



Mr Anthony Keon
Director Compliance and Enforcement
Office of Liquor, Gaming & Racing
GPO Box 7060
SYDNEY NSW 2001

Dear Mr Keon

**Consideration of Third Strike under Part 9A *Liquor Act 2007*
Dreamgirls, Kings Cross**

The Independent Liquor and Gaming Authority has completed its consideration of whether a third strike should be incurred on the licence of premises known as "Dreamgirls" located at B Level, 77 Darlinghurst Road, Potts Point NSW 2011 under Part 9A of the *Liquor Act 2007*.

This consideration by the Authority arose as a result of a letter sent by you to the Authority on 24 March 2015 stating that legislative triggers have been enlivened for the Authority to consider a third strike and potential remedial action in relation to Dreamgirls, on the basis that a prescribed offence had been detected by NSW Police on 25 August 2014.

Following consultation with the parties the Authority has determined not to incur a third strike on the basis of this prescribed offence. The reasons for the Authority's decision are set out in the statement of reasons enclosed with this letter.

Yours sincerely

Micheil Brodie
Chief Executive

- 9 SEP 2015

cc Ms Julieanne levick
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Mr Dion Manca
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STATEMENT OF REASONS

INTRODUCTION

1. On 24 March 2015 the Independent Liquor and Gaming Authority (Authority) received a letter from Mr Anthony Keon, Director Compliance and Enforcement, Office of Liquor Gaming & Racing (OLGR) regarding the commission of a prescribed offence at the licensed premises trading as "Dreamgirls" located at B Level, 77 Darlinghurst Road, Potts Point NSW 2011 (Premises).
2. In this letter, Mr Keon notified the Authority that two strikes are currently in force in relation to the licence of the Premises and that on 25 August 2014 a prescribed offence had been detected in relation to the Premises. That penalty notice was paid on 3 January 2015. As a consequence of this, the Authority's power to consider whether or not a third strike should be incurred against the licence has been enlivened pursuant to Part 9A of the *Liquor Act 2007* (Act).
3. At the Authority meeting of 26 August 2015, the Authority considered Mr Keon's letter of 24 March 2015; the submissions of OLGR, the business owner of the Premises and Police; and all other material before the Authority.
4. On the basis of this material and the statutory considerations to which the Authority is required to have regard when making decisions under Part 9A of the Act, the Authority has determined not to incur a third strike on the licence for the Premises.

MATERIAL BEFORE THE AUTHORITY

OneGov liquor licence record for licence number LIQO624013611 as at 25 March 2015:

5. This licence record discloses that:
 - (a) the licence name is "Dreamgirls"
 - (b) the licensed premises are at B Level, 77 Darlinghurst Road, Potts Point NSW 2011
 - (c) the licence type is an on-premises licence for a "Theatre public entertainment venue"
 - (d) that the Licensee is Mr David Wilhelm Lakepa (Licensee)
 - (e) that the Business Owner is Royal Restaurant Pty Limited (Business Owner)
 - (f) the licence start date is recorded as 25 July 2005
 - (g) the licensed trading hours are recording as being the hours from 5:00am to 5:00am, Monday through Sunday (ie, 24 hours per day).

The Authority notes that the primary form of entertainment provided involves female strippers.

Letter to the Authority from Mr Anthony Keon, Director Compliance and Enforcement, OLGR dated 24 March 2015:

6. In this covering letter Mr Keon states that legislative triggers have been enlivened for the Authority to consider a third strike and potential remedial action in relation to Dreamgirls.
7. Mr Keon states that as a result of the commission of a prescribed offence on 27 June 2014, he has decided to impose a second strike on the venue's liquor licence.

8. Mr Keon states that a subsequent prescribed offence was detected at the Premises on 25 August 2014, and that the Penalty Notice relating to this offence has been paid, which triggers consideration by the Authority of a potential third strike as contemplated by section 144D(3)(c) of the Act.
9. Attached to Mr Keon's letter is the following material described in greater detail below:
 - (a) Timeline of "significant events" in relation to the Premises
 - (b) Decision under section 144D(2) of the Act by Mr Anthony Keon dated 24 March 2015
 - (c) Document titled "3 Strikes Narratives"
 - (d) Extract from State Debt Recovery Office report dated 27 January 2015.

OLGR Timeline of Significant Events provided on 24 March 2015:

10. The events listed in this timeline consist of the following:
 - (a) 24 January 2014: "first" prescribed offence, being the offence of '*Licensee fail to comply with conditions of licence (HRVM – KX)*'
 - i. 22 May 2014: prescribed offence committed and first strike incurred.
 - (b) 31 January 2014: "second" prescribed offence, being the offence of '*Licensee fail to comply with conditions of licence (CCTV – KX)*'
 - i. 17 May 2014: prescribed offence committed
 - ii. 18 September 2014: Executive Director, OLGR determined not to impose second strike.
 - (c) 27 July 2014: "third" prescribed offence, being the offences of '*Supply liquor to a minor on licensed premises*' and '*Licensee fail to comply with conditions of licence (ID scanned – KX)*'.
 - (d) 25 August 2014: "fourth" prescribed offence, being the offence of '*Licensee fail to comply with conditions of licence (CCTV – KX)*'
 - i. 3 January 2015: prescribed offence committed.

Second Strike Decision of Mr Anthony Keon, Director Compliance and Enforcement, OLGR dated 24 March 2015 (Decision):

11. In this Decision Mr Keon determines, in his capacity as a delegate of the (then) Secretary, NSW Trade & Investment, had decided pursuant to section 144D(2) that a second strike should be incurred against the licence of the Premises.
12. Briefly, Mr Keon notes that a first strike is in force in respect of the licence for the prescribed offence of '*licensee fail to comply with conditions of licence*' relating to the requirement for a Kings Cross high-risk venue to engage a high-risk venue manager during prescribed times pursuant to clause 53GA of the Liquor Regulation 2008 (Regulation).
13. Mr Keon notes that the offence occurred on 24 January 2014, that a penalty notice was subsequently issued by NSW Police and that an enforcement order was made under the *Fines Act 1996* on 22 May 2014, triggering an automatic first strike.
14. Mr Keon then states that on 31 January 2014, OLGR inspectors detected a second prescribed offence of '*licensee fail to comply with conditions of licence*' relating to the requirement to have CCTV coverage of all publically accessible areas as required under clause 53H of the Regulation.

15. Mr Keon states that a penalty notice was issued by OLGR on 28 February 2014 and an enforcement order was made on 16 May 2014, giving rise to whether a second strike should be incurred.
16. However, it was decided under delegation by the Executive Director, OLGR that "...in the absence of aggravating features" that matter did not satisfy the threshold test for the imposition of a second strike under section 144D(2) of the Act.
17. Mr Keon notes that on 26 September 2014 the licensee was notified that a second strike would not be incurred.
18. Mr Keon continues that on 27 July 2014, the third prescribed offence occurred. This arose from the detection by NSW Police of two prescribed offences of '*supply liquor to a minor on licensed premises*' and '*licensee fail to comply with conditions of licence*'.
19. He states that the latter offence arose from a failure to comply with the ID scanning requirements under section 116AC of the Act, and that as these two offences occurred within a single 24-hour period, they are considered to be a "single prescribed offence" by the operation of section 144C(3) of the Act.
20. Mr Keon then provides a summary of the facts provided in the COPS report for this matter:
 - (a) At 1:00am on Sunday 27 July 2014, two males approached the entrance of the venue. One of these two males was a minor, aged 16 at the time the alleged offence occurred
 - (b) The over-age male provided his identification to the security guard on duty, who scanned the identification using the ID scanner. The minor was not asked to produce ID, and did not provide any to the security guard. The two males were the only persons seeking entry to the venue at the time
 - (c) Both males entered the venue and sat at a table near the stage area. A staff member then arrived, took an order and subsequently delivered two cans of beer to the males. Both males then consumed the beer at the table
 - (d) At around 1:30am, the over-age male left the venue. Shortly thereafter, having realised his companion had departed, the minor also left the premises.
21. Mr Keon continues that on 25 August 2014, a fourth prescribed offence occurred, when the offence of '*licensee fail to comply with conditions of licence*' was detected on the Premises by NSW Police. This relates to a further detected breach of a licence condition requiring the venue to have CCTV coverage of all publically accessible areas - per clause 53H of the Regulation.
22. Mr Keon then provides a summary of the facts provided in the relevant COPS Report:
 - (a) On 21 August 2014 (following detection of the third prescribed offence involving a minor) NSW Police served written notice on the licensee to produce all CCTV footage for the Premises. When the CCTV was received, the footage for the area near the stage where the two males were seated and supplied with liquor was missing
 - (b) A further written notice requiring production of CCTV footage for the area around the stage was served on 23 August 2014, and again the footage that was provided to Police did not include footage of the necessary area
 - (c) On 12 September 2014, Police attended the venue and spoke to the licensee regarding the outstanding footage. The CCTV system was checked and found to be fully functioning, and covering the area around the stage. The licensee advised Police that there was a fault in the CCTV system on the night in question which prevented coverage of the area near the stage.

23. Mr Keon then notes that three Penalty Notices, relating to the third and fourth prescribed offences, were issued to the Licensee by Police on 16 October 2014.
24. Mr Keon notes that all three Penalty Notices were paid on 3 January 2015, which triggered the Secretary's consideration as to whether a second strike should be incurred on the licence.
25. Mr Keon notes that on 30 January 2015, OLGR invited written submissions from the licensee, Mr Lakepa; the business owner, Royal Restaurant Pty Limited; and NSW Police as to whether a second strike should be incurred. Mr Keon states that no invitation was made to the Bureau of Crime Statistics and Research (BOCSAR) due to previous correspondence which advised that BOCSAR would not be making any submissions on matters relating to liquor legislation.
26. Mr Keon states that on 17 February 2015, Mr Michael Amante made a submission on behalf of the Business Owner requesting that the Secretary not impose a second strike against the licence. Mr Keon summarises the key points of this submission as follows:
 - (a) The minor allegedly '*slipped in unnoticed*' and was not visible to the guard, who was engaged in scanning the ID of the minor's friend
 - (b) It is submitted that while the minor's entry in to the Premises was the result of '[plain] human error', the guard in question is nevertheless no longer employed by the venue
 - (c) The submission further alleges that the minor did not order the liquor that the pair was served, but acknowledges that the waitresses and security guards did not check IDs during the half hour the two males were on the Premises
 - (d) As far as the fourth prescribed offence is concerned, Mr Amante submits that he was not told that the Police did not receive all necessary footage '*...until it was too late*', and that he was only made aware that they were not satisfied when the venue received its infringement notice for failing to provide the CCTV footage
 - (e) The submission acknowledges some of the harm that may have arisen from the offending, noting that it is Mr Amante's belief that minors should not be consuming liquor '*...because their brains haven't fully developed yet and should not be interfered with [by] alcohol*'
 - (f) In conclusion, the submission states that it is not the venue's policy to allow minors to enter, that the payment of the infringement notices should be '*sufficient enough punishment*' and that the imposition of a second strike could result in serious ramifications for the venue.
27. Mr Keon notes that no submission was received from either the Licensee or NSW Police.
28. Mr Keon states that he is satisfied that procedural fairness was afforded to the parties regarding consideration of the second strike; that the Licensee committed a prescribed offence and that one strike was in force in respect of the licence when the offence under consideration was committed.
29. Mr Keon notes that the Premises was not a declared premises at the time that the offences were committed, within the meaning of Schedule 4 for the purposes of section 144G of the Act.
30. Mr Keon states that he is not persuaded that "*...action other than determining for a second strike to be incurred*" is the "*...appropriate response in this instance*". Mr Keon states that the third and fourth prescribed offences relate "*...not only to the supply of liquor to a minor, which in itself carries with it a substantial risk of harm*", but also to "*...another two breaches of the Kings Cross precinct special licence conditions*".

31. Mr Keon states that the Licensee's "...failure to implement appropriate controls" to "...guard against a recurrence of similar breaches" of the conditions suggests an "...indifference or disregard for his obligations under the liquor laws". Mr Keon notes that the submission received from the Business Owner "...does not indicate that there have been changes made to venue practices".
32. Mr Keon states that there are a range of potential harms that could be realised due to the prescribed offence and that the facts in this case indicates a "...comprehensive failure of the venue's systems and controls". Mr Keon states that a minor entered the venue unchallenged despite there being a security guard stationed at the entrance to the Premises. Mr Keon notes that the Licensee is required to ensure that processes and procedures are in place at the Premises to ensure that such alleged human errors do not occur. Mr Keon states that given the location of the Premises within a high-risk precinct, "...an even greater level of prudence and diligence is expected".
33. Mr Keon states that the supply of liquor to a minor greatly increases the risk of harm arising from the misuse or abuse of liquor, due to a minor's inherent vulnerability and lack of both physical and psychological maturity.
34. Mr Keon states that there has been a repeated and consistent failure by the Licensee to make adequate and timely arrangements following the detection of previous contraventions of the Kings Cross precinct special licence conditions relating to CCTV and ID scanning requirements, to ensure future compliance. Mr Keon states that this indicates an indifference to regulatory engagement and "...an inability to operate a licensed venue in accordance with community expectations".
35. Mr Keon states that the potential harm in this instance extends beyond the immediate and evident harm to include the potentially negative effect on industry and community confidence in the regulatory environment.
36. In conclusion, Mr Keon states that he is "...satisfied that a second strike should be incurred" on the licence due to the "...seriousness of the harm" that may have resulted from or been associated with the commission of the prescribed offence.

Document entitled "3 Strikes Narratives" provided by OLGR on 24 March 2015:

37. This partially redacted document provides details of events recorded to have occurred at the Premises at 1:00am on 27 July 2014, including an offence of '*Fail to comply with condition of licence – ID scanner system*'; an offence of '*Licensee allow minor to enter licensed public entertainment venue*'; an offence of '*Supply of liquor to minor upon licensed premises*'; and an offence of '*Fail to comply with condition of licence – CCTV coverage*'.
38. The document states that at about 1:00am on Saturday 27 July 2014, a young person aged 16 approached the licensed security guard, Viliami Haunga with another person and was not asked to produce any form of identification to Mr Haunga, who at the time was not distracted and the young person was clearly visible to him.
39. The document states that once the identification of the other person had been scanned, both he and the young person entered the Premises.
40. The document states that shortly after this, an unidentified staff member of the Premises asked "would you like drinks?" and that the person accompanying the young person ordered and paid by credit card for two cans of Carlton Draught, which were delivered to

and consumed by he and the young person. Both persons exited the Premises at about 1:30am.

41. The document states that on 21 August 2014, Police served written notice on the Licensee to produce all CCTV recorded at the Premises and that the following day some footage was received, but "...no CCTV covering the area around the stage was included", this being the area where the young person and his companion were sitting and were supplied with liquor. Police made a further request for CCTV footage showing this particular area on 23 August 2014 but were again supplied with CCTV which omitted footage of this area.
42. The document states that on 12 September 2014, Police attended the Premises and found the CCTV to be "...fully functioning and covering the area around the stage". Police asked why footage showing this area had not been provided on request and the Licensee stated that there was a "...fault on that particular night" and that "...the particular angle must not have recorded".

Extract from State Debt Recovery Office (SDRO) Report to OLGR dated 27 January 2015 provided with OLGR Letter on 24 March 2015:

43. This document records the times, dates and penalties imposed for the prescribed offences committed in relation to the licence of the Premises, and the status of the penalties as "*Closed Paid*" as at 3 January 2015.
44. The document notes that Penalty Notice Number 4924255701 for the offence of *Licensee fail to comply with conditions of licence* which occurred on 25 August 2014 has now been paid on 3 January 2015.
45. The document notes that Penalty Notice Number 4924255692 for the offence of *Licensee fail to comply with conditions of licence* which occurred on 27 July 2014 has now been paid on 3 January 2015.
46. The document notes that Penalty Notice Number 4924255683 for the offence of *Supply liquor to a minor on licensed premises* which occurred on 27 July 2014 has now been paid on 3 January 2015.

Prosecution Fact Sheet regarding OLGR v David Wilhelm LAKEPA, Licensee of Dreamgirls LIQO624013611 dated 6 February 2015:

47. This Fact Sheet lists offences committed by the Licensee that constitute an offence against section 11(2) of the Act which requires a licensee to comply with the conditions to which the licence is subject.
48. The Fact Sheet also details the offence against clause 53(G)(4) of the Regulation, requiring a licensee of subject premises to ensure that any person who is carrying out RSA supervisory duties to wear clothing that identifies the person as an RSA marshal while carrying out those duties.
49. The Fact Sheet states that Mr Lakepa is the current licensee of the Premises and was appointed on 29 May 2014; that the Premises has an on-premises licence, being a theatre/public entertainment venue; and that the Premises "...primarily operates as a strip club" and is "...located within the Kings Cross Precinct".
50. The Fact Sheet states that on Sunday 7 September 2014 between 1:17am and 3:09am, inspectors attended the Premises in a "...covert capacity as part of Strategic Operation

Kings Cross SO14/0002663"; that the inspectors were "...unable to identify the RSA marshal required for a class 2 venue" and that "...further observations were made of a female performer walking around the venue wearing a fluoro vest with the words "...'Security' printed on the rear and 'RSA Marshal' hand-written in black pen on the front".

51. The Fact Sheet states that the inspectors then identified themselves to a staff member, Siao Si Taulapapa (George), who was dressed in civilian clothing and did not stand out and who advised the inspectors that he was the designated RSA marshal. The Fact Sheet states that when questioned about the vest being worn by the entertainer, George "...shrugged his shoulders and said that was the only vest available and didn't fit".
52. The Fact Sheet states that the matter was brought to the attention of the Licensee, CCTV footage was requested, and that the CCTV footage demonstrated the female performer wearing the fluoro vest but did not reveal any other RSA marshal within the venue.
53. The Fact Sheet states that the Licensee was invited to attend an Electronic Record of Interview of Suspected Person (ERISP), which the Licensee attended. At the ERISP, still images were obtained from the provided CCTV footage and presented to the Licensee who identified Mr Taulapapa and the female performer wearing the high-visibility vest in the images.
54. The Fact Sheet states that when presented with the images, the Licensee "...conceded a breach of Regulation 53G of the Regulation".
55. The Fact Sheet states that the Premises is a class 2 subject premises and by virtue of this, the Licensee must ensure that any person who is carrying out RSA supervisory duties as required by clause 53G is, while carrying out those duties, wearing clothing that identifies the person as an RSA marshal.
56. The Fact Sheet states that Mr Taulapapa was "...engaged to carry out RSA supervisory duties on the Saturday night" but was "...not wearing any clothing to identify him as an RSA marshal".

Email from Michael Foot, Senior Constable, Kings Cross Police Station (Police) to the Authority dated 26 May 2015:

57. In this email attaching a submission from Police, Sen Constable Foot states that as officer in charge of the investigation he is concerned that the sparse nature of facts and allegations contained in the Penalty Notice that enlivens consideration of a third strike being imposed upon the licence for the Premises may "...not accurately reflect the facts of the matter".
58. Sen Constable Foot states that he believes that the underlying offence committed in relation to this Penalty Notice was that the Premises "...did not maintain CCTV coverage of all publically accessible areas on the night of 27 July 2014".
59. Sen Constable Foot states that on 21 August 2014 and 23 August 2014 Police requested the production of all the CCTV footage recorded at the Premises from 12:10am to 3:00am on 27 July 2014.
60. This was to assist in the investigation and prosecution of the alleged offences of '*Patron permitted entry without scanning ID onto scanning system*' and '*Supply liquor to minor on licensed premises*'.

61. Sen Constable Foot submits that in response to both these requests the Licensee provided CCTV recordings which did not include footage of the stage area where a minor had allegedly been supplied with liquor.
62. Sen Constable Foot states that on 12 September 2014, Police attended the Premises and questioned the Licensee as to the requested CCTV footage and were told by the Licensee and the venue manager Mr Michael Amante that "...the one CCTV camera facing the stage area was not working on 27 July 2014".
63. Sen Constable Foot states that on the same date he inspected the venue's CCTV system and "...noted all cameras to be recording correctly".
64. Sen Constable Foot states that the Licensee "...confirmed that the faulty camera had since been repaired" and was once again operational.
65. Sen Constable states that on the available evidence he took the view that the Licensee had committed an offence under clause 53H of the Act by failing to maintain CCTV cameras covering all publically accessible areas (cl.53H(1)) or by failing to provide CCTV recordings within 24 hours of request (cl.53H(2)).
66. However, Sen Constable Foot states that he accepted the Licensee's explanation for failing to provide the CCTV covering the stage area. This was on the basis that the Licensee provided Police with all other CCTV recordings, including that which had substantiated the offence of permitting entry to a patron without scanning ID.
67. Sen Constable Foot states that the Licensee stated that he would not dispute that he had committed the offence of supplying liquor to a minor. Sen Constable Foot states that the alternate explanation for the non-provision of footage - that it was withheld to hinder the police investigation - was not consistent with the Licensee's other actions in relation to this matter.
68. Sen Constable Foot states that NSW Police relied upon a failure in respect of cl.53H(2) to substantiate this offence and this was a forensic decision based upon the current evidence.
69. Despite these observations, Sen Constable Foot further submits that:

"...it is my belief that factually, the licensee committed an offence under cl.53H(1)".
70. Mr Foot states that this further information does not constitute police submissions with respect to the consideration of the imposition of a third strike and that Police would ask for a further opportunity to provide submissions if the Authority were to proceed with consideration of a third strike.

Copy of handwritten Penalty Notice signed by Sen Constable Foot concerning the Premises dated 25 August 2014:

71. This handwritten Penalty Notice states that "...at 8:30pm on the 21/8/14 police served a written request for CCTV" on Mr Lakepa which "...was not complied with". The Penalty Notice further states that "...a further written request was served" on Mr Lakepa at "3:10am on 25/8/14" for the CCTV footage which "...again was not supplied"; and that "...about 3pm on 25/8/14 police received some CCTV" but "...not all that was requested".

Further submission to the Authority from OLGR dated 9 June 2015:

72. In this submission, Mr Keon states that in addition to the matters addressed in his letter to the Authority of 24 March 2015, the Authority "...should also be aware" that on 7 September 2014, OLGR inspectors detected a further prescribed offence of '*Licensee fail to comply with conditions of licence*' with respect to the Premises relating to a failure to comply with the Kings Cross special licence condition requiring RSA marshals to be on duty (and to be wearing identifiable clothing) at high-risk venues.
73. Mr Keon states that during an inspection at the Premises, it was discovered that the designated RSA marshal was wearing civilian clothing and that a female entertainer was walking around the venue wearing the RSA marshal's high visibility vest "...tied up at the front in the style of a halter top".
74. Mr Keon states that a Penalty Notice has been issued by OLGR, that the Licensee has elected to have this notice determined by a court, and that the matter has not yet been finalised.

[The Authority notes that this Penalty Notice has not been provided, nor any evidence that it has been paid or an Enforcement Order issued.]

75. Mr Keon submits that between 24 January 2014 and 6 September 2014, the Licensee of the Premises has committed five discrete prescribed offences, four of which were breaches of Kings Cross special licence conditions, and that this repeat offending demonstrates a "...persistent disregard of obligations imposed on high-risk venues" under the Act.
76. Mr Keon submits that the potential harm which may arise from the misuse or abuse of alcohol is "...exacerbated by both the location and business type of the venue, being an adult entertainment venue located in a high-risk precinct".
77. Mr Keon contends that the Licensee's consistent failure to comply with special conditions "...has the effect of undermining the integrity of the regulatory regime" and "...magnifies the risk" of alcohol-related harm arising from the offending.
78. Mr Keon submits that the special condition imposed upon premises in the Kings Cross Precinct with regard to CCTV (which the Authority notes is imposed by clause 53 of the Regulation):

"...aims to ensure violent incidents and liquor offences can be properly and promptly investigated".
79. Mr Keon submits that the Licensee's history of non-compliance with this condition throws doubt on the Licensee's ability to meet basic requirements suggesting a heightened risk of serious harm occurring due to breaches of the venue's licence conditions.
80. Mr Keon submits that the third strikes scheme is designed to operate as a deterrent to improper conduct by licensees and that in a case such as this where there is no change in behaviour the only appropriate outcome is the imposition of a third strike.
81. Mr Keon notes that the Licensee has remained the same over the entire period of offending and that its conduct is inconsistent with the objects of the Act and offends the public interest.

82. Mr Keon concludes that "...a third strike ought to be incurred" and that the appropriate remedial action in this instance is "...to cancel the liquor licence".
83. Mr Keon further submits that it is also appropriate to disqualify the Licensee, Mr David Lakepa; the Business Owner, Royal Restaurant Pty Limited; and its director and shareholder, Mr Michael Amante, from holding or being granted a liquor licence in respect of any licensed premises in NSW for such a period as the Authority deems appropriate.
84. Attached to this submission is a document entitled "Timeline of significant events: Dreamgirls, Kings Cross" which is an updated version of the document provided with the OLGR Letter dated 24 March 2015 and states the following:
- (a) 24 January 2014: "first" prescribed offence, being the offence of '*Licensee fail to comply with conditions of licence (HRVM – KX)*'
 - (i) 22 May 2014: prescribed offence committed and first strike incurred.
 - (b) 31 January 2014: "second" prescribed offence, being the offence of '*Licensee fail to comply with conditions of licence (CCTV – KX)*'
 - (i) 17 May 2014: prescribed offence committed
 - (ii) 18 September 2014: Executive Director, OLGR determined not to impose second strike.
 - (c) 27 July 2014: "third" prescribed offence, being the offences of '*Supply liquor to a minor on licensed premises*' and '*Licensee fail to comply with conditions of licence (ID scanned – KX)*'
 - (i) 3 January 2015: prescribed offence committed
 - (ii) 24 March 2015: second strike imposed.
 - (d) 25 August 2014: "fourth" prescribed offence, being the offence of '*Licensee fail to comply with conditions of licence (CCTV – KX)*'
 - (i) 3 January 2015: prescribed offence committed.
 - (e) 7 September 2014: fifth prescribed offence, being the offence of '*Licensee fail to comply with conditions of licence (RSA marshal) – KX)*'
 - (i) 14 October 2015 (Note: the Authority believes that this is meant to state "14 October 2014") penalty notice issued (offence not yet committed).

Consultation with interested parties involved with the licensed business on 15 June 2015:

85. In a letter from the Authority dated 15 June 2015 sent by email and post, the Authority notified the Licensee of the correspondence received from Mr Keon on 24 March 2015 regarding the commission of a prescribed offence at the Premises.
86. The Authority enclosed the OLGR Letter first notifying the potential third strike dated 24 March 2015; the submission from NSW Police dated 26 May 2015 and the further submission from OLGR dated 9 June 2015.
87. Similar letters were sent to the business owner of the Premises, Royal Restaurant Pty Limited and the premises owner of the Premises, Camco N.S.W. Pty Limited.

**Preliminary Submissions to the Authority from Ms Julieanne Levick,
Counsel for the Business Owner dated 13 July 2015:**

88. In this submission, Ms Levick concedes that the first and second strikes are now in effect.
89. However, Ms Levick disputes whether on 24 August 2014 the prescribed offence of failing to comply with a condition of the licence, relating to a breach of CCTV requirements imposed by clause 53H of the Regulation, should be treated as a separate prescribed offence.
90. Briefly, Ms Levick submits that this alleged contravention of a licence condition regarding CCTV is referable to a request that was made by Police of the Licensee to produce footage in relation to the "index incident" that occurred on *27 July 2014*.
91. Ms Levick submits that on 16 October 2014 Police issued three (3) Penalty Notices:
 - (a) One Notice concerned an offence against section 116AC of the Act
 - (b) One Notice concerned an offence against section 117 of the Act
 - (c) One Notice concerned an offence against Clause 53H of the Regulation.
92. Ms Levick submits that the prescribed offence against clause 53H that is alleged to have occurred on 25 August 2014 should not have been referred to the Authority by the Secretary by reason that this matter had been considered by Mr Keon when he made his Second Strike decision on 23 March 2015.
93. Ms Levick further submits that the Penalty Notice number 4924255701 dated 25 August 2014 is unclear as to whether it pertains to a breach of the requirement in clause 53H(1) – which requires CCTV coverage of all public areas of the Premises, or 53H(2) – which requires that a premises maintain recordings for 30 days and produce footage within 24 hours of a request.
94. Ms Levick emphasizes that the Penalty Notices that were issued by Police in respect of offences detected on 27 July 2014 and 25 August 2014 were:
 - (a) "issued at the same time on 16 October 2014" and
 - (b) "relate to the same offences committed in the same 24 hour period on 27 July 2014".
95. Ms Levick submits upon this basis that the offence that is now the subject of consideration for the imposition of a third strike is "...not in fact a prescribed offence" and rather "...is to be viewed in the context of the one course of conduct" along with "...the breaches of Sections 116AC and 117 on 27 July 2014".
96. Ms Levick requests that if the Authority takes a contrary view, the Licensee should be given further time to provide comprehensive written submissions with a view to addressing the "...substantive question as to whether a third strike should be imposed directly referable to this offence".

Email from OLGR to the Authority dated 4 August 2015:

97. In a brief response to Ms Levick's submissions Mr Keon states:

...The matters raised by Ms Levick, particularly the representations pertaining to the penalty notice dated 25 August 2015 (whether there is a breach of clause 53H of the Liquor Regulation 2008), is best dealt with by the issuing department, in this case, NSW Police.

*This Office was supplied with information from the State Debt Recovery Office that indicated the offence in question occurred on **25 August 2014** and therefore was not within the 24 hour time frame for the offence that formed the second strike. It is noted the second strike offence occurred on **27 July 2014**. It was for this reason the prescribed offence of **25 August 2014** was referred to the Independent Liquor and Gaming Authority for consideration under the Three Strikes scheme.*

Email from Police to the Authority dated 10 August 2015:

98. This short response to Ms Levick's submission from Sen Constable Foot states:

As stated in my original submission, I believe that factually there was a breach of cl.53H(1).

All offences stemmed from the same incident and occurred in the same 24 hour period.

Cl.53H(2) was relied upon as a 'cover-all' for both subsections (1) and (2). This was a forensic decision based on what limb of cl.53 could be most readily proven on the available evidence.

Cl.53H(2) provided a firm back up had ss(1) been defended. Relying on ss(1) alone provided no such security.

Submission from Mr Michael Amante, company director of the Business Owner to the Authority dated 12 August 2015

99. This email submission was sent directly to the Authority, notwithstanding that Mr Amante had previously been communicating via Ms Levick. Mr Amante's submissions provide more of a substantive response on the merits of incurring a third strike than do the preliminary submissions made by Ms Levick.
100. Mr Amante states that a third strike would have "dire consequences" for the business which he states employs "just over 80 people".
101. Mr Amante accepts that the first two strikes were incurred as a result of "...bad management on our part". However, he submits that the former licensee of the Premises has moved to New Zealand with little notice, giving the Business Owner insufficient time to apply for a high risk venue manager.
102. Mr Amante states that the Licensee has been put on notice and that "...we are currently changing licensees".
103. Mr Amante states that he takes full responsibility for the unfortunate chain of events leading to the imposition of a first strike on the licence for the Premises.
104. Mr Amante states that following the decision of OLGR to not impose a second strike on the licence for failure to comply with the CCTV licence conditions, "...we immediately installed cameras in the private rooms" and the Business Owner was grateful to OLGR for not imposing a second strike.
105. The imposition of a second strike following the detection of a minor on the Premises was, in Mr Amante's view, "...very unfortunate".
106. Mr Amante states that when he paid the penalties relating to the night of 27 July 2014, "...we believed they all related to the same incident" and that therefore only one strike would be incurred.
107. However he since discovered that "...Anthony Keon was not happy with this" and "...has imposed a third strike in relation to the CCTV footage not being adequate".

[The Authority notes that the Secretary does not determine third strikes, but that this is

an apparent reference to Mr Keon forwarding the CCTV offence to the Authority for its consideration as to whether a third strike should be incurred.]

108. Mr Amante states that "...we obviously think this is unfair" and that after reading the submission from Police "...I am inclined to think he [Senior Constable Michael Foot] also thinks it is harsh that we receive a third strike".
109. Mr Amante states that "...Anthony Keon himself says, '*in isolation the failure to produce CCTV in the required timeframe may not seem to be at the upper end of the scale of seriousness*'".
110. In relation to Mr Keon's submission that the Business Owner disregards the law, Mr Amante submits "...I do not believe this to be true".
111. Mr Amante states that "...I believe we obey the law and requirements of Kings Cross special conditions" and that "...we have no history of violence and we are very, very careful with who we let in".

LEGISLATION

112. When considering whether to impose a third strike on the licence for the Premises, the Authority is required to have regard to the following sections of Part 9A of the Act:

144B – definitions

prescribed offence, in relation to a licence, means an offence against any of the following provisions of this Act (or a provision of this Act or the regulations that is prescribed by the regulations) that was committed on or in relation to the premises to which the licence relates:

- (a) section 9 (sale or supply of liquor contrary to licence), but only where the offence relates to the sale or supply of liquor on or in relation to the premises outside of the trading hours for those premises,
- (b) section 11 (2) (breach of licence condition) but only in respect of conditions imposed under Division 3 or 4 of Part 6, section 144E or clauses 2A–5 or 7 of Schedule 4,
- (c) section 73 (1) (a) or (b) (permitting intoxication or indecent, violent or quarrelsome conduct),
- (d) section 73 (2) (selling or supplying liquor to an intoxicated person),
- (e) section 74 (1) (b) or (2) (permitting the sale, possession or use of a prohibited plant or drug),
- (f) section 75 (3) (failure to comply with a direction given by the Secretary),
- (g) section 82 (6) (failure to comply with a short-term closure order),
- (h) section 84 (7) (failure to comply with a long-term closure order),
- (i) section 102A (2) (failure to comply with a notice issued by the Secretary),
- (j) section 117 (1), (2) or (8) (selling or supplying liquor to a minor or allowing such sale or supply),
- (k) section 149 (licensees and managers liable for act of employees etc) in respect of a contravention of section 73 (2), 75 (3) or 117 (1) or (2).

relevant person, in relation to a licence, means the licensee or manager of the premises to which the licence relates.

144C Committing a prescribed offence

- (1) For the purposes of this Part, a person commits a prescribed offence if:
 - (a) a court convicts the person for the offence (whether or not it imposes any penalty), or
 - (b) an amount is paid under a penalty notice in respect of the offence, or
 - (c) a penalty notice enforcement order under the Fines Act 1996 is made against the person in respect of the offence.
- (2) However, if:
 - (a) the conviction is overturned on appeal, or
 - (b) the person elects, after an amount is paid under the penalty notice, to have the offence dealt with by a court, or
 - (c) the penalty notice, or the penalty notice enforcement order to the extent that it applies to the penalty notice, is withdrawn or annulled,any strike based on the conviction, penalty notice or enforcement order is revoked and any remedial action taken as the result of the strike ceases to have effect.

- (3) *Prescribed offences that are committed in relation to a particular licence within a single 24 hour period are taken, for the purposes of this Part, to be a single prescribed offence.*

144D *Incurring strikes*

- (1) *A first strike is incurred in respect of a licence if no other strike is in force in respect of the licence and a relevant person in relation to the licence commits a prescribed offence.*
- (2) *A second strike is incurred in respect of a licence if:*
 - (a) *a relevant person in relation to the licence commits a prescribed offence, and*
 - (b) *one strike was in force in respect of the licence when the offence was committed, and*
 - (c) *the Secretary decides that a second strike should be incurred because of the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence.*
- (3) *A third strike is incurred in respect of a licence if:*
 - (a) *a relevant person in relation to the licence commits a prescribed offence, and*
 - (b) *2 strikes were in force in respect of the licence when the offence was committed, and*
 - (c) *the Authority decides that a third strike should be incurred taking the following into account:*
 - (i) *the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence,*
 - (ii) *any other matter that may be prescribed by the regulations.*
- (4) *A strike comes into force on the day on which the offence that caused the strike was committed.*
- (5) *A strike expires on the day occurring 3 years after the day on which it comes into force.*
- (6) *The expiration of a strike does not affect the continued operation of remedial action taken under this Division in respect of the strike.*

144E *1 or 2 strikes—remedial action*

- (1) *The Secretary may, if 1 or 2 strikes are in force in respect of a licence, impose conditions on the licence relating to any one or more of the following:*
 - (a) *the use of plans of management and incident registers in respect of the licensed premises,*
 - (b) *the prohibition of the use of glass or other breakable containers on the licensed premises,*
 - (c) *the engagement of persons to promote the responsible service of alcohol at the licensed premises,*
 - (d) *the notification of persons, by the licensee, that the strike has been incurred,*
 - (e) *in the case of a club licence—requiring members of the governing body of the club to undergo training,*
 - (f) *any other matter that may be prescribed by the regulations.*
- (2) *The Secretary may, if 2 strikes are in force in respect of a licence, impose conditions on the licence relating to any one or more of the following:*
 - (a) *the persons who may be appointed as a manager of the licensed premises,*
 - (b) *the implementation of security measures in respect of the licensed premises,*
 - (c) *the prohibition of the sale or supply of liquor on the licensed premises before 10 am or after 11 pm (or both),*
 - (d) *the prohibition of patrons entering the licensed premises at certain times,*
 - (e) *the prohibition of the sale or supply of certain types of liquor on the licensed premises (including liquor with a high alcohol content or liquor that is intended to be consumed rapidly such as a shot),*
 - (f) *the prohibition of certain types of entertainment on the licensed premises,*
 - (g) *any other matter that may be prescribed by the regulations.*
- (3) *The Secretary may vary or revoke a condition imposed under this section at any time.*
- (4) *The Secretary is not to impose or vary a condition under this section in respect of a licence unless the Secretary is satisfied that the condition (or condition as varied) is a reasonable response to the behaviour that led to any of the strikes being incurred in respect of the licence.*
- (5) *A condition imposed under this section remains in force until revoked by the Secretary.*
- (6) *Nothing in this section limits the power of the Secretary to impose, vary or revoke conditions under any other provision of this Act.*

144F 3 strikes—remedial action

- (1) When 3 strikes are incurred in respect of a licence, the Authority must take action under this section for the purpose of preventing the commission of any further prescribed offences by a relevant person in relation to the licence.
- (2) The Authority must also take action under this section for that purpose if the Authority becomes aware that a relevant person in relation to the licence committed a prescribed offence while 3 strikes were in force in respect of the licence.
- (3) **Licences other than club licences**
If the licence is a licence other than a club licence, the action that the Authority is to take is one or more of the following actions that the Authority considers to be reasonably necessary for the purpose of preventing the commission of any further prescribed offences by a relevant person in relation to the licence:
 - (a) suspend the licence for up to 12 months,
 - (b) cancel the licence and disqualify (for up to 12 months) any of the following persons from being granted a licence in respect of the premises to which the cancelled licence related (the **subject premises**):
 - (i) any person who was a business owner under the cancelled licence at the time the prescribed offence resulting in the third strike being incurred was committed,
 - (ii) any close associate of any such business owner,
 - (c) disqualify (permanently or for a specified period) any person who was the licensee or manager of the subject premises at the time the prescribed offence resulting in the third strike being incurred was committed from holding a licence in respect of, or managing, the subject premises or any other licensed premises,
 - (d) impose a condition on the licence, or any subsequent licence issued in respect of the subject premises, that a person who is disqualified under paragraph (c) must not be employed or otherwise engaged as an employee or agent of the licensee or manager of those premises,
 - (e) impose, vary or revoke any condition on the licence that is not inconsistent with this Act.
- (4) **Club licences**
If the licence is a club licence, the action that the Authority is to take is one or more of the following actions that the Authority considers to be reasonably necessary for the purpose of preventing the commission of any further prescribed offences by a relevant person in relation to the licence:
 - (a) disqualify (permanently or for a specified period) a person who held any of the following positions at the time the prescribed offence resulting in the third strike being incurred was committed from holding any of those positions:
 - (i) secretary of the club,
 - (ii) manager of any of the club's premises,
 - (iii) member of the governing body of the club,
 - (b) disqualify (permanently or for a specified period) any such person from being the secretary of any other registered club, holding any licence or being appointed to manage any other licensed premises,
 - (c) appoint a person to administer the affairs of the club who, on appointment and until the Authority orders otherwise, has, to the exclusion of any other person or body of persons, the functions of the governing body of the club,
 - (d) impose a condition on the club licence that a person who is disqualified under paragraph (a) must not be employed or otherwise engaged as an employee or agent of the club or of the manager of any of the club's premises,
 - (e) impose, vary or revoke any condition on the club licence that is not inconsistent with this Act.
- (5) Nothing in this section limits the power of the Authority to impose, vary or revoke conditions under any other provision of this Act.
- (6) The Authority may undo any remedial action taken under this section at any time.

144G Matters to be considered by Secretary and Authority

- (1) In this section:
decision-maker means the Secretary or the Authority.
- (2) A decision-maker must, when making a reviewable decision in relation to a licence:
 - (a) notify the following persons in writing that the decision-maker is deciding the matter and invite those persons to make a submission within a specified period of at least 21 days:

- (i) *the licensee,*
- (ii) *the manager (if any) of the premises to which the licence relates (the **licensed premises**),*
- (iii) *if the decision is whether a second or third strike should be incurred—each interested person in the business carried on under the licence (but only if the person's name has been provided to the Authority under section 41 or 55) and the owner of the licensed premises,*
- (iv) *if the decision is whether a third strike should be incurred—each former licensee or manager who may be adversely affected by the decision,*
- (v) *any other person prescribed by the regulations, and*
- (b) *take into account any submissions received before the end of the specified period from any of the following:*
 - (i) *a person referred to in paragraph (a),*
 - (ii) *the NSW Police Force,*
 - (iii) *the Office of Liquor, Gaming and Racing, Department of Trade and Investment, Regional Infrastructure and Services,*
 - (iv) *the Bureau of Crime Statistics and Research of the Department of Attorney General and Justice, and*
- (c) *take into account each of the following to the extent that the decision-maker considers it to be relevant to the decision:*
 - (i) *whether the licensed premises were declared premises within the meaning of Schedule 4 when the offences that caused a strike are alleged to have been committed,*
 - (ii) *the size and patron capacity of the licensed premises and how this may impact on the ability of the licensee or manager to prevent the commission of prescribed offences,*
 - (iii) *the history and nature of the commission of prescribed offences by relevant persons in relation to the licence or on or in relation to the licensed premises,*
 - (iv) *the history and nature of violent incidents that have occurred in connection with the licensed premises,*
 - (v) *whether other action would be preferable,*
 - (vi) *whether there have been changes to the persons who are the licensee, manager or business owner,*
 - (vii) *whether there have been changes to the business practices in respect of the business carried on under the licence,*
 - (viii) *any other matter prescribed by the regulations.*
- (3) *Nothing in this section prevents a decision-maker from taking into account any other matter that the decision-maker thinks is relevant to the proper making of a decision under this Part.*
- (4) *A decision-maker must, as soon as practicable after making a decision under this Part, give notice in writing of the decision, the reasons for the decision and any right of review in respect of the decision to each person that is required to be notified by the decision-maker under subsection (2) (a) in respect of the decision.*
- (5) *A submission provided to a decision-maker under subsection (2) (b) (i) may not be used for the purposes of prosecuting an offence under this Act.*
- (6) *The regulations may prescribe guidelines setting out how the matters referred to in subsection (2) (c) are to be taken into account by a decision-maker.*

REASONS

113. The Authority considered this matter at its ordinary monthly meeting of 26 August 2015.
114. The Authority notes for a prescribed offence to act as a trigger for the consideration of a third strike, that offence must be "*committed*" within the particular meaning of section 144C of the Act.
115. Although the commission of an offence ordinarily occurs at the time at which the elements of that offence actually occurred, section 144C requires that particular events occur before the prescribed offence is deemed to be *committed* for the purposes of that section.

116. Briefly, if an offence has been detected and proceeds by way of a Local Court prosecution following the issue of a Court Attendance Notice, the defendant must actually be convicted of that offence for the offence to be *committed*.
117. If on the other hand a Penalty Notice is issued, the offence is *committed* if and when that Penalty Notice is paid, or, if it is not paid, the Penalty Notice becomes the subject of an Enforcement Order issued by the State Debt Recovery Office.
118. If a Penalty Notice is issued and the defendant elects to defend the matter in Court, the offence is *committed* for the purposes of section 144C if a conviction is secured.
119. Through the operation of clause 53H(2)(c) of the Regulation, it is a condition of the licence of the Premises that the Licensee produce CCTV footage, within 24 hours of a request by a Police officer or OLGR inspector.
120. In this case the relevant prescribed offence against clause 53H(2)(c) occurred with the non-production of some CCTV footage requested by Police on 21 and 23 August 2014. The footage concerned the period of licensed trading between 12:10am and 3:00am on 27 July 2014. Part of the footage requested was not provided to Police by 25 August 2015.
121. That offence was deemed to be *committed* by section 144C when a Penalty Notice issued by Police on 16 October 2014 in respect of that offence was paid on 3 January 2015.
122. The Authority notes that Mr Keon's correspondence dated 9 June 2015 also includes information that on 7 September 2014, in a separate incident OLGR inspectors detected a failure by an RSA Marshall employed by the licensed business to wear a high visibility vest, as required by another condition of the licence.
123. However, this alleged breach of condition regarding the RSA Marshall had not yet been finally determined by the Local Court at the time the Authority considered this matter at its meeting of 26 August 2015.
124. According to the latest advice from OLGR before the Authority at its meeting of 26 August 2015, the licensee had pleaded guilty to that offence, but the matter has been adjourned pending sentencing. No final orders have been made. For the avoidance of doubt that prescribed offence involving the RSA Marshall *has not been taken into account by the Authority in the determination of this matter*.
125. The Authority is satisfied, on the basis of the handwritten Penalty Notice in evidence before the Authority dated 16 October 2014 that the Licensee, Mr Lakepa, did not produce all of the CCTV footage requested by Police for the relevant time and date, despite being requested to do so on 21 August 2014 and again on 23 August 2014. The Authority is further satisfied on the basis of the SDRO records before the Authority that this Penalty Notice was paid for the purposes of section 144C of the Act on 3 January 2015.
126. The Authority would ordinarily take a very dim view of the non-production by any licensed premises, let alone a high risk licensed business, of CCTV footage to the Police or an OLGR inspector in contravention of a licence condition.
127. The non-production of CCTV footage is not only an offence but has the clear potential to cause substantial harm through compromising the deterrence provided by maintaining

CCTV and by frustrating the investigation of offences against the Act or other serious offences committed on licensed premises.

128. However, in the particular circumstances of this case, the Authority notes that a submission dated 26 May 2015, Kings Cross Police submit that the non-production of the relevant part of the CCTV footage sought by Police (with regard to one camera) was the result of a faulty camera that had been promptly repaired. Police do not believe that the non-production of footage that gave rise to the Penalty Notice was intended to, nor resulted in the frustration of the Police investigation of the conduct of concern to Police on 27 July 2014 that had prompted the request for footage. The Authority accepts the account of Police as to the nature and circumstances of this offence.
129. The Authority notes that while Sen Constable Foot believes that an offence was also committed against clause 57H(d)(iii) of the Regulation, in that the Licensee did not maintain CCTV coverage of all publically available areas of the Premises on the night of 27 July 2014 (due to the faulty camera). However, that alleged offence is not the subject of the actual handwritten Penalty Notice that is in evidence before the Authority and that was paid on 3 January 2015.

DECISION

130. In these particular circumstances the Authority is not satisfied, with respect to this particular prescribed offence, that a third strike should be incurred, having regard to the seriousness of any harm that may have resulted from or been associated with the commission of the offence in question for the purposes of section 144D(3)(c)(i) of the Act.
131. The Authority has turned its mind to all of the considerations listed in section 144G of the Act, but none of those factors overcome the submission from Police which satisfies the Authority that the non-production of one part of the requested CCTV footage on 25 August 2015 gave rise to any adverse consequence nor harm to the public interest in respect of the due administration of the Act.

CONCLUSION

132. In conclusion, the Authority has determined pursuant to section 144D(3) of the Act to *not* incur a third strike on the basis of *this* prescribed offence.



Micheil Brodie
Chief Executive

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

DATED: 9 / 9 / 2015