



Mr Anthony Keon
Director, Compliance
Office of Liquor, Gaming and Racing
Level 6, 323 Castlereagh Street
HAYMARKET NSW 2000

Midcoast Commercial Plastering Pty Ltd
Business Owner
Downunder Nightclub
13 Short Street
PORT MACQUARIE NSW 2444

Mr Maxim Gunsberger
Former Licensee
Downunder Nightclub
*Address
not for publication*

Mr and Mrs Rodney and Georgina Bell
Premises Owners
Downunder Nightclub
c/o Merrick Spicer and Associates
103 Victoria Street
TAREE NSW 2430

cc: *Address not for publication*

By email and/or Express Post

anthony.keon@olgr.nsw.gov.au sean.goodchild@olgr.nsw.gov.au
mspicer@merrickspicer.com.au

Dear Sir/Madam

**Final Decision on Disciplinary Complaint
under Part 9 of the *Liquor Act 2007* against
Mr Maxim Gunsberger, former licensee of "Downunder Nightclub", Port Macquarie**

INTRODUCTION

1. On 27 May 2015, the Independent Liquor and Gaming Authority (**Authority**) received a disciplinary complaint (**Complaint**) under Part 9 of the *Liquor Act 2007* (**Act**) made by Mr Anthony Keon (**Complainant**), Director of Compliance and Enforcement, Office of Liquor, Gaming and Racing (**OLGR**) in his capacity as a delegate of the (then) Secretary (**Secretary**) of NSW Trade and Investment, now the NSW Department of Justice.
2. The Complaint is made in relation to Mr Maxim Eric Gunsberger, the former licensee of the licensed premises trading as "Downunder Nightclub", located at 13 Short Street, Port Macquarie (**Premises**).
3. The licensed business on the Premises operates in the mode of a nightclub pursuant to an on-premises liquor licence number LIQO624006554. The designated primary purpose recorded on the *OneGov* licence record is "*other public entertainment venue*".
4. The licence also has the benefit of an extended trading authorisation that enables the sale or supply of liquor at the Premises to continue beyond the standard licensed trading hours prescribed by section 12 of the Act. In this case, liquor may be sold or supplied for

consumption on the Premises from 5:00am to 4:00am on the following morning, Monday through Saturday and from 10:00am to 12:00 midnight on Sunday.

5. The licence record before the Authority discloses that the licensee is Mr Maxim Gunsberger (**Licensee**) and the business owner of the licensed business operating on the Premises is a company, Midcoast Commercial Plastering Pty Limited (**Business Owner**).
6. [The Authority notes that, since the making of this Complaint, Mr Gunsberger has advised that he ceased employment at the Premises as of 5 July 2015. Mr Gunsberger is still listed on the *OneGov* licence record as the licensee as at the date of this letter. A Cease to Trade Notice received by the Authority on 21 July 2015 indicates that the Premises is no longer trading, that the Licensee has retired and that the Business Owner is "looking for a replacement licensee".]
7. An "Update liquor licence details" form dated 22 August 2013 submitted by Mrs Georgina Carmen Bell indicates that the current owners of the property comprising the Premises are Mr Rodney Thomas Bell and Mrs Georgina Carmen Bell (**Premises Owners**). The Premises Owners are also the shareholders in the corporate Business Owner.

Second Strike Review

8. The Authority also simultaneously considered a separate but related matter concerning the Downunder Nightclub on 25 November 2015. The Premises Owners have made an application for review of a decision pursuant to Part 9A of the Act dated 30 June 2015 made by a delegate of the Secretary that a second "strike" be incurred against the liquor licence (**Second Strike Review**).
9. At the time of this letter, the Authority has determined that the Reviewable Decision should be confirmed and that a final decision on any remedial action to be taken in light of the Second Strike Review will be made following consideration of any final submissions on remedial action.

GROUNDS OF COMPLAINT

10. The Complainant specifies four (4) grounds of Complaint (**Grounds**) that are available under section 139(3) of the Act.

Ground 1

11. This Ground is available under subsection 139(3)(a) of the Act, which states:

That the licensee or manager has, while holding licence or managing licensed premises, been convicted of an offence under this Act or the regulations (or under the former Act) or of an offence prescribed by the regulations.

Ground 2

12. This Ground is available under subsection 139(3)(b) of the Act, which states:

That the licensee or manager has failed to comply with any of the conditions to which the licence is subject.

Ground 3

13. This Ground is available under subsection 139(3)(g) of the Act, which states:

That intoxicated persons have frequently been on the licensed premises or have frequently been seen to leave those premises.

Ground 4

14. This Ground is available under subsection 139(3)(i) of the Act, which states:

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) of the Act 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).

SUMMARY OF FACTS ALLEGED

15. The Complainant relies upon the following allegations in relation to each of the four Grounds.
16. On 31 August 2014, OLGR officers inspected the Premises and detected four (4) offences against the Act committed by the Licensee including:
- three (3) counts of the offence of *Licensee permit intoxication on licensed premises* (which the Authority notes is contrary to section 73(1)(a) of the Act)
 - one (1) count of the offence of *Licensee/employee sell/supply liquor to intoxicated persons* (which the Authority notes is contrary to section 73(2) of the Act).
17. On 6 November 2014, an offence of *Licensee fail to comply with conditions of licence* was detected by Port Macquarie Licensing Police (which the Authority notes is contrary to section 11(2) of the Act) with respect to the following condition on the licence:
- Condition 10100: the requirement for at least two uniformed and highly visible security to patrol the area around the licensed premises.*
18. On 23 November 2014, another offence of *Licensee fail to comply with conditions of licence* was detected by Port Macquarie Licensing Police (which the Authority notes is contrary to section 11(2) of the Act) with respect to the following condition:
- Condition 10600: the "LA10" requirement restricting the level of permissible noise emitted from the licensed premises.*
19. The Complainant submits that a first "strike" was automatically incurred against the licence for the Premises arising from the prescribed offence of *permit intoxication on licensed premises*, which is alleged to have occurred on 16 August 2014.
20. The Complainant has attached to the Complaint a report sourced from the NSW Police Computerised Operational Policing System (**COPS Report**) for the offence of *permitting intoxication on licensed premises* detected on 16 August 2014, along with business records provided to OLGR from the State Debt Recovery Office (**SDRO**) indicating that the Penalty Notice issued by Police in respect of that offence was *paid* on 12 September 2014.
21. The Complainant submits that by reason that a first "strike" was already in force as of 31 August 2014, the detection by OLGR inspectors of further prescribed offences on

31 August 2014 triggered consideration as to whether a second strike ought be incurred against the licence pursuant to the "three strikes" scheme in Part 9A of the Act.

22. The Complainant contends that there is a history of compliance breaches that have been detected in relation to the Premises and that the Licensee's personal history is "indicative of recidivism" in respect of "some of the most serious contraventions of the *Liquor Act 2007* and the former *Liquor Act 1982*".
23. In relation to the regulatory history of the Premises, the Complainant also refers to and encloses a "Liquor Licensing History Report" prepared by the Port Macquarie Local Area Command (**LAC**) of NSW Police which lists offences committed by the Licensee against the *Liquor Act 2007* and the former *Liquor Act 1982* in relation to the Premises. This document states that the licence for the Premises has been held by Mr Gunsberger since 9 May 2005.
24. [The Authority notes that the *OneGov* record for the licence indicates that Mr Gunsberger has been the licensee of the Premises since 9 May 2005. However, an historical record sourced from the AViiON database maintained by the former Liquor Administration Board (**LAB**) discloses that Mr Gunsberger held the licence for the "Downunder Cabaret Restaurant" business that formerly operated on the Premises from 18 September 1986 to 6 February 1991. The licence for the "Downunder Cabaret Restaurant" business was surrendered on 10 December 1997 by reason of the grant of a new nightclub licence for the "Downunder Nightclub" and Mr Gunsberger has held that licence since 9 May 2005.]
25. The Police *Liquor Licensing History Report* briefly identifies five (5) convictions recorded against the licence by the former Licensing Court of NSW during 2007 for the offence of *permitting intoxication on licensed premises* contrary to subsection 125(1)(b) of the former *Liquor Act 1982* while Mr Gunsberger held the licence.
26. The Complainant submits that the convictions secured against the Licensee are reported by Police in the *Liquor Licensing History Report* as follows:
 - a) **16 March 2007**: Conviction for permitting intoxication on the Premises (x 1)
 - b) **18 March 2007**: Conviction for permitting intoxication on the Premises (x 1)
 - c) **7 December 2007**: Conviction for permitting intoxication on the Premises (x 1)
 - d) **9 December 2007**: Convictions for permitting intoxication on the Premises (x 2) (contrary to section 125(1)(b) of the former *Liquor Act 1982*).
27. The Complainant further submits that between 2006 and July 2014, eight (8) warnings and four (4) Penalty Notices were issued by NSW Police to the Licensee, Mr Gunsberger for intoxication offences detected in relation to the Premises.
28. The cautions and infringement notices reported by Police in the *Liquor Licensing History Report* are as follows:
 - a) **13 August 2006**: Penalty Notice No. 4011552564 issued on 4 September 2006 for permitting intoxication on the Premises (\$550)
 - b) **18 August 2006**: Penalty Notice No. 4011552555 issued on 4 September 2006 for permitting intoxication on the Premises (\$550)
 - c) **31 August 2006**: Caution letter in relation to frequent intoxication on the Premises;
 - d) **8 March 2007**: Caution letter in relation to two (2) instances of permitting intoxication on the Premises
 - e) **9 April 2008**: Penalty Notice No. 4015092649 issued on 22 May 2008 in relation to an offence of "unaccompanied minor enter nightclub" (\$550) and Penalty Notice

- No. 4015092630 issued on 22 May 2008 in relation to an offence of "supply liquor to minor" (\$550)
- f) **14 September 2008:** Caution letter in relation to two (2) instances of supplying liquor to intoxicated persons, in respect of the offences outlined in COPS Report number E35126312
 - g) **9 January 2009:** Caution/Warning for supplying liquor to a minor, in respect of the events outlined in COPS Report number E36162018
 - h) **31 May 2009:** Caution letter in relation to permitting intoxication on the Premises, in respect of the events outlined in COPS Report number E3139124295
 - i) **4 July 2009:** Caution letter in relation to permitting intoxication on the Premises, in respect of the events outlined in COPS Report number E37500909
 - j) **26 July 2009:** Penalty Notice No. 4022737979 issued on 5 August 2009 for permitting intoxication on the Premises (\$1,100) and Penalty Notice No. 4022737988 issued on 5 August 2009 for breach of a licence condition in relation to a failure to observe the requirement to keep RSA Certificates in an RSA Register
 - k) **8 August 2009:** Caution/Warning for permitting intoxication on the Premises, in respect of the events outlined in COPS Report number E38053124
 - l) **9 June 2011:** Penalty Notice No. 4031244856 issued on 4 October 2011 in respect of an offence of "licensee fail to comply with conditions of licence" – not record required information in Incident Book (\$1,100)
 - m) **14 August 2011:** Penalty Notice No. 4031244782 issued on 19 August 2011 for permitting intoxication on the Premises (\$1,100)
 - n) **4 March 2013:** Caution/Compliance notice for failure to provide CCTV footage in accordance with the requirements of Part 4 of the *Gaming and Liquor Administration Act 2007*
 - o) **16 August 2014:** Infringement notice (\$1,100) for permitting intoxication on the Premises and Infringement notice (\$1,100) for failing to implement security patrols as required by licence conditions.
29. The Complainant further notes that on 16 August 2014, Police issued a Penalty Notice to the Licensee after observing that three (3) of the venue's patrons were well affected by alcohol and argumentative while on the Premises.
30. [The Authority notes that the SDRO business record dated 17 September 2014 disclose that this Penalty Notice number 4925533847 has been *paid*.]
31. The Complainant further contends that on 30 August 2014, OLGR inspectors attended the Premises and advised the Licensee as to measures to prevent the occurrence of intoxication on the Premises. However, upon their return early the next morning, the OLGR inspectors detected multiple intoxicated patrons on the Premises.
32. The Complainant submits that the Licensee's "inaction" in this regard is "indicative of a permissive culture" and that this "limits the effectiveness of any proposed conditions or alternate measures" to taking disciplinary action.

COMPLAINT MATERIAL

33. The entire Complaint Material provided by OLGR and accompanying the initial Complaint may be summarised as follows:
34. **Complaint Letter dated 27 May 2015** as summarised above.

35. **Complaint Form AM0222.** This is the approved form for making a disciplinary complaint in relation to a liquor licensed premises under Part 9 of the Act. It is signed by the Complainant and dated 27 May 2015. The form identifies the four Grounds upon which the Complaint is made (as noted above). The licensee of the Premises is identified as Mr Maxim Gunsberger.

36. **OneGov liquor licence details for the Premises (LIQO624006554) as at 24 May 2015.** This is a record of the liquor licence provided by the Complainant which indicates that as of 24 May 2015, there is an extended trading authorisation in force in respect of the licence. The licensed trading hours are from 5:00am to 4:00am Monday to Saturday and from 10:00am to 12:00 midnight on Sunday. The conditions of the licence are also listed on this document and include the following requirements:

- a) **Condition 101:** *Different trading hours on Good Friday (12pm to 10pm), Christmas Day (12pm to 10pm), and 31 December (Normal opening time until normal closing time or 2am, whichever is later).*
- b) **Condition 130:** *On Good Friday liquor may only be served with or ancillary to a meal in a dining area. On Christmas Day liquor may only be served with or ancillary to a meal in a dining area.*
- c) **Condition 310:** *No person is to be admitted to the Premises after 2:30am. The sale or supply of liquor on the Premises is to cease at 3:45am. No patrons are to be allowed on the Premises after 4:15am.*
- d) **Condition 350:** *Surveillance cameras are to be installed to monitor and record the main entrance, entire entry stairway, bar, dance floor, and entrance to toilets on Wednesday, Thursday, Friday, and Saturday between 8pm and 4am and for half an hour after closure.*
- e) **Condition 360:** *The licensee must be regularly on duty and on the premises on every Friday and Saturday evening or in his absence an approved manager.*
- f) **Condition 370:** *The licensee is to maintain an Incident Book recording all circumstances in which a patron is removed from the premises and any other confrontation staff may have with a patron.*
- g) **Condition 380:** *Food must be available on the Premises at any time, and advertised with signage.*
- h) **Condition 390:** *The licensee is to install cash facilities on the Premises.*
- i) **Condition 400:** *An announcement is to be made at the cessation of entertainment indicating that patrons should leave the Premises and the vicinity quickly and quietly. A sign requesting that patrons leave the Premises quietly and quickly must also be visible.*
- j) **Condition 420:** *The licensee must not permit any person to take glass or open containers of liquor off the Premises.*
- k) **Condition 430:** *The licensee is to clear a fifty metre radius from the front of the Premises of any garbage left by patrons.*
- l) **Condition 440:** *Water must be available at all times at a minimal price and advertised at the main bar.*
- m) **Condition 450:** *The bar area is to be well lit to assist in assessing intoxication and provide sufficient lighting for surveillance cameras.*
- n) **Condition 460:** *The licensee is to take affirmative action against any patron who has failed to abide by the requests of himself or staff. This is to be recorded in the Incident Book.*
- o) **Condition 470:** *An announcement is to be made at the cessation of entertainment to the effect that any patrons urinating in public places will be banned from the licensed premises.*
- p) **Condition 10100:** *The licensee must ensure that on any trading night at least two licensed uniformed security guards must patrol the area around the Premises.*
- q) **Condition 10600:** *The LA10 noise level emitted from the Premises shall not exceed the background noise level in any Octave Band Centre Frequency by more than 5dB between 7am and 12am at the boundary of any residence or accommodation facility. Between 12am and 7am the LA10 noise level shall not exceed the background noise level in any Octave Band Centre Frequency. Furthermore, the noise from the Premises shall not be audible within any habitable room in any residential premises between the hours of 12am and 7am.*
- r) **Condition 10620:** *When music is conducted on the Premises, an acoustic barrier will be positioned outside of the Premises.*

37. **COPS Event number E54660720 and SDRO business records in relation to the offence detected by Police on 16 August 2014 of permitting intoxication on the Premises contrary to section 73(1) of the Act.** This COPS Report notes that at 2:20am on 16 August 2014, Police entered the Premises and observed three highly intoxicated patrons. This COPS Report also states that Police informed the Licensee that they were investigating intoxication on the Premises. The SDRO business records indicate that the Penalty Notice issued by Police in respect of that offence was paid on 12 September 2014.
38. **Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger* in respect of the offences detected on 31 August 2014.** This document alleges that OLGR inspectors attended the Premises on 30 August 2014 and advised the Licensee to ensure that his security staff were vigilant in identifying intoxicated persons and ensuring that they are not permitted on the Premises. The document alleges that OLGR inspectors attended the Premises again at about 1:10am on 31 August 2014 and identified three patrons who appeared to be intoxicated on the Premises.
39. This document further alleges that OLGR inspectors obtained CCTV footage from the Premises and observed from that footage that on the evening of 31 August 2014, between 12:45am and 1:30am, five patrons on the dance floor appeared to be "well intoxicated".
40. ***JusticeLink* record of the outcomes of the 31 August 2014 offences.** This is an online record of Court outcomes administered by the NSW Attorney-General's Department. It constitutes business records of the outcomes of prosecutions mounted against the Licensee, Mr Gunsberger for the four liquor offences that were detected by OLGR inspectors on 31 August 2014. The orders made by Port Macquarie Local Court are recorded as follows:
 - a) **Order number 00069334-001.** The Licensee was convicted of permitting intoxication on the Premises contrary to section 73(1) of the Act. A fine of \$1,000 was ordered against the Licensee.
 - b) **Order number 00069334-002.** The Licensee was convicted of permitting intoxication on the Premises contrary to section 73(1) of the Act. A fine of \$1,000 was ordered against the Licensee.
 - c) **Order number 00069334-003.** The Licensee was convicted of permitting intoxication on the Premises contrary to section 73(1) of the Act. A fine of \$1,000 was ordered against the Licensee.
 - d) **Order number 00069334-004.** The Licensee was convicted of the offence of licensee, or an employee or agent of the licensee selling or supplying alcohol to intoxicated persons on the Premises contrary to section 73(2) of the Act. A fine of \$1,000 was also issued against the Licensee.
41. ***JusticeLink* indictment text and outcome text for the November 2014 offences.** This business record details the outcome of the prosecutions mounted against the Licensee for the two offences that were detected by Port Macquarie Licensing Police during November 2014 (described above). The orders made by Port Macquarie Local Court are recorded as follows:
 - a) **Order number 00371380-001.** The Licensee was convicted of failing to comply with a condition of the licence contrary to section 11(2) of the Act. A guilty plea was accepted. A fine of \$500 was ordered against the Licensee.
 - b) **Order number 00371380-002.** The Licensee was convicted of failing to comply with a condition of the licence contrary to section 11(2) of the Act. A guilty plea was accepted. A fine of \$500 was ordered against the Licensee.

42. **Liquor Licensing History Report produced by NSW Police, Mid North Coast Local Area Command, dated 20 November 2014.** This Police business record details the history of infringement notices, convictions, and complaints and associated Court ordered fines issued in relation to the Premises during the period from August 2006 to August 2014. This document is discussed in detail above. Accompanying this record is an affidavit sworn on 20 November 2014 by Police Sergeant John Colin Lawrie of Mid North Coast Local Area Command, who prepared the Licensing History, verifying the accuracy of this report.
43. **Regulatory Delegations Conferred by the Secretary, NSW Trade and Investment – Instrument of Delegation as at 27 April 2015.** This 40-page document records the delegation of functions from the Secretary of the (then) Department of Trade and Investment, Regional Infrastructure and Services (NSW Trade & Investment) to various Departmental office holders.
44. It is noted with regard to section 139(1)(a) of the Act that a delegation in respect of disciplinary complaints made under Part 9 of the Act has been issued to the Deputy Secretary, IIR&A, the Executive Director of OLGR, and the Director, Compliance and Enforcement of OLGR (the position occupied by the Complainant).

PROGRESS OF THE COMPLAINT

45. At its meeting on 26 August 2015, the Authority resolved to issue Show Cause Notices, subject to a requirement that the Complainant first provide the Authority with appropriate business records (Penalty Notices, Certificates of Convictions or *JusticeLink* records) evidencing the outcomes of the matters pertaining to Mr Gunsberger's personal history of licensing compliance that had been only briefly referred to in the *Liquor Licence History Report* prepared by NSW Police.

Supplementary Material provided by the Complainant on 9 October 2015

46. On 28 August 2015, the Authority advised OLGR that it would require supplementary evidence before issuing the Show Cause Notices.
47. On 9 October 2015, the Complainant sent an email to the Authority attaching three bundles of further material (**Supplementary Material**). This material included:
48. First, the Complainant provided a bundle of 8 pages of records from the LAB AViiON licensing database with records of pre 1 July 2008 action taken in relation to the Licensee and the Premises. That material records the following Court outcomes in proceedings dating from February 1990 to December 2007:
 - a) **17 February 1990:** Licensee did without previous written consent sub-let part of licensed premises. Prosecution dismissed.
 - b) **17 February 1990:** Prescribed signs were not displayed on the licensed premises. Conviction (fine of \$150 plus Court costs of \$40).
 - c) **17 February 1990:** Offences against the *Liquor Act 1982*, sections 67, 68 and 69. Section 68(1)(b) – conviction (fine of \$500 plus Court costs of \$40).
 - d) **23 February 1990:** Prescribed signs were not displayed within the licensed premises. Conviction (fine of \$150 plus Court costs of \$40).
 - e) **23 February 1990:** Licensee did sell and supply liquor outside authorised hours. Conviction (fine of \$200 plus Court costs of \$40).
 - f) **23 February 1990:** Offences against the *Liquor Act 1982*, sections 67, 68 and 69. Section 68(1)(b) – conviction (fine of \$750 plus Court costs of \$40).

- g) **16 March 2007:** On 16 March 2007 at Port Macquarie, the Licensee did permit intoxication or indecent, violent or quarrelsome conduct on licensed premises contrary to section 125(1)(b) of the *Liquor Act 1982*. Conviction (fine of \$535 plus Court costs of \$65).
 - h) **18 March 2007:** On 18 March 2007 at Port Macquarie, the Licensee did permit intoxication or indecent, violent or quarrelsome conduct on licensed premises contrary to section 125(1)(b) of the *Liquor Act 1982*. Conviction (fine of \$535 plus Court costs of \$65).
 - i) **7 December 2007:** On 7 December 2007 at Port Macquarie, the Licensee did permit intoxication or indecent, violent or quarrelsome conduct on licensed premises contrary to section 125(1)(b) of the *Liquor Act 1982*. Conviction (fine of \$200 plus Court costs of \$70).
 - j) **9 December 2007:** On 9 December 2007 at Port Macquarie, the Licensee did permit intoxication or indecent, violent or quarrelsome conduct on licensed premises contrary to section 125(1)(b) of the *Liquor Act 1982*. Conviction (fine of \$200 plus Court costs of \$70).
 - k) **9 December 2007:** On 9 December 2007 at Port Macquarie, the Licensee did permit intoxication or indecent, violent or quarrelsome conduct on licensed premises contrary to section 125(1)(b) of the *Liquor Act 1982*. Conviction (fine of \$200 plus Court costs of \$70).
49. Second, the Complainant provided a bundle of 67 pages of COPS Reports, *JusticeLink* records, Prosecution Fact Sheets, Penalty Notices and various correspondence between Police and the Licensee and OLGR and the Licensee dating from March 2007 to August 2014. This bundle comprises:
- a) **COPS Event number E54660720** recording the circumstances of the offences of permitting intoxication that were detected on the Premises on 16 August 2014.
 - b) **Letter from Senior Constable Dean Magennis of Mid North Coast Licensing Police to the Licensee dated 15 August 2013** drawing the Licensee's attention to a "noticeable increase" in noise complaints, alcohol related assaults and street offences linked to the Premises and advising that the Premises will be closely monitored and possible intervention or action will be taken to rectify this problem if incidents of violence keep occurring.
 - c) **Letter from Senior Constable Dean Magennis of Mid North Coast Licensing Police to the Licensee dated 15 August 2013** advising that there appears to be a "deficiency" in the CCTV footage provided by the Licensee pursuant to a Notice to Produce issued under section 21 of the *Gaming and Liquor Administration Act 2007* and requesting that the Licensee ensure that the CCTV system covers the entire entry stairway.
 - d) **Letter from Senior Constable Dean Magennis of Mid North Coast Licensing Police to the Licensee (undated)** advising that breaches of the licensing legislation pertaining to CCTV and the Security and Premises Incident Registers detected during January 2013 have been recorded as Compliance Notices (attached to this letter).
 - e) **COPS Event number E45169923** recording the circumstances of an offence of permitting intoxication that was detected on the Premises on 14 August 2011.
 - f) **Penalty Notice No. 4031244782** issued by NSW Police on 19 August 2011 in respect of an offence of "permitting intoxication on licensed premises" that occurred on 14 August 2011 (\$1,100).
 - g) **Penalty Notice No. 4031244856** issued by NSW Police on 4 October 2011 in respect of an offence of "licensee fail to comply with conditions of licence" – not record required information in Incident Book that occurred on 9 June 2011 (\$1,100).

- h) **Caution Notice from Sergeant John Lawrie to the Licensee dated 24 August 2009** for frequent intoxication and breach of licence conditions.
- i) **COPS Event number E139124295** regarding an overt audit conducted on the Premises on 31 May 2009. Intoxicated patrons were observed on the Premises and the Licensee was spoken to and given a warning regarding these observations.
- j) **COPS Event number E37500909** regarding a business inspection conducted on the Premises on 4 July 2009. The Licensee was given a warning regarding the need for proactive security patrols both within and outside the Premises, the need to identify intoxicated persons in a timely and appropriate manner, and the requirement to complete the Incident Book at the time of an incident rather than upon closure of the Premises.
- k) **Penalty Notice No. 4022737988** issued by NSW Police on 5 August 2009 in respect of a breach of licence conditions – not have RSA Certificate in the RSA Register that occurred on 26 July 2009 (\$1,100).
- l) **Penalty Notice No. 4022737979** issued by NSW Police on 5 August 2009 in respect of an offence of "licensee permit intoxication on licensed premises" that occurred on 26 July 2009 (\$1,100).
- m) **COPS Event number E38289462** detailing the observations made by Licensing Police during an overt audit of the Premises conducted on 26 July 2009 "due to the obvious high levels of intoxication in patrons on the CBD streets".
- n) **Letter from Sergeant John Lawrie to the Licensee dated 19 February 2009** recording the minutes for a meeting held on that date between Sergeant Lawrie and the Licensee. Positive aspects and concerns in relation to the Premises were discussed, with the "focal issues" for the Premises being recorded as intoxication; assaults; and quiet and good order.
- o) **Caution Notice from Sergeant John Lawrie to the Licensee dated 15 September 2008** in relation to permitting intoxication on licensed premises.
- p) **COPS Event number E35126312** concerning a licensed premises inspection conducted by NSW Police on 14 September 2008. The Licensee received a Compliance Notice for permitting an intoxicated patron to remain on the licensed premises.
- q) **COPS Event number E38053124** concerning a covert observation of the Premises by Licensing Police conducted on 8 August 2009. The Licensee was given a warning regarding permitting intoxication on the Premises.
- r) **COPS Event number E292077891** in relation to a report that one of the security officers on duty at the Premises on 10 April 2008 was detaining a young person for offensive language. The young person agreed to receive a caution for offensive language and was eventually ejected from the Premises. The Licensee was advised that an infringement notice would be forthcoming for supplying liquor to a minor.
- s) **Penalty Notice No. 4015092649** issued by NSW Police on 22 May 2008 in relation to an offence of "unaccompanied minor enter nightclub" that occurred on 9 April 2008 (\$550).
- t) **Penalty Notice No. 4015092630** issued by NSW Police on 22 May 2008 in relation to an offence of "supply liquor to minor" that occurred on 9 April 2008 (\$550).
- u) **Letter from Mr Albert Gardner, the (then) Director Compliance of OLGR to the Licensee dated 16 October 2007** enclosing Penalty Notice No. 7670487029 for the offence of permitting intoxication on licensed premises that occurred on 7 October 2007 (\$550).
- v) **Letter from Sergeant John Lawrie to the Licensee dated 17 July 2007** noting a number of recent offences of permitting intoxication on licensed premises that

occurred on 10 June 2007 and making several recommendations by which to address intoxication.

- w) **Letter from Sergeant John Lawrie to the Licensee dated 8 March 2007** noting a number of recent offences of permitting intoxication on licensed premises that occurred on 24 February 2007 and 3 March 2007 and advising that this matter has been recorded on the Police COPS database as a warning.
 - x) **Letter from Sergeant John Lawrie to the Licensee dated 31 August 2006** noting a number of recent offences of permitting intoxication on licensed premises that occurred on 9 July 2006, 12 August 2006 and 18 August 2006 and making several recommendations by which intoxication may be reduced.
 - y) **Penalty Notice No. 4011552564** issued by NSW Police on 4 September 2006 in relation to an offence of "licensee permit intoxication" that occurred on 13 August 2006 (\$550).
 - z) **Penalty Notice No. 4011552555** issued by NSW Police on 4 September 2006 in relation to an offence of "licensee permit intoxication" that occurred on 18 August 2006 (\$550).
 - aa) **COPS Event number E27643433** concerning an overt audit of the Premises conducted by Licensing Police on 13 August 2006. The Licensee was informed that he would be spoken to about permitting intoxication on the licensed premises.
 - bb) **Letter from Mr Albert Gardner, the (then) Assistant Director of Compliance of the (then) Department of Gaming and Racing to Superintendent Mark Holohan attached to the Mid North Coast LAC dated 12 September 2005** advising that OLGR had received a complaint against the Premises which alleges that the Premises serves liquor irresponsibly. OLGR states that the concerns raised by the complainant would seem best addressed by the Police Service. Accordingly, the matter is referred by OLGR to Police for attention and consideration of any necessary action.
 - cc) **Caution Notice from Sergeant Lawrie to the Licensee dated 22 September 2005** in relation to employing an unlicensed person to engage in security activities at the Premises.
 - dd) **NSW Police Facts Sheet for Charge number H33390665** in relation to two (2) counts of the offence of "licensee permit intoxication on licensed premises" contrary to section 125(1)(b) of the former *Liquor Act 1982* detected on 9 December 2007.
 - ee) **NSW Police Facts Sheet for Charge number H32453864** in relation to one (1) count of the offence of "licensee permit intoxication on licensed premises" contrary to section 125(1)(b) of the former *Liquor Act 1982* detected on 7 December 2007.
 - ff) **NSW Police Facts Sheet for Charge number H29795927** in relation to two (2) counts of the offence of "licensee permit intoxication on licensed premises" contrary to section 125(1)(b) of the former *Liquor Act 1982* detected on 15 and 18 March 2007.
 - gg) **NSW Police Criminal History – Bail Report for the Licensee obtained by Sergeant Lawrie on 6 October 2015.**
 - hh) **JusticeLink record of the outcomes of the offences that occurred on 31 August 2014** (as discussed above).
 - ii) **JusticeLink record of the outcomes of the offences that occurred in November 2014** (as discussed above).
 - jj) **Summary of several offences and outcome text for the Licensee between 2007 and 2008** (included on the NSW Police *Criminal History – Bail Report*).
50. Third, the Complainant attached the 31-page bundle comprising the Complaint Material, which has already been summarised above.

51. On 12 October 2015, the Authority's Chief Executive wrote to the Licensee, the corporate Business Owner and the Premises Owners pursuant to the consultation requirements in section 140 of the Act, setting out the Grounds of Complaint, providing a copy of all of the Complaint Material and the Supplementary Material in the form in which it was provided by the Complainant, and inviting each of these interested parties to show cause by way of written submissions as to why disciplinary action should not be taken against the Licensee or the licence on the basis of the Grounds specified in the Complaint.
52. The Licensee, Business Owner and Premises Owners were also advised of a timetable for making written submissions on disciplinary action and informed that the Authority will usually determine disciplinary matters on the papers.

Submission from the Licensee to the Authority dated 16 October 2015

53. On 16 October 2015, the Licensee, Mr Gunsberger provided a brief email submission to the Authority. The full text of that email states as follows:

*I do not work for Downunder Niteclub anymore.
I ceased working for the venue on 5 Jul 2015.*

Two (2) weeks prior to that date a signed application to transfer the license was supplied to the business owners.

*On the 15th of July they also got me to sign a currently not trading notice.
Local Police have been notified verbally that I am no longer involved with the business and that I have retired as of 5/7/15.*

I am unsure as to why I am still listed as the licensee as I am now a retired Aged Pensioner.

54. The Authority's General Counsel advised Mr Gunsberger via return email also dated 16 October 2015 that the Authority may still consider the Complaint, notwithstanding that Mr Gunsberger is now the former licensee of the Premises. The full text of that email states:

Thank you for your email.

As requested in the letter, if you do make a submission, please copy the Complainant (whom I have copied in this email).

I should point out for your assistance that even if your employment relationship with the business has ceased it is open to the Authority to consider a complaint in relation to a former licensee as well as a current one.

This means that if you propose to make any further submissions (or evidence in the form of a statutory declaration) addressing the merits of the Complaint you must do so within the time specified in the timetable.

If you do not wish to make any further submissions, please confirm by email and the matter will be determined on the basis of the material before the Authority (including your email of today).

Submission from the Business Owner/Premises Owners dated 5 November 2015

55. On 5 November 2015, Mr Peter Smith of the law practice Merrick Spicer & Associates, who act for the Business Owner and Premises Owners (**Owners**), provided a submission to the Authority in response to the Grounds of Complaint. The key points of that submission may be summarised as follows:

Ground 1

56. Ground 1 of the Complaint alleges that the Licensee has been convicted of an offence under the Act. Mr Smith notes that the Complainant refers to the offences committed by the Licensee on 31 August 2014 which gave rise to the Secretary's consideration of the imposition of a second strike against the licence.
57. Mr Smith submits that the Licensee has been dealt with by Port Macquarie Local Court in relation to the commission of those offences and that the Complainant again seems to wish to rely upon those same offences when considering whether further disciplinary action should be taken against the Licensee as a consequence of this Complaint.

Ground 2

58. Ground 2 of the Complaint alleges that the Licensee failed to comply with conditions to which the licence was subject. Mr Smith notes that the Complainant relies upon the two contraventions of Condition 10100 (a requirement that at least two uniformed and highly visible security guards patrol the area around the licensed premises) and Condition 10600 (the "LA10" noise requirement restricting the level of permissible noise emitted from the licensed premises) that occurred during November 2014 and were dealt with at Port Macquarie Local Court on 8 April 2015.
59. Mr Smith notes that these matters were not considered as part of the decision determining that a second strike should be incurred upon the licence.
60. In relation to these matters, Mr Smith submits that the Premises Owner, Mrs Bell, has "at all times been willing to cooperate" with the Authority and particularly local licensing Police, and that Mrs Bell has "sought to develop an open line of communication so that improvements can be made and new issues worked through".
61. Mr Smith notes that Mrs Bell wrote to Port Macquarie Licensing Sergeant John Lawrie in December 2011, and attaches a copy of that correspondence (discussed below).
62. Mr Smith submits that the imposition of licence Condition 10610 (in relation to a requirement that a noise limiter be used at all times when amplified music is conducted at the Premises) and Condition 10620 (in relation to a requirement that an acoustic barrier be positioned above the nightclub entrance at all times when amplified music is conducted on the Premises) arose in part as a result of consultation between the interested parties, which was a "satisfying concept" from the Owners' point of view and one that "sought a solution to an otherwise challenging issue".
63. Mr Smith submits that the fact that a "further complaint" was made in relation to the Premises on 23 November 2014 [the Authority notes that this is an apparent reference to the contravention of Condition 10600 of the licence in relation to the LA10 noise restriction] is "disappointing".
64. Mr Smith submits that the Licensee did not challenge the "actual assertions" [the Authority notes that this is perhaps intended to read "factual assertions"] regarding that offence and entered a plea of guilty, and that "no similar offences have taken place since". However, Mr Smith notes that the Premises has not traded since July 2015.
65. Mr Smith submits that the second matter under Ground 2 now relied upon by the Complainant is the failure to comply with licence Condition "1010" [the Authority notes that this is an apparent reference to Condition 10100].

66. Mr Smith contends that the imposition of this licence condition "came without any consultation with the Licensee" or the Premises Owners. Mr Smith acknowledges that "consultation need not take place", but submits that such consultation "does help develop a better understanding and commitment to compliance when some teamwork dealing with the social interaction with patrons and authorities is concerned".
67. Mr Smith submits that there is "certainly a distinction" between the former patrol conditions and the subject condition imposed on 30 October 2014. Mr Smith refers to the attached statement made by the Licensee, Mr Gunsberger, dated 3 November 2015 in support of his submissions (discussed below).

Ground 3

68. In response to Ground 3 of the Complaint, Mr Smith submits on behalf of the Owners that they "cannot identify the circumstances relied upon to establish Ground 3" and that the Complainant again seems to rely upon the offences that occurred in August 2014.

Ground 4

69. In response to Ground 4 of the Complaint, Mr Smith submits on behalf of the Owners that:

...when taking into context the very lengthy history of this Night Club, the overall improvement in compliance, and attitude towards working towards compliance is evident that this ground cannot be given sufficient weight to impose further disciplinary action.

70. In conclusion, Mr Smith submits that the offences that have occurred since August 2014 do not involve any degree of harm that may have resulted from or been associated with the commission of an offence.
71. Mr Smith submits that while these offences "cannot be ignored", they are offences of a "technical nature" in terms of compliance with the Premises' licence conditions.
72. Mr Smith advises that the Licensee has signed an agreement to enable Mrs Bell to make an application for the licence to be transferred to her as an owner in possession.
73. Attached to this submission on behalf of the Owners are the following documents:
74. **Submission from the Licensee dated 1 May 2015** in relation to the consideration of the second strike, which had been previously submitted to OLGR on 4 May 2015. Briefly, the Licensee requests in this document that a second strike should not be imposed against the licence. The Licensee's submissions may be summarised as follows:
- a) Mr Gunsberger has been the Licensee of the Premises for the last "18 years", during which time there have been "big changes" in the Liquor Act and the conditions of the licence. The Licensee submits that he has "been a constant" as far as the Premises and the licence are concerned.
 - b) The Licensee submits that he is responsible for hiring and firing staff and that he has, during his tenure as licensee, "fired a lot of staff because of the risk that they posed regarding potential breaches of the Act". The Licensee submits that he is "always careful to employ properly qualified staff" and to ensure that those staff know precisely the types of behaviour that they need to be on the lookout for.
 - c) The Licensee submits that "nearly everyone" that attends the Premises drinks alcohol; some of whom may have consumed alcohol before they arrive at the Premises. However, patrons are "vetted at the door for intoxication" and if admitted, are "under surveillance" by bar staff, security staff, general staff and the Licensee.

- d) The Licensee submits that the Downunder Nightclub is operated in "what would otherwise be an underground car park". The Licensee submits that the Premises has low ceilings; dimmed lighting; is permitted to have in excess of 200 people when at full capacity; and that the nightclub operates at full capacity "on a number of occasions each year". The Licensee submits that when the Premises is at or close to full capacity, it is "difficult to monitor every last patron for intoxication".
- e) The Licensee contends that on 31 August 2014, the nightclub was "busy". The Licensee submits that no violence occurred at the nightclub "at all" on that date and the mood within the club was "positive". The Licensee submits that "people, often in a celebratory mood, embrace each other, pick each other up and dance in a strange way" and that the Licensee is "very used to this" and can "very quickly" identify any patron who is becoming aggressive or anti-social.
- f) The Licensee submits that he has a history in security, that he employs a number of security guards, and that people who display violent or anti-social behaviour are "ejected immediately".
- g) The Licensee submits that there was no such behaviour on 31 August 2014, but "accepts" that he "made a mistake" on 31 August 2014 between the hours of 12:55am and 1:30am by allowing three intoxicated patrons to be admitted to the Premises and to remain on the Premises.
- h) The Licensee submits that these patrons were not admitted to the Premises as intoxicated persons and that they "became intoxicated over the time they stayed within the Premises, possibly a period of between 1 and 2 hours".
- i) The Licensee accepts that at the time these patrons were observed by Police, they were intoxicated, but submits that "15 minutes before this, they were not, in my view, intoxicated".
- j) The Licensee submits that all of the intoxicated patrons were ejected, "none of whom put up any resistance and all left peacefully".
- k) The Licensee observes that the facts recorded by Police mention "larrikinism", but in the Licensee's view, the intoxicated patrons were "simply happy and celebrating".
- l) The Licensee submits that he was interviewed by Police about this matter and made "immediate admissions" in relation to the matter. He submits that he has "been in the industry long enough to recognise a person who is intoxicated" within the meaning of the *Liquor Act* and that although the patrons in question were intoxicated, they "had not been in that state for very long".
- m) The Licensee submits that the nightclub went through its "busiest period of the year" following 31 August 2014 and that "we have had full houses on a number of occasions and there have not been any further offences".
- n) The Licensee submits that the Police attention to the Premises, and other late night trading venues in Port Macquarie, is "both constant and enthusiastic". The Licensee contends that Police attend the Premises on "every night the Premises are open" and that on busy nights, it is not uncommon to see Police "up to three times to do a walk-through". The Licensee further contends that there are other occasions when licensing Police "from out of town attend undercover".
- o) The Licensee contends that all of his staff have been spoken to; that staff meetings have been held; regular reminders are given to staff; and new staff are given inductions and "the point is driven home that when in doubt, don't serve". Staff are also told that, if in doubt that a person is an intoxicated person, they should notify either the Licensee or one of the security guards on the Premises so that any intoxicated persons may be removed.

- p) The Licensee concludes with the submission that:

I was simply off my game on 31 August 2014 and I am sorry for this, both for myself and indeed for the owners of the Premises who have suffered a financial loss because of my inadvertence.

75. **Statement of the Licensee, Mr Maxim Gunsberger (unsworn) dated 3 November 2015.** Briefly, the key points of this submission are as follows:

- a) Since 5 July 2015, Mr Gunsberger has not been employed by the Premises. He has consented to the licence being transferred to Mrs Bell as an owner in possession.
- b) Mr Gunsberger is now "retired" and his primary source of income is an aged pension. He has "no intention" of re-entering the workforce and in particular the hospitality industry as a licensee, manager or otherwise.
- c) By way of background to the contraventions of licence conditions that were detected in November 2014, Mr Gunsberger submits that both he as the licensee and the Premises Owners were aware that the management of the Mantra holiday accommodation facility, located on the corner of William and Short Streets, Port Macquarie (across the road from the Downunder Nightclub) had previously lodged noise complaints against the Premises.
- d) Mr Gunsberger states that he was aware that when his employer was given notice of these noise complaints, they engaged a sound engineer to work towards arriving at a solution, as suggested by the Authority. Mr Gunsberger submits that as a follow on from the reports prepared by the sound engineer, Conditions 10610 and 10620 were imposed upon the licence. Mr Gunsberger states that he, in a meeting with the Owners, "agreed that the conditions were not unreasonable and didn't believe we should challenge them".
- e) However, by contrast, Mr Gunsberger submits that Condition number 10100 was "simply imposed" upon the licence. Mr Gunsberger does not believe that the Owners were involved in any "discussions of a consultative nature" that gave rise to the imposition of that condition.
- f) Mr Gunsberger submits that the first time he became aware of the imposition of that condition was when he received a letter from OLGR in November 2014. Further, as there had been "no consultation" about the imposition of that condition, there was "no background material that could add to a clear interpretation of the clause so there was merely my reading of the condition that was to be acted upon".
- g) Mr Gunsberger submits that as Licensee of the Premises, he was responsible for hiring and firing staff and engaging contract personnel. Mr Gunsberger states that he liaised with Sigma Services Group (**SSG**) to employ security personnel for the nightclub. Up until the imposition of Condition 10100 on 30 October 2014, SSG provided security personnel on Friday and Saturday nights (and special trading nights such as during Easter and Christmas).
- h) Mr Gunsberger submits that the licence conditions prior to 30 October 2014 stipulated that any security personnel engaged by the Premises must be persons other than employees of the Premises, and that was the reason why he contracted that work to SSG. Mr Gunsberger submits that Condition 10100 was "slightly different" in terms of the area to be patrolled and "confusingly drafted" as to its definition of "vicinity".
- i) Mr Gunsberger submits that upon receiving the letter from OLGR advising the imposition of this condition in early November 2014, he briefed the security personnel engaged by the Premises and read out the terms of the condition to them. Mr Gunsberger submits that he "was not aware" that the security personnel were not compliant with this licence condition until the Port Macquarie Licensing

Sergeant contacted Mr Gunsberger to discuss his observations of the patrol movements.

- j) In conclusion, Mr Gunsberger makes the following submissions in response to the Complaint:
- i. Mr Gunsberger **does not admit** that since the events of 2014 that gave rise to the imposition of the second strike, he has committed any offence under the Act
 - ii. Mr Gunsberger **admits** that since the events of 2014 giving rise to the imposition of the second strike, he did plead guilty to a failure(s) to comply with a condition to which the licence is subject
 - iii. Mr Gunsberger **disputes** that since the events giving rise to the imposition of the second strike, intoxicated persons have frequently been on the licensed premises or have been seen to leave those premises
 - iv. Mr Gunsberger **disputes** that he is not a fit and proper person to be a holder of a licence were he in a position to wish to hold a licence.

76. **Email from the Premises Owner, Mrs Georgina Bell to Port Macquarie Licensing Sergeant John Lawrie dated 5 December 2011.** The full text of this email states as follows:

I haven't received any correspondence from you in some time and anticipate that things are progressing well. As you are aware we have continued to keep in place the procedures and policies you have suggested and are happy to be moved from a Category 4 to a Category 3 premises.

I haven't received any incident or linking reports for some time and was hoping you would be able to send me the last years [sic] worth of data, so that Max I can review these.

I am in Port Macquarie regularly if you feel the need for us to meet in person.

77. **Email from Port Macquarie Licensing Sergeant John Lawrie to the Premises Owner, Mrs Georgina Bell dated 8 December 2011.** The full text of this email states as follows:

I will not be doing the linking data report with yourself at this time. There is no requirement for me to do that with any owner of premises or licensee. This is mainly due to time constraints for me, nothing personal. I prefer to work directly with the licensee who is there every weekend until 4am. Perhaps work in with Max and when we meet you are most welcome.

I have been regularly dealing with Max and we have a declared premises review every round which he is supplied the violent incidents that have occurred on the premises. The premises has been travelling well the last three months, however there are signs of intoxicated patrons inside and leaving the venue. Anti-social behaviour and violence is a regular situation around the nightclub precincts, the DECLARED PREMISES strategy only deals with violence that occurs on or directly outside the premises.

At this time I am working with all the licensee's [sic] looking at promoting

- *Strict Responsible Service*
- *The Night Rider Bus is utilised to maximum potential*
- *The Liquor Accord funded radio's [sic] are properly utilised.*

Happy to talk on the phone outside of this.

No Submission in reply from OLGR

78. The submission on behalf of the Owners was forwarded to OLGR, inviting the Complainant to make any submissions in reply by 12 November 2015. No submission was received on behalf of the Complainant.

LEGISLATION

79. The Authority has considered the provisions contained in Part 9 of the Act. Relevantly, sections 139 through 142 state as follows:

139 Grounds for making complaint

- (1) *A complaint in relation to a licensee, manager or close associate of a licensee may be made to the Authority by any of the following (referred to in this Part as "**the complainant**"):*
 - (a) *the Secretary,*
 - (b) *the Commissioner of Police,*
 - (c) *a person authorised by the regulations to make a complaint under this Part.*
- (2) *A complaint must be in writing and specify the grounds on which it is made.*
- (3) *The grounds on which a complaint in relation to a licensee, manager or close associate may be made are as follows:*
 - (a) *that the licensee or manager has, while holding a licence or managing licensed premises, been convicted of an offence under this Act or the regulations (or under the former Act) or of an offence prescribed by the regulations,*
 - (b) *that the licensee or manager has failed to comply with any of the conditions to which the licence is subject,*
 - (c) *that the licensee has failed to comply with any of the conditions to which any authorisation or approval held by the licensee under this Act is subject,*
 - (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,*
 - (e) *that the licensee or manager has failed to comply with a direction or other requirement of the Authority, the Secretary or the Commissioner of Police under this Act (or of the Secretary or the Commissioner under the former Act),*
 - (f) *that the licensee or manager has engaged in conduct or activities that are likely to encourage misuse or abuse of liquor (such as binge drinking or excessive consumption),*
 - (g) *that intoxicated persons have frequently been on the licensed premises or have frequently been seen to leave those premises,*
 - (h) *that acts involving violence against persons or damage to property have frequently been committed on or near the licensed premises by persons who have been on the licensed premises,*
 - (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),*
 - (j) *that the close associate is not a fit and proper person to be a close associate of a licensee,*
 - (k) *that a complaint against a licensee under this section has been made and that:*
 - (i) *the close associate knew or ought reasonably to have known that the licensee was engaging (or was likely to engage) in conduct of the kind to which the complaint relates, and*
 - (ii) *the close associate failed to take all reasonable steps to prevent the licensee from engaging in conduct of that kind,*
 - (l) *that the close associate is (or has become) a close associate of a licensee while disqualified by the Authority from being a close associate,*
 - (m) *that a person who is interested in the business, or in the conduct or profits of the business, carried on under the licence is not a fit and proper person to be so interested,*
 - (n) *that a person is (or has become) a person who is interested in the business, or in the conduct or profits of the business, carried on under a licence while disqualified by the Authority under this Part from being a person so interested,*
 - (o) *in the case of a limited licence – that the licensee has not exercised proper control and supervision over a function held under the licence,*
 - (p) *in the case of a limited licence – it is not in the public interest for liquor to be sold or supplied at functions held by or under the auspices of the non-proprietary association on whose behalf the licence is held,*

- (q) *in the case of a licence held by a corporation – that a person who occupies a position of authority in the corporation is not a fit and proper person to occupy such a position in a corporation that is the holder of a licence,*
- (r) *that public entertainment has been conducted on the licensed premises otherwise than in accordance with any requirements under the Environmental Planning and Assessment Act 1979 relating to the use of the premises for public entertainment,*
- (s) *that the licence has not been exercised in the public interest,*
- (t) *that the continuation of the licence is not in the public interest.*
- (4) *In subsection (3),*
"former Act" *means the Liquor Act 1982 or the regulations made under that Act and includes, in the case of a licensee that is a registered club, the Registered Clubs Act 1976 as in force immediately before the repeal of section 9 of that Act by Schedule 2 to the Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Act 2007.*

140 Procedure for taking disciplinary action

- (1) *If a complaint in relation to a licensee, manager or close associate is made under this Part, the Authority must, before taking any disciplinary action against the licensee, manager or close associate, notify the licensee, manager or close associate in writing of the grounds on which the Authority is proposing to take disciplinary action.*
- (2) *Any such notice is to invite the licensee, manager or close associate to show cause, by way of a written submission, as to why the Authority should not take disciplinary action against the licensee, manager or close associate.*
- (3) *The Authority must also, before taking disciplinary action against a licensee, invite written submissions from the following persons:*
 - (a) *if the licensee occupies the licensed premises under a lease—the lessor,*
 - (b) *each person named in the written statement referred to in section 41 that accompanied the application for the licence,*
 - (c) *each person named in the information provided to the Authority (as required by section 55) who has become interested in the business, or the conduct of the business, carried out on the licensed premises concerned,*
 - (d) *if the grounds for taking the proposed disciplinary action relate to a person (other than the licensee) not being a fit and proper person—that person.*
- (4) *The Authority may specify:*
 - (a) *the time within which a submission under this section may be made, and*
 - (b) *any other requirements that must be complied with in relation to the making of any such submission.*
- (5) *If any written submission is made in accordance with this section, the Authority must take the submission into consideration in deciding whether or not to take disciplinary action against the licensee, manager or close associate concerned.*
- (6) *Subsection (1) does not require the Authority to disclose any criminal intelligence.*

141 Disciplinary powers of Authority

- (1) *The Authority may deal with and determine a complaint that is made to it under this Part.*
- (1A) *If the Authority is satisfied that the criminal organisation associate ground applies in relation to a licensee, the Authority must do one or both of the following:*
 - (a) *disqualify the licensee from holding a licence for such period as the Authority thinks fit,*
 - (b) *cancel the licence.*
- (1B) *If the Authority is satisfied that the criminal organisation associate ground applies in relation to a manager, the Authority must do one or both of the following:*
 - (a) *disqualify the manager from being the manager of a licensed premises for such period as the Authority thinks fit,*
 - (b) *withdraw the manager's approval to manage licensed premises.*
- (2) *If the Authority is satisfied that any of the grounds (other than a criminal organisation associate ground) on which the complaint was made apply in relation to the licensee, manager or close associate, the Authority may decide not to take any action or may do any one or more of the following:*
 - (a) *cancel the licence,*
 - (b) *suspend the licence for such period not exceeding 12 months (or, if circumstances of aggravation exist in relation to the complaint, not exceeding 24 months) as the Authority thinks fit,*
 - (c) *order the licensee or manager to pay, within such time as is specified in the order:*

- (i) a monetary penalty not exceeding 500 penalty units (in the case of a corporation) or 200 penalty units (in the case of an individual), or
 - (ii) if circumstances of aggravation exist in relation to the complaint—a monetary penalty not exceeding 1,000 penalty units (in the case of a corporation) or 400 penalty units (in the case of an individual),
 - (d) suspend or cancel any authorisation or other approval (other than the licence itself) held by the licensee under this Act,
 - (e) impose a condition to which the licence, or any authorisation or approval held by the licensee under this Act, is to be subject or revoke or vary a condition to which the licence or any such authorisation or approval is subject,
 - (f) disqualify the licensee from holding a licence, or from being the manager of licensed premises or the close associate of a licensee, for such period as the Authority thinks fit,
 - (g) withdraw the manager's approval to manage licensed premises,
 - (h) disqualify the manager from being the manager of licensed premises, or from holding a licence or being the close associate of a licensee, for such period as the Authority thinks fit,
 - (i) in the case of a limited licence held on behalf of a non-proprietary association—order that a limited licence is not, for a period of not more than 3 years from the date on which the decision takes effect, to be granted to any person on behalf of the non-proprietary association,
 - (j) disqualify the close associate from being a close associate of a licensee or the manager of licensed premises for such period as the Authority thinks fit,
 - (k) disqualify the close associate from holding a licence for such period as the Authority thinks fit,
 - (l) order the licensee, manager or close associate to pay the amount of any costs incurred by:
 - (i) the Secretary in carrying out any investigation or inquiry under section 138 in relation to the licensee, manager or close associate, or
 - (ii) the Authority in connection with the taking of disciplinary action against the licensee, manager or close associate under this section,
 - (m) reprimand the licensee, manager or close associate.
- (3) If the Authority orders a licensee or manager to pay a monetary penalty under this section and the penalty is not paid within the time specified in the order, the Authority may:
- (a) cancel the licence, or
 - (b) suspend the licence until such time as the penalty is paid (or for such other period as the Authority thinks fit).
- (4) While a person is disqualified by the Authority from being a close associate of a licensee, the person is conclusively presumed for the purposes of this Act to be a person who is not a fit and proper person to be a close associate of a licensee.
- (5) **Action against other interested persons**
In deciding whether to take disciplinary action under this section against a licensee in relation to a complaint, the Authority may take disciplinary action against a person who is interested in the business, or in the conduct or profits of the business, carried on under the licence (regardless of whether the Authority takes any disciplinary action under this section against the licensee concerned).
- (6) If the Authority decides to take disciplinary action against any such interested person, the Authority may do any one or more of the following:
- (a) disqualify the person, for a period commencing on a specified day, from being a person interested in the business, or in the conduct or profits of the business, carried on under a licence,
 - (b) reprimand the person.
- (7) **Circumstances of aggravation**
For the purposes of this section, circumstances of aggravation exist in relation to a complaint if (and only if) each of the following paragraphs applies:
- (a) the complaint concerns a contravention or alleged contravention of section 73 or 74,
 - (b) the complaint alleges that for the reasons specified in the complaint the matter of the complaint is so serious as to warrant the taking of action that is available to the Authority when circumstances of aggravation exist,
 - (c) the Authority, in finding that the matter of the complaint has been made out, is of the opinion (having regard to any matter such as the number of contraventions of the Act involved, the seriousness of the contravention involved, the number of

people involved in the contravention or the seriousness of the outcome of the contravention, or any other relevant consideration) that the matter of the complaint is so serious as to warrant the taking of action that is available to the Authority when circumstances of aggravation exist.

- (8) In this section:
"criminal organisation associate ground" means:
(a) in relation to a licensee—that the licensee is not a fit and proper person to be the holder of a licence for the same reason as that set out in section 45 (5), or
(b) in relation to a manager—that the manager is not a fit and proper person to be the manager of the licensed premises for the same reason as that set out in section 68 (4A).

142 Procedure for implementing disciplinary action

- (1) If the Authority decides to take disciplinary action against or in relation to a licensee, manager, close associate or other person under this Part, the Authority is required to serve on the licensee, manager, close associate or person a notice informing the person of the Authority's decision.
- (2) The notice must include the reasons for the Authority's decision.
- (2A) Subsection (2) does not require the Authority to disclose any criminal intelligence.
- (3) Any disciplinary action under this Part takes effect when notice of the action is served on the licensee, manager, close associate or person concerned (or on such later date as may be specified in the notice).
- (4) The Authority may, by serving a further notice on the licensee, manager, close associate or person concerned, cancel a notice under this section before the notice takes effect.
- (5) The Authority is not prevented from taking disciplinary action under this Part merely because the licensee, manager, close associate or person concerned is subject to criminal or civil proceedings that relate to the same matters or incident to which the disciplinary action relates.
- (6) If a licensee is disqualified from holding a licence under this Part, the Authority may, on application by:
- (a) the spouse or de facto partner of the licensee, or
 - (b) a member of the family of the licensee who is of or above the age of 18 years, or
 - (c) the owner of the licensed premises, or
 - (d) a person directly or indirectly interested in the business, or the conduct of the business, carried out on the licensed premises,
- transfer the licence to that spouse, de facto partner or member of the family or to some other person approved by the Authority.

80. The Authority has also considered the statutory objects and considerations of the Act, which further inform the public interest in respect of the Act, prescribed by section 3 which states as follows:

3 Object of the 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.

RECENT AMENDMENTS TO THE *LIQUOR ACT 2007*

81. The Authority notes that subsection 45(5A) has been inserted into the Act by the *Liquor Amendment Act 2014 (Amending Act)*. The Act was passed without amendment by the NSW Legislative Assembly and NSW Legislative Council on 30 January 2014.
82. The Amending Act inserted a new subsection 45(5A) into the Act which prescribes some express and non-exhaustive considerations to which the Authority must turn its mind, and provides further guidance in determining whether an applicant is a fit and proper person.
83. Subsection 45(5A), which is now in effect, commenced operation on 17 December 2014. It states as follows:

- (5A) Without limiting subsection (3)(a), in determining whether an applicant is a fit and proper person to carry on the business or activity to which the proposed licence relates, the Authority is to consider whether the applicant:*
- (a) is of good repute, having regard to character, honesty and integrity, and*
 - (b) is competent to carry on that business or activity.*

FINDINGS ON GROUNDS OF COMPLAINT

Finding on Ground 1

84. Ground 1 is based on section 139(3)(a) of the Act, which provides that a complaint may be made against a licensee who has, while holding a licence or managing a licensed premises, been convicted of an offence against the Act or the regulations (or under the former Act) or of an offence prescribed by the regulations.
85. The Authority notes that the Complaint Letter does not specify the offences relied upon in support of this Ground. In those circumstances, the Authority has considered the entirety of the material provided by the Complainant, including the original Complaint Material provided on 27 May 2015 and the Supplementary Material which was provided on 9 October 2015.
86. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 17 February 1990 against section 116C of the former *Liquor Act 1982*, involving a failure to display prescribed signs on the licensed premises. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$150 in respect of this offence. This finding is based upon the bundle of records from the former LAB AViiON licensing database provided by the Complainant in the Supplementary Material.
87. The Authority is satisfied, on the basis of the bundle of records from the LAB AViiON licensing database provided by the Complainant in the Supplementary Material, that the Licensee, Mr Gunsberger committed an offence on 17 February 1990 against section 68(1)(b) of the former *Liquor Act 1982*, involving a breach of a licence condition [the Authority notes that the AViiON record does not specify the licence condition breached]. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$500 in respect of this offence.
88. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 23 February 1990 against section 116C of the former *Liquor Act 1982*, involving a failure to display prescribed signs on the licensed premises. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$150 in respect of this offence.

This finding is based upon the bundle of records from the LAB AViiON licensing database provided by the Complainant in the Supplementary Material.

89. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 23 February 1990 against section 119 of the former *Liquor Act 1982*, involving the sale or supply of liquor outside authorised hours. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$200 in respect of this offence. This finding is based upon the bundle of records from the LAB AViiON licensing database provided by the Complainant in the Supplementary Material.
90. The Authority is satisfied, on the basis of the bundle of records from the LAB AViiON licensing database provided by the Complainant in the Supplementary Material, that the Licensee, Mr Gunsberger committed an offence on 23 February 1990 against section 68(1)(b) of the former *Liquor Act 1982*, involving a breach of a licence condition [the Authority notes that the AViiON record does not specify the licence condition breached]. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$750 in respect of this offence. While the Authority accepts that this offence occurred, the Authority does not rely on this finding for the purposes of this decision by reason of its age and the lack of specificity as to the condition that was contravened and the absence of further evident convictions over the following 16 years.
91. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 16 March 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. On 4 June 2007, Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$535 in respect of this offence. This finding is based upon the bundle of records from the LAB AViiON licensing database and the detailed account of the facts in the NSW Police Facts Sheet for Charge number H29795927 provided by the Complainant in the Supplementary Material.
92. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 18 March 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$535 in respect of this offence. This finding is based upon the bundle of records from the LAB AViiON licensing database and the detailed account of the facts in the NSW Police Facts Sheet for Charge number H29795927 provided by the Complainant in the Supplementary Material.
93. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 31 March 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving two (2) counts of permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. On 4 June 2007, Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$600 in respect of this offence. This finding is based upon the NSW Police *Criminal History – Bail Report* for the Licensee obtained by Sergeant Lawrie on 6 October 2015, which was provided by the Complainant in the Supplementary Material.
94. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 7 December 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$200 in respect of this offence. This finding is based upon the bundle of records from the LAB AViiON licensing database and the detailed account of the facts in the NSW Police

Facts Sheet for Charge number H32453864 provided by the Complainant in the Supplementary Material.

95. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 9 December 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving two (2) counts of permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$200 for each count in respect of this offence. This finding is based upon the bundle of records from the former LAB AViiON licensing database and the detailed account of the facts in the NSW Police Facts Sheet for Charge number H33390665 provided by the Complainant in the Supplementary Material.
96. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 3 January 2008 against section 125(1)(b) of the former *Liquor Act 1982*, involving permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. On 3 March 2008, Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$200 in respect of this offence. This finding is based upon the NSW Police *Criminal History – Bail Report* for the Licensee obtained by Sergeant Lawrie on 6 October 2015, which was provided by the Complainant in the Supplementary Material.
97. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 15 January 2008 against section 125(1)(b) of the former *Liquor Act 1982*, involving two (2) counts of permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. On 3 March 2008, Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$500 for each count in respect of this offence. This finding is based upon the NSW Police *Criminal History – Bail Report* for the Licensee obtained by Sergeant Lawrie on 6 October 2015, which was provided by the Complainant in the Supplementary Material.
98. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 31 August 2014 against section 73(1) of the current *Liquor Act 2007*, involving three (3) counts of permitting intoxication on licensed premises. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$1,000 for each count in respect of this offence. This finding is based upon the *JusticeLink* records provided by the Complainant and the Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger*.
99. The Authority is satisfied that the Licensee, Mr Gunsberger committed a further offence on 31 August 2014 against section 73(2) of the current *Liquor Act 2007*, involving selling or supplying liquor to intoxicated persons on licensed premises. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$1,000 in respect of this offence. This finding is based upon the *JusticeLink* records provided by the Complainant and the Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger*.
100. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 6 November 2014 against section 11(2) of the current *Liquor Act 2007*, involving a failure to comply with a condition of the licence in relation to the requirement that licensed security guards conduct patrols of the Premises and its surrounds. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$500 in respect of this offence. This finding is based upon the *JusticeLink* records provided by the Complainant.

101. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 23 November 2014 against section 11(2) of the current *Liquor Act 2007*, involving a failure to comply with a condition of the licence requiring observance of the "LA10" restriction on noise emissions. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$500 in respect of this offence. This finding is based upon the *JusticeLink* records provided by the Complainant.
102. The Authority is satisfied, on the basis of the NSW Police *Criminal History – Bail Report* for the Licensee obtained by Sergeant Lawrie on 6 October 2015, which was provided by the Complainant in the Supplementary Material, that the Licensee, Mr Gunsberger committed an offence on 18 December 2014 against section 11(2) of the current *Liquor Act 2007*, involving two (2) counts of failing to comply with the conditions of the licence [the Authority notes that the Criminal History – Bail Report does not specify the licence condition(s) breached]. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$500 for each count in respect of this offence.
103. The Authority is satisfied that Ground 1 of the Complaint is established and that the Licensee, Mr Gunsberger has been convicted of numerous offences under the former *Liquor Act 1982* and the current *Liquor Act 2007* while he has held a liquor licence and/or managed a licensed premises.

Finding on Ground 2

104. Ground 2 is based on section 139(3)(b) of the Act, which provides that a complaint may be made against a licensee or manager who has failed to comply with any of the conditions to which the licence is subject.
105. The Authority notes that the Complaint Letter does not specify the offences relied upon in support of this Ground. In those circumstances, the Authority has considered the entirety of the material provided by the Complainant, including the original Complaint Material provided on 27 May 2015 and the Supplementary Material which was provided on 9 October 2015.
106. The Authority is satisfied that on 26 July 2009, the Licensee, Mr Gunsberger failed to comply with a licence condition requiring the keeping of an RSA Certificate in an RSA Register, contrary to section 11(2) of the Act. NSW Police issued a Penalty Notice in the amount of \$1,100 in respect of this contravention. This finding is based upon the *Liquor Licensing History Report* prepared by Sergeant John Lawrie of Mid North Coast Licensing Police dated 20 November 2014 and a copy of Penalty Notice No. 4022737988 issued by NSW Police on 5 August 2009, as provided by the Complainant in the Supplementary Material.
107. The Authority is satisfied that on 9 June 2011, the Licensee, Mr Gunsberger failed to comply with a licence condition requiring maintenance of an Incident Register, contrary to section 11(2) of the Act. NSW Police issued a Penalty Notice in the amount of \$1,100 in respect of this contravention. This finding is based upon the *Liquor Licensing History Report* prepared by Sergeant John Lawrie of Mid North Coast Licensing Police, dated 20 November 2014 and a copy of Penalty Notice No. 4031244856 issued by NSW Police on 4 October 2011, as provided by the Complainant in the Supplementary Material.
108. The Authority is satisfied that on 4 March 2013, the Licensee, Mr Gunsberger failed to comply with a licence condition requiring maintenance of an Incident Register, contrary to section 11(2) of the Act. NSW Police issued a Caution/Compliance Notice in respect of this failure. This finding is based upon the *Liquor Licensing History Report* prepared by

Sergeant John Lawrie of Mid North Coast Licensing Police, dated 20 November 2014 and a copy of Compliance Notice No. 130167 issued by NSW Police on 4 March 2013, as provided by the Complainant in the Supplementary Material.

109. The Authority is satisfied that on 16 August 2014, the Licensee, Mr Gunsberger failed to comply with a licence condition with regard to a requirement that licensed security guards patrol the Premises and its surrounds, contrary to section 11(2) of the Act. NSW Police issued a Penalty Notice in the amount of \$1,100 in respect of this contravention. This finding is based upon the *Liquor Licensing History Report* prepared by Sergeant John Lawrie of Mid North Coast Licensing Police, dated 20 November 2014 and an SDRO business record indicating that the Penalty Notice in respect of that offence was *paid* on 12 September 2014, as provided by the Complainant.
110. Further, the Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 6 November 2014 against section 11(2) of the current *Liquor Act 2007*, involving a failure to comply with a condition of the licence in relation to the requirement that licensed security guards conduct patrols of the Premises and its surrounds. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$500 in respect of this offence. This finding is based upon the *JusticeLink* records provided by the Complainant.
111. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 23 November 2014 against section 11(2) of the current *Liquor Act 2007*, involving a failure to comply with a condition of the licence requiring observance of the "LA10" restriction on noise emissions. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$500 in respect of this offence. This finding is based upon the *JusticeLink* records provided by the Complainant.
112. The Authority is also satisfied, on the basis of the NSW Police *Criminal History – Bail Report* for the Licensee obtained by Sergeant Lawrie on 6 October 2015, which was provided by the Complainant in the Supplementary Material, that the Licensee, Mr Gunsberger committed an offence on 18 December 2014 against section 11(2) of the current *Liquor Act 2007*, involving two (2) counts of failing to comply with the conditions of the licence [the Authority notes that the *Criminal History – Bail Report* does not specify the licence condition(s) breached]. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$500 for each count in respect of this offence.
113. The Authority is satisfied that Ground 2 of the Complaint is established and that the Licensee, Mr Gunsberger has repeatedly failed to comply with conditions to which the licence is subject.

Finding on Ground 3

114. Ground 3 is based on section 139(3)(g) of the Act. The Complainant alleges that intoxicated persons have frequently been on the Premises or have frequently been seen to leave the Premises.
115. The Authority notes that the Complaint Letter does not specify the offences relied upon in support of this Ground. In those circumstances, the Authority has considered the entirety of the material provided by the Complainant, including the original Complaint Material provided on 27 May 2015 and the Supplementary Material which was provided on 9 October 2015.

116. The Authority is satisfied that the Licensee, Mr Gunsberger was the person responsible for supervising the Premises when five (5) offences involving intoxicated persons on the Premises were detected, on two separate occasions, just two weeks apart during August 2014.
117. The Authority is satisfied, on the basis of COPS Report number E54660720, that Police issued a Penalty Notice to the Licensee for the prescribed offence of "licensee permit intoxication on licensed premises" under section 73(1) of the current *Liquor Act 2007*, after observing that three (3) of the venue's patrons were well affected by alcohol and argumentative while on the Premises on 16 August 2014.
118. The Authority is further satisfied, on the basis of SDRO business records dated 17 September 2014, that this Penalty Notice was paid on 12 September 2014, giving rise to the incurring of a first "strike" against the licence for the Premises pursuant to the "Three Strikes" scheme in Part 9A of the Act.
119. The Authority is satisfied, on the basis of the Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger*, that OLGR inspectors attended the Premises two weeks later on 30 August 2014 and advised the Licensee to ensure that his security staff were vigilant in identifying intoxicated persons and ensuring that they are not permitted on the Premises. However, notwithstanding OLGR inspectors' engagement with the Licensee, four further intoxication offences were detected when OLGR inspectors attended the Premises at about 1:10am on 31 August 2014.
120. The Authority is further satisfied that the Licensee, Mr Gunsberger committed an offence on 31 August 2014 against section 73(1) of the current *Liquor Act 2007*, involving three (3) counts of permitting intoxication on licensed premises. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$1,000 for each count in respect of this offence. This finding is based upon the *JusticeLink* records provided by the Complainant and the Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger*.
121. The Authority is satisfied that the Licensee, Mr Gunsberger committed a further offence on 31 August 2014 against section 73(2) of the current *Liquor Act 2007*, involving selling or supplying liquor to intoxicated persons on licensed premises. On 8 April 2015, Mr Gunsberger was convicted by Port Macquarie Local Court and ordered to pay a fine of \$1,000 in respect of this offence. This finding is based upon the *JusticeLink* records provided by the Complainant and the Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger*.
122. Furthermore, the Authority is satisfied that Mr Gunsberger has been convicted in his capacity as Licensee of numerous further offences involving the permission of intoxication or indecent, violent or quarrelsome conduct on licensed premises contrary to section 125(1)(b) of the former *Liquor Act 1982*.
123. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 16 March 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. On 4 June 2007, Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$535 in respect of this offence. This finding is based upon the bundle of records from the LAB AViiON licensing database and the detailed account of the facts in the NSW Police Facts Sheet for Charge number H29795927 provided by the Complainant in the Supplementary Material.

124. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 18 March 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$535 in respect of this offence. This finding is based upon the bundle of records from the LAB AViiON licensing database and the detailed account of the facts in the NSW Police Facts Sheet for Charge number H29795927 provided by the Complainant in the Supplementary Material.
125. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 31 March 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving two (2) counts of permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. On 4 June 2007, Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$600 in respect of this offence. This finding is based upon the NSW Police *Criminal History – Bail Report* for the Licensee obtained by Sergeant Lawrie on 6 October 2015, which was provided by the Complainant in the Supplementary Material.
126. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 7 December 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$200 in respect of this offence. This finding is based upon the bundle of records from the LAB AViiON licensing database and the detailed account of the facts in the NSW Police Facts Sheet for Charge number H32453864 provided by the Complainant in the Supplementary Material.
127. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 9 December 2007 against section 125(1)(b) of the former *Liquor Act 1982*, involving two (2) counts of permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$200 for each count in respect of this offence. This finding is based upon the bundle of records from the former LAB AViiON licensing database and the detailed account of the facts in the NSW Police Facts Sheet for Charge number H33390665 provided by the Complainant in the Supplementary Material.
128. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 3 January 2008 against section 125(1)(b) of the former *Liquor Act 1982*, involving permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. On 3 March 2008, Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$200 in respect of this offence. This finding is based upon the NSW Police *Criminal History – Bail Report* for the Licensee obtained by Sergeant Lawrie on 6 October 2015, which was provided by the Complainant in the Supplementary Material.
129. The Authority is satisfied that the Licensee, Mr Gunsberger committed an offence on 15 January 2008 against section 125(1)(b) of the former *Liquor Act 1982*, involving two (2) counts of permitting intoxication or indecent, violent or quarrelsome conduct on licensed premises. On 3 March 2008, Mr Gunsberger was convicted by the NSW Licensing Court and ordered to pay a fine of \$500 for each count in respect of this offence. This finding is based upon the NSW Police *Criminal History – Bail Report* for the Licensee obtained by Sergeant Lawrie on 6 October 2015, which was provided by the Complainant in the Supplementary Material.

130. The Authority is also satisfied, on the basis of the *Liquor Licensing History Report* prepared by Sergeant John Lawrie of Mid North Coast Licensing Police dated 20 November 2014, that the Licensee, Mr Gunsberger has received various Caution and Infringement Notices for contraventions of the Act as detected by Police on the Premises, as follows:
- a) **13 August 2006:** Penalty Notice No. 4011552564 issued on 4 September 2006 for permitting intoxication on the Premises (\$550)
 - b) **18 August 2006:** Penalty Notice No. 4011552555 issued on 4 September 2006 for permitting intoxication on the Premises (\$550)
 - c) **31 August 2006:** Caution letter in relation to frequent intoxication on the Premises
 - d) **8 March 2007:** Caution letter in relation to two (2) instances of permitting intoxication on the Premises
 - e) **14 September 2008:** Caution letter in relation to two (2) instances of supplying liquor to intoxicated persons, in respect of the events outlined in COPS Report number E35126312
 - f) **31 May 2009:** Caution letter in relation to permitting intoxication on the Premises, in respect of the events outlined in COPS Report number E3139124295
 - g) **4 July 2009:** Caution letter in relation to permitting intoxication on the Premises, in respect of the events outlined in COPS Report number E37500909
 - h) **26 July 2009:** Penalty Notice No. 4022737979 issued on 5 August 2009 for permitting intoxication on the Premises (\$1,100)
 - i) **8 August 2009:** Caution/Warning for permitting intoxication on the Premises, in respect of the events outlined in COPS Report number E38053124
 - j) **14 August 2011:** Penalty Notice No. 4031244782 issued on 19 August 2011 for permitting intoxication on the Premises (\$1,100).
131. Further, the Authority is satisfied, on the basis of the *Liquor Licensing History Report* provided by the Complainant, that on 22 May 2008, the Licensee was issued Penalty Notice No. 4015092649 for allowing an unaccompanied minor entrance to the Premises during trading hours (\$550) and Penalty Notice No. 4015092630 for selling or supplying liquor to a minor (\$550), in respect of the events outlined in COPS Report number E292077891. The Authority is also satisfied that the Licensee was issued with a Caution/Warning for supplying liquor to a minor on 9 January 2009, in respect of the events outlined in COPS Report number E36162018.
132. In addition to the convictions, Penalty Notices and Compliance Notices received by the Licensee in relation to permitting intoxication on the Premises as noted above, the Authority is further satisfied (on the basis of the information provided by the Complainant in the Supplementary Material) that OLGR and the Mid North Coast Licensing Unit of NSW Police have detected further incidents of intoxicated persons on or leaving the Premises during the period from August 2006 to August 2009 as follows:
- a) **COPS Event number E27643433** concerning an overt audit of the Premises conducted by Licensing Police on 13 August 2006. The Licensee was informed that he would be spoken to about permitting intoxication on the licensed premises.
 - b) **Letter from Sergeant John Lawrie to the Licensee dated 31 August 2006** noting a number of recent offences of permitting intoxication on licensed premises that occurred on 9 July 2006, 12 August 2006 and 18 August 2006 and making several recommendations by which intoxication may be reduced.
 - c) **Letter from Sergeant John Lawrie to the Licensee dated 8 March 2007** noting a number of recent offences of permitting intoxication on licensed premises that occurred on 24 February 2007 and 3 March 2007 and advising that this matter has been recorded on the Police COPS database as a warning.

- d) **Letter from Sergeant John Lawrie to the Licensee dated 17 July 2007** noting a number of recent offences of permitting intoxication on licensed premises that occurred on 10 June 2007 and making several recommendations by which to address intoxication.
- e) **Letter from Mr Albert Gardner, the (then) Director Compliance of OLGR to the Licensee dated 16 October 2007** enclosing Penalty Notice No. 7670487029 for the offence of permitting intoxication on licensed premises that occurred on 7 October 2007 (\$550).
- f) **COPS Event number E35126312** concerning a licensed premises inspection conducted by NSW Police on 14 September 2008. The Licensee received a Compliance Notice for permitting an intoxicated patron to remain on the licensed premises.
- g) **Caution Notice from Sergeant John Lawrie to the Licensee dated 15 September 2008** in relation to permitting intoxication on the Premises.
- h) **Letter from Sergeant John Lawrie to the Licensee dated 19 February 2009** recording the minutes for a meeting held on that date between Sergeant Lawrie and the Licensee. Positive aspects and concerns in relation to the Premises were discussed, with the "focal issues" for the Premises being recorded as intoxication; assaults; and quiet and good order.
- i) **COPS Event number E139124295** regarding an overt audit conducted on the Premises on 31 May 2009. Intoxicated patrons were observed on the Premises and the Licensee was spoken to and given a warning regarding these observations.
- j) **COPS Event number E37500909** regarding a business inspection conducted on the Premises on 4 July 2009. The Licensee was given a warning regarding the need for proactive security patrols both within and outside the Premises, the need to identify intoxicated persons in a timely and appropriate manner, and the requirement to complete the Incident Book at the time of an incident rather than upon closure of the Premises.
- k) **COPS Event number E38289462** detailing the observations made by Licensing Police during an overt audit of the Premises conducted on 26 July 2009 "due to the obvious high levels of intoxication in patrons on the CBD streets".
- l) **COPS Event number E38053124** concerning a covert observation of the Premises by Licensing Police conducted on 8 August 2009. The Licensee was given a warning regarding permitting intoxication on the Premises.
- m) **Caution Notice from Sergeant John Lawrie to the Licensee dated 24 August 2009** for frequent intoxication and breach of licence conditions.

133. The Authority is satisfied, on the basis of the number of intoxicated persons detected on the Premises during the year 2014 alone that Ground 3 of the Complaint has been established in that intoxicated persons have "frequently" been on the Premises or have "frequently" been seen to leave the Premises.

Finding on Ground 4

134. Ground 4 of the Complaint is based on section 139(3)(i) of the Act. The Complainant alleges that the Licensee, Mr Gunsberger is not a "fit and proper" person to be the holder of a liquor licence (whether for the same reason as that set out in section 45(5) of the Act or otherwise).

135. As noted above, under section 139(3)(i) of the Act, a potential ground upon which a complaint may be made is that the licensee is not a fit and proper person to be the holder of a licence (whether for the same reason as set out in section 45(5) of the Act 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) of the Act or otherwise).

136. It is well established at common law 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.
137. 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 – *Clarahan v Register of Motor Vehicle Dealers in the ACT* (1994) 17 FLR 44.
138. 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.

139. The Authority is satisfied that this Ground is established. In reaching this conclusion, the Authority accepts the facts alleged in the Complaint and the Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger* regarding the detection of four (4) offences on the Premises on 31 August 2014 in relation to three (3) counts of permitting intoxication and one (1) count of selling or supplying liquor to intoxicated persons. The Authority is satisfied that the Licensee was convicted of all four offences on 8 April 2015 at Port Macquarie Local Court.
140. The Authority is satisfied that the Licensee was present on the Premises at the time that the alleged offences occurred and that OLGR inspectors engaged with the Licensee on 30 August 2014 in relation to maintaining awareness of intoxicated persons on the Premises, just a few hours before the detection of these four offences. The Authority is satisfied that the Licensee failed to act accordingly, despite being put on notice the previous evening, and contributed to the occurrence of those relatively serious offences against the Act in flagrant disregard for his obligations as a licensee.
141. The Authority is satisfied, as alleged by the Complainant, that the offences committed on 31 August 2014 in particular demonstrates a "complete breakdown in venue procedures or a distinct lack of appropriate procedures to manage and prevent intoxication". The absence of positive remedial action by the Licensee to rectify any management issues following the detection on 16 August 2014 of the prescribed offence giving rise to the first strike exhibits a "lack of agility and adaptability required to manage a licensed premises" in line with the requirements of the Act.
142. The Licensee has not provided evidence as to his personal character for consideration for the purposes of section 45(5A) of the Act. There is no evidence of other criminal

convictions, aside from the extensive list of licensing convictions and adverse regulatory action taken by Police and OLGR with regard to Mr Gunsberger's involvement with this nightclub. There is no material before the Authority indicating a lack of honesty, but the regulatory history satisfies the Authority that Mr Gunsberger has not demonstrated the knowledge and ability necessary to ensure compliance with the minimum requirements of licensing legislation during his tenure as licensee of the Premises.

143. Further, the Authority is satisfied that the Licensee has an extensive history of convictions for intoxication offences under the former *Liquor Act 1982* and the current *Liquor Act 2007* from as far back as 1990.
144. The Licensee has also received numerous Infringement Notices and Compliance Notices/Cautions issued by NSW Police and OLGR in relation to intoxication offences and breaches of licence conditions pertaining to *this* Premises from as far back as 2006.
145. The Authority is satisfied, on the basis of the persistent breaches of the Act that are the subject of this Complaint, committed over a sustained period of almost ten (10) years in relation to this Premises, that the Licensee, Mr Gunsberger has not demonstrated sufficient knowledge and ability of legislative requirements to ensure compliance with the Act. The Authority is satisfied that Mr Gunsberger is not a fit and proper person to be the licensee of any licensed premises in New South Wales at this time.
146. The Authority cannot dismiss the Licensee's conduct as the product of a lack of supervision or a lack of diligence, as contended by the Licensee in his submission on the Second Strike Review dated 1 May 2015. The Licensee's acts and omissions, particularly during 2014, demonstrate a repeated disregard for the legislative provisions of the Act and a lack of ability to operate the licensed business for which he was responsible within the bounds of licensing legislation.
147. These numerous adverse events, involving the detection of patron intoxication and other offences committed over a sustained period of time, cannot be dismissed as isolated errors or lapses in personal judgment. Mr Gunsberger elected to serve as the licensee of a late trading licensed business and has not demonstrated the ability to manage that business in a manner that observes the minimum requirements of the Act.

SUBMISSIONS ON DISCIPLINARY ACTION

148. On 19 January 2016, the Authority sent decision letters notifying its findings on the Grounds of Complaint (**Decision on Grounds**). Noting that Mr Gunsberger is no longer an employee of the Premises, the Decision on Grounds was sent to two mailing addresses for Mr Gunsberger that were advised to the Authority by the Complainant.
149. The Decision on Grounds was also sent via email to the Complainant and the solicitors for the corporate Business Owner/Premises Owners via their solicitors, Merrick Spicer and Associates.
150. The Decision on Grounds notified a timetable for final submissions on the question of what, if any, disciplinary action should be taken by the Authority pursuant to Part 9 of the Act in light of the Authority's findings on the Grounds of Complaint.
151. The Complainant was requested to make any final submissions on disciplinary action within seven (7) days of the date of the Decision on Grounds and the Licensee, Business Owner and Premises Owners were requested to make any final submissions on disciplinary action within seven (7) days thereafter.

Final Submission from the Complainant dated 22 January 2016

152. On 22 January 2016, Mr Sean Goodchild, A/Director Compliance and Enforcement, OLGR provided a submission on disciplinary action on behalf of the Complainant.
153. Briefly, the Complainant submits that the following disciplinary action is "both necessary and appropriate" in the circumstances:
- a) Disqualification of Mr Maxim Eric Gunsberger from holding a licence, managing a licensed premises or being a close associate of a licensee for such period as the Authority thinks fit.
 - b) Any other disciplinary action the Authority thinks fit.
154. The Complainant submits that "a ban of 5-10 years would be appropriate".
155. The Complainant notes that in Mr Gunsberger's submissions to the Authority, he maintains that he is retired and no longer the licensee of the Premises. However the Complainant submits that the "risk to the public remains" should Mr Gunsberger elect to return to the industry and operate a licensed premises or be a close associate, as defined under the Act. The Complainant notes that Mr Gunsberger is still listed as licensee of the Premises on the *OneGov* licensing system.
156. The Complainant submits that the history of offending by Mr Gunsberger "over almost a 10 year period" demonstrates a number of "concerning and aggravating factors", including:
- a) Mr Gunsberger has been "unable to manage licensed premises in line with the objects of the Act and the expectations of the community". This assertion is evidenced by his "poor compliance history", including five convictions by the former Licensing Court of New South Wales for intoxication offences in 2007 alone, as well as two warning letters from NSW Police for the same offence during that year. Additionally, in 2006, two infringement notices were issued by NSW Police for intoxication, as well as a warning letter in relation to frequent intoxication on the Premises.
 - b) Despite the "troubling" number of contraventions of some of the most serious requirements of the *Liquor Act 2007* and its predecessor (the *Liquor Act 1982*), it is "evident that the operation of the venue under the oversight of Mr Gunsberger has not improved". The Complainant submits that from 2008 until July 2014, five warnings, two infringement notices and three convictions were incurred by Mr Gunsberger for intoxication offences, as well as one offence recorded in 2008 in relation to supplying liquor to a minor. Further, in August 2014, five offences were committed by Mr Gunsberger involving intoxicated persons on the licensed premises on two separate occasions. The Complainant submits that two weeks after the first offence, OLGR inspectors attended and engaged with Mr Gunsberger in an attempt to assist with venue management and operation. Inspectors advised Mr Gunsberger to ensure patrons are adequately monitored; however a further four intoxication offences were committed "the next evening".
157. The Complainant contends that to date, Mr Gunsberger has been granted "multiple opportunities to rectify the historic deficiencies in the management of the Downunder Nightclub and has clearly failed to do so".
158. The Complainant submits that the following objects and considerations of section 3 of the Act are most relevant in light of this matter:
- a) **Section 3(1)(a)** – to regulate the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community.

- b) **Section 3(2)(a)** – the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour).
- c) **Section 3(2)(b)** – the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor.
- d) **Section 3(2)(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.

159. With reference to the objects of the Act, the Complainant submits that:

...offences of permitting intoxication and the supply of liquor to minors are some of the fundamental laws introduced for the protection and wellbeing of the community. The respondent's recurring antecedents strike at the core of the system of liquor regulation in NSW and either directly or indirectly contribute to alcohol related harm within the State.

160. The Complainant concludes that the facts and circumstances of this Complaint are "uniquely suited towards providing a deterrent to persons electing to or contemplating operating outside the parameters of NSW liquor laws, particularly on a continued basis". The Complainant submits that such a deterrent will also assist in the development of a "compliant and responsible industry".

No Submission from the Licensee, Business Owner or Premises Owners

161. No further submissions in relation to disciplinary action were received on behalf of the Licensee, the corporate Business Owner or the Premises Owners.

DECISION ON DISCIPLINARY ACTION

162. The purpose of disciplinary action is protective rather than punitive. When considering taking disciplinary action under Part 9 of the Act, the Authority is concerned with the prevention of the occurrence of offences against the Act by reducing the risk posed by the individual or the licensed premises who are the subject of the Complaint in question, for the protection of the public.

163. Having considered cumulatively the Authority's findings on the Grounds of Complaint as set out above and the further submissions now before the Authority, the Authority notes that Complainant has sought that Mr Gunsberger be disqualified for between 5 and 10 years.

164. The Complainant has not sought that any action be taken against the licence itself - although the Authority notes that it has recently taken remedial action against the licence while confirming the second strike against the licence under Part 9A of the Act.

165. In light of the multiple convictions recorded against Mr Gunsberger arising from serious breaches of licensing legislation while he acted as licensee of the Premises, the Authority is satisfied that it is now an appropriate protective action for the Authority to order that Mr Gunsberger be disqualified from holding a regulated position within the liquor industry for a period of **ten (10) years**.

166. The Authority has had regard to Mr Gunsberger's advice that he has resigned from employment with the Downunder Nightclub and that he has now retired. Accepting that this is currently the case, the Authority is nevertheless satisfied that Mr Gunsberger has spent a considerable period in the liquor industry, is not of particularly advanced years and that it remains open to him to return to the industry should he decide to do so.

167. The Authority notes with concern that Mr Gunsberger has been convicted of multiple serious offences against the *Liquor Act* within the last two years, particularly with regard to offences of permitting intoxication on the licensed premises and selling or supplying liquor to intoxicated persons. These matters indicate a persistent lack of ability demonstrated by him as a liquor licensee to ensure the implementation of harm minimisation measures commensurate with the operation of a higher risk late trading venue.
168. Disqualifying Mr Gunsberger will serve the protective purpose of ensuring that he does not work in a relevant capacity in the industry in New South Wales for a period of ten years and also send an appropriate message to others in the industry of the regulatory consequences of engaging in the kind of repeated and serious statutory non-compliance that is the subject of this Complaint.

ORDER

169. The Authority makes the following order:

1. Pursuant to section 141(2)(f) of the Act, the Authority orders that Mr Maxim Eric Gunsberger be **disqualified** from:
 - (a) Holding a licence
 - (b) Being the approved manager; and
 - (c) Being the close associate of a licenseeof any licensed premises in New South Wales **for a period of ten (10) years**.

REVIEW RIGHTS

170. Pursuant to section 144 of the Act, an application for review of this decision may be made to the New South Wales Civil and Administrative Tribunal (**NCAT**) by the Complainant or any person against whom any disciplinary action is taken, no later than 28 days after those parties receive notification of this decision.
171. For more information, please visit the NCAT website at www.ncat.nsw.gov.au or contact the NCAT Registry at Level 9, John Maddison Tower, 86-90 Goulburn Street, Sydney.

Yours faithfully



David Armati
Deputy Chairperson
for and on behalf of the **Independent Liquor and Gaming Authority**

DATED 26 February 2016