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Mr Gang Il An
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Dear Sir/Madam

**Notification of Decision to Incur Third Strike against Liquor Licence
under Part 9A of the *Liquor Act 2007* – Young Pocha, Sydney
(formerly *Sam and Terry Café*)**

INTRODUCTION

1. The Independent Liquor and Gaming Authority (Authority) has received notification of the commission of a prescribed offence against the *Liquor Act 2007* (Act) requiring consideration as to whether or not a third strike should now be incurred and remedial action taken against the licence of the premises currently known as "Young Pocha" trading at Level 1, 378 Pitt Street, Sydney (Premises) pursuant to the "Three Strikes" disciplinary scheme (Scheme) contained within Part 9A of the Act.
2. An on-premises liquor licence type, number LIQO660011267, currently attaches to the Premises, which permits the sale or supply of liquor for consumption on the Premises ancillary to the designated primary purpose of the licensed business, which is specified on the licence as a "restaurant".

3. The Authority notes that the Premises previously traded under the name "Sam & Terry Café" until about 22 May 2014. The liquor licence was transferred to the current licensee and business owner of the Premises with effect from 3 July 2014.
4. Material provided by licensing staff indicates that the current licensee of the business operating on the Premises is a corporation, Y J Food Corporation Pty Limited (Licensee). The approved manager appointed by the current Licensee is Mr Sungkyun (Christopher) Yoo (Approved Manager). The owner of the business that currently operates on the Premises is a corporation, Y J Food Corporation Pty Limited (Business Owner). The owner of the property in the Premises is another corporation, Vinny Pty Limited (Premises Owner).
5. The Authority received correspondence dated 2 July 2014 and 19 September 2014 from Mr Anthony Keon, Director of Compliance, Office of Liquor, Gaming and Racing (OLGR) informing the Authority of the commission of four prescribed offences that may potentially give rise to the incurring of a third strike against the licence attaching to the Premises.
6. In further correspondence dated 5 December 2014, Mr Paul Newson, Executive Director, OLGR informed the Authority that the Premises had previously incurred a first and second strike (under previous business ownership) and that those two strikes are currently in force against the licence.
7. The offences now before the Authority giving rise to the potential incurring of a third strike against the liquor licence took place under previous business ownership and at a time when the licence was under the control of Mr Gang Il An (Former Licensee), the proprietor of the previous business operating on the Premises trading as Sam & Terry Café. Mr Gang Il An has been notified of the OLGR correspondence and given an opportunity to make a submission to the Authority addressing these matters.
8. The circumstances in which the first strike was incurred are set out in a decision of a delegate of the (then) Director General of the NSW Department of Trade and Investment, Regional Infrastructure and Services (Director General) dated 31 January 2013, which notified the delegate's decision to take remedial action in respect of a first strike that had been automatically incurred against the licence by the operation of the Act, following the commission by the Former Licensee of a prescribed offence (First Strike Remedial Decision).
9. In the First Strike Remedial Decision, the (then) Director General determined to impose a new condition upon the licence requiring the formulation of a plan of management for the licensed business to be conducted on the Premises to be implemented by 1 April 2013.
10. The circumstances in which a second strike was incurred are set out in a decision of a delegate of the (now) Secretary of NSW Trade and Investment (Secretary) dated 27 June 2014. In this decision, the delegate decided that a second strike should be incurred against the licence (Second Strike Decision).

OVERVIEW OF THE THREE STRIKES SCHEME

11. The disciplinary regime contained in Part 9A provides a supplementary scheme for taking disciplinary action against participants in the liquor industry that is separate from, and does not limit the pre-existing disciplinary provisions contained in Part 9 of the Act.

12. While incurring a first strike is an automatic process, once a prescribed offence is deemed to have been committed in accordance with section 144C of the Act, a decision to incur either a second or third strike is at the discretion of the relevant decision maker – and may not be made until consultation with a range of third parties has occurred and all relevant statutory considerations have been taken into account.
13. With regard to first and second strikes, the primary decision maker is the Secretary. Second strike decisions are reviewable by the Authority. With regard to third strikes, the primary decision maker is the Authority. The Authority's decisions with respect to third strikes are reviewable on the merits by the New South Wales Civil and Administrative Tribunal (NCAT).
14. The Scheme is reasonably complex, with provisions designating, *inter alia*:
 - (i) those offences against the Act that are deemed to be prescribed offences which may potentially form the basis of a strike
 - (ii) the circumstances in which a relevant person is deemed to have committed a prescribed offence in relation to a liquor licence for the purposes of the Scheme
 - (iii) the parties who must be consulted before a decision maker (the Secretary in respect of a second strike or the Authority in respect of a third strike) may decide that a second or third strike should be incurred
 - (iv) discretionary factors that must be considered before a decision maker may decide that a second or third strike should be incurred
 - (v) the circumstances in which a strike commences, or ceases, to be in force against a licence.
15. Briefly, for a *strike* to be incurred, a relevant person must first *commit a prescribed offence* in relation to the licensed premises in question. The definition of "prescribed offence" is provided by section 144B of the Act and identifies eleven types of offences. Relevantly to this matter, the section states:

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 Director General),
 - (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 Director General),
 - (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).

16. Section 144C sets out those circumstances in which a "prescribed offence" is *deemed* to have been "committed" for the purposes of the Scheme. The section states:

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.

Requirements for a First, Second or Third Strike

17. Under the Scheme, a first strike is automatically incurred once a prescribed offence has been committed. By contrast, incurring a second or third strike is a discretionary matter, requiring that an assessment be made by the relevant decision maker as to whether the strike *should* be incurred, having regard to the seriousness of the harm that *may* have resulted from or been associated with the commission of the prescribed offence and a number of other statutory considerations listed below. The decision to incur a second strike is made by the Secretary, while the decision to incur a third strike is made by the Authority.
18. For a first strike to be incurred, section 144D(1) prescribes that there must be *no strike* already incurred in relation to the liquor licence and that a relevant person must commit a prescribed offence.
19. For a second strike to be incurred, section 144D(2) prescribes that a relevant person must have committed a prescribed offence in circumstances where *one strike* is already in force in relation to the licence. The Secretary must then decide whether 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".
20. For a third strike to be incurred, section 144D(3) prescribes that a relevant person must have committed a prescribed offence in circumstances where *two strikes* are already in force in relation to the licence. The Authority must then decide whether 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 [the Authority notes that the *Liquor Regulation 2008* (Regulation) does not prescribe any such matters for the purposes of this section of the Act].
21. Section 144G(2)(a) of the Act lists those third parties who must be notified and invited to make a submission, within a time period of at least 21 days, when a decision maker (the

Secretary or the Authority, as the case may be) makes a reviewable decision (a decision to incur a second or third strike). They include:

- (i) the licensee
- (ii) the approved manager (if any)
- (iii) any person whose name is provided to the Authority as an *interested person* in the business if notified to the Authority under section 41 or section 55 of the Act, and the owner of the licensed premises
- (iv) if the decision is whether a third strike should be incurred – each former licensee or manager of the business who may be adversely affected by the decision
- (v) any other person prescribed by regulations.

[The Authority notes that the Regulation does not prescribe any other parties for the purposes of this section of the Act.]

22. Furthermore, section 144G(2)(b) of the Act requires a decision maker to notify and have regard to any submissions received within the specified period of 21 days from:

- (i) the New South Wales Police Force (Police)
- (ii) the Office of Liquor, Gaming and Racing within the NSW Trade and Investment
- (iii) the NSW Bureau of Crime Statistics and Research (BOCSAR).

23. Section 144G(2)(c) of the Act provides a list of statutory considerations which a decision maker must take into account, to the extent that the decision maker considers them relevant to a reviewable decision:

- (i) whether the licensed premises were *declared premises* within the meaning of Schedule 4 to the Act at the time 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.

[The Authority notes that no such matters are prescribed by the Regulation at the time of this decision.]

24. Section 144G(3) provides that nothing in section 144G 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".
25. Timing is important under the Scheme. Pursuant to section 144D(4) a strike comes into force on the day upon which the prescribed offence that caused the strike is *deemed* to have been committed. This is not the same as the date when the offence actually occurred.
26. That is, once a second or third strike has been determined to be incurred, the strike "comes into force" from the date of conviction for the prescribed offence, the date of payment of any Penalty Notice issued in respect of the offence, or the date when the State Debt Recovery Office (SDRO) issues a Penalty Notice Enforcement Order in respect of an unpaid Penalty Notice for the offence – as the case may be. However, section 144D(5) provides that a strike against a licence *expires* three years after the day upon which it came into force.

TWO STRIKES ARE CURRENTLY IN FORCE AGAINST THE LICENCE

27. The Authority is satisfied, on the basis of the correspondence from Mr Keon dated 2 July 2014 and 19 September 2014, the submission from Mr Newson dated 5 December 2014 and the business records published by OLGR on the *Three Strikes Register* at www.olgr.nsw.gov.au/pdfs/threestrikesregister.pdf that two strikes are already in force with regard to the licence attaching to the Premises at the time of this decision.
28. The material provided by Mr Newson satisfies the Authority that on 11 August 2012, a prescribed offence of "licensee sell or supply liquor outside authorised trading hours" contrary to section 9(1) of the Act was detected at the licensed premises by NSW Police and a Penalty Notice was issued in respect of the contravention. This was the prescribed offence that would give rise to the first strike.
29. The Authority is also satisfied on the basis of that material that on 7 November 2012, the SDRO issued a Penalty Notice Enforcement Order in respect of the Penalty Notice that had been issued by Police in connection with the prescribed offence of selling liquor outside of licensed trading hours that had been detected on 11 August 2012. Upon SDRO taking this administrative action, the requirements of section 144C were met and a first strike was automatically incurred against the licence for the purposes of the Scheme.
30. As noted above, the First Strike Remedial Decision was then made on 31 January 2013 by a delegate of the (then) Director General who determined, under section 144E(1) of the Act, to impose a new condition upon the licence. This condition required that a plan of management, addressing certain prescribed matters, must be developed and implemented by the then licensee of the Premises by 1 April 2013 (Plan of Management Condition).
31. As detailed in the Second Strike Decision, on 27 October 2013 and 9 November 2013, two further prescribed offences of "licensee sell or supply liquor outside authorised trading hours" contrary to section 9(1) of the Act were detected by NSW Police. Penalty

Notices were issued by Police to the Former Licensee in respect of both of those contraventions.

32. The Authority is satisfied that Penalty Notice Enforcement Orders were issued by SDRO on 22 April 2014 and 23 April 2014 respectively in relation to Penalty Notices issued by Police in connection with the prescribed offences of "licensee sell or supply liquor outside authorised trading hours" that had been detected on 27 October 2013 and 9 November 2013. Upon SDRO taking this administrative action, the requirements of section 144C were satisfied and a second strike could potentially be incurred.
33. As a first strike was already in force, the commission of this new prescribed offence enlivened the (then) Director General's power to consider imposing a second strike against the licence.
34. On 27 June 2014, a delegate of the (now) Secretary decided, in the Second Strike Decision, that a second strike *should* be incurred in respect of the offence detected on 9 November 2013.
35. Although the decision incurring the second strike was not made until 27 June 2014, by the operation of section 144D(4), that second strike was deemed to have "come into force" when the relevant prescribed offence was deemed to have been "committed" – that is, when a Penalty Notice Enforcement Order in respect of that prescribed offence was issued on 23 April 2013.
36. The Authority notes that as part of administrative arrangements for the Scheme, SDRO routinely provides business records to OLGR specifying the payment status of Penalty Notices that have been issued in relation to licensed premises in New South Wales.
37. The Authority is satisfied, on the basis of the SDRO information contained in Mr Newson's submission dated 5 December 2014, that Penalty Notice Enforcement Orders were issued in relation to the two Penalty Notices that were issued by NSW Police in respect of the two instances of the prescribed offence of "licensee sell or supply liquor outside authorised trading hours" contrary to section 9(1) of the Act that were detected by Police on 27 October 2013 and 9 November 2013 respectively.
38. There is no evidence or other information indicating that a relevant party has elected to have these two Penalty Notices heard in Court, or that these Penalty Notices have been withdrawn or annulled.
39. The Authority is satisfied that the Second Strike Decision remains in effect at the time of this decision and notes that the Second Strike Decision was not the subject of any application for review by the Authority.

FOUR POTENTIAL BASES FOR A THIRD STRIKE

40. The Authority is satisfied, and it is not contested by the parties consulted on this matter, that two strikes continue to be in force against the licence at this time. What is disputed by the current Licensee and the Former Licensee, is whether the Authority should determine that a third strike *should* now be incurred against the licence.
41. The Authority was notified of three potential bases for incurring a third strike against the licence attaching to the Premises by letter dated 2 July 2014 from Mr Anthony Keon, Director of Compliance, OLGR.

42. The Authority was notified of a further (fourth) potential basis for incurring a third strike against the licence by letter dated 19 September 2014 from Mr Anthony Keon, Director of Compliance, OLGR.

SDRO Penalty Notice Enforcement Order dated 18 February 2014

43. The first potential basis for incurring a third strike arises by reason of the commission by the Former Licensee of the prescribed offence of "licensee sell or supply liquor outside authorised trading hours", contrary to section 9(1) of the Act.
44. Mr Newson advises in his submission dated 5 December 2014 that on 18 February 2014, SDRO issued a Penalty Notice Enforcement Order in respect of a Penalty Notice that Police had issued to the Former Licensee for the prescribed offence of "licensee sell or supply liquor outside authorised trading hours" contrary to section 9(1) of the Act, as detected on 29 November 2013.
45. The Authority accepts, on the basis of the information provided in Mr Newson's submission, that on 29 November 2013, Police attended the Premises for the purposes of conducting a business inspection. On that occasion, Police observed liquor to be freely supplied beyond the Premises' authorised licensed trading hours. The Authority is satisfied, on the basis of the material provided by Mr Newson that a Penalty Notice Enforcement Order was issued by Police on 18 February 2014 in respect of that prescribed offence. These facts are not contested by any of the parties consulted on this matter.

SDRO Penalty Notice Enforcement Order dated 13 June 2014

46. The second potential basis for incurring a third strike arises by reason of the commission by the Former Licensee of a further instance of the prescribed offence of "licensee sell or supply liquor outside authorised trading hours", contrary to section 9(1) of the Act.
47. Mr Newson advises in his submission dated 5 December 2014 that on 13 June 2014, SDRO issued a Penalty Notice Enforcement Order in respect of a Penalty Notice that Police had issued to the Former Licensee of the Premises for the prescribed offence of "licensee sell or supply liquor outside authorised trading hours" contrary to section 9(1) of the Act, as detected on 26 January 2014.
48. The Authority accepts, on the basis of the information provided in Mr Newson's submission, that on 26 January 2014, Police attended the Premises for the purposes of conducting a business inspection. On that occasion, Police observed liquor to be freely supplied beyond the Premises' authorised licensed trading hours. The Authority is satisfied that a Penalty Notice was issued in respect of that detected contravention of the Act, and that SDRO issued a Penalty Notice Enforcement Order in respect of that unpaid Penalty Notice on 13 June 2014. These facts are not contested by any of the parties consulted on this matter.

Conviction of Former Licensee at Downing Centre Local Court on 18 June 2014

49. The third potential basis for incurring a third strike arises by reason of the commission by the Former Licensee of a further instance of the prescribed offence of "licensee sell or supply liquor outside authorised trading hours", contrary to section 9(1) of the Act.
50. The Authority accepts, on the basis of the information provided in Mr Newson's submission dated 5 December 2014, that on 5 April 2014, Police attended the Premises for the purposes of conducting a business inspection. Immediately upon entry, an hour

and a half after the Premises' authorised trading hours for liquor sales had ended, Police observed approximately 15 to 20 patrons consuming liquor on the Premises. The Former Licensee was on duty at the time. Upon a subsequent review of CCTV footage obtained from the Premises, Police identified nine discrete instances of unauthorised supply of liquor outside of licensed trading hours, including bottles of plum wine and "Soju" spirits (which contains 16.9 per cent alcohol by volume).

51. The Authority is satisfied, on the basis of the information provided in Mr Newson's submission, that this matter was heard at the Downing Centre Local Court on 18 June 2014, where the Former Licensee was convicted of the prescribed offence of "licensee sell or supply liquor outside authorised trading hours" contrary to section 9(1) of the Act. The Former Licensee was fined \$3,000. These facts are not contested by the parties consulted on this matter.

SDRO Penalty Notice Enforcement Order dated 13 September 2014

52. The fourth potential basis for incurring a third strike was detailed in a separate letter to the Authority from Mr Keon dated 19 September 2014. That letter enclosed business records provided to OLGR by SDRO, indicating that on 13 September 2014, SDRO issued a Penalty Notice Enforcement Order with regard to a Penalty Notice number 4025587309 that had been issued to the Former Licensee by Police on 16 May 2014. That Penalty Notice arose from the detection by Police from the Alcohol and Licensing Enforcement Command (ALEC), during a business inspection on 16 May 2014, of the prescribed offence of "licensee fail to comply with conditions of licence", contrary to section 11(2) of the Act.
53. Enclosed with Mr Keon's letter was an extract of the Police report of this incident, which is recorded in Computerised Operational Policing System report (COPS Report) number E54686272.
54. In this contemporaneous record the ALEC officer reports, and the Authority accepts, that the following (uncontested) events occurred on 16 May 2014:
- (i) At approximately 9:45pm on 16 May 2014, Police officers attached to ALEC attended the Premises for the purposes of conducting an audit
 - (ii) At the time of inspection, Police noted "...about 20 patrons inside the venue seated at tables"
 - (iii) Police spoke to the Former Licensee, who was asked to produce a number of documents relating to the audit.

Breach 1: Breach of licence condition

- (iv) The Former Licensee, Gang Il An, was unable to produce the liquor licence relating to the Premises. He had an A4 form printed depicting the liquor licence (near the kitchen entry). When asked why, Mr An states that this was a "mistake".

Breach 2: Breach of licence condition (Plan of Management Condition)

- (v) The Plan of Management Condition imposed upon the licence on 31 January 2013 states:
 - 1. *The licensee must develop and maintain a plan of management by 1 April 2013.*

2. *The plan of management must include information on the venue's authorised trading hours and pre-closure procedures.*
 3. *All staff must be provided with a copy of the plan of management.*
 4. *A copy or extract of the plan of management detailing the venue's trading hours must be placed within the serving area/s of the venue so that it is visible to staff.*
 5. *A copy of the current plan of management must be maintained at the licensed premises and made available for immediate inspection by members of the NSW Police Force or inspectors from the Office of Liquor, Gaming and Racing.*
- (vi) Mr An was initially unable to produce the plan of management. He left to retrieve the document from his vehicle.
- (vii) Upon inspection, it was noted that the plan of management did not address the points required by the Plan of Management Condition.

Breach 3

- (viii) No prescribed particulars were displayed anywhere in the venue.

Breach 4

- (ix) "Sign 1" was displayed near the kitchen [the Authority notes that "Sign 1" is not specified in the Report, but is apparently a reference to a sign prescribed by legislation]. The venue does not offer bar service. Alcohol is served by table service only. In this case, Sign 1 is required to be displayed prominently at each entry to the Premises
- (x) No sign was displayed at the entry
- (xi) Mr An stated to Police that he has been "in trouble" on a number of occasions already. He stated that he is handing the lease to the venue in on Tuesday 20 May 2014 and is returning to his cleaning business
- (xii) Police have attempted to contact Mr An on a number of occasions without success. Action to be taken, investigation continuing.
- (xiii) Police have issued four infringement notices for the abovementioned offences.
55. The Authority notes that these facts have not been contested by any of the parties consulted on this matter.
56. The Authority is aware that OLGR regularly receives written advice from SDRO regarding the payment status of certain Penalty Notices that have been issued in relation to licensed premises throughout NSW. Mr Keon has provided the Authority with an extract from OLGR's business records of the advice it has received from SDRO, which records that a Penalty Notice Enforcement Order was issued by SDRO on 13 September 2014 in respect of Penalty Notice number 4025587309 issued by NSW Police on 16 May 2014 in relation to the detection by Police of the prescribed offence of "licensee fail to comply with a condition of a licence" contrary to section 11(2) of the Act, being the Plan of Management Condition.

RESPONSE TO CONSULTATION

57. On 25 September 2014, Express Post letters were sent to the Licensee (noting that the current corporate Licensee is also the Business Owner), Approved Manager, Premises Owner and Former Licensee of the licensed premises now trading as "Young Pocha",

inviting them to make submissions in reply to the material that had been provided to the Authority by Mr Keon in his letters dated 2 July 2014 and 19 September 2014.

Submission from Former Licensee dated 17 October 2014

58. On 17 October 2014, Ms Jinhi Kim of the law practice *Sydney Legal House* advised that she was acting on behalf of the Former Licensee, Mr Gang Il An. The submission from the Former Licensee makes the following observations or contentions:
- (i) The Former Licensee was a tenant of the Premises located at Level 1, 378 Pitt Street, Sydney from 1 November 2012 to 22 May 2014
 - (ii) The Former Licensee was operating the licensed premises known as Sam & Terry Café trading as "WAWA" at this location
 - (iii) On or about 21 October 2013, the Former Licensee lodged an application for a liquor licence with the Authority and was granted liquor licence number LIQO660011267 "on a later date"
 - (iv) The Former Licensee was "experiencing extreme difficulty" in managing the business and ceased trading the café business "on or about 20 May 2014"
 - (v) On or about 23 May 2014, the lessor of the Premises issued a new lease to Y J Food Corporation Pty Limited (ACN 169 330 205)
 - (vi) The Former Licensee, "upon request from the lessor", executed an application to transfer the liquor licence to the new lessee
 - (vii) The Authority provisionally approved this application to transfer the licence to Y J Food Corporation Pty Limited "on or about 23 June 2014"
 - (viii) The liquor licence was transferred on 3 July 2014
 - (ix) The Former Licensee has been "diligently attending" to the payment of Penalty Notices issued to him during the period he was managing the Café. The balance owing of \$2,800 "will be cleared in due course"
 - (x) The Former Licensee is "...in the process of starting a new business" and this venture "...will not involve the sale or service of alcohol".

Submission from current Licensee dated 17 October 2014

59. On 17 October 2014, Mr David Oh of the law practice *Strathfield Law* made a submission to the Authority advising that he acts for the current Licensee (and Business Owner) of the Premises, Y J Food Corporation Pty Limited and also the current Approved Manager, Mr Sungkyun (Christopher) Yoo. Material provided by the current Licensee included:
- Legal submission from Strathfield Law dated 17 October 2014
 - Key liquor licence details sourced from the Government Licensing System (GLS) for liquor licence number LIQO660011267 as at 25 July 2014
 - Plan of Management for the business trading as "Young Pocha"
 - Letter from Sydney Nationwide Realty Pty Ltd dated 10 October 2014 indicating that the corporate Licensee has been the lessee of the Premises since "22 May 2014"
 - Inspection Checklist from City of Sydney Council dated 6 September 2014

- Photographs of various parts of the Premises depicting signage and copies of relevant certification.
60. Mr Oh submits that the factual background to this matter, as contended by the current Licensee, is as follows:
- (i) The liquor licence was duly transferred from Mr Gang Il An, the Former Licensee, to the current Licensee "on or about 3 July 2014" as evidenced by the "Start date" of the Licensee noted in the GLS record for the licence
 - (ii) The Licensee purchased the licensed business operating within the Premises from the Former Licensee and commenced trading on the Premises from "on or about 22 May 2014"
 - (iii) "At all material times" throughout the process of the transfer of the business and the liquor licence, the current Licensee and Business Owner "were neither aware nor received any notice/advice" as to the incidents detected by Police nor any other prior offences committed by the previous management
 - (iv) The current Licensee and Business Owner "did not receive any legal advice" from their (then) solicitors as to the nature and extent of these incidents, or potential legal consequences arising from the operation of the Scheme
 - (v) At the time of the sale of the business operating on the Premises and the transfer of the liquor licence, the Licensee and Business Owner's then solicitors "also acted simultaneously" for the Former Licensee and former business owner
 - (vi) The incidents forming the basis of the four prescribed offences that are the subject of Mr Keon's notification regarding a potential third strike against the licence took place "prior to [the current Licensee's] commencement of trading"
 - (vii) The current Licensee and Approved Manager of the Premises "did not receive" any Penalty Notice Enforcement Orders issued by SDRO "to date" including the latest Enforcement Order issued on 13 September 2014
 - (viii) Despite the Licensee assuming ownership of the business operating on the Premises "as at 22 May 2014", the Licensee was "never afforded an opportunity to seek a review" of the Second Strike Decision which took effect from 27 June 2014
 - (ix) When the Licensee and Approved Manager were made aware of the "alleged incidents and offences", these parties attempted to contact the Former Licensee "without success"
 - (x) The Licensee notes, from the extract of COPS Report E54686272 attached to Mr Keon's letter dated 2 July 2014, that Police have also attempted to contact the Former Licensee on a number of occasions "without success"
 - (xi) Police "randomly" attended the Premises, "allegedly" upon instructions from OLGR, at around 12:40am on Saturday 27 September 2014 to ascertain whether the conditions of the liquor licence were being observed. The Licensee contends that at that time, Police "verbally confirmed" to the Approved Manager that the Licensee is "...conducting business operation legally and in compliance with the conditions of the liquor licence".

61. While acknowledging that a licensee's failure to comply with the conditions of a liquor licence is a clear, serious breach of the licence, Mr Oh submits that the Licensee was not aware of the commission of the prescribed offences that are under consideration, and "...denies any wrongdoings and/or responsibility concerning same in unequivocal terms".
62. Mr Oh submits that upon receiving legal advice, it has "...voluntarily rectified the abovementioned breaches" committed by the Former Licensee. In accordance with the licence conditions, copies of the latest version of the Plan of Management - which includes information on the venue's authorised trading hours and pre-closure procedures - have been distributed to all staff and displayed prominently within the Premises.
63. Mr Oh submits that the Licensee "...intends to further develop and improve the Plan of Management on an ongoing basis" to comply with its legal and ethical obligations to relevant authorities, local industry and the wider community as a whole. Mr Oh submits that the full liquor licence document and prescribed signage are now displayed prominently near the entry to the Premises.
64. Mr Oh submits that since it has commenced trading on the Premises, the Licensee has "...taken all necessary measures, to the best of its knowledge and capacity", to avoid any contravention of the provisions of the Act. The Licensee further submits that, to the best of [its] knowledge, there were no breaches of the Act or liquor licence conditions to date since it commenced trading on the Premises, a position that the Licensee contends is supported by the local Council inspection report dated 6 September 2014 and members of the Police upon their inspection.
65. Mr Oh submits that the Authority can be reasonably satisfied as to the compliance history of the Licensee, and asks that the Authority give a "...favourable consideration against imposing a third strike" on the basis of recent changes to the licensee of the Premises, as per section 144G(2)(c)(vi) of the Act.
66. Mr Oh submits that the Licensee has been advised as to the consequences of a third strike being incurred against the licence, which would "adversely affect" the Licensee's business operation to "an extreme level" given that the Licensee has been trading for less than six months.
67. Mr Oh submits that it would be "unfair" to incur a third strike against the licence, given that the prescribed offences in question "were not committed by the current licensee". He refers to the Fact Sheet associated with the Scheme as published on the OLGR website at www.olgr.nsw.gov.au/pds/three_strikes_fact_sheet.pdf which states:

The scheme has been designed so that it targets repeat offenders, and does not adversely impact on responsible licensees.

68. Mr Oh also refers to another section of that OLGR Fact Sheet, which states:

The "Three Strikes" Scheme provides an opportunity for licensees and managers to review their business practices and any alcohol and security management plans to reduce the risk of incidents that can lead to liquor offences and strikes being incurred.

69. Mr Oh also refers the Authority to the following extracts from an (undated) "agreement in principle speech" delivered to the NSW Parliament by the Honourable George Souris MP, the former Minister for Tourism, Major Events, Hospitality and Racing:

When considering whether a strike should be incurred, the decision maker must have regard to the seriousness of any harm that may have resulted from or been associated with the

commission of the offence that triggered the strike process...the Three Strikes Scheme reflects the principle of escalating penalties to target repeat offenders.

70. Mr Oh submits that the current Licensee and Business Owner are **not** repeat offenders under the Scheme, and that they have "not been given an opportunity" to address the incidents and offences which gave rise to the previous two strikes being incurred against the licence.
71. Mr Oh submits that, based on the above extracts, a decision to incur a third strike given the Licensee's circumstances "...would potentially be against the purposes and principles of the Scheme itself".
72. Mr Oh submits that the correspondence from the Authority and OLGR has "...alerted [the Licensee] to urgently review its business practice and conform to the requisite standards with successful results", as "...acknowledged by various members of the community including the enforcement authorities".
73. Mr Oh submits that the Licensee's "...swift actions in response should be commended and should not be penalised" by the imposition of a third strike which "...may force [the Licensee] to close business for faults not of their own".

Notification to Police and BOCSAR

74. On 3 November 2014, the ALEC from NSW Police was notified of the matter and invited to make a submission, by reason that the Scheme requires the Authority to consult with Police when a third strike determination is contemplated. No submission from Police was received by the Authority.
75. On 3 November 2014, the NSW BOCSAR was also notified of the matter, by reason that the Scheme requires the Authority to consider any information that BOCSAR may provide. Consistent with BOCSAR's previously advised position, that agency advised that it does not propose to volunteer submissions with regard to the regulation of individual licensed premises.

No submission from Premises Owner

76. On 25 September 2014, the Authority sent a copy of the OLGR correspondence to the Premises Owner, Vinny Pty Limited. No submission was received.

Further Submission from OLGR dated 5 December 2014

77. Although OLGR had already initiated this consideration of a possible third strike, OLGR were also consulted on the matter, as required by the Scheme. On 5 December 2014, Mr Paul Newson, Executive Director, OLGR provided a further submission to the Authority. Annexed to this submission is a brief overview of the history of the matter from OLGR's records, including a flow chart demonstrating when the prescribed offences at issue occurred. Also annexed to the OLGR submission is an ASIC Company Extract for "Sam & Terry Pty Ltd" (the corporate business owner of the business previously operating on the site of the Premises) as at 28 November 2014.
78. Briefly, Mr Newson makes the following general submissions on the nature of the Authority's powers and the remedial action that it is open to the Authority to take, should a third strike be incurred:

- (i) In order to determine whether a third strike should be incurred, the Authority is required to take into account the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence. Mr Newson submits that "multiple prescribed offences" have been committed by the Licensee whilst two strikes were in force, which "...demonstrates a persistent disregard of obligations" imposed under the Act and is material to the threshold question of whether a third strike should be incurred and the nature of remedial action that may be appropriate
- (ii) Mr Newson notes that the Scheme is "...designed to operate as a deterrent to improper conduct by licensees, with the graduated approach to strikes and associated sanctions" reflecting this. Mr Newson refers to the second reading speech and contends that the Licensee's conduct is "...inconsistent with the objects of the Act, offends the public interest and demonstrates that the individuals involved in the business are incapable or unwilling to faithfully acquit the function required under the Act"
- (iii) Mr Newson submits that a third strike ought to be incurred in respect of the licence and the "appropriate remedial action" in this instance is to cancel the liquor licence. Mr Newson submits that it is also appropriate in this instance to disqualify the Former Licensee, Mr Gang Il An, and the former business owner, Sam & Terry Pty Limited and its sole director, Byong Ha Song, from holding or being granted a liquor licence in respect of any licensed premises in NSW for such period as the Authority deems appropriate – a course of action which Mr Newson submits "...provides an adequate deterrent to licensees electing to operate outside the parameters of NSW liquor laws".

79. Mr Newson then makes the following specific submissions on the actual prescribed offences under consideration:

- (i) The risk of harm from trading outside authorised hours is "greatly exacerbated" by the extended availability of liquor and the "general disregard" for regulatory and statutory obligations exhibited by the offending conduct. The subsequent prescribed offences also demonstrate consistent failures by the Licensee to make "...adequate and timely arrangements, following the detection of previous contraventions of the venue's authorised hours, to ensure compliance with obligations under the liquor laws"
- (ii) Mr Newson submits that the Licensee's conduct "...demonstrates an indifference to regulatory engagement and an inability to operate a licensed venue in accordance with community expectations" and that the Licensee's failure to remedy such recidivist conduct serves only to aggravate the risk of harm to industry and the wider community
- (iii) Mr Newson submits that the venue's poor compliance history is directly attributable to the Former Licensee, with whom Police and OLGR have made considerable attempts to engage. Despite the graduated approach to enforcement demonstrated by NSW Police (including the use of warnings, Compliance Notices and the imposition of the Plan of Management Condition), the Former Licensee "...continued to commit the same prescribed offence with some regularity" and failed to comply with the Plan of Management Condition
- (iv) Mr Newson notes that the liquor licence was transferred in July 2014 and that submissions received from the solicitors representing the current Licensee and Approved Manager request that a third strike not be imposed, on the basis of the change in licensee and "...alleged improvement in business practices". These

submissions also contend that no issues have been detected at the venue since the licence was transferred

- (v) Although it is acknowledged that the licensee has changed and the venue is under new management, Mr Newson submits that the mere fact that these changes have occurred "does not have a material effect" on the assessment of the seriousness of harm that may have arisen as a result of the offences
- (vi) Mr Newson submits that over a two year period, the Former Licensee committed seven prescribed offences, almost on a regular basis, then vacated the Premises, citing difficulties in management, with the licence subsequently being transferred – a "...pattern of repeat and ongoing offending"
- (vii) Mr Newson contends that there is no guarantee that this pattern will cease, and there has been no information submitted by the current Licensee that provides adequate assurance that there will be a significant shift in the venue's operation
- (viii) Mr Newson concludes that the "...mere changeover of a licensee should not provide a mechanism to avoid the appropriate escalating sanctions".

Submission in Reply from Licensee dated 20 February 2015

- 80. On 23 February 2015, Ms Jinhi Kim of *Sydney Legal House* provided a further submission dated 20 February 2015 to the Authority after having had the opportunity to consider the further submission from OLGR dated 5 December 2014.
- 81. Ms Kim advises that she now acts on behalf of the *current Licensee, the current Approved Manager and the Former Licensee*.
- 82. Material provided by Ms Kim on behalf of those parties includes:
 - Legal submission from Sydney Legal House dated 20 February 2015
 - Copy of a registered lease to the new lessee, Y J Food Corporation Pty Limited, dated 23 May 2014
 - ASIC Company Extract of Y J Food Corporation Pty Limited (ACN 169 330 205) and resume of the current Approved Manager, Mr Sungkyun (Christopher) Yoo
 - Letter from City of Sydney Council dated 6 September 2014
 - Letter from the landlord's agent, Sydney Nationwide Realty Pty Limited
 - Business Activity Statements of the business for the July 2014 and October 2014 quarters.
- 83. Briefly, the current Licensee, Approved Manager and Former Licensee jointly make the following submissions:
 - (i) It is "agreed" that the circumstances of the offending show that the venue's poor compliance history is "directly attributable" to the Former Licensee, Mr Gang Il An
 - (ii) Mr An is currently working in the real estate industry and is employed as a sales manager by "Sydney Top Realty" in Chatswood
 - (iii) Sam & Terry Pty Ltd is currently inactive and both directors have agreed to and are in the process of dissolving the company. The parties undertake that the Former Licensee "...will not be involved in managing a business that is related to supplying or serving alcohol"

- (iv) On or about 23 May 2014, the lessor issued a new lease to the lessee, Y J Food Corporation Pty Limited, which is a "...new entity, unrelated to the previous lessee"
- (v) The Former Licensee and current Licensee executed a Transfer of Liquor Licence form "...upon mutual agreement and with the consent of the lessor"
- (vi) On or about 23 June 2014, the Authority provisionally approved the application to transfer the liquor licence
- (vii) The licence was confirmed as transferred on 3 July 2014, with a new licensee and business owner in operation. An ASIC Company Extract for Y J Food Corporation and a copy of the resume of the current Approved Manager, Mr Sungkyun (Christopher) Yoo, are attached
- (viii) On or about 6 September 2014, City of Sydney Council inspected the Premises for compliance with the licence conditions and excellent results were received
- (ix) Police attended and observed the venue on 26 September 2014, 14 November 2014 and 22 November 2014, and provided "...positive feedback without any complaint".
- (x) On or about 2 January 2015, another inspection was carried out by City of Sydney Council, which received excellent feedback. A reference letter from the landlord's agent, Sydney Nationwide Realty Pty Limited is attached, which states that the current Licensee is "...an independent entity and not run by the previous tenant" and is "...capable, reliable and promising" in running its own business
- (xi) The parties strongly emphasise the fact that the current Licensee has "...put extra effort to comply with all the required regulations and will continue to do the same". They submit that no complaints have been received by the relevant authorities and no issues have been detected at the venue since the licence was transferred
- (xii) The current Licensee submits that as a result, the business is "healthy" and "...has been booming". The two most recent Business Activity Statements for the 2014 July and October quarters are attached
- (xiii) In conclusion, the parties request that a third strike should not be imposed and they "...rely on the change in licensee and business ownership". The parties also "...request that the business is not adversely affected in any way as growing number of customers have become regular customers and have been enjoying our restaurant's menu".

MEETING WITH AUTHORITY ON 25 MARCH 2015

- 84. After giving preliminary consideration to this matter at its ordinary (February) monthly meeting conducted on 4 March 2015, the Authority decided, in principle, that a third strike and then further strikes should be incurred against the licence attaching to the Premises on the basis of each of the prescribed offences that are under consideration.
- 85. However, the Authority resolved to defer finalisation of its decision until having received oral submissions from the parties.
- 86. To that end, the Authority invited the Former Licensee, Mr Gang Il An and the current Licensee/Business Owner and Approved Manager of the business, along with the solicitor now acting for all of those parties, Ms Jinhi Kim of *Sydney Legal House*, to

attend an informal meeting, recorded for transcription purposes, with the Authority conducted on 25 March 2015, pursuant to section 36B of the *Gaming and Liquor Administration Act 2007* (Meeting).

87. The current Approved Manager, Mr Sungkyun (Christopher) Yoo attended the Meeting, represented by Ms Jinhi Kim of *Sydney Legal House*. A Korean interpreter was also arranged by the Authority.
88. The Former Licensee, Mr Gang Il An, did not attend the Meeting, notwithstanding Ms Kim's earlier advice that he would be attending.
89. Mr Sean Goodchild, OLGR Manager Investigations and Mr James Shand, OLGR Compliance Officer also attended the Meeting as representatives of OLGR in its capacity as informant of the potential third strike.
90. The Chairperson of the Authority observed that the Authority was particularly concerned with the nature of the relationship between the previous business owner and the current business owner and the circumstances in which the business was sold to the current business owner, and noted the possibility of collusive behaviour in relation to the change of business ownership.
91. The Chairperson also noted that the material before the Authority indicated that there was a common solicitor for both the purchaser and the vendor of the business, and requested information about who that solicitor was and what steps were taken to ensure that both parties received independent advice.
92. Additionally, the Authority was concerned that Ms Kim was now representing both the Former Licensee *and* the current Licensee/Business Owner, giving rise to a potential conflict of interest in respect of Ms Kim's position.
93. In response to these concerns, Ms Kim advised the Authority that she had become involved in this matter because "there is a mess". Ms Kim had been instructed by the Former Licensee, Mr Gang Il An, when he began to face difficulty running the business by reason of his receiving infringement notices and subsequent Local Court convictions in respect of breaches of the licensing legislation. In May 2014, Ms Kim notified the landlord of the Premises that the Former Licensee would no longer be running the business. This was "a couple of months prior" to the eventual transfer of the lease and the liquor licence to the current business owner and around the same time that she (Ms Kim) was introduced to the current Licensee.
94. Ms Kim stated that she only became aware of the potential third strike under consideration when asked to make submissions on the matter.
95. The current Approved Manager, Mr Yoo, then addressed the Authority through a Korean interpreter. He stated that he had initially researched a Korean community real estate website and was seeking to purchase a "...Korean restaurant with a liquor". Under questioning, Mr Yoo stated that he had not had any previous contact with and did not personally know the former licensee and business owner (Mr Gang Il An) or anyone associated with the Sam & Terry Café before commencing negotiations for the purchase of this business, which he conducted via an agent who he met through that Korean real estate website.
96. Mr Yoo advised that he was introduced to his business partner and co-owner of the new business (who was not present at the Meeting) through his business partner's wife, with whom Mr Yoo had previously worked as a chef at the Sheraton Hotel in Sydney.

97. Mr Yoo stated that he is also a member of the Korean Chefs Association. Mr Yoo advised that he and his now business partner had been looking for a business to acquire for some time, ever since Mr Yoo worked as a chef and his now business partner had worked as a waiter, both at The Star casino.
98. When questioned about which solicitors had performed legal work on this matter at various times, Ms Kim advised that there were two lawyers involved "...only because the restaurant was doing so bad" and that there was no goodwill component included in the purchase price for the former Sam and Terry Café licensed business.
99. Ms Kim stated that Mr Yoo had instructed Mr Soo Boong Lee, a solicitor from Strathfield in relation to the transfer of the lease for the Premises and that he instructed Mr Ki Dong Lee, a solicitor from Lidcombe (who also acted for the Premises Owner, Vinny Pty Limited) on the transfer of the liquor licence.
100. In response to specific questions from the Chairperson, Mr Yoo stated that Mr Ki Dong Lee (his licensing solicitor) did not give Mr Yoo any advice about the existence of the first two strikes on the licence, nor any information about the prior offences against the Liquor Act committed by the Former Licensee, Mr An.
101. However, Mr Yoo conceded that he did not ask any questions about the history of the liquor licence or how the business formerly operating on the Premises had been managed.
102. Mr Yoo stated that he did not pay any money to acquire goodwill in the business but that in addition to legal fees, he paid a \$15,000 commission for the transfer of the licence.
103. Ms Kim then made the following submissions to the Authority on behalf of the Former Licensee, Mr An:
 - (i) The current Young Pocha business is a separate entity to the Sam & Terry Café
 - (ii) Ms Kim was approached by the former proprietors of the business to make submissions on the potential third strike as they felt that they "...haven't been given proper legal advice in relation to this type of law".
 - (iii) The Former Licensee, Mr Gang Il An, had left the business operating on the Premises and was now working for a real estate business in Chatswood during the day, while running another business providing cleaning services in the evenings, "...so he doesn't come near city"
 - (iv) Ms Kim submitted that the company Sam & Terry Pty Ltd, the former business owner of the Sam & Terry Café run by Mr An "...cannot be dissolved only because the company was formed to serve another purpose" and that the other director of Sam & Terry Pty Limited, Mr Byong Ha Song, now lives in the Philippines
 - (v) On the question of remedial action, Ms Kim stated on behalf of the Former Licensee, Mr An that "...he is in remorse, he is sorry for what has been happening, he is no longer involved in running a business related to alcohol or supply or to do anything like it"
 - (vi) Ms Kim submitted that the Former Licensee is not going to be doing anything in relation to running a restaurant or any type of business involving alcohol

- (vii) Ms Kim then submitted on behalf of the current Licensee that since the commencement of trade in May 2014, the Young Pocha business has been operating in accordance with their new plan of management and "...running sufficiently, efficiently and according to the regulation". Ms Kim contended that the current proprietors of the business "...have not got any complaints from the nearby premises or the clients"
 - (viii) Ms Kim submitted that the sole purpose in running this new business is to "...supply a Korean menu that complements well with alcohol" and that the current Licensee has been operating the business in accordance with the trading hours specified on the licence
 - (ix) Ms Kim submitted that for the current proprietors of the business to be "disadvantaged" as a result of the fact that Mr An has "badly performed" is, in Ms Kim's submission, "not fair".
104. Mr Yoo then personally addressed the Authority. He stated that he has been a chef for 12 years and since the transfer of the lease in May 2014, he has been running the business "for 10 months without any problem". Mr Yoo stated that the Young Pocha Korean restaurant does not provide a karaoke facility and the sale of liquor is not the primary purpose of the business. Mr Yoo stated that he has completed RSA training and was aware that alcohol must only be served with a (full) meal and "...not even with a side meal".
105. Mr Yoo also submitted that he has complied with all of the requirements of Police and Council and that his restaurant business elects to trade between 5:00pm and 12:30am seven days a week, but the service of liquor ceases at 11:00pm Monday through Saturday and at 10:00pm on Sunday, in accordance with the licensing legislation and the trading hours specified on the licence.
106. Mr Yoo conceded that he had no knowledge of the Three Strikes Scheme prior to acquiring the business, but that since receiving notification of the potential third strike, he had conducted "...a lot of research" on the operation of the Scheme.

Oral Submissions from OLGR at Meeting

107. Noting that the Authority must take remedial action when incurring a third strike against a liquor licence, Mr Goodchild then made the following submissions on behalf of OLGR:
- (i) The Three Strikes Scheme is at risk of being undermined in circumstances when there are changes of licensee that may be artificial
 - (ii) OLGR concedes, based on the oral evidence presented at the Meeting, that it cannot make that strong submission (that the change of business is artificial) in this case. However, it is the view of OLGR that a person purchasing a liquor licence has a duty to make certain enquiries, particularly with regard to licensed premises in the high risk Sydney CBD entertainment precinct. OLGR would expect a "...fairly high level of diligence" in persons seeking to enter such businesses
 - (iii) OLGR submits that while it might be unfortunate that a person may not be aware of previously incurred strikes against a licence or the regulatory history of a licensed business, that is *not* a strong enough reason not to incur a third strike against a licence and for the Authority not to consider some form of remedial action.

108. Ms Kim then further submitted on behalf of the Former Licensee that Mr Gang Il An has surrendered the lease, left the business and undertakes not to be involved in any business that sells or supplies liquor.
109. Ms Kim submitted that the Former Licensee "...has learnt his lesson but wants to survive through this ordeal" and does not want any "break up" in the running of the business.
110. Ms Kim submitted that if the former and current proprietors had been aware of the consequences of "...transferring two strike or a messy licence like this", the Young Pocha business would have applied for a new restaurant licence instead of seeking a transfer of the existing licence.
111. Ms Kim submitted on behalf of the current Licensee that since forming the Young Pocha business, the current Licensee has implemented a new plan of management and new policies with regard to operating the business in accordance with the conditions on the liquor licence.
112. Ms Kim submitted that the Korean menu available at this restaurant includes a particular "very popular dish" that is complemented by the service of liquor.
113. Ms Kim also submitted that should a third strike be incurred against the licence, both the current proprietors of the business and the landlord of the Premises will be disadvantaged financially by reason that the current proprietor/lessee will be deprived of revenue from liquor sales and unable to continue to pay rent to the Premises Owner.

[The Authority notes that while it is not clear what, if any, action the Premises Owner took to be aware of and deal with the conduct of its tenant, Sam and Terry Café, the issue of disadvantage to the Premises Owner does not arise by reason of the action taken by the Authority below.]

114. Ms Kim submitted that since the new business has commenced operating under the control of the current Licensee, neither the licence nor the Premises has in any way come under adverse notice from Police, Council or OLGR.
115. In conclusion, Ms Kim requests that should the Authority take remedial action against the licence, such action be confined to the imposition of a special condition so that the current Licensee will not be disadvantaged by any cancellation or suspension of the licence.

REASONS FOR DECISION

116. The Authority considered this matter at its meeting on 4 March 2015. The Authority has had regard to those considerations that are prescribed by section 144G(2)(c) of the Act, which it must consider, to the extent that they are relevant, when deciding whether or not to incur a third strike.
117. *By reference to section 144G(2)(c)(i) of the Act*, the Authority is satisfied, on the material provided by OLGR, the submissions in reply and its awareness of Schedule 4 to the Act that the Premises is not a "declared premises" and was not a declared premises when the prescribed offences occurred.
118. *By reference to section 144G(2)(c)(ii) of the Act*, the Authority is satisfied, on the basis of the condition contained within development approval number D/2009/269/A issued by City of Sydney Council on 13 June 2013, that the venue is of a *very small scale* by any standards, with the maximum patron capacity restricted to just 30 persons. The Authority

is satisfied that the venue's size is not a contributing factor in the commission of the prescribed offences, the ability to supervise the Premises, or the risk of further offences. The size of the Premises does not adversely impact the ability of the Licensee or Approved Manager to prevent the commission of prescribed offences, although its small size underscores that this Premises has given rise to an unusual amount of adverse regulatory action for its size and licence type.

119. *By reference to section 144G(2)(c)(iii) of the Act*, the Authority is satisfied that there is a troubling recent history of the commission of prescribed offences in relation to the sale or supply of liquor outside authorised trading hours. This has not been contested by the parties consulted on this matter. There is no such adverse regulatory history under the current business ownership.
120. With regard to the regulatory history of the Premises, the online "Three Strikes Register" published by OLGR satisfies the Authority that two strikes have already been incurred against the licence. The Authority notes with concern that the very licence condition imposed by the (then) Director General as a remedial measure in response to the incurring of the first strike, which required the development and maintenance of a plan of management for the Premises, was not promptly addressed by the Former Licensee, Mr Gang Il An. The repeated commission of prescribed offences relating to the observance of licensed trading hours is of particular concern to the Authority.
121. *By reference to section 144G(2)(c)(iv) of the Act*, the Authority is satisfied, on the basis of the material before it, that there is no evidence to indicate that the venue has a history of violent incidents *in connection* with the Premises.
122. *By reference to section 144G(2)(c)(v) of the Act*, the Authority has considered whether any other action would be preferable (to incurring a strike). While the business ownership has now changed, the three strikes Scheme is concerned with the regulation of licensed *premises*, not individual licensed *businesses*. It is difficult to identify alternative action that should be directed to the current licensed business to remedy repeated prescribed offences by the former business, and it is difficult in the present circumstances to be satisfied that no action should be taken in response to the prescribed offences now under consideration.
123. While the Authority accepts that the current Approved Manager and co-owner of the business, Mr Yoo was not on notice of the poor regulatory history of the Premises when acquiring the business, it is of some considerable concern that he did not seek to become informed of its regulatory record. This could have been achieved by Mr Yoo (or particularly the former solicitor who advised him on the licence transfer) obtaining the licensing files for the Premises, conducting a GIPA Application or inspecting the Three Strikes Register published on the OLGR website before acquiring the business. This is the kind of due diligence that a reasonably diligent licensed business owner should conduct when acquiring a licensed business.
124. The Authority agrees with the OLGR submission that ignorance on the part of an incoming licensee or business owner is *not* of itself a persuasive reason not to incur a strike.
125. The four potential bases for incurring further strikes include three detected breaches of section 9(1) of the Act and one breach of section 11(2) of the Act. These are serious matters that occurred on the Premises over a relatively short period of time.
126. The Authority notes that the Former Licensee, who was responsible for the operation of the former Sam & Terry Café business at all relevant times when these four prescribed

offences occurred, made little or no attempt to defend the regulatory history of that business. He has not defended the facts alleged, nor did he attend the Meeting convened by the Authority to hear oral submissions.

127. Any licensee and/or approved manager of any licensed business, as well as any staff on duty, should be aware of the licensed trading hours to which their licensed business is subject. If a licensee cannot observe those basic requirements, then that business poses a risk to the public interest in respect of the Liquor Act.
128. *By reference to section 144G(2)(c)(vi) of the Act*, the Authority is satisfied that there was a change of ownership of the business in May 2014 and transfer of the licence and appointment of a new approved manager in July 2014, as discussed above. The Authority is satisfied, on the basis of the submissions from the Licensee and Approved Manager, that the Former Licensee and his business have no relationship to the current Licensee/Business Owner and Approved Manager and that this was a *bona fide* transfer of the licence to an unrelated entity.
129. *By reference to section 144G(2)(c)(vii) of the Act*, the Authority is satisfied that since the change of ownership of the business in May 2014 and the transfer of the licence in July 2014, no prescribed offences have been committed and the business has not come under any adverse regulatory or compliance notice. The Authority is satisfied, on the basis of the current Licensee/Business Owner's submissions, that a plan of management has been implemented and the business practices have changed to ensure compliance with all requirements of OLGR, Council and Police.
130. The Authority accepts Mr Yoo's oral submissions to the Authority that the current business has a genuine focus on Korean cuisine, and the supply of liquor is ancillary to that purpose. The Authority finds this to be in contrast to the conduct of the previous licensed business, which sought to maximise liquor sales at the expense of compliance with the Act, provoking a substantial regulatory response from Police, evidenced through the issue of Penalty Notices.

Does the Commission of any of the Four Recent Prescribed Offences Warrant a Third Strike?

131. The Authority has taken into account all of the material and submissions before it regarding the prescribed offences before the Authority and the statutory considerations the Authority is required to address.
132. When determining whether a third strike *should* be incurred, the Authority must consider not only what harm *has* occurred in relation to the prescribed offences before the Authority, but what harm *may have resulted from*, or been associated with, these prescribed offences.
133. In this case, the prescribed offences at issue concern three breaches of section 9(1) of the Act. Legislative provisions that control licensed trading hours are of fundamental importance to the regulatory scheme imposed by the Act. A licensee without the diligence to comply with those controls may give rise to a range of adverse alcohol related harm – from noise, public disturbance and property damage arising from the intoxication of patrons on the premises or in public places after leaving the premises, through to a wide range of potential accidental or intentional injury caused to patrons or staff working on the premises from persons drinking for a prolonged period.
134. Breach of the licensed trading hours also poses a broader harm to the community by undermining the integrity of the regulatory system and giving non-compliant licensed

businesses an unfair commercial advantage over their law-abiding rivals – especially during times of the week when there is high demand for hospitality services in an area with numerous licensed premises.

135. The fourth prescribed offence under consideration – failing to comply with the Plan of Management Condition, was a remedial measure imposed in response to the commission of an earlier strike against the licence of the Premises. That misconduct poses two types of potential harm to the community. First, it deprives management and staff of the business of a management document that may assist in ensuring day to day compliance with the Act. Second, its non-observance threatens to undermine the efficacy of the Scheme which is designed to prevent the recurrence of prescribed offences against the Act. When a licensee fails to comply with remedial action previously taken under the Scheme, this conduct threatens public confidence in the Scheme as a whole.
136. The repeated commission of prescribed offences has required a considerable regulatory response to manage this small licensed premises. Between August 2012 and May 2014, six instances of the prescribed offence of "licensee sell or supply liquor outside authorised trading hours" contrary to section 9(1) of the Act were detected, reflecting a patent lack of concern for compliance with the law by the Former Licensee.
137. The Authority is satisfied that the new Approved Manager and co-owner of the business, Mr Yoo has a background as a chef at a major Sydney hotel and accepts that his new business has a genuine focus on providing Korean cuisine, and the supply of liquor is genuinely ancillary to that purpose.
138. The Authority is satisfied that Mr Yoo was an independent purchaser of the licensed business with no prior association with the Former Licensee or his business, and that he did not have any knowledge of the poor regulatory history of the Sam & Terry Café business formerly operating on the Premises when the current Licensee and Business Owner acquired the business and started trading from late May 2014.
139. However, as noted above, it is of some concern that Mr Yoo was not aware of the two strikes against the licence when Mr Yoo acquired the business. The Scheme has received considerable media publicity and the Authority expects new licensees and approved managers to be aware of it.
140. The Authority is also satisfied that since the transfer of the licence in or around July 2014, the new "Young Pocha" business operating on the Premises has been conducted under the management of the current Licensee and Approved Manager without further adverse incident and that the licence operates with two recorded strikes.
141. The Authority notes that the Former Licensee, Mr Gang Il An, did not appear at the meeting as foreshadowed. Having considered the submissions made through his solicitor, the Authority is satisfied that Mr Gang Il An is now working in the Sydney real estate industry. The Authority notes Mr An's undertaking not to run a licensed business again.
142. In conclusion, having regard to the facts and circumstances of this case and the statutory considerations described above, the Authority is satisfied that a third strike and further strikes *should* be incurred against the licence in respect of each of the four prescribed offences that are now before the Authority.

143. This means that with six strikes now recorded against the licence, the Young Pocha business will, in regulatory terms, be operating on "thin ice" while those strikes remain in force for the statutory period of three years.
144. Any further prescribed offence committed in relation to the current licensed business may well require remedial action against the licence itself, or persons associated with the current Licensee.

REMEDIAL ACTION

145. Having determined to incur a third strike against the licence, section 144F of the Act structures the Authority's discretion as to remedial action, providing the following options:

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 Authority is to take 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 third strike was incurred,*
 - (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 third strike was incurred 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) *...*
 - (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.*
146. Having considered the options available to it, and noting the change of ownership of the business in May 2014 and the transfer of the licence in July 2014, the Authority has decided *not* to take remedial action against the licence itself, the current Approved Manager, Mr Sungkyun Yoo or the corporate Licensee and Business Owner, Y J Food Corporation Pty Limited.
147. However, the Authority considers it appropriate and in the public interest – in light of the poor regulatory history of prescribed offences accumulated while the Former Licensee, Mr Gang Il An was proprietor of the Sam & Terry Café business – that Mr Gang Il An be disqualified, pursuant to section 144F(3)(c) of the Act, from holding a liquor licence in respect of, or managing the Premises or any other licensed premises in the State of New South Wales for a period of **ten (10) years** from the date of this decision.

148. The Authority also directs (by way of an internal administrative measure) that a record be made that any future application indicating Mr Gang Il An's involvement with any licensed business in NSW shall be brought to the attention of the Authority for determination.
149. In making this decision, the Authority has had regard to the statutory objects and considerations provided by section 3 of the Act, which states:

3 *Objects of Act*

- (1) *The objects of this Act are as follows:*
- (a) *to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community.*
 - (b) *to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,*
 - (c) *to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.*
- (2) *In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following:*
- (a) *the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),*
 - (b) *the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,*
 - (c) *the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.*
150. When considering the appropriate disciplinary action, the Authority has given weight to subsection 3(2)(a) of the Act – the need to minimise harm associated with the misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour) and subsection 3(2)(c) of the Act – the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

REVIEW RIGHTS

151. Pursuant to section 144H of the Act, an application for review of this decision may be made to the New South Wales Civil and Administrative Tribunal by the licensee, manager, person interested in the business, former licensee or former manager of a business operating on the Premises by no later than 21 days after those parties receive notification of this decision.
152. A person who has an interest in the business conducted at the Premises may also seek review of the decision, but only if that person was identified as a person interested in the business on a statement that was previously provided to the Authority under section 41 or section 55 of the Act. For more information, 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



19 MAY 2015

Micheil Brodie
Chief Executive