generated invoice and Westpac bank account record for Smithfield Cellars.
28. Exhibit E26: Advertising flyers.
29. Exhibit E27: Application for liquor licence lodged on 7 September 2016 by Fortress Freight Services Pty Ltd including email correspondence from L&GNSW staff dated 2 August 2017 advising that the Authority decided to refuse the application.
30. Exhibit E28: An unsigned contract (prepared by JHK Legal) for a chattel sub-lease between Elisa Lewis and Smithfield Cellars for a Mercedes Benz van to commence on 1 September 2017 and end on 24 October 2020.
31. Exhibit E29: Four Smithfield Cellars Recipient Created Tax Invoices dated 2017, three of which relate to a "Sprinter" and one which relates to a "Forklift".
32. Exhibit E30: An unsigned contract (prepared by JHK Legal) for a chattel sub-lease between Inn Security Pty Ltd ("Inn Security") and Smithfield Cellars for a Toyota forklift to commence on 1 September 2017 and end on 30 November 2018.
33. Exhibit E31: ASIC Company Extract for Inn Security extracted on 30 May 2018.
34. Exhibit E32: Two Smithfield Cellars Recipient Created Tax Invoices dated 2017 relating to a "Forklift Lease Monthly Payment".
35. Exhibit E33: OneGov key liquor licence details for Smithfield Cellars, LIQP700352388, as at 25 September 2018.



### **Schedule B – Material Sourced by the Authority Secretariat**

1. OneGov key liquor licence details for Smithfield Cellars Pty Ltd, LIQP700352388, as at 22 August 2019.
2. Screenshot of a OneGov search performed on 22 August 2019 for All Liquor Wholesales related individuals.
3. Screenshot of a OneGov search performed on 22 August 2019 for individuals.
4. Screenshot of a OneGov search performed on 22 August 2019 for organisations.