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Mr Maxim Gunsberger
Former Licensee
Downunder Nightclub
[address not published]

Mr and Mrs Rodney and Georgina Bell
Premises Owners, Downunder
Nightclub c/o Mr Merrick Spicer
Merrick Spicer and Associates
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By Email and/or Express Post

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Dear Sir/Madam

**Notice of Remedial Action on "Second Strike"
under Part 9A of the *Liquor Act 2007*
Downunder Nightclub, Port Macquarie**

INTRODUCTION

1. On 21 July 2015, the Independent Liquor and Gaming Authority (**Authority**) received an application for review (**Review Application**) of a decision to incur a second "strike" pursuant to Part 9A of the *Liquor Act 2007* (**Act**) against the liquor licence attaching to the premises currently known as the "Downunder Nightclub", located at 13 Short Street, Port Macquarie (**Premises**).
2. The Review Application was filed with the Authority by Mr Merrick Spicer of Merrick Spicer & Associates, who act for Mr Rodney Thomas Bell and Mrs Georgina Carmen Bell - the owners of the Premises (**Premises Owners**) and the shareholders in the corporate business owner, Midcoast Commercial Plastering Pty Limited. The review applicant identified on the Review Application Form is Mrs Georgina Carmen Bell (**Review Applicant**).
3. The Review Application is made under section 144H of the Act and concerns a decision (**Reviewable Decision**) made by a delegate (**Delegate**) of the Secretary of (then) NSW Trade and Investment, now the Department of Justice (**Secretary**) dated 30 June 2015 determining that a second "strike" should be incurred against the licence attaching to the Premises pursuant to the "Three Strikes" disciplinary scheme (**Scheme**) contained within Part 9A of the Act.

4. The Premises operates in the mode of a nightclub pursuant to an on-premises liquor licence number LIQO624006554. The designated primary purpose recorded on the *OneGov* record for this licence is "*other public entertainment venue*".
5. The licence also enjoys the benefit of an extended trading authorisation that enables the sale or supply of liquor at the Premises to continue beyond the standard licensed trading hours prescribed by section 12 of the Act. In this case, liquor may be sold or supplied for consumption on the Premises from 5:00am to 4:00am on the following morning on Monday through Saturday and from 10:00am to 12:00 midnight on Sunday.
6. The licence record discloses that the licensee is Mr Maxim Gunsberger (**Licensee**) and the business owner of the licensed business operating on the Premises is a company, Midcoast Commercial Plastering Pty Limited (**Business Owner**).
7. [The Authority notes that, since the making of this Complaint, Mr Gunsberger ceased employment at the Premises as of 5 July 2015. He is still listed on the *OneGov* licence record as the licensee. A Cease to Trade Notice received by the Authority on 21 July 2015 indicates that the Premises is no longer trading, that the Licensee has retired and that the Business Owner is "looking for a replacement licensee".]

Part 9 Disciplinary Complaint

8. The Authority notes, by way of background, that on 27 May 2015, a delegate of the Secretary made a separate disciplinary complaint to the Authority under section 139 of the Act against Mr Gunsberger in his capacity as Licensee of the licensed business trading on the Premises (**Disciplinary Complaint**).
9. As at the time of this decision, the Authority has found that the grounds of the Disciplinary Complaint have been established and is awaiting submissions on the question of disciplinary action.

STRIKES INCURRED AGAINST THE LICENCE

First Strike

10. As disclosed in the Reviewable Decision, a first strike was automatically incurred against the licence when a Penalty Notice issued by New South Wales Police to the Licensee in respect of the prescribed offence of "*licensee permit intoxication on licensed premises*" (detected on 16 August 2014) was *paid* on 12 September 2014. The prescribed offence was thereby "committed" for the purposes of the Scheme upon payment of the Penalty Notice. The first strike is recorded on the OLGR "Three Strikes" Register published on the OLGR website at www.olgr.nsw.gov.au.
11. [The Authority notes that neither the Penalty Notice nor any record of payment of the Penalty Notice has actually been provided by OLGR in relation to this Review Application. However, a business record from the State Debt Recovery Office was included in the material provided by OLGR in respect of the separate Disciplinary Complaint that is simultaneously being considered by the Authority, indicating that this Penalty Notice was paid on 12 September 2014. The incurring of a first strike offence in relation to this licence is in any event not disputed by the Licensee, Business Owner or Premises Owners.]

Prescribed Offences Giving Rise to Consideration of a Second Strike

12. As detailed in the Reviewable Decision, on 31 August 2014, four (4) further prescribed offences were detected by OLGR officers while on the Premises. These concern:
 - a) three (3) counts of the offence of "*licensee permit intoxication on licensed premises*" contrary to section 73(1) of the Act and
 - b) one (1) count of "*licensee/employee sell/supply liquor to intoxicated person*" and section 73(2) of the Act.
13. Court Attendance Notices were issued in relation to these offences.
14. On 8 April 2015, the charges in relation to these four offences were heard at the Port Macquarie Local Court. The Licensee of the Premises, Mr Maxim Gunsberger, was *convicted* of all four charges.
15. [The Authority notes that, as these four offences occurred within the same 24-hour period, they are considered to be a single prescribed offence for the purpose of the Scheme through the operation of section 144C(3) of the Act.]
16. Accordingly, the "commission" of a prescribed offence (within the particular meaning of section 144C(1)(a) of the Act) occurred upon the Court convicting the Licensee on 8 April 2015. This triggered the Secretary's consideration as to whether a second strike should be incurred against the licence.
17. On 14 April 2015, OLGR invited written submissions as to whether a second strike should be incurred against the licence. Submissions were sought from the Licensee, the Premises Owners and the Business Owner. Submissions were also sought from NSW Police.
18. Although the legislation prescribes that submissions from the NSW Bureau of Crime Statistics and Research (**BOCSAR**) should also be considered, the Reviewable Decision records that no invitation was made to BOCSAR due to previous correspondence from the Director of BOCSAR, Dr Don Weatherburn dated 7 October 2012 indicating that BOCSAR would not be volunteering submissions on individual licensed premises involved in Part 9A matters.
19. Two submissions were received by OLGR on whether a second strike should be incurred. One submission was made by Mr Merrick Spicer of Merrick Spicer & Associates who act for both the corporate Business Owner and Premises Owners (collectively, the **Owners**). The other submission was made by NSW Police. These submissions are discussed below.

OVERVIEW OF THE THREE STRIKES SCHEME

20. The disciplinary regime provided by Part 9A was inserted into the Act by the *Liquor Amendment (3 Strikes) Act 2011*. 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.
21. 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.

22. With regard to first and second strikes, the primary decision maker is the Secretary of the Department of Justice and those decisions are reviewable by the Authority.
23. With regard to the incurring of third strikes, the primary decision maker is the Authority and those decisions are reviewable on the merits by the New South Wales Civil and Administrative Tribunal (**NCAT**).
24. The Scheme is reasonably complex, with provisions designating, *inter alia*:
 - a) those offences against the Act that are deemed to be "prescribed offences" which may potentially form the basis of a strike
 - b) 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
 - c) 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"
 - d) discretionary factors that must be considered before a decision maker may decide that a second or third strike should be "incurred"
 - e) the circumstances in which a strike commences, or ceases, to be "in force" against a licence.
25. 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).
26. 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.*

27. Section 144H contains general provisions relating to reviews made under Part 9A of the Act. As noted above, a decision to incur a second strike is made by the Secretary of the Department of Justice and is reviewable by the Authority. A review application made under this Part automatically operates to stay a reviewable decision unless an order is made to the contrary.

28. Section 144H of the Act states:

144H Reviews generally

- (1) *An application for the review of a reviewable decision may be made by a person who is required to be notified of the decision under section 144G no later than 21 days after the person receives the notification.*
- (2) *An application is to be made:*
 - (a) *in the case of a decision of the Secretary – to the Authority, and*
 - (b) *in the case of a decision of the Authority – to the Civil and Administrative Tribunal as an application for an administrative review of the decision under the Administrative Decisions Review Act 1997.*
- (3) *Part 2 of Chapter 3 of the Administrative Decisions Review Act 1997 does not apply to an application to the Civil and Administrative Tribunal for an administrative review of a decision by the Authority under this Part.*
- (4) *An application for a review operates to stay the reviewable decision unless the body conducting the review otherwise directs.*
- (5) *The operation of any remedial action taken in respect of a strike is suspended during any time that the decision to impose the strike is stayed.*
- (6) *In determining an application for review under this section, the body conducting the review must take into account any matter that was required to be taken into account in making the reviewable decision that is the subject of the review.*

Requirements for a First, Second or Third Strike

29. Under the Scheme, a first strike is automatically "incurred" once a "prescribed offence" has been "committed".
30. 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.
31. 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.
32. 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".

33. 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:
 - a) the seriousness of any harm that may have resulted from, or been associated with, the commission of the offence, and
 - b) 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].

34. Section 144G(2)(a) of the Act lists those third parties who must be notified and invited to make a submission, within a specified period of at least 21 days, when a decision maker (the Secretary or the Authority, as the case may be) makes a reviewable decision. They include:
 - a) the licensee
 - b) the approved manager (if any)
 - c) 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
 - d) 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
 - e) any other person prescribed by the regulations [the Authority notes that the Regulation does not prescribe any other parties for the purposes of this section of the Act].

35. Furthermore, section 144G(2)(b) of the Act requires a decision maker to notify and have regard to any submissions received within the specified time period from:
 - a) the New South Wales Police Force
 - b) the Office of Liquor, Gaming and Racing within the Department of Justice
 - c) the New South Wales Bureau of Crime Statistics and Research within the Department of Justice.

36. 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 decision whether to incur a second or third strike:
 - a) 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
 - b) 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
 - c) 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
 - d) the history and nature of violent incidents that have occurred in connection with the licensed premises
 - e) whether other action would be preferable
 - f) whether there have been changes to the persons who are the licensee, manager or business owner

- g) whether there have been changes to the business practices in respect of the business carried on under the licence
 - h) any other matter prescribed by the regulations [the Authority notes that no such matters are prescribed by the Regulation at the time of writing].
37. 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".
38. Timing is important under the Scheme. Pursuant to section 144D(4) a strike "comes into force" on the day upon which the "offence that caused the strike" was "committed".
39. Although, pursuant to section 144C of the Act, a prescribed offence requires a conviction (if the matter proceeds by way of prosecution) or payment of a Penalty Notice (if the matter proceeds by way of Penalty Notice) or, if the Penalty Notice is not paid, the issue of a Penalty Notice Enforcement Order from the State Debt Recovery Office (**SDRO**), once the offence has been deemed to have been committed, the strike is then deemed to have come into force from the date that the "offence that causes the strike" was committed – meaning the date of the relevant act or omission giving rise to the prescribed offence.
40. However, section 144D(5) provides that a strike against a licence *expires* three (3) years after the day upon which it came into force.

PROGRESS OF APPLICATION BEFORE THE AUTHORITY

Review Application Material

41. The Review Application material comprises the following material:
42. **Review Application Form signed by Mrs Georgina Carmen Bell** in her capacity as Premises Owner and shareholder of the current corporate Business Owner dated 21 July 2015. Briefly, the Review Application Form seeks the "revocation" of the Reviewable Decision, and states that:
- ...the decision will directly effect [sic] the value of the Applicant's premises and their saleability. The decision will also directly effect [sic] the value of the business conducted on the premises and the business's saleability. The Applicant is a shareholder in the company that conducts the business.*
43. **Submission Letter from Mr Merrick Spicer to the Authority dated 21 July 2015.** This submission argues that a second strike should not have been incurred by the Delegate against the licence.
44. Briefly, the Review Applicant submits that the interests of the Owners are "detrimentally affected" by the Reviewable Decision, in that the value and saleability of the Premises and the business operating on the Premises are "both reduced and restricted whilst ever [sic] a second strike remains in force".
45. The Review Applicant specifies five (5) "grounds" or bases upon which the Review Applicant seeks a review of the Reviewable Decision:
- a) **Ground 1:** The Secretary, in making the Reviewable Decision, did not take into account the submissions made by the Licensee, forwarded by email to OLGR on 4 May 2015.
 - b) **Ground 2:** The Reviewable Decision "did not give proper weight" to the steps which the Owners have taken to address the offending behaviour.

- c) **Ground 3:** The Reviewable Decision "did not take into account adequately or at all" the comments of the Port Macquarie Local Court Magistrate when the Licensee was convicted of the offences giving rise to the incurring of the second strike against the licence.
 - d) **Ground 4:** The Reviewable Decision will have a "harsh and disproportionate effect" on the Owners when compared with the nature of the actual offences giving rise to the prosecutions.
 - e) **Ground 5:** The Reviewable Decision relied on a factor, being the consideration of "seriousness of any harm", which was not "not supported" by the Prosecution evidence before the Local Court.
46. **In relation to Ground 1**, the Review Applicant notes that paragraph 12 of the Reviewable Decision states that "a submission was not received from the Licensee".
47. However, the Review Applicant contends that a submission from the Licensee was made and attaches an email forwarded by the Licensee directly to the safe.premises@olgr.nsw.gov.au email address on 4 May 2015.
48. The Review Applicant further submits that the principal submission on the second strike consideration was made by Merrick Spicer & Associates on 1 May 2015 and the Police submission was not received until 6 May 2015.
49. The Review Applicant submits that "in the Licensee's submission there is reference to the fact that there was no violence in the premises on 31 August 2014 nor any violence which flowed from these offences". The Review Applicant also attaches a copy of this submission from the Licensee (discussed below).
50. **In relation to Ground 2**, the Review Applicant contends that the Business Owner "took positive steps to address the offending behaviour" in consultation with the Licensee. The Review Applicant submits that the steps taken, as referred to in the Business Owner's submission to OLGR dated 1 May 2015 and the Licensee's submission to OLGR dated 4 May 2015, were "appropriate".
51. The Review Applicant contends that the Licensee has now ceased employment with the business on the Premises on 5 July 2015 and that, although the licence remains in the name of Mr Maxim Gunsberger, the Premises is not currently trading and "will not re-open with Maxim Gunsberger as the licensee".
52. **In relation to Ground 3**, the Review Applicant refers to the Local Court hearing on 8 April 2015 when the Licensee was convicted of the offences that gave rise to the incurring of the second strike.
53. The Review Applicant contends that Port Macquarie Local Court Magistrate Hodgson was of the view that the record of the Licensee, considering the length of time that he has been in the industry and the type of premises with which he has been involved, was "not a bad record".
54. [The Authority notes that the Review Applicant has not provided a transcript of the Local Court proceedings or any other evidence of the Magistrate's comments in relation to these matters.]
55. The Review Applicant further submits that the Magistrate, in imposing fines which were "well below the maximums that could have been imposed", inferentially took the view that

the offences which gave rise to the incurring of the second strike "were not as serious as may have been the case".

56. **In relation to Ground 4**, the Review Applicant submits that the Owners "stand to lose a substantial sum of money" as a result of the imposition of a second strike, by reason that the Owners are currently in discussions with prospective purchasers in relation to a sale of the Premises and the business operating on the Premises. The Review Applicant submits that "no purchaser is interested to proceed with a purchase where a second strike has been incurred".
57. [The Authority notes that the Review Applicant has not quantified or estimated this loss, let alone provided independent evidence as to the likely loss that will flow to the Business Owner or Premises Owner should the second strike stand.]
58. The Review Applicant further submits that the offences of permitting intoxication that gave rise to the incurring of the second strike were not offences involving "an actual 'seriousness of harm'".
59. The Review Applicant concedes that there was a "potential for seriousness of harm" but "no harm in fact occurred" and on the basis of the video provided by the Licensee to the Prosecution and relied on by the Prosecution in the Local Court, the persons found to be intoxicated on the Premises were "happy" as opposed to being "angry, aggressive or offensive".
60. The Review Applicant submits that:

...this is not a situation where a brawl broke out, where furniture was damaged or people were injured. There was intoxicated skylarking which all patrons of the venue, as can be seen from the Prosecution video, took in [sic] a good natured way.
61. **In relation to Ground 5**, the Review Applicant submits that the issue of the seriousness of *any* harm that may have arisen from this type of offence as relied upon by the Delegate is "not supported by the evidence" upon which the Prosecution actually relied in the Court proceedings. The Review Applicant reiterates the submissions made in relation to Ground 4 in this regard.
62. The Review Applicant submits that it "could well understand" a second strike being imposed where intoxicated persons had acted in a way which caused harm to either persons or property, but "that is not the situation in this case".
63. The Review Applicant contends that a number of events have transpired since the date of the Reviewable Decision on 30 June 2015, which may be summarised as follows:
 - a) The Licensee is no longer, in a practical sense, in charge of the Premises. This has been the situation since the Premises' temporary closure on 5 July 2015. The Licensee has "retired" and will not be returning to active licensee duties. The "only remaining matter" for the Licensee to do is to sign a transfer of licence form when a new licensee is found.
 - b) The Review Applicant proposes that the Premises shall remain closed "for at least three months" and during this time, the Review Applicant, as the Premises Owner and effective Business Owner, "will be ensuring major changes occur" in the way in which the Premises is managed, run and operated. The Review Applicant submits that the prosecutions and the threat of the second strike have had a "salutary effect on the [Owners] so as to see major steps now be taken to remediate the past performance which the [Owners] accept was below the standard that is required".

- c) In addition to a new licensee being sought for the Premises, new staff will also be sought by the Business Owner. The relations between the Licensing Sergeant at Port Macquarie and the outgoing Licensee, Mr Gunsberger, have been "poor". The Review Applicant accepts that "things need to change" and it is for the purposes of effecting this change that the Premises is currently closed and will remain closed until it can be operated and staffed appropriately.
 - d) The Review Applicant intends to employ a "younger well experienced person" as the licensee of the Premises. All staff will go through an induction and there will be regular staff meetings. The way in which the Premises functions with respect to security "is being changed". Vigilant bar staff are being sought who are "both experienced and sensible in late night trading situations".
64. The Review Applicant contends that the Authority "can have confidence" that when the Premises reopens, in all likelihood in "mid-October 2015", it will reopen with:
- a) A new licensee
 - b) New security staff
 - c) New bar staff
 - d) A new approach to compliance
 - e) Owing to the above changes, a "better working relationship" with the Port Macquarie Licensing Sergeant.
65. **Submission from the Licensee, Mr Gunsberger dated 1 May 2015** in relation to the consideration of the second strike, which was forwarded to OLGR on 4 May 2015. Briefly, the Licensee requests that a second strike not be imposed against the licence. The key submissions and contentions made by the Licensee may be summarised as follows:
- a) The Licensee has held the licence to the Premises for the last 18 years, during which time there have been "big changes" in the *Liquor Act* and the conditions of the licence. The Licensee submits that he has "been a constant" as far as the Premises and the licence are concerned.
 - b) The Licensee submits that he has been responsible for hiring and firing staff and contends that he has, during his tenure as licensee, "fired a lot of staff because of the risk that they posed regarding potential breaches of the Act".
 - c) The Licensee contends that he is "always careful to employ properly qualified staff" and to ensure that those staff know precisely the types of behaviour for which they need to be on the lookout.
 - d) The Licensee submits that "nearly everyone" that attends this venue drinks alcohol; some of whom may have consumed alcohol before they arrive at the Premises. However, patrons are "vetted at the door for intoxication" and if admitted, are "under surveillance" by bar staff, security staff, general staff and the Licensee.
 - e) The Licensee contends that the Downunder Nightclub is operated in "what would otherwise be an underground car park". The Licensee submits that the Premises has low ceilings; dimmed lighting; is permitted to have in excess of 200 people when at full capacity; and that the nightclub operates at full capacity "on a number of occasions each year".
 - f) The Licensee submits that when the Premises is at or close to full capacity, it is "difficult to monitor every last patron for intoxication".
 - g) The Licensee contends that on 31 August 2014, the nightclub was "busy". No violence occurred at the nightclub "at all" on that date and the mood within the club was "positive".
 - h) The Licensee submits that "people, often in a celebratory mood, embrace each other, pick each other up and dance in a strange way" and that the Licensee is

"very used to this" and can "very quickly" identify any patron who is becoming aggressive or anti-social.

- i) The Licensee submits that he has a history in security, that he employs a number of security guards, and contends that people who display violent or anti-social behaviour are "ejected immediately".
- j) The Licensee contends that there was no such violent behaviour on 31 August 2014, but "accepts" that he "made a mistake" on 31 August 2014, between the hours of 12:55am and 1:30am, by allowing three intoxicated patrons to be admitted to the Premises and to remain on the Premises.
- k) The Licensee contends that these patrons were not intoxicated persons when they entered but "became intoxicated over the time they stayed within the Premises, possibly a period of between 1 and 2 hours".
- l) The Licensee accepts that at the time they were noticed by Police, they were "actually intoxicated", but contends that "15 minutes before this, they were not, in my view, intoxicated".
- m) The Licensee contends that all of the intoxicated patrons were ejected, "none of whom put up any resistance and all left peacefully".
- n) The Licensee submits that the facts recorded by Police for this event mention "larrikinism", but submits that in his view, the intoxicated patrons were "simply happy and celebrating".
- o) The Licensee submits that he was interviewed by Police and that he "made immediate admissions" in relation to the matter. He submits that he has "been in the industry long enough to recognise a person who is intoxicated" within the meaning of the *Liquor Act* and that although the patrons in question were intoxicated, they "had not been in that state for very long".
- p) The Licensee contends that the nightclub then went through its "busiest period of the year" following 31 August 2014 and submits that "we have had full houses on a number of occasions and there have not been any further offences".
- q) The Licensee contends that the Police attention to the Premises, and other late night trading venues in Port Macquarie, is "both constant and enthusiastic". The Licensee contends that Police attend the Premises on "every night the Premises are open" and that on busy nights, it is not uncommon to see Police "up to three times to do a walk-through". The Licensee further contends that there are other occasions when licensing Police "from out of town attend undercover".
- r) The Licensee contends that all of his staff have been spoken to; staff meetings have been held; regular reminders are given to staff; and new staff are given inductions and "the point is driven home that when in doubt, don't serve".
- s) The Licensee contends that staff are also told that, if in doubt that a person is an intoxicated person, they should notify either the Licensee or one of the security guards on the Premises so that any intoxicated persons may be removed.
- t) The Licensee concludes with the submission that:

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

66. **Submission on behalf of the Premises Owners and Business Owner dated 1 May 2015** in relation to the consideration of the second strike (discussed below).

The OLGR File

67. A copy of the entire bundle of material before the Delegate at the time the Reviewable Decision was made (**OLGR File**) was released to the Authority for the purposes of the

review on 12 August 2015. In summary, the material before the Delegate in the OLGR File comprises the following material:

68. **Briefing memo prepared by an OLGR compliance officer to the Delegate, OLGR Director of Compliance & Enforcement Mr Anthony Keon dated 30 June 2015 (OLGR Briefing Memo)**. Briefly, the OLGR Briefing Memo provides a short history of the nature of the prescribed offences giving rise to the first strike and the offences under consideration for the second strike and recommends that a second strike be incurred.
69. The OLGR Briefing Memo also notes that a separate disciplinary complaint has been lodged with the Authority under Part 9 of the Act, seeking that the Licensee be disqualified from holding a licence and managing a licensed premises for such period as the Authority thinks fit.
70. However, the writer recommends that the fact that this separate disciplinary process is underway should not be given significant weight when determining whether or not a second strike should now be incurred or whether remedial licence conditions are appropriate under Part 9A of the Act.
71. The writer states that the incurring of a second strike and associated remedial conditions would "provide greater certainty" that the licensee (both present and future) will ensure compliance with the applicable liquor laws, as the commission of further prescribed offences would enliven the consideration of a third strike.
72. Attached to the OLGR Briefing Memo are copies of OLGR letters sent to the Licensee, the Business Owner, the Premises Owners and NSW Police attached to the Alcohol and Licensing Enforcement Command dated 30 June 2015, notifying the interested parties that the Delegate had imposed a second strike and inviting submissions on the potential imposition of remedial conditions pertaining to the engagement of an RSA Marshal on the Premises and a Plan of Management for the Premises.
73. **Attachment A to the OLGR Briefing Memo** is a timeline of relevant events prepared by OLGR staff in relation to the history of prescribed offences detected on the Premises.
74. **Attachment B to the OLGR Briefing Memo** is a Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger* which sets out the alleged circumstances of the four offences detected on the Premises on 31 August 2014.
75. **Attachment C to the OLGR Briefing Memo** is a screenshot of a *JusticeLink* record disclosing the outcomes of prosecutions commenced against the Licensee that were determined on 8 April 2015 at Port Macquarie Local Court.
76. **Attachment D to the OLGR Briefing Memo** is a copy of the Reviewable Decision dated 30 June 2015. The Reviewable Decision provides a brief background of the prescribed offences giving rise to consideration of a second strike. It briefly summarises all of the submissions received by OLGR and makes findings on the statutory considerations prescribed by section 144G(2)(c) of the Act.
77. Briefly, the Delegate was satisfied that the Premises was not a declared premises within the meaning of Schedule 4 to the Act when the offences occurred.
78. The Delegate was satisfied that there is no information indicating that the venue's size was a contributing factor in the commission of the prescribed offences.

79. On the history and nature of violent incidents in connection with the Premises, the Delegate noted that in Round 13 of the Declared Premises Scheme administered by the Secretary under Schedule 4 to the Act (based on violent incident data from 1 January 2014 to 31 December 2014), seven (7) incidents were attributed to the Premises. In Round 12 (based on violent incident data from 1 July 2013 to 30 June 2014), nine (9) incidents were attributed to the venue.
80. The Delegate further noted the information that had been provided in support of the Police submission on the second strike indicating that from January 2015 to April 2015, six (6) breaches of the licensing legislation were detected by Police, along with two (2) assaults.
81. The Delegate notes that for the 2014 calendar year the following events were recorded by Police as having been *linked* to the Premises:
 - a) seventeen (17) assaults
 - b) eleven (11) breaches of licensing legislation
 - c) three (3) "resist/hinder/assault Police" incidents
 - d) one (1) sexual assault
 - e) one (1) homicide.
82. The Delegate noted that the fact that these incidents were "linked" to the Premises does not necessarily mean that they occurred *in or directly outside* the Premises.
83. The Delegate noted the submissions made by the Licensee that it would be preferable to take no action in this instance. However, the Delegate finds that given this is the second prescribed offence involving the permission of intoxication on the Premises for which the Licensee is responsible, the Delegate is not satisfied that any action other than determining that a second strike is the appropriate response in this instance.
84. The Delegate observed that the Licensee's failure to adequately implement appropriate controls to guard against recurrence of the same prescribed offence suggests an "indifference or disregard for obligations under the liquor laws or at the least, a repeat lapse in procedures relating to the responsible service of alcohol".
85. The Delegate observed that it is "particularly concerning" that such a large number of similar prescribed offences occurred only some two weeks after the offences resulting in a first strike occurred, and only one day after OLGR inspectors engaged with the Licensee to remind him of his obligations under the licensing legislation.
86. Furthermore, the Delegate was satisfied that there is a "high risk of harm associated with intoxication" and that it is important that this risk is minimised in the future through "effective implementation of policies, procedures and staff training, among other initiatives".
87. The Delegate observed that incurring a second strike and the imposition of associated remedial action would go towards ensuring that this occurs, particularly where "it has been demonstrated that voluntary agreements have not been adhered to" as contended by Police.
88. The Delegate noted the submissions made on behalf of the Owners that the Licensee has offered his resignation or will retire "in late June or early July 2015", and that the Premises Owners are currently in the process of selling the Premises.
89. While the submissions made on behalf of the Owners indicate that changes have been made to business practices, the Delegate observed that "no further detail is provided on

the exact nature of these changes" other than to say that they related to "discussions with staff" and "increasing the staff's vigilance".

90. The Delegate found that in the present circumstances, it is "difficult to ascertain the form that these changes took or to make an assessment of their effectiveness in preventing a recurrence of the offence".
91. On the question of the harm that may have resulted from the commission of the prescribed offences in issue, the Delegate was satisfied that there are a range of potential harms that could be realised due to the prescribed offences.
92. In relation to the offences of permitting intoxication and supplying liquor to an intoxicated person, the Delegate observed that the potential harms that may have occurred range from the commission of such offences including the harassment of other persons, major or minor injury to the intoxicated person or others, undue disturbance to the neighbourhood, through to an assault on venue staff or a member of the public.
93. The Delegate observed that permitting intoxication on licensed premises can lead to potentially fatal consequences associated with alcohol related violence and alcohol related harm more generally.
94. The Delegate observed that a state of intoxication "severely impairs cognitive functioning and increases the likelihood a person will exercise impaired judgment which may lead to a range of personal and health related consequences".
95. The Delegate was satisfied that the risk of harm to those within a venue, stemming from the potential for violent or anti-social behaviour on the part of the intoxicated patron, and the risk of personal injury to the patron themselves, is "significant".
96. In this instance, the Delegate was satisfied that the risk of harm is "greatly exacerbated" by the extent of the offending evident from the offences before the Delegate, with multiple intoxicated patrons being detected on the Premises, which is a "relatively small" venue. The Delegate is satisfied that this demonstrates a "complete breakdown in existing procedures or a lack of measures in place to prevent intoxication".
97. The Delegate was satisfied as to the "reckless and potentially harmful behaviour" of the intoxicated patrons detected on the Premises, which included throwing a drink vessel and putting another patron in a head lock.
98. The Delegate also had regard to the fact that the prescribed offence giving rise to the consideration of a second strike represents the second prescribed offence detected on the Premises that relates to intoxication.
99. The Delegate found that the repeated commission of the same prescribed offence represents a "failure by the Licensee to make adequate arrangements to ensure future compliance and to prevent the recurrence of the same prescribed offence", which is highlighted by the fact that OLGRI inspectors had been present at the Premises the very day before, engaging with the Licensee and reminding him of his obligations and the need to remain vigilant to prevent intoxication.
100. The Delegate was satisfied that the harm evident 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.

101. The Delegate observed that the integrity of the regulatory regime is undermined by repeat offending, particularly offending that involves a recurrence of the same offence, and was satisfied that it is "not in the public interest" to have licensed venues operated in a manner that presents an "increased risk of contributing to alcohol related violence and disturbance in the community, whilst posing an unnecessary drain on regulatory resources".
102. The Delegate noted the submissions made on behalf of the Owners, particularly in relation to the economic impact of the imposition of a second strike, but found that those arguments were not persuasive.
103. The Delegate observed that there is an "obligation upon both the business and premises owners to ensure that the licensed premises in which they have an interest are operated in accordance with community expectation, and in a manner that complies with the applicable liquor laws", and found that in this instance, it is "readily apparent that this obligation has not been fulfilled".
104. The Delegate was satisfied that the Licensee, Mr Gunsberger has an "extensive history of offending and non-compliance" that dates back to 2007.
105. The Delegate was satisfied that both the Premises Owners and the corporate Business Owner have had "ample opportunity" to take positive action to ensure that the venue was operated appropriately, but have failed to do so – serving only to increase the potential for harm arising from the venue.
106. The Delegate was satisfied that a second strike should be incurred against the licence because of the seriousness of the harm that *may* have resulted from, or been associated with, the commission of the prescribed offences.
107. **Attachment E to the OLGR Briefing Memo** is a copy of the letters dated 14 April 2015 that were sent to the Licensee, the corporate Business Owner and the Premises Owners notifying the Secretary's consideration of whether to impose a second strike on the licence triggered by the prescribed offences that were detected at the Premises on 31 August 2014.
108. **Attachment F to the OLGR Briefing Memo** is a copy of the submission made to OLGR on behalf of the corporate Business Owner and the Premises Owners in relation to the second strike dated 1 May 2015.
109. Briefly, the key points made by the Owners may be summarised as follows:
 - a) The "Three Strikes Scheme" is part of a comprehensive plan to "tackle alcohol related violence and anti-social behaviour". However, the Owners submit that the prescribed offences actually detected as occurring on the Premises on 31 August 2014 "contained no element" of alcohol related violence or anti-social behaviour.
 - b) The Owners submit that the offences of permitting intoxication on licensed premises detected in this case related to three separate individuals, all of whom were in a "buoyant, happy and somewhat exuberant mood". There was "no aggression" displayed by any of those persons who were found to be intoxicated and the "general demeanour of the crowd within the licensed premises that night was one of happiness".
 - c) None of the intoxicated persons, on being ejected from the Premises on 31 August 2014, caused any concern by way of "violent behaviour, violent language, raised voices or indeed anything else that could be considered anti-social behaviour". The patron involved in the offence relating to the service of alcohol to an intoxicated

person was also "non-violent and peaceful and left the Premises without argument or incident".

- d) The Owners submit that a decision to incur a second strike must take into consideration "the seriousness of any harm that may have resulted from or been associated with the commission of the offence". The Owners submit that there was no such actual harm and as such the offences, while serious, "should not ground any decision to incur a second strike".
- e) The Owners contend that the Local Court Magistrate was of the view that the Licensee's record, bearing in mind the fact that the Licensee had held the licence for 18 years, was a "good record".
- f) The Owners submit that prior to the offence giving rise to the first strike on 16 August 2014, the last offence for which an infringement notice was issued or a conviction recorded "of a similar nature" was "some 3 years earlier on 14 August 2011".
- g) The Owners contend that since the offences of 31 August 2014 occurred, "no further offences have been committed". The Owners submit that the eight months that have elapsed since 31 August 2014 constitute the "busiest period of the year" for the Downunder Nightclub business and there is a "greater opportunity" for this type of offence to have occurred during this period - however no such offence has occurred.
- h) The Owners submit that the events between 16 and 31 August 2014 are "regrettable" - however the fact that there have been no offences in the last eight months indicates that "a lesson has been learnt and procedures have been changed".
- i) The Owners submit that when the offences occurred, the Licensee stated in his interview with Police that, "There is nothing I can say. I fucked up because I wasn't on top of it. They were intoxicated and that's it". The Owners submit that these "direct and forthright words" are both an expression of the remorse felt by the Licensee and the reality of what had happened.
- j) The Owners contend that the Licensee has been in the liquor business for 45 years and has been the licensee of the Premises for the last 18 years.
- k) The Owners contend that throughout that time, the Licensee has been "cooperative with Police and was a founding member of the Hastings Liquor Accord". He remains the Treasurer of the Hastings Liquor Accord and an active member of that organisation.
- l) The Owners submit that there "must have been a real lapse in the Licensee's supervision and management of the Premises" on 31 August 2014 for these offences to have occurred.
- m) The Owners submit that the Licensee accepts the blame for what has happened and, through his actions in "changing the management of the Premises", avoided any recurrence.
- n) The Owners submit that they regularly meet with the Licensee "at least every fortnight" to discuss the running of the Premises.
- o) The Owners submit that the Licensee has "superior knowledge" of this particular licence and the liquor industry generally, and that they "looked to [the Licensee] for answers". The Owners contend that changes were implemented with respect to discussions with staff and increasing staff vigilance "to avoid any recurrence".
- p) The Owners contend that the Licensee, who will shortly turn 65, "believes that his time in the industry is nearly up" and has indicated that he will resign effective from 6 July 2015. In accepting the Licensee's resignation, the Owners submit that they "do not seek to blame him for what occurred, but rather accept the fact that he has been a person good at what is a very difficult job".

- q) The Owners submit that the lack of any further offences being detected on the Premises is not because offences are occurring and not being detected, but rather they are not occurring.
- r) The Owners accept, on the basis of statements made by the Licensee, that Police do a "walk through" of the Premises "at least three times per night" and that the Police presence is "understood and welcomed".
- s) The Owners contend that the incurring of a second strike against the licence "will have an effect that will extend far beyond any lesson that might be sought to be taught to the Licensee or management". They contend that a second strike would put the Premises Owners in a "precarious economic position for the next two and a half years" as they are in the process of selling the Premises and the incurring of a second strike will not only reduce the value of the Premises, but also reduce its saleability generally.
- t) The Owners submit that a second strike should not be incurred against the licence, given that there has been a "change in which the business is conducted".
- u) The Owners reiterate that the Premises operates as a "late night venue" with "dim lighting" and that when a patron enters the Premises, they do so "with the specific intention of consuming alcohol" and thus becoming intoxicated in a physiological sense, which may see them become an intoxicated person within the meaning of the *Liquor Act*.
- v) The Owners submit that the change in a patron from "not being intoxicated" to "becoming an intoxicated person" can occur quickly because of the metabolisation of alcohol.
- w) The Owners contend that a person can at one point not be an intoxicated person and "within 5 or 10 minutes", become an intoxicated person. The Owners submit that "the vigilance that is required from staff can in these circumstances, bearing in mind the number of patrons that are permitted in the Premises and the lighting in the Premises, be difficult to manage".
- x) The Owners conclude that all efforts are being made within the Premises and with respect to the licence to "ensure no further recurrence of these offences".

110. **Attachment G to the OLGR Briefing Memo** is a copy of the submission made to OLGR by Sergeant John Lawrie, Mid North Coast Licensing Coordinator attached to Port Macquarie Police Station on behalf of NSW Police (**Police**) in relation to the second strike dated 6 May 2015. Briefly, the key submissions made by Police in the cover letter may be summarised as follows:

- a) The Downunder Nightclub is one of four late trading premises in the Port Macquarie central business district (as well as Altitude Nightclub, the Port Macquarie Hotel and The Beach House Bar & Café).
- b) Police contend that there has been a "long adverse history" associated with the Premises and in 2004, after Police lodged a "Quiet and Good Order complaint", a number of conditions were imposed on most of these late trading venues.
- c) Police contend that the Downunder Nightclub "continues to attract an older clientele" – that is, the over 35s market.
- d) Police contend that the Premises is a "pokey venue, low ceiling and located in the basement of the Galleria Building".
- e) Police submit that the Licensee has "long been associated" with the Premises and since 2005 has officially been the licensee. However prior to 2005, Police submit that "one could be mistaken" in thinking he was the licensee and owner as he was "always managing the Premises and on site".
- f) Police contend that the Licensee has "extensive convictions and records for non-compliance" and contend that it is "likely" that disciplinary action will be taken

against him to have him removed as licensee. Police note that Mr Gunsberger is 64 years old and has indicated that he will be retiring in 2015.

- g) Police submit that the Downunder Nightclub has been previously listed on the Declared Premises list in Schedule 4 to the Act during 2009 and that there is "invariably" one of the Port Macquarie late trading premises on that Schedule in any given 12 month period. Police contend that this reflects "ongoing issues" occurring in the area as a whole.
- h) Police submit that nearby residents have recently lodged a complaint about music and patron noise from the venue during 2014. Police contend that OLGR inspectors have conducted observations and "recorded damning [sic] evidence".
- i) Police submit that licence conditions were recently imposed to control disturbance issues such as patron and music noise, including street patrols and measures to reduce noise from the Premises.
- j) Police contend that they have already detected breaches of those conditions and that Mr Gunsberger has recently been convicted for failing to ensure the patrols were taking place (which resulted in patrons kicking a passing car and throwing a shopping trolley at another parked vehicle).
- k) Police further contend that there was a breach detected for noise heard within a residential accommodation facility, where patrons from the Premises were clearly heard outside the venue, along with the music. Police submit that this led to a plea of guilty and subsequent conviction.
- l) Police submit that they were responsible for identifying the offence that gave rise to the first strike, where intoxication was "rife" on the Premises. After making the observations and determining a number of patrons were well affected by alcohol, an investigation was conducted, which led to CCTV footage being obtained and an examination of the Premises' records.
- m) Police submit that their investigation found that the Premises did not have a satisfactory Alcohol or Security Plan of Management. Police contend that there was also evidence that there was "poor or no communication amongst the security, staff and the Licensee relating to compliance".
- n) Police contend that the CCTV footage of the Premises also revealed two drinks being sold to patrons after 1:00am despite the Licensee entering into a Local Licensing Agreement in 2010.
- o) Police contend that since entering into that Agreement, the Licensee would "always acknowledge" that the business was adhering to the Agreement, yet there was evidence that drinks were being supplied after the agreed (voluntary) time.
- p) Police contend that food provided by the business is not appealing nor is it advertised in such a fashion to entice patrons to eat whilst consuming liquor, which has led to "issues around the takeaway outlets by the Downunder patrons".
- q) Police further contend that intoxicated patrons of the Premises are the subject of move on directions, street offences, malicious damage offences and the perpetrators or victims of assault. Police contend that they are "regularly called to the venue".
- r) Police also refer to statistics recorded in the NSW Police database known as the Alcohol Related Crime Information Exchange (**ARCIE**) for 2013 to 2015 (discussed below) and submit that a *second strike should be incurred* against the Premises by reason that for far too long there have been "intoxication issues, non-compliance and adverse impact on the community".
- s) Police submit that, despite attempting to work with the Licensee, there is an "obvious failure in compliance, adherence to agreements and even taking initiative on venue [sic] to develop Plans of Management and have staff meetings".

- t) In conclusion, Police recommend that:
 - i. trading hours be reduced to reduce the number of incidents generated by the venue
 - ii. Wednesday night trade cease or current conditions and any further conditions apply to every night's trade. Currently the Licensee does not meet the Wednesday night trade demands with the same resources and concern
 - iii. along with the imposition of a second strike, Police submit that it would be helpful if a number of the agreements within the Local Licensing Agreement be imposed as enforceable conditions, including the incorporation of a Plan of Management.
111. **Annexure A to the Police submission dated 6 May 2015** – NSW Police P87A *Licence History Form* for the Licensee, Mr Maxim Gunsberger outlining his record and antecedent since being the licensee of the Premises. Police submit that "intoxication is very much an issue under his management".
112. **Annexure B to the Police submission dated 6 May 2015** – a copy of the Local Licensing Agreement signed by the Licensee and Sergeant Lawrie on behalf of NSW Police, effective as of 28 May 2010. This voluntary Local Licensing Agreement includes provisions regarding the responsible service of alcohol (RSA Marshals, staff meetings, drink restrictions); reducing violence and anti-social behaviour (CCTV footage, security - No Touch Policy, Persons Barred/Incident Book, dress regulations, lighting, patron education, announcements); and the quiet and good order of the neighbourhood (patron transport scheme, security patrols, liquor accord radio/log, entry identification scheme).
113. **Annexure C to the Police submission dated 6 May 2015** – NSW Police ARCIE data indicating that between January 2015 and April 2015, there was a total of **19** incidents *linked* to the Premises, with the top three categories being "Licensing Legislation" (6 incidents), "Powers - Move on" (5 incidents), and "Street Offence" (3 incidents). These incidents occurred mostly on Sunday mornings, predominantly between 12:00 midnight and 6:00am.
114. **Annexure D to the Police submission dated 6 May 2015** – NSW Police ARCIE data for calendar year 2014, indicating that there was a total of **73** incidents *linked* to the Premises, with the top four categories being "Assault" (17 incidents), "Powers - Move on" (12 incidents), "Licensing Legislation" (11 incidents), and "Street Offences" (9 incidents). These incidents occurred mostly on Sunday mornings, predominantly between 12:00 midnight and 6:00am.
115. **Annexure E to the Police submission dated 6 May 2015** – NSW Police ARCIE data for calendar year 2013, indicating that during 2013, there was a total of **51** incidents *linked* to the Premises, with the top three categories being "Assault" (11 incidents), "Street Offences" (8 incidents), and "Powers - Move on" (5 incidents). These incidents occurred mostly on Sunday mornings, predominantly between 12:00 midnight and 6:00am.
116. **Annexure F to the Police submission dated 6 May 2015** – "Last Place of Consumption Report" based upon data from January 2013 to April 2015, showing a comparison between the Premises and other venues of where patrons classified by Police as "well affected" consumed alcohol prior to becoming involved in incidents linked to the Premises.
117. Police submit that this venue rates second for well affected patrons in the Port Macquarie CBD and the entire Mid North Coast Local Area Command. Police submit that the level of patrons of this venue being classified as "well affected" is "unsatisfactory".

118. Police submit that the Premises is situated behind the Port Macquarie Hotel, which is open seven days per week. The Downunder Nightclub is open for about four to five hours on three days per week.
119. **Annexure G to the Police submission dated 6 May 2015** – Caution Notice from Sergeant Lawrie to the Licensee dated 24 August 2009 for frequent intoxication and breach of licence conditions. This is accompanied by a document summarising the "Incidents of Concern" recorded as occurring on or near the Premises for the period from January to June 2011.
120. **Annexure H to the Police submission dated 6 May 2015** – bundle of various correspondence between Police and the Licensee for the period from August 2006 to August 2013 in relation to issues arising at the Premises and engagement with the Licensee. Police submit that this correspondence is "separate to any informal meetings, formal caution letters and infringements". Briefly, this bundle comprises:
- a) **Letter from Senior Constable Dean Magennis of Mid North Coast Licensing Police to the Licensee dated 15 August 2013** drawing the Licensee's attention to a "noticeable increase" in noise complaints, alcohol related assaults and street offences linked to the Premises and advising that the Premises will be closely monitored and possible intervention or action will be taken to rectify this problem if incidents of violence keep occurring.
 - b) **Letter from Senior Constable Dean Magennis of Mid North Coast Licensing Police to the Licensee dated 15 August 2013** advising that there appears to be a "deficiency" in the CCTV footage provided by the Licensee pursuant to a section 21 Notice to Produce and requesting that the Licensee ensure that the CCTV system covers the entire entry stairway.
 - c) **Caution Notice from Sergeant John Lawrie to the Licensee dated 24 August 2009** for frequent intoxication and breach of licence conditions.
 - d) **Letter from Sergeant John Lawrie to the Licensee dated 19 February 2009** recording the minutes for a meeting held on that date between Sergeant Lawrie and the Licensee. Positive aspects and concerns in relation to the Premises were discussed, with the "focal issues" for the Premises being recorded as intoxication; assaults; and quiet and good order.
 - e) **Caution Notice from Sergeant John Lawrie to the Licensee dated 15 September 2008** in relation to permitting intoxication on licensed premises.
 - f) **Letter from Sergeant John Lawrie to the Licensee dated 17 July 2007** noting a number of recent offences of permitting intoxication on licensed premises that occurred on 10 June 2007 and making several recommendations by which to address intoxication.
 - g) **Letter from Sergeant John Lawrie to the Licensee dated 8 March 2007** noting a number of recent offences of permitting intoxication on licensed premises that occurred on 24 February 2007 and 3 March 2007 and advising that this matter has been recorded on the Police Computerised Operational Policing System (**COPS**) database as a warning.
 - h) **Letter from Sergeant John Lawrie to the Licensee dated 31 August 2006** noting a number of recent offences of permitting intoxication on licensed premises that occurred on 9 July 2006, 12 August 2006 and 18 August 2006 and making several recommendations by which intoxication may be reduced.

CONSULTATION BY AUTHORITY ON THE REVIEW APPLICATION

121. On 13 August 2015, OLGR and Licensing Police attached to the Mid North Coast Local Area Command were forwarded a copy of the Review Application and the OLGR File

and invited to make further submissions, within 21 days, in relation to the imposition of the second strike.

122. On 13 August 2015, the Licensee and the solicitor for the Premises Owners and corporate Business Owner were forwarded a copy of the OLGR File and invited to make further submissions, within 21 days, in relation to the imposition of the second strike against the licence for the Premises.
123. BOCSAR were also notified of the Review Application and invited to make written submissions as required by Part 9A of the Act. In accordance with their usual practice, that agency advised on 17 August 2015 that they did not propose to make any submissions on the matter.
124. Mid North Coast Licensing Police did not make a submission on the Review Application.

Further submission from OLGR dated 31 August 2015

125. On 1 September 2015, a submission on the Review Application from Mr Anthony Keon, OLGR Director Compliance & Enforcement dated 31 August 2015 was received by the Authority. This submission responds to the "grounds" of the Review Application. The key points may be summarised as follows:
126. In response to the Review Applicant's Ground 1", OLGR submits that the Review Applicant is correct in that a submission made by the Licensee to OLGR dated 1 May 2015 was not taken into account when the Reviewable Decision was made. An "administrative error" meant that the Licensee's submission was not before the Delegate, and it was "incorrectly surmised" that no submission had been made from the Licensee.
127. However, having now reviewed the Licensee's submission, OLGR submits that the Licensee submission appears to raise "similar facts in mitigation" to the submission that was before the Delegate made on behalf of the Review Applicant in her capacity as Premises Owner and shareholder of the corporate Business Owner.
128. OLGR notes that the contentions made include that the Licensee had held that position for 18 years, that no violence occurred on the night in question (31 August 2014) and that the intoxicated patrons left without resistance. OLGR notes that the Licensee also concedes that the patrons were intoxicated and takes responsibility for the patrons not being identified and removed.
129. OLGR submits that these facts were "effectively considered" by the Delegate as part of the second strike process when submitted by the Review Applicant. However at that time, these facts "were not considered sufficiently persuasive or relevant to the consideration of harm that *may* have arisen to obviate the imposition of a second strike".
130. OLGR concludes that the facts raised by the Licensee in his submission of 1 May 2015 are "again not sufficiently persuasive to justify not imposing a second strike".
131. In response to the Review Applicant's "Grounds 2, 3 and 4", OLGR submits that the steps taken by the Review Applicant to address the offending behaviour were "adequately considered and discussed" in the Reviewable Decision, where it was also noted that "no further detail [was] provided" regarding the exact nature of the changes in business practices that the Business Owner claims to have implemented.
132. OLGR notes the Review Applicant's statement that the venue has now voluntarily ceased to trade.

133. OLGR submits that the "subjective view" presented by the Owners that the Licensee had a "good record" is not directly relevant to consideration of whether or not a second strike should now be imposed. A decision to incur a second strike largely rests upon an assessment of the seriousness of harm which *may* have arisen from the commission of the offences.
134. OLGR submits that the financial impact upon the Owners of incurring a second strike was considered at paragraphs 28 and 29 of the Reviewable Decision, where the obligation placed upon the Owners to "ensure that the licensed premises in which they have an interest [is] operated in accordance with community expectation, and in a manner that complies with the applicable liquor laws" is contemplated.
135. OLGR submits that, given that the magnitude of the failure on the part of both the Business Owner and the Premises Owners to ensure that this obligation is fulfilled was found to exacerbate the risk of harm arising from the venue, and particularly considering that the Licensee's extensive history of offending and non-compliance with the Act dates back to 2006, the consequences for the Owners from the second strike are "neither harsh nor disproportionate".
136. OLGR observes that when considering a decision to impose a second strike on the licence of Golden Sands Tavern in Nambucca Heads, the Authority upheld the view that such an obligation upon interested parties exists. OLGR submits that it was also held in the *Golden Sands Tavern* decision that "the effect of a strike on these parties is not a determinative factor in making a decision to impose a second strike in circumstances where it can be shown that failure to fulfil that obligation has occurred".
137. In response to the Review Applicant's "Ground 5", OLGR reiterates its position that the legislative test set out in section 144D(2)(c) of the *Liquor Act 2007* requires the Secretary, or delegate, to determine the imposition (or otherwise) of a second strike based on the "seriousness of harm that *may* have resulted from, or been associated with, the commission of the offence" (emphasis added).
138. Having regard to this legislative test and its view that consideration of harm contemplated by the test is not limited to any *actual* harm that resulted from the offending in question, it is OLGR's view that the Delegate's consideration of the wide range of harms that *may* have resulted from the type of offence under consideration is valid.
139. OLGR notes that this view has been upheld in the Authority's decision to confirm the imposition of a second strike on the licence of *Hue Karaoke* on the basis of a broad reading of the legislative test, which took into account a range of potential harms that *may* have arisen from the prescribed offence.
140. OLGR notes the new evidence provided by the Review Applicant, and acknowledges that the proposed change of licensee and staff members, combined with an intention to build a better relationship with local licensing Police, is a measure that "may assist with reducing the risk of the further prescribed offences occurring at the venue".
141. While these measures are "commendable", OLGR submits that "more active intervention of this nature" following the imposition of the first strike may have prevented the commission of the offences leading to the second strike.
142. OLGR notes that all of the prescribed offences at issue related to permitting intoxication on the Premises. OLGR submits that:

...the failure to adequately implement appropriate controls to guard against recurrence of the same prescribed offence suggests an indifference or disregard for obligations under the liquor laws or at the least, a repeat lapse in procedures relating to the responsible service of alcohol.

143. Further, OLGR submits that it is "particularly concerning" that such a large number of similar prescribed offences occurred only some two weeks after the offences resulting in a first strike occurred, and only one day after OLGR Inspectors engaged with the Licensee to remind him of his obligations under the liquor laws.
144. OLGR submits that the mere fact that these measures have been implemented and the venue has operated for a time without any further identified concerns prior to its voluntary cessation of trade "does not have a material effect" on the assessment of the seriousness of harm that *may* have arisen as a result of the offending, as required by the legislative test in section 144D(2)(c) of the Act.
145. OLGR notes that *multiple intoxicated patrons* were detected on the Premises and that OLGR Inspectors observed reckless and potentially harmful behaviour by those patrons, which included throwing a drink vessel and putting a patron in a head lock.
146. Further, having considered the grounds raised by the Review Applicant, OLGR's view is that these considerations were "adequately" dealt with in the Reviewable Decision.
147. While OLGR acknowledges that the Licensee's personal submission should have been considered at first instance, its position is that the matters raised in that submission are "very similar" to those raised in the earlier submission made by the Owners, and in any event are not sufficiently persuasive to justify not imposing a second strike.
148. OLGR concludes that "a decision to impose a second strike remains an appropriate response considering the recidivist nature of the offending, the lack of positive action taken by the [Review] Applicants in response to the first strike, and the seriousness of harm that may have arisen as a result of the offences".

No Further Submission from the Licensee or Review Applicant

149. On 18 September 2015, the Licensee and the Review Applicant's solicitor were provided with another copy of the OLGR File and the further submission from OLGR dated 31 August 2015, and invited to make submissions in reply by 9 October 2015.
150. No submission in reply was received from either the Licensee or the Review Applicant.

DECISION ON REVIEW AND REASONS

151. The Authority has considered the Review Application and all the submissions before it pertaining to the Review Application.
152. Notwithstanding that the Delegate has acknowledged (inadvertently) failing to have regard to the Licensee's submission during the primary decision making phase, this is a review on the merits of the matter. The Authority is standing in the shoes of the primary decision maker, making a de novo decision on whether a second strike should be incurred, with the benefit of all the material now before it. The Licensee's submission has been considered as part of the material before the Authority.
153. Similarly, although the Delegate did not consult with BOCSAR on the second strike decision (by reference to BOCSAR's previously stated practice of not making submissions on individual Part 9 matters) the Authority has consulted with BOCSAR by

reason that it is expressly required to do so by the Act. Consistent with its previous practice BOCSAR elected not to make a submission on this matter.

154. *By reference to section 144G(2)(c)(i) of the Act, which requires a decision maker to consider whether the licensed premises were "declared premises", the Authority is satisfied, on the basis of the material provided by OLGR, the submissions from the Review Applicant to the Authority and the Authority's consideration of Schedule 4 to the Act, that the Premises is not currently a "declared premises" and was not a declared premises when the relevant prescribed offences were committed.*
155. *By reference to section 144G(2)(c)(ii) of the Act, which requires a decision maker to consider 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, the Authority notes that there is no evidence, submissions or material before it regarding the regulatory implications of the size, patron capacity and/or layout of the Premises.*
156. The Authority notes the findings made by the Delegate in the Reviewable Decision in relation to the consideration in section 144G(2)(c)(ii) that there was no information before the Delegate to indicate that the size of the venue was a contributing factor in the commission of the prescribed offences detected as occurring on 31 August 2014 that are presently under consideration. The venue is of moderate size, with a maximum patron capacity of 200.
157. While there is some indication in the Licensee's and Owners' submissions that the layout of the Premises is dark and it is difficult to detect intoxication, the Authority is satisfied that this is not a large venue and the use of lighting at a venue involves a personal choice for the business operator – unlike, for example, a racecourse where the scale of the licensed area may make it objectively difficult to prevent intoxication.
158. The Authority further notes the Delegate's finding that it was "clear from the facts" that the intoxicated patrons were within the view of bar staff, a security guard, an RSA marshal and the Licensee, none of whom took any action. The Authority is satisfied as to those findings for the purposes of this review.
159. The Authority is satisfied, on the material before it, that the size and patron capacity of the licensed premises has not adversely impacted the ability of the Licensee to prevent the commission of prescribed offences on the Premises.
160. *By reference to section 144G(2)(c)(iii) of the Act, which requires a decision maker to consider 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, the Authority is satisfied, on the basis of the material provided by OLGR, that there is a troubling history of multiple prescribed offences being detected on the Premises, particularly in relation to offences of permitting intoxication on the Premises.*
161. The occurrence of these offences has not been contested by the parties in this matter, although the Review Applicant has made submissions in mitigation that the Local Court Magistrate was of the view that the Licensee had a "good" record, bearing in mind that he had been the licensee of the Premises for the last 18 years.
162. [The Authority notes that the *OneGov* record for the licence indicates that Mr Gunsberger has been the licensee of the Premises since 9 May 2005. However, an historical record sourced from the AViiON database that was maintained by the former Liquor Administration Board discloses that Mr Gunsberger held the licence for the "Downunder

Cabaret Restaurant" business formerly operating on the Premises from 18 September 1986 to 6 February 1991. The licence for the "Downunder Cabaret Restaurant" business was surrendered on 10 December 1997 by reason of the grant of a new nightclub licence for the "Downunder Nightclub" and Mr Gunsberger has held the licence for the "Downunder Nightclub" business operating on the Premises since 9 May 2005.]

163. The Authority is satisfied, on the material before it, that an offence of permitting intoxication was detected as occurring on the Premises on 16 August 2014. A first strike was incurred arising from this offence on 12 September 2014, when a Penalty Notice issued by NSW Police in respect of this offence was paid.
164. The Authority notes that the prescribed offences giving rise to consideration of this second strike (three counts of "*licensee permit intoxication on licensed premises*" and one count of "*licensee/employee sell/supply liquor to intoxicated person*") were detected on 31 August 2014 - just two weeks after the occurrence of the prescribed offence giving rise to the incurring of the first strike against the licence.
165. The Authority notes with concern that following the first prescribed offence of permitting intoxication on licensed premises, this did not seem to have caused the Licensee or the Owners to take care or make sufficient changes in business practices to avoid committing another four prescribed offences (three counts of permitting intoxication on licensed premises and one count of selling or supplying liquor to an intoxicated person) that were detected by OLGR inspectors on 31 August 2014.
166. The Authority notes that, while these four offences occurred within a 24 hour period, they are deemed to be a single prescribed offence for the purposes of section 144C(3) of the Act. This offence was "committed" for the purposes of section 144C(1) of the Act on 8 April 2015 once the Licensee, Mr Gunsberger was convicted of all four charges.
167. The Authority is satisfied, on the basis of the Delegate's findings in the Reviewable Decision and the Prosecution Fact Sheet issued on 24 January 2015 in the matter of *Office of Liquor, Gaming & Racing v Maxim Gunsberger*, that the Licensee was present on the Premises at the time that the alleged offences occurred and that OLGR inspectors engaged with the Licensee on 30 August 2014 in relation to maintaining awareness of intoxicated persons on the Premises, just a few hours before the detection of these four offences.
168. The Authority notes the Review Applicant's submission that the Owners meet regularly with the Licensee to discuss the running of the Premises and that changes have been implemented with respect to discussions with staff and increasing staff vigilance within the Premises and with respect to the licence to "ensure no further recurrence of these offences". The Review Applicant submits that the Licensee accepts the blame for what has happened and, through his actions in "changing the management of the Premises", avoided any recurrence of prescribed offences since August 2014.
169. Further, the Authority notes the Licensee's submission that, since the detection of the prescribed offences on 31 August 2014, all of his staff have been spoken to; staff meetings have been held; regular reminders are given to staff; and new staff are given inductions and "the point is driven home that when in doubt, don't serve". The Licensee contends that staff are also told that, if in doubt that a person is an intoxicated person, they should notify either the Licensee or one of the security guards on the Premises so that any intoxicated persons may be removed. The Authority accepts that directions to that effect have been given to staff.

170. The Authority also notes that the Premises is no longer currently trading and that Mr Gunsberger has retired, ceasing employment as the Licensee of the Premises as of July 2015.
171. The Authority accepts that the Licensee and Owners have taken steps to implement changes in business practices since the events giving rise to the possible incurring of the *second* strike. However, the Authority notes that the Licensee and Owners failed to undertake adequate due diligence and monitoring to ensure that the Premises was being operated in a manner compliant with the liquor legislation, following the imposition of the *first* strike.
172. With regard to the recent regulatory history of the Premises, the Authority notes with concern that the offence of permitting intoxication on licensed premises was one of the prescribed offences giving rise to both the first strike *and* the second strike now under consideration. The repeated commission of prescribed offences relating to the permission of intoxication on licensed premises is of particular concern to the Authority and indicative of systemic failure or a licensed premises that is not responsive to sanction under the Scheme.
173. *By reference to section 144G(2)(c)(iv) of the Act, which requires a decision maker to consider the history and nature of violent incidents that have occurred in connection with the licensed premises,* the Authority is satisfied, on the basis of the Delegate's findings in the Reviewable Decision, that in Round 13 of the Declared Premises Scheme (based on violent incident data from 1 January 2014 to 31 December 2014), seven (7) incidents were attributed to the Premises. In Round 12 (based on violent incident data from 1 July 2013 to 30 June 2014), nine (9) incidents were attributed to the venue.
174. The Authority is satisfied that there is a persistent moderate history of violence occurring *on* the Premises which, while below the threshold necessitating the imposition of special conditions pursuant to Schedule 4 of the Act, is nevertheless relevant for the purposes of this statutory consideration.
175. *Section 144G(2)(c)(v) of the Act requires a decision maker to consider whether other action would be preferable.* The Authority has reviewed all of the material before it in relation to this matter and considered whether any other action would be preferable (to incurring a strike).
176. The Authority notes that the Premises is no longer currently trading and that Mr Gunsberger has retired, ceasing employment as the Licensee of the Premises as of July 2015. The Authority also notes the Review Applicant's submissions that changes have been made to the venue's operating procedures and that the business will reopen with a new licensee, new security staff, new bar staff, a "new approach to compliance" and a "better working relationship" with the Port Macquarie Licensing Sergeant.
177. The Authority further notes that in the Reviewable Decision, the Delegate was not satisfied that these measures are sufficient to warrant taking alternative action as "no further detail is provided on the exact nature of these changes" and it is "difficult to ascertain the form that these changes took or to make an assessment of their effectiveness in preventing a recurrence of the offence". The Authority shares that view and there is little by way of evidence or even specific submissions identifying the nature of those changes.
178. The Delegate considered that, in light of the potential harm arising from the prescribed offences under consideration, the Licensee has not established that some other action would be preferable, especially given that this is the second prescribed offence involving

the permission of intoxication on the Premises by the Licensee resulting in a second strike being incurred against the licence.

179. Having had regard to all of the evidence and material now before it, the Authority is *not* satisfied that the factors referred to by the Review Applicant warrant not incurring a second strike against the licence. The commission of the prescribed offences of permitting intoxication on licensed premises and selling or supplying liquor to an intoxicated person that gave rise to the consideration of *this* second strike have the potential to cause a range of serious harms to patrons and staff of the Premises, as well as the wider community.
180. Furthermore, the Review Applicant has not specified what alternative action should be taken in order to address the prospect of further prescribed offences occurring in relation to the Premises, noting that the current Business Owner may not be the actual operator of this business into the future as the Owners are in the process of selling the Premises and the business operating on the Premises.
181. *By reference to section 144G(2)(c)(vi) of the Act, which requires a decision maker to consider whether there have been any changes to the persons who are the licensee, manager or business owner, the Authority is satisfied, on the basis of the information provided by the Delegate in the Reviewable Decision, that the Licensee has retired and that the Premises has voluntarily ceased to trade.*
182. The Authority also notes that the Owners are in the process of selling the Premises and the business operating on the Premises. As things stand, there is considerable uncertainty as to who the licensee, business owner and premises owner may be in future. This militates in favour of confirming the second strike.
183. *By reference to section 144G(2)(c)(vii) of the Act, which requires a decision maker to consider whether there have been any changes to the business practices in respect of the business carried on under the licence, the Authority notes and accepts the Review Applicant's submission that changes in policies, procedures and staff training have been implemented since the imposition of the second strike.*
184. The Authority is also satisfied, as found by the Delegate, that management staff at the Premises appear to be working closely with local licensing Police in order to minimise the risk of future prescribed offences occurring in connection with the Premises. That is a positive development, but it is not sufficiently persuasive to warrant not imposing a strike, which will better ensure that, should the business resume operation under the present or some future ownership, compliance with the Act is a priority.

Does the Commission of the Recent Prescribed Offences Warrant a Second Strike?

185. The Authority has taken into account all of the material and submissions before it in relation to the Review Application currently before the Authority and the statutory considerations the Authority is required to address.
186. When determining whether a second strike *should* be incurred, the Secretary (and the Authority, upon review) 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.
187. In this case, the prescribed offences at issue giving rise to the incurring of a second strike against the licence concern three breaches of section 73(1) of the Act in relation to

permitting intoxication on the licensed premises, and one breach of section 73(2) of the Act in relation to selling or supplying liquor to an intoxicated person.

188. Legislative provisions that regulate licensees with regard to the management of intoxicated persons on licensed premises are of fundamental importance to harm minimisation and the integrity of the regulatory Scheme imposed by the Act.
189. Accepting that the events now under consideration were not attended by anger or violence, the Authority is nevertheless satisfied that the conduct identified on the part of several patrons was demonstrative of the risk of accidental injury to patrons of the Premises.
190. Accepting the Review Applicant's contention that the persons found to be intoxicated on the Premises were "happy" as opposed to "angry, aggressive or offensive" the Authority is conscious of how easily the "happiness" of intoxicated persons and those affected by their conduct can turn to aggression, anger and violence. The Authority has taken into account the facts of these offences but also the potential harm that may flow from the commission of this type of offence.
191. Failure to comply with the prohibition on permitting intoxication on licensed premises may well impair the cognitive function of patrons and give rise to a range of likely adverse alcohol related harms - from noise, public disturbance and property damage on the Premises or in public places after leaving the Premises, to accidental or intentional injury caused to patrons or staff working on the Premises.
192. A failure to comply with the prohibition on selling or supplying liquor to intoxicated persons may give rise to all of those harms, but also generates the broader harm of undermining public confidence in the regulation of the liquor industry and exposing law-abiding businesses to a commercial disadvantage.
193. When considering whether a second strike should be incurred, it is of some considerable concern that following the first prescribed offence of permitting intoxication on licensed premises, this did not seem to have caused the Licensee or the Owners to take care or make sufficient changes in business practices to avoid committing another four prescribed offences that were detected by OLGR inspectors on 31 August 2014 (three counts of permitting intoxication on licensed premises and one count of selling or supplying liquor to an intoxicated person).
194. With regard to the recent regulatory history of the Premises, the Authority notes with concern that permitting intoxication on licensed premises was one of the prescribed offences giving rise to both the incurring of the first *and* the second strike now under consideration.
195. The Review Applicant contends that confirming the Reviewable Decision will "directly affect the value of the Premises and their saleability". While that may potentially be the case, the Review Applicant has not provided any evidence or material substantiating or explaining how the property value or the Owners' livelihood will be detrimentally affected and this contention is made in general terms with no specificity.
196. In any event, those potential commercial ramifications do not, in the circumstances of this case, provide a sufficient basis for the Authority not to incur a second strike against the licence in the face of a Scheme designed to remedy and prevent the recurrence of prescribed offences.

197. In conclusion, having regard to the facts and circumstances of this case and the statutory considerations outlined above, the Authority has determined that a second strike *should be incurred* against the licence, in light of the seriousness of any harm that may have resulted from, or been associated with, the commission of the prescribed offences of permitting intoxication on the Premises and selling or supplying liquor to an intoxicated person.
198. Under section 144I of the Act the Authority may confirm the decision under review, vary the decision or revoke the decision. The Authority has decided to confirm the Reviewable Decision.
199. In making this decision, the Authority has had regard to the statutory objects and considerations provided by section 3 of the Act, which states as follows:

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 the harm associated with the 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.*

SUBMISSIONS ON PROPOSED REMEDIAL ACTION

200. On 17 December 2015 the Authority notified its confirmation of the second strike and invited submissions on proposed remedial action from OLGR, Mid North Coast Licensing Police, the Licensee, the Business Owner and the Premises Owners.
201. The Authority noted that the purpose of disciplinary action is protective rather than punitive and when considering remedial action the Authority is concerned with the prevention of the occurrence of further prescribed offences by reducing the risk posed by the individual licensed premises in question.
202. The Authority advised the parties that, on the basis of the material before it and subject to considering any final submissions, the Authority was *minded* to take the following remedial action:
- a) Pursuant to section 144E(2)(c) of the Act, impose a condition prohibiting the sale or supply of liquor on the Premises after 1:00am following Monday through Saturday evening trade
 - b) Pursuant to section 144E(2)(c) of the Act, impose a condition prohibiting any further patrons from entering the Premises after 10:00pm until the close of trade on Monday through Sunday when patron numbers on the Premises have reached 150
 - c) Pursuant to section 144E(2)(d) of the Act, impose a condition prohibiting any patrons entering or remaining on the Premises after 1:00am following Monday through Saturday evening trade.
- (Proposed Remedial Action).**

203. OLGR and Police were invited to make submissions within seven days of this letter, while the other parties were invited to make any final submission seven (7) days thereafter.

204. On 23 December 2015 Sgt John Lawrie of NSW Police Mid North Coast Licensing Police at Port Macquarie made the following brief email submission:

Police have no further statistical information to assist the authority as the Down Under Night Club has been closed since late June 2015.

Police have reviewed the decision and in particular the remedial action considered by the Authority.

Since the closing of the Down Under, we have had a reduction in alcohol related issues within that part of the CBD, particularly at that late part of the evening between 1am and 4am. We support the remedial action in further consolidating a reduction in alcohol related crime in Port Macquarie CBD. Although it is unlikely that a lock out at 10pm would affect patron migration and movements as the venue was rarely patronised before that time.

For further information or comment please contact me on the below numbers.

205. On 16 January 2015 Merrick Spicer & Associates who act for Rodney and Carmen Bell, the premises owners and shareholders in the corporate Business Owner, made the following submissions in response to the Authority's invitation:

We refer to correspondence from the Authority dated 17 December 2015 and received by email that day, and in hard copy on 22 December 2015.

We act on behalf of the premises owners and business owners and licensee (owner in possession).

The proposal put forward in the letter of 17 December 2015 is that the Authority is 'minded' to impose three conditions on the licence, they being:

- 1 Limit the licence to a 1 am licence*
- 2 Impose a lock out commencing at 10 pm where numbers of patrons within the premises have reached 150, and*
- 3 Prohibit patrons entering or remaining on the premises after 1 am.*

The recent history with respect to these licensed premises which gave rise to the second strike being incurred related purely to a management and licensee-based problem.

At that time the licensee was Maxim Gunsberger. He retired in early July 2015 and the premises have not traded since that time. Our clients are able to obtain, if required, a Statutory Declaration by Maxim Gunsberger to the effect that he will not be associated in the future with the licence in any way.

It is the Licensing Sergeant's view, as we understand it, that it is not part of his job description to discuss the management of the night club with the owners. Owing to this, our clients were reliant on the advice given to them by their licensee, Maxim Gunsberger, about management issues and whether or not compliance was being had with licence conditions. They were misinformed.

Following the voluntary suspension of trading in July 2015, our clients, who both own the premises and own the business, took the view that there needed to be a major change in the way in which the business was run and the supervision the licensee had in relation to behaviour within the premises.

Our clients spent some time searching for an alternative and appropriate licensee while simultaneously seeking to sell the business and the premises.

*In late December 2015 a purchaser was found for the premises. That purchaser also wishes to buy the business and have the night club licence transferred to him. We **attach** a copy of the Sales Advice by way of verification. It is to be noted that the value of the premises and business fell due to the fact that the second strike had been imposed. If additional conditions are imposed, then the value will no doubt fall further.*

The present licence, without the proposed remedial conditions, permits trading until 4 am together with a multitude of conditions that also applied.

When it is recognised and accepted that the problems these premises suffered and caused stemmed from the management and licensee directly, then these problems will, in all likelihood, be resolved when a new licensee and new management are in place.

Contracts have issued for the sale of both the premises and the business to a company 'Somewhere You Love Being Pty Limited'. Contracts for the sale have, as at the date of these submissions, not exchanged.

We make the following comments in relation to each of the proposed remedial action conditions:

1 Restricting the licence to 1 am.

This effectively sees the premises have a one-hour operation. All other licensed premises in the Port Macquarie area are open and able to trade and sell alcohol until at least midnight. The history of these premises has been that they receive their maximum patronage after midnight. To take three hours out of what is currently a four-hour window (midnight to 4 am) would be unduly and unnecessarily harsh and in all likelihood see the premises and business become unviable. Our submission is that the premises should remain with a 4 am licence.

2 Imposing a lock out from 10 pm

It is respectfully suggested that our clients would agree to a lock-out at 1am providing always the premises retained the 4 am licence.

The 1 am lock out made as a licence condition together with the new licensee and new management would, in our view, address the concerns that the Authority otherwise has.

3 Prohibiting patrons entering or remaining on the premises after 1 am

This is linked to the first proposed condition. The current arrangement is, because of the 4 am licence, that trade usually stops at approximately 3.30 am to ensure that no patrons remain on the premises after 4 am. To impose this proposed condition would further exacerbate the concerns that are raised in relation to Item 1 in the sense that the business would need to stop trading at approximately 12.30 am, thus giving it a half hour window of operation beyond the closing time of the local hotels.

At paragraph 200 in the Authority's letter of 17 December 2015, it is noted that when considering remedial action, the emphasis is to prevent the occurrence of further prescribed offences by reducing the risk posed by the individual licensed premises.

It is our submission that the licensed premises, per say, do not pose any risk at all. The way in which they are managed and run is the factor that is determinative of any risk.

Clearly there have been shortfalls in the past. This is recognised by the Authority, in imposing the second strike and by our clients in closing the venue from early July 2015.

The premises currently have an opportunity for a fresh start with new management, a new licensee and, understandably, with close supervision by the local police.

It is therefore our submission that:

- (a) The premises should be allowed to re-open with a new owner and new licensee.*
- (b) The existing licence conditions remain with the imposition of an additional condition of a formal 1 am lock out only.*

We await your further advices.

206. On 19 January 2016 Mr Merrick Spicer was invited to make any further comment in reply to the submissions from Sgt Lawrie. Later on 19 January 2016 Merrick Spicer provided the following response via email:

Our clients are content to rely on the submissions lodged noting the Police comments regarding the lack of utility in a 10pm lockout. We await your decision.

207. No further submission was made by OLGR in relation to the Review Decision.

DECISION ON REMEDIAL ACTION

208. Notwithstanding that the Licensee has now apparently retired, the Secretary (and hence the Authority upon review) has the power to take certain remedial action in relation to the licence under section 144E of the Act, which states:

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 10am or after 11pm (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.*

209. The Authority is satisfied that it should take remedial action against the licence by reason that the *ARCIE Licensed Premises Overview* data before the Authority provided by Police in their submission dated 6 May 2015 indicates that the proportion of assaults recorded as having been *linked* to the Premises is elevated in the late evening/early morning and peaks at around 3:00am.

210. The Authority further notes and accepts the Licensee's submission that it is "difficult to monitor every last patron for intoxication" when the nightclub is operating at full patron capacity and that this proposed condition will reduce the scope for regulatory non-compliance making it easier for staff to monitor the intoxication levels of fewer patrons at any one time.

211. The Authority further notes that the letters sent by the Delegate to the interested parties notifying the incurring of a second strike against the licence had invited submissions on the potential imposition of remedial conditions pertaining to the use of an RSA Marshal and the development of a Plan of Management for the Premises - but such conditions

were ultimately not imposed in the Reviewable Decision, in light of the intervening Application for Review of the Second Strike.

212. The Authority has considered the final submissions made by the parties and all of the material before it in relation to the second strike.
213. The Authority gives weight to the "last place of consumption" data previously provided by local Police identifying the relative contribution made by persons linked to this venue in incidents involving the Police who were recorded as "well affected" by liquor.
214. The Authority accepts the observations made by Police in their final submissions that there has been a reduction in late night disturbance in Port Macquarie since this business ceased trading, although Police do not see any particular benefit from remedial action commencing at 10:00pm.
215. The Authority does not accept the submission made by the business owner and premises owner that the regulatory difficulties arising from the operation of the venue should be isolated as a "management problem" which has been resolved through the departure of Mr Gunsberger.
216. As former licensee, Mr Gunsberger was ultimately responsible for the venue's compliance with the Act but he managed that venue for a prolonged period of non-compliance, with the agreement of the business owner, who shares responsibility for the staff they appoint.
217. The remedial measures provided by section 144E provide a structured regulatory response whose purpose is to prevent further prescribed offences occurring on a licensed premises once two strikes have been incurred.
218. That is, this disciplinary scheme is designed to remedy the occurrence of prescribed offences at a given licensed *premises*. While the proposed sale of the *business* has been taken into account when making this decision, the Authority is not satisfied that it obviates the need for remedial action to be taken in respect of the premises in question. The Authority is satisfied, on the basis of the business owner's final submissions, that contracts have yet to be exchanged.
219. In conclusion, the Authority is satisfied that of the remedial measures available to it under section 144E the following remedial action is appropriate in the present circumstances:
 1. Pursuant to section 144E(2)(c) of the Act, a new condition is imposed upon the licence which states:

The sale or supply of liquor on the Premises shall cease at 01:00 Tuesday to Sunday.
 2. Pursuant to section 144E(2)(d) of the Act, a new condition is imposed upon the licence which states:

No patron may enter the Premises after 01:00 Tuesday to Sunday. Patrons who are on the Premises by 01:00 on those days may remain until the close of trade, but not re-enter the Premises during that time.

220. Please direct any enquiries about this letter to the Authority's General Counsel via bryce.wilson@ilga.nsw.gov.au .

Yours faithfully

A handwritten signature in black ink, consisting of a stylized 'D' and 'A' followed by a long horizontal stroke.

DB Armati

Deputy Chairperson

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

DATED 25 February 2016