



Our ref: L204
Your ref:KAS:100380

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By email
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Dear Sir

Application for revocation of extended trading authorisation for the Eye Bar, Kings Cross under section 51 (9) of the *Liquor Act 2007*

BACKGROUND

1. I refer to the above mentioned application ("**Application**") made by a delegate of the NSW Commissioner of Police regarding your client's premises at 68 Darlinghurst Road, Kings Cross ("the **Premises**").
2. The Premises has an on-premises liquor licence number LIQO600409555 which , through the operation of an Extended Trading Authorisation, effectively enables the Premises to trade beyond the standard hours prescribed by section 12 of the *Liquor Act 2007* ("**Act**") and supply liquor on premises 24 hours per day, seven days per week.
3. The Premises was originally granted extended licensed trading hours by the former NSW Licensing Court under the *Liquor Act 1982*. Those hours transitioned to the current licence that commenced when the present Act commenced on 1 July 2008.
4. Section 51 of the Act applies to Extended Trading Authorisations and other types of authorisations that may granted under the Act. Subsection 51 (9) states that:
 - (9) An authorisation:
 - (a) is subject to such conditions:
 - (i) as are imposed by the Authority (whether at the time the authorisation is granted or at a later time), or
 - (ii) as are imposed by or under this Act or as are prescribed by the regulations, and
 - (b) may be varied or revoked by the Authority on the Authority's own initiative or on application by the licensee, the Director-General or the Commissioner of Police.
5. At its meeting on 28 June 2011 the Authority convened to consider the Application and all submissions made by the interested parties, including submissions made by the licensee, Mr Dominic Kaikaty ("**Licensee**") and the landlord of the premises, Toftwood Pty Ltd ("**Landlord**").
6. The Authority resolved to further consider the matter and on 1 July 2011 decided to revoke the Extended Trading Authorisation, with effect from 12.01 am on Monday 4 July 2011. From that time, the licensed premises may no longer trade 24 hours, seven days per week and may only

trade in accordance with the standard trading hours that are prescribed by section 12 of the Act.

7. The Authority notified its decision by a short letter sent by email to the Licensee, the Landlord, Kings Cross Police, the NSW Police Alcohol and Licensing Enforcement Command and the compliance and licensing sections of the Office of Liquor Gaming and Racing (“OLGR”) on the evening of 1 July 2011.
8. While the Authority is not required by the Act to provide reasons for this type of decision, this letter provides a necessarily truncated summary of the submissions made and the Authority’s reasons for its decision on this matter.

The Application

9. The Application was made in two phases. The initial application dated 30 November 2010 was filed with the Authority during December 2010. The accompanying Police submission included an “evidence matrix” (“the **First Evidence Matrix**”) comprising a table summarising 53 reports of incidents, linked by Police to the Premises, in chronological order, during the period from 24 June 2009 to 21 October 2010. These were reports of

- alleged alcohol related disturbance or disorderly conduct incidents (including but not limited to assaults and intoxicated persons on the premises)
- alleged drug detection on the premises incidents
- other alleged incidents of non- compliance with liquor and environmental planning laws

(“**Adverse Incidents**”).

10. The First Evidence Matrix is supported by one lever arch folder of material, including individual contemporaneous reports that have been prepared by Police officers and logged in the Computerised Operational Policing System (“**COPS Reports**”). These documents either record Police observations from their attendance at the Premises and/or Police action with regard to incidents involving patrons of the Premises. For some incidents, Police have also provided copies of witness statements, photographs and still photographs captured from CCTV cameras.
11. The Authority decided to adjourn its processing of the Application until its meeting scheduled for 28 June 2011, to enable it to consider the outcome of three related prosecutions of the Licensee for alleged offences against the Act, set down for hearing at the Downing Centre Local Court on 14 June 2011. Those matters, along with the Licensee’s record of convictions, are discussed below.
12. During this period of adjournment Police were invited to update the Application and on 8 April 2011 Police filed a supplementary submission (“**Police Second Submission**”) with the Authority. This included a further evidence matrix (“**Second Evidence Matrix**”) summarising 30 more Adverse Incidents linked by Police to the Premises during the period from 24 October 2010 to 18 March 2011.
13. Those further Adverse Incidents were supported by a bundle of material, mainly COPS Reports and extracts from the Incident Register that all late trading licensed premises must maintain under section 56 of the Act. Police also provided a Prosecution Facts Sheet with respect to one of the Adverse Incidents, and an OLGR Audit was provided by way of supporting material for another of the Adverse Incidents.

The Police Case

14. The Police case for revoking the Authorisation essentially has two limbs. First, Police contend that the Premises is trading outside the authority granted to it by its liquor licence. The Premises has an “on premises” licence and the designated primary purpose of the business or activity associated with that licence is that of a “restaurant”.
15. Police contend that in fact the Premises trades with all the characteristics of a bar, that is, it is not a bona fide restaurant and its primary purpose is in fact the sale of liquor, contrary to section 22 of the Act, which states:

22 Primary purpose test

- (1) An on-premises licence must not be granted in respect of any premises if the primary purpose of the business or activity carried out on the premises is the sale or supply of liquor.
 - (2) The authorisation conferred by an on-premises licence does not apply if the primary purpose of the business or activity carried out on the licensed premises is the sale or supply of liquor.
 - (3) Subsections (1) and (2) do not apply if the premises to which the licence or proposed licence relates:
 - (a) are part of an airport, or
 - (b) are located on land occupied by a tertiary institution and cater for students of that institution.
 - (4) Subsections (1) and (2) are also subject to such exceptions as may be prescribed by the regulations.
16. Second, Police contend that for a licensed restaurant of modest size (with a maximum capacity of 76 persons) the Premises is generating a disproportionate amount of Adverse Incidents and that the great bulk of these Adverse Incidents are occurring during extended trading hours (that is, between midnight and 5 am from Tuesday to Sunday morning and between 10 pm on Sunday and 5 am on Monday).
 17. Police note that the Premises has a liquor licence that enables it to trade 24 hours per day, seven days per week. They submit that the Premises typically does not open from Monday to Wednesday. It opens late on Thursday evening and trades “very late, beyond 6 am” on Saturday and Sunday mornings. Police contend that, while the Premises is only open for part of the week, it is generating a very high number of Adverse Incidents.
 18. Police submit that they seek the revocation of the Extended Trading Authorisation in order to
 - significantly reduce the risk of patrons being assaulted within, or in the vicinity of, the Premises
 - significantly reduce the incidents of intoxication and anti-social behaviour within the Premises
 - significantly reduce the incidents of drug possession and consumption within the Premises
 - significantly reduce the incidents of non-compliance with Liquor and Local Government legislation
 - prevent the licensed premises further assuming the characteristics and operation of a bar or hotel, rather than that of a restaurant.

19. Police submit that prior to filing the Application they consulted with the Licensee and the Landlord about their regulatory concerns and have requested the Licensee to close voluntarily at 3 am in order to reduce the occurrence of Adverse Incidents.
20. According to Police, the Licensee would not agree to reducing his trading hours voluntarily, citing financial reasons. The Licensee is also said to have disputed the link between the extended trading of his business and the occurrence of Adverse Incidents.

The Licensee's Response

21. The Licensee has responded to the Application with three main submissions. On 4 May 2011, JDK Legal filed a letter comprising the Licensee's primary response to the Application ("**Licensee's Primary Submission**"). On 18 May 2011 JDK Legal filed a second submission ("**Licensee's Second Submission**") and on 17 June 2011 a third and final submission ("**Licensee's Third Submission**").
22. The key points made by JDK Legal in the Licensee's Primary Submission are:
 - i) The Licensee is 23 years old and has held the licence for the Premises since 31 March 2009. This is his first liquor licence.
 - ii) The Police submissions "largely comprise references to incidents and events which allegedly occurred during the period when the Premises had the benefit of a Primary Service Authority".
 - iii) The Licensee contends that he does not tolerate drug taking or supply on the Premises, has no connection with Outlaw Motorcycle Gangs ("**OMCGs**") or any crime figures, "detests violence" and takes measures to ensure that patrons displaying aggression are immediately removed and "prides himself on compliance with responsible service of alcohol principles".
 - iv) The Premises is a small venue located in Kings Cross – a tourist and destination attraction and the major entertainment precinct in Sydney. While there are "some residences" in Kings Cross, the "vast majority of premises are commercial in nature".
 - v) Kings Cross has 20 licensed premises that are authorised to trade 24 hours per day. Kings Cross operates 24 hours a day and caters to the "varied needs" of the public. This is not an environment for a "mum and dad" suburban restaurant business.
 - vi) The acknowledged "unorthodoxy" of the Licensee's trading hours does not mean that the venue is operating unlawfully. The premises operate in a "niche environment" catering to shift workers and late diners.
 - vii) It would be a "mistake" to accept the Police submission that the Premises has "extreme and exceptionally late trading". The Premises may be unorthodox, but it is not unlawful.
 - viii) From around September 2010, following discovery by the Authority that the Premises did not have a Primary Service Authorisation, the Premises has "operated in a different manner, so as to comply with the provisions of the Liquor Act".

- ix) The Licensee “accepts that during the first year or so of operation there were some unsavoury incidents which occurred in or around the Premises” but a good many of those incidents should have been attributed to patrons of other premises operating in the vicinity.
- x) The Premises is “wedged between a methadone clinic and 2 of the more notorious nightclubs in the Cross”. A “number of incidents” should have been attributed to those other premises or the methadone clinic (or, more correctly, the Sydney Medically Supervised Injecting Centre). (The Authority notes that Police dispute that the Centre is the cause of their concerns with the Premises and its patrons.)
- xi) The Authority should be more interested in the current position than with regard to events occurring over 2 years ago.
- xii) The Licensee notes that the Premises was closed for 72 hours by the Authority with respect to a drug raid in which a Manager of the Premises was charged. That matter (recorded at Event No 46 on the First Evidence Matrix) is before the Courts and “no further comment can be made at this point”.
- xiii) Event 47 in the First Evidence Matrix indicates that the Licensee is culpable for dealing with the proceeds of crime. However, Police do not explain that this matter has been dealt with by the Courts and the charge against the Licensee was dismissed.
- xiv) It is likely that “at any time, in any licensed premises throughout New South Wales, drugs are being sold and consumed on the premises”. This fact does not derogate from the Licensee’s position that he does not tolerate drugs on premises.
- xv) It is common knowledge that OMCGs have connections with licensed premises in Kings Cross. This is the Licensee’s first licensed premises and he has no former or current association with any criminal group.
- xvi) Police allege that the Licensee has denied the existence of wrong doing and has paid lip service to their suggestions with regard to management of the Premises. This is not true. The Licensee advises that, as a consequence of being notified by the Authority that his licence does not have the benefit of a Primary Service Authorisation, he has had to change his method of operation.
- xvii) A meal has always been available at the Premises and it is now a “pre requisite to having a drink that patrons also dine”.
- xviii) All service at the Premises is now by waiter service and all patrons are requested to be seated or at least have a seat available at a table. Patrons are asked if they intend to have a meal and, if they do not, they are not served alcohol.
- xix) At the suggestion of Police the Licensee employs two security guards whose duties are “primarily” to ensure proof of identification and compliance with RSA.
- xx) The Licensee also employs an RSA Marshall whose sole duty is to ensure that patrons approaching intoxication are not served or that any intoxicated person is immediately escorted off the Premises.

- xxi) At the request of Police the Licensee has joined the Local Liquor Accord and “is considered by its members as a worthwhile and serious contributor”.
- xxii) The Licensee advises that there are “approximately 10 police visitations a night“ (between 40 and 50 police visitations a week). There has “not been a single police prosecution for intoxication in the last six months”.
- xxiii) The only Police prosecution over the past 6 months (and after in excess of 1000 police visitations) was for a “relatively minor breach relating to CCTV”.
- xxiv) Of the 30 incidents identified in the Police Second Submission from 24 October 2010 to 18 March 2011 there has “only been one breach of licence in that six month period” regarding CCTV on the premises. During that period there were no breaches for permitting intoxication, permitting drug supply, breach of RSA requirements or other offences against the Act.
- xxv) The Licensee submits that the Police Second Submission shows that the business has changed.
- xxvi) This was the Licensee’s first licence and the Premises are “very tricky” to run given its location. The Premises trades in accordance with the Act during standard and extended hours. Otherwise given the “over 1000 visits” by Police over the last 6 months, there would be a plethora of charges against the Licensee.
- xxvii) The issue is not how the Premises has traded “under a different authorisation a year and in some cases 2 years ago” but “whether or not the Premises now operates within the Act during standard hours and thereafter”.

23. JDK Legal concludes the Licensee’s Primary Submission with a quote from the now Police Minister the Hon Michael Gallacher MP at a forum on law and order, as reported in the April 2011 edition of *Hotel News*:

“Changing trading hours won’t change people’s behaviour. We need to talk about responsible consumption of alcohol not just responsible service of alcohol.”

24. Following a further submission by Police dated 10 May 2011 (“**Police Third Submission**”) in reply to the Licensee’s Primary Submission, JDK Legal filed the Licensee’s Second Submission dated 18 May 2011, responding to contentions made in the Police Third Submission.

25. In the Licensee’s Second Submission, JDK Legal makes the following points:

- (i) There is a “total absence” of any conviction of the Licensee for permitting intoxication on premises, for assaults, or for anti- social behaviour in or around the Premises.
- (ii) Kings Cross Police generate, on a monthly basis, a “top ten” of the worst offending licensed premises in the precinct for the purposes of the Kings Cross Liquor Accord, yet the Eye Bar has not once appeared on that list.
- (iii) Kings Cross is a “seedy” area and this is not the Licensee’s fault. The Premises is located in one of the busiest areas of Kings Cross and is flanked by two of the more notorious venues in that precinct.

- (iv) Police assert that the Premises is a place where people “pre-fuel” but the regulatory notion of pre-fuelling concerns the consumption of liquor at home or in places other than at licensed premises.
- (v) In response to the Police submissions regarding the price of drinks at the Premises, the Licensee submits that the prices of his drinks are “dearer” than at the Sapphire nightclub, Soho, World Bar and the Trademark Hotel, located elsewhere in the Kings Cross precinct.
- (vi) The Premises is a “restaurant and proudly so”. The Premises is “unorthodox” but this does not make its conduct “unlawful”. All patrons at the Premises are provided with a menu. On the Police contention that “it is contrary to all logic” that a restaurant (whose primary purpose is supposed to be the supply of a meal) can supply free food, the Licensee submits that there are “numerous Hotels” in and around Kings Cross whose primary purpose is the supply of liquor yet who provide a cheap meal and a free alcoholic drink for promotional purposes.
- (vii) The Authority should give “no weight” to the Police submission that there have been 13 instances of intoxication occurring on the Premises, because Police have had the ability to prosecute those matters yet did not do so.
- (viii) The Licensee has taken proactive responsible service of alcohol measures such as “reducing the alcohol content of all shots to the equivalent of ½ a standard drink”. The Licensee has also removed (it is not specified when) all liquor lines with over 40% alcohol content. The Licensee ensures that liquor with over 20% alcohol content “is only served in mixed drinks”.
- (ix) On the Police criticism that there is no Plan of Management for the Premises, the Licensee submits that this document is “being finalised”.
- (x) With respect to Police submissions regarding section 49(8) of the Act (which concerns the issue of undue disturbance to the neighbourhood arising from extended trading), that section only applies when the Authority is required to consider whether or not to grant extended trading to an applicant. That section is not relevant to licensed premises that already have an Extended Trading Authorisation in effect.
- (xi) The Police material indicates that Police have investigated only a few of the assaults on the Premises. The Licensee asks: “where are the prosecutions for assaults?”
- (xii) To the extent that the Application is based upon the number of breaches of the law identified by Police in this matter, the Licensee submits that the “vast majority” of those breaches are “technical in nature”.
- (xiii) The Licensee submits that Police consultation with him has mainly concerned the presence of OMCG members on the Premises and “has had little to do with the consumption of liquor or alcohol-related crime”.
- (xiv) In response to the statement in the Police Third Submission that Police have only had 98 recorded inspections of the Premises, the Licensee contends that Police will have in fact inspected the Premises far in excess of this figure, which presumably does not include inspections from the Alcohol and Licensing Enforcement Command.

(xv) On the Licensee's delay in having the lease for the Premises assigned from the Licensee's brother, Mr David Kaikaty (whose arrest for supply of drugs in premises was part of the case for the issue of the Authority's Short Term Closure Order dated 30 July 2010), the Licensee submits that he made an "application" to transfer the licence but "Police do not understand the procedure involved".

(xvi) JDK Legal advise that they are instructed by the Licensee that "a number" of the 14 Penalty Notices that Police say have been issued with respect to the Premises concern non-compliance with the purported Primary Service Authorisation. JDK Legal advise that the Licensee "will be seeking an order of the Court, in due course, to quash these convictions because the Premises did not have, at the relevant times, a valid PSA".

26. On 16 June 2011 Police sent emails to the Authority advising that on 14 June 2011, at Downing Centre Local Court,

- (i) the Licensee was convicted and fined \$2500 for breach of a liquor licence condition requiring that liquor only be supplied for consumption on the premise
- (ii) the Licensee was convicted and fined \$3000 for breach of a liquor licence condition (imposed by the Authority in relation to its Short Term Closure Order dated 30 July 2010) requiring that the kitchen only be accessible to staff and the door and latch be operative at all times
- (iii) the charge against the Licensee of exercising the licence for the primary purpose of supplying liquor contrary to section 22 of the Act was dismissed.

27. In response to that information JDK Legal filed the Licensee's Third Submission. That submission

- i) provided a copy of the second Short Term Closure Order issued against the Premises by a duty magistrate in response to an application by Police in the early hours of 28 May 2011
- ii) notes that this Order was issued by reason of material put to that duty magistrate regarding the likelihood of a serious breach of section 74 of the Act (which prohibits the use of licensed premises for the sale of stolen goods or prohibited drugs). The Order was not issued with respect to food safety risks, as intimated by Police in earlier communications
- iii) notes that Police do not rely on this Short Term Closure Order as part of its case in support of the Application
- iv) submits that the Police charge of not complying with the primary purpose of the licence was dismissed by the Court and that that it is a central plank of this Application that the Premises is trading in the manner of a bar, not a restaurant, yet Police have not established this in Court
- v) advises that, when dismissing this prosecution, the magistrate observed that the Licensee had provided significant evidence of the sale of food and that this evidence had gone uncontested by Police. The magistrate considered this to be inconsistent with Police allegations that the Premises was being conducted as a bar

- vi) advises that the Licensee pleaded guilty to the other two offences and submits that the fines imposed by the magistrate “were reflective of the submissions made on our client’s behalf”.

The Landlord’s response

28. The Landlord was also consulted on the Application and made two submissions in reply. In a submission dated 4 April 2011 the Landlord requested that no change be made to the Authorisation, submitting that:

“Retail properties on Darlinghurst Road (between Springfield Avenue and Bayswater Road) over the past 7 years have been extremely difficult to lease, due to the injecting room which is located on the main retail strip right next door to our property. Some retail shops can barely exist but there is more chance with the liquor licence, which trade mainly at night.

Before leasing our premises eventually to “Eye Bar” we had long periods of vacancy, and even today some shops have been vacant for over 12 months.

This together with rapidly rising costs with outgoings (i.e land tax alone is \$60,000 p.a) it is hardly viable for tenants and owners to exist.

Since purchasing the property and existing 24 hour licence approximately 22 years ago, we have always endeavoured to have tenants of good standing (apart from our present problems) and we hope that this will continue in the future.”

29. In a submission dated 19 April 2011 the Landlord’s director, Mr Albert Strykowski submits:

“I believe that a reduction in trading hours of the licence would make the premises unviable and financially jeopardise Toftwood Pty Limited causing financial problems for the shareholders who have been long term investors and involved in commercial activities in the Kings Cross area...

..I am aware that the former licensee David Kaikaty has had problems with the Police however I point out that representatives of Toftwood Pty Limited have been in touch with the Police regarding such problems. Toftwood has also discussed such issues with the lessee to ensure compliance by the premises and encouraged the lessee to spend money on refurbishing the premises.

As a result Eye Bar provides a more affordable option for customers than other higher priced bars in the area.

I point out that the premises at 69 Darlinghurst Road, Kings Cross and other local businesses have been drastically affected by the establishment of a heroin injecting room in the adjacent premises at 66 Darlinghurst Road, Kings Cross. The injecting room continues to create problems for the owners and occupiers of number 68 due to the concentration of drug users in the vicinity during the injecting rooms daylight operation. As a result successful night trading for tenants of No 68 is all the more crucial.”

30. After detailing the Landlord’s support for initiatives such as the transfer of the lease from David Kaikaty and the installation of CCTV on the premises, Mr Strykowski submits:

“I am not aware of any complaints regarding the licensed premises for at least the last three (3) months. Previous issues have been rectified and are concluded. To my knowledge there are no current complaints regarding the premises. The lessee who is now also the licensee has cooperated with all requests to my knowledge made by Toftwood Pty Limited and the Police. Mr Matthew Davoren of Laing Real Estate (acting as property manager) liaises regularly with the lessee who now

holds the liquor licence. I submit that the matters complained of by the Police have been rectified and in any event were not of such serious nature as to justify the cancellation of the 24 hour licence and its reversion to a simply 12 am closing and (probably) 4pm on a Sunday.

I submit that the shareholders of Toftwood Pty Limited are being unduly penalised and Toftwood Pty Limited would like to maintain the present liquor licence (or certainly a late night licence) in order for the tenancy and Toftwood Pty Limited to remain financially viable.”

COMMENT

31. In response to JDK Legal’s submissions that there that there is an absence of convictions of the Licensee for intoxication on premises, assaults on premises or incidents of alcohol related disturbance, the Authority obtained a copy of the Licensee’s Criminal History from Kings Cross Police on 22 June 2011. That document discloses that, as of that date, the Licensee has been convicted of the following offences:

Date of conviction	Offence	Penalty
5 August 2008 Downing Centre Local Court	Fail to give particulars to another driver	Fine \$600 plus \$73 Court Costs
30 March 2010 Burwood Local Court	Larceny as a bailee > \$15000 (two counts)	Good Behaviour Bond 2 years
30 March 2010 Burwood Local Court	Larceny as a bailee \$5000- \$15,000	Good Behaviour Bond 2 years
6 May 2011 Downing Centre Local Court	Fail to comply with condition of liquor licence	Fine \$750 plus \$79 Court Costs
14 June 2011 Downing Centre Local Court	Fail to comply with condition of liquor licence	Fine \$2500 plus \$79 Court Costs
14 June 2011 Downing Centre Local Court	Fail to comply with condition of liquor licence	Fine \$3000 plus \$79 Court Costs

32. On 22 June 2011 the Authority also obtained from Kings Cross Police a spread sheet prepared by the State Debt Recovery Office (SDRO) detailing all Penalty Notices issued against the Licensee. This document was provided by SDRO to Police under the cover of an email dated 6 June 2011 which advises:

“Attached is a spreadsheet outlining all penalty notices in the name of Dominic Kaikaty and their current status.

In summary, there are 30 penalty notices, 4 are paid, 2 are outstanding and 24 are enforced. Of the Enforced matters, none of them are paid in full.

Mr Kaikaty has an outstanding balance of \$35,121.43. He is on a Time to Pay arrangement where he agreed to pay \$100 per fortnight. That TTP is currently \$780 in arrears.”

33. The SDRO record discloses that the Licensee has been issued with the following Penalty Notices:

Offence	Date	Amount Owing on Notice (\$)
Reverse vehicle further than necessary	230906	0
Exceed speed limit by 15km	150807	0
Disobey No Stopping sign	180807	0
Not display P plates	230308	0
Proceed through red traffic light	290808	324

Not carry driver licence	031008	81
Licensee sell liquor outside authorised hrs	100409	1100
Sell food fail to comply with Food Standards Code	140509	330
Exceed speed limit by >45km/hr	210809	1744
Licensee fail to comply licence condition	120909	1100
Licensee fail to comply licence condition	250909	1100
Licensee permit intoxication on premises	250909	1100
Licensee fail to comply licence condition	260909	1100
Licensee fail to comply licence condition	041009	1100
Licensee fail to comply licence condition	211109	1100
Licensee fail to comply licence condition	211109	1100
Licensee fail to comply licence condition	211109	1100
Licensee fail to comply licence condition	051209	1100
Development not in accord with consent	010110	1500
Owner fail to maintain fire safety measures	030110	1500
Owner fail to maintain fire safety measures	030110	1500
Licensee permit intoxication on premises	120210	1100
Development not in accord with consent	270210	1500
Development not in accord with consent	280210	1500
Employ security without master licence	260410	5500
Development not in accord with consent	290510	3000
Licensee fail to display 18+ notice	291010	220
Licensee supply liquor in contravention of licence	131110	1100
Display scheme authority in contravention of any condition	130311	516
Licensee fail to comply with licence conditions	170411	1100

34. While JDK Legal is correct to say that there have been few convictions of the Licensee for liquor offences and no convictions for intoxication on premises, the Authority does not accept the contention that those convictions which have been recorded against the Licensee are technical in nature. The three convictions recorded for failure to comply with licence conditions have resulted in substantial fines, from \$750 to \$3000, reflecting the seriousness with which the Courts have regarded those offences.
35. Moreover, it is apparent that Police have, in the alternative to mounting prosecutions, issued numerous Penalty Notices imposing substantial fines against the Licensee. Notwithstanding the Licensee's submission that he has "instructed" his solicitor to commence proceedings to set aside some of those Notices, it does not appear that any Notices have been set aside. As things stand, the Authority relies upon the advice provided by SDRO regarding the number and nature of Penalty Notices that have been issued to the Licensee.
36. Commencing a prosecution for conduct amounting to an offence is in the discretion of Police. Police may issue Penalty Notices in the alternative to commencing a formal prosecution, or may observe and report the relevant conduct while electing to either give a warning or take no action.
37. When the convictions and Penalty Notices recorded against the Licensee are considered together, it is apparent that Police have in fact undertaken a considerable amount of enforcement action against the Licensee during his short tenure as business owner and Licensee of the Premises.

38. It is of some concern to the Authority that as of 6 June 2011 the Licensee had a balance of \$35,121.43 owing to SDRO with regard to 30 Penalty Notices that had been issued against him. Of those Penalty Notices 25 have been issued against the Licensee since his acquisition of the Licence. Only 4 of the Penalty Notices issued against the Licensee have been paid (relating to traffic offences). Twenty-four of those Notices have reached the enforcement stage, including numerous liquor licensing fines and other fines directly relevant to running a licensed restaurant (such as breaches of fire regulations, environmental planning laws and security staff requirements).
39. The Authority notes that the Licensee has entered into a payment plan with the SDRO for repayment of the enforced fines at the modest rate of \$100 per fortnight, but even that arrangement was reportedly \$780 in arrears as of 6 June 2011.
40. To the extent that the Licensee's response is based on the contention that the Licensee is not at "fault" for the Adverse Incidents cited by Police the Authority notes that, while the culpability of a Licensee may be relevant to an application under section 51 (9) of the Act, it is not determinative of whether it is in the public interest to revoke an Extended Trading Authorisation at a given venue.
41. A decision to revoke an Extended Trading Authorisation does not involve the imposition of punitive action against the Licensee or (as suggested by Toftwood Pty Limited) the Landlord and its shareholders. The question is whether the Authority is satisfied, on the material before it, that revoking the Extended Trading Authorisation is reasonable in the circumstances and in the public interest.
42. If the Authority is satisfied that incidents involving the presence of intoxicated persons, assaults, alcohol related disturbance, drugs on premises or other offences are being repeatedly detected and dealt with by Police (whether or not a prosecution or a Penalty Notice has ensued for each incident), and those incidents can be properly linked to the Premises and its late trading activity, the Authority may take those incidents into account when deciding whether or not it is in the public interest for the Extended Trading Authorisation to be revoked.
43. In this case, the Authority considers that the total amount of convictions and unpaid Penalty Notices for liquor and other offences incurred by the Licensee over a comparatively short period of time supports an inference that the Licensee does not take his legal and regulatory responsibilities (or the prospect of being fined) seriously.
44. Running any late trading licensed premises poses a heightened risk of alcohol related disturbance to the community, as the premises may have persons whose judgment is affected by being tired and/or from drinking for a prolonged period. Late trading premises may also attract patrons who have been drinking at other venues, or who attempt to enter or remain on the premises when in no fit state to do so. Late trading premises may also attract persons seeking to use the premises as a venue for the supply or consumption of prohibited drugs.
45. The Authority notes the Licensee's submissions that Kings Cross is a "seedy" area and that it is "tricky" to run any licensed premises in this area but the Authority takes no comfort from the Applicant's Police and SDRO record or the fact that he is only 23 years old and this is his first liquor licence.

46. There are many licensed restaurants in the Kings Cross/Potts Point area that have not achieved this profile of Adverse Incidents, let alone been subject to two Short Term Closure Orders within a period of 12 months.
47. The inference that the Licensee does not diligently attend to his regulatory responsibilities is reinforced by the Authority's own dealings with the Licensee, arising from the Licensee's delay in complying with the Authority's requirement, arising from the Authority's Short Term Closure Order under section 82 of the Act issued on 30 July 2010, that the lease be transferred from the Licensee's brother Mr David Kaikaty. This requirement was communicated to the Licensee on 30 July 2010 in light of the prosecution of David Kaikaty for the supply of drugs on the Premises.
48. Police have noted the Licensee's delay in transferring the lease as an example as to why the Licensee's undertakings to deal with regulatory issues arising from the Premises cannot be given much weight. In response, the Licensee has submitted that Police do not understand the process of transferring a lease.
49. The Authority's letter notifying the Order requested the Licensee to effect the removal of Mr David Kaikaty from the lease within 28 days. However, the Licensee delayed in complying with this request, first seeking an extension of time (that was granted) and then simply not attending to the Authority's requirement.
50. Following repeated communication from the Authority in the face of several unconvincing reasons for delay from the Licensee, it was not until the Authority formally notified its intention to impose a new condition on the licence mandating compliance with this requirement that the transfer of the lease from David Kaikaty to Dominic Kaikaty was executed, effective from 6 April 2011, some 8 months after the Authority's initial request.
51. Furthermore, the Authority notes that on 14 June 2011 the Licensee was convicted at Downing Centre Local Court for breach of one of the very conditions that had been imposed by the Authority when issuing the Short Term Closure Order.
52. As previously noted, there are two limbs to the Application. The first is that the Premises have been trading outside the scope of its licence with the primary purpose of supplying liquor, contrary to section 22 of the Act. The second limb is that this late trading Premises has been the location of a disproportionate number of Adverse Incidents and it is in the public interest to address this by revoking the Extended Trading Authorisation.
53. Police have been unable to prove the first limb of their case in any prosecution for breach of section 22 of the Act. In the Authority's view, the material provided by Police in support of this Application supports a *reasonable suspicion* that the Premises has a trading profile that is more akin to that of a bar than a restaurant, given
 - the very basic standard of food on offer
 - photographs of the premises
 - the fact that is food is reportedly being supplied free of charge
 - the apparently inactive kitchen and lack of observed food service during some Police inspections, and
 - the material seized by Police on some occasions showing little evidence of the sale of food compared to liquor sales.

54. However, in order to satisfy the Authority that the Premises is in fact operating with the “primary purpose” of supplying liquor, the Authority would expect Police to provide a more comprehensive body of evidence or other material – that is, records of all takings from the Premises over a more representative period. While some use of Police powers under section 26 of the *Casino, Liquor and Gaming Control Authority Act 2007* has been made in this instance, the Authority observes that Police could have used that power more extensively in gathering material in support of this limb of the Application. The Authority is not satisfied as to this part of the Police case.
55. The Licensee’s Third Submission notes that the Licensee is reported to have presented evidence to Downing Centre Local Court of significant food sales, sufficient to secure the dismissal on 14 June 2011 of the Police prosecution alleging that the business was operating with the primary purpose of supplying liquor. That evidence was not made available by the Licensee to the Authority in response to this Application.
56. The Authority’s decision to revoke the Extended Trading Authorisation turns upon the number and type of reported Adverse Incidents that Police have linked to the Premises, and the nexus of most of these incidents to the late trading hours of the Premises.
57. The Authority accepts the Police submission that, for a small licensed restaurant that only opens from Thursday to Sunday, the Premises has generated an inordinate number of Adverse Incidents requiring Police attention.
58. The Licensee contends in its final submissions that Kings Cross Police maintain a “top ten” list of the most problematic premises in the precinct from a regulatory perspective, yet the Premises has not once featured on that list. Police have not adequately responded to this submission but in any event the Authority must deal with the Application before it, and in this case Police have presented a reasonable case, with sufficient evidence and other material that supports revoking the Extended Trading Authorisation.
59. The Licensee also contends that some of the Adverse Incidents relied upon by Police should be attributed to the presence of the neighbouring Sydney Medically Supervised Injecting Centre (“SMSIC”). Police contend that their complaints with regard to the Premises do not concern the users of the SMSIC. The Authority notes that the SMSIC is open from 9.30am to 9.30pm on weekdays and from 9.30am to 5.30pm on weekends. That facility does not open during late hours. The Authority has considered the supporting material regarding the Adverse Incidents and is satisfied that Police have fairly attributed most of the Adverse Incidents to the Premises and/or its patrons. While the Authority accepts the Landlord’s submission that the presence of the SMSIC may make the Premises less attractive for prospective tenants, the Authority does not accept the Licensee’s attribution of Adverse Incidents to that facility.
60. The occurrence of incidents like serious assaults, intoxicated persons on the premises, significant drug detection incidents and other apparent licensing breaches – mainly occurring during extended trading – satisfies the Authority that the continuation of the Extended Trading Authorisation is not in the public interest.
61. The Licensee has not contested the facts of all the individual Adverse Incidents that are relied upon by Police. However, given the financial consequences to the Licensee and the Landlord of granting the Application, the Authority has not accepted the Police material uncritically, even when it is uncontested. The Authority must be satisfied that Police have presented a reasonable body of evidence or other material that supports granting the Application.

62. The Authority is satisfied, on the balance of probabilities, that most of the 53 Adverse Incidents identified by Police in the First Evidence Matrix did in fact occur and that the Adverse Incidents have been reasonably linked by Police to the Premises and/or its patrons. The Authority has counted all but the following Adverse Incidents that were listed on the First Evidence Matrix, noting that:

- Event 4 is a consultation about existing regulatory issues. While it confirms that Police did consult with the Licensee, and confirms that Police have had to devote resources to dealing with the Licensee, it does not record an Adverse Incident in its own right.
- Event 9 is a note that Police have recently observed that the premises only opens late from 8pm on Friday and Saturday nights. As the licence enables the Premises to trade 24 hours, seven days per week, this seems to be of little consequence other than to record that the trading is unusual for a business with the designated primary purpose of a restaurant. In the Authority's view this is not an Adverse Incident.
- Event 19 notes that Police observed no provision of food and that only 6 dockets regarding the sale of food could be produced by the Licensee that night during the Police inspection. The Authority notes, however, that this incident pre-dates the 1 October 2010 when the Authority formally gave notice to the Licensee that the Premises did not enjoy the benefit of any valid Primary Service Authorisation. In the Authority's view, it would be unfair to count against the Licensee incidents of supply of liquor to an individual without a meal that occurred before 1 October 2010 as the Licensee was likely to have held a bona fide belief that the business enjoyed a Primary Service Authorisation.
- Event 20 notes the "extremely late opening" of the Premises, after 11.30 pm. Police suspect that this is inconsistent with a "restaurant", but the Authority notes that the venue was licensed to trade 24 hours, seven days per week. The Authority does not regard this to be an Adverse Incident.
- Event 23 is characterised by Police as "disorderly patrons" and "breach of licence conditions". The report identifies patrons of the Premises loitering and spitting outside the Premises. Police observed no evidence of any service of food during a 7 am inspection, but the Authority notes that the event pre-dates the 1 October 2010 notice given by the Authority that the Premises does not have a valid Primary Service Authorisation. This event is only counted by the Authority as a disorderly conduct Adverse Incident but not as a breach of the licence.
- Event 24 reports Police consultation with the Licensee and the Licensee's reluctance to accept Police recommendations *vis a vis* extended trading. While it confirms that Police have had to devote resources to dealing with the Licensee including concerns as to CCTV overwriting itself each 24 hours and concerns regarding the presence of OMCG members on the Premises, it does not report an Adverse Incident in its own right.
- Event 25 is a report on a meeting by Police with the Landlord regarding Police regulatory concerns regarding extended trading. While it confirms that Police have had to devote further resources to this matter, it does not report an Adverse Incident in its own right. Police are also recorded as putting the Landlord on notice of recent licensing breaches.
- Event 26 is an anonymous report of an assault. In its own terms this report states that the occurrence of the assault has not been verified. The Authority has not counted this report as an Adverse Incident.
- Events 27 and 28 each record a consultation between Police and the Licensee with regard to the trading hours of the Premises. While these reports further demonstrate the devotion of Police resources to managing regulatory concerns, the Authority does not consider either to record an Adverse Incident per se.

- Events 33 and 34 are recorded by Fact Sheets for a prosecution of the Licensee for alleged failure to comply with a licence condition, namely, having the primary purpose the sale of alcohol, on 20 March 2010 and 21 March 2010. It would appear that these charges were dismissed on 14 June 2011. They have not been counted as an Adverse Incident.
 - Event 35 is supported by a Fact Sheet for prosecution of the Licensee for allegedly having the primary purpose of the sale of alcohol, on 10 April 2010. The outcome of this prosecution is not specified and would appear to have been unsuccessful. This is not counted as an Adverse Incident.
 - Event 47 reports that Police prosecuted the Licensee alleging receipt of the proceeds of crime, regarding an incident of drug supply on the Premises. Police have confirmed that this matter was heard on 29 March 2011 and the charge against the Licensee was dismissed. This is not counted as an Adverse Incident.
 - Event 53 is a record of consultation by Police with the Licensee regarding extended trading. While it demonstrates the further devotion of Police resources to regulatory issues involving the Premises, it is not counted by the Authority as an Adverse Incident per se.
63. The Authority has critically reviewed the 30 further Adverse Incidents that were identified in the Second Evidence Matrix. The supporting material for these events mainly comprises COPS Reports and extracts from the Premises' own Incident Register. In one case Police provide a prosecution Facts Sheet and in one case Police furnished an OLGR audit of the Premises.
64. The supporting material satisfies the Authority that nearly all of the Adverse Incidents identified by Police on the Second Evidence Matrix did occur and have been properly attributed by Police to the Premises and/or its patrons and that the problems identified are relevant to the late trading activity of the Premises. However, Event 4 has not been counted by the Authority as an Adverse Incident as the supporting COPS Report, in its own terms, notes that Police will not proceed with any prosecution by reason that there was an insufficient basis for taking further action.
65. The Authority has taken into account the entire history of matters identified by Police and does not accept the Licensee's contention that it should focus upon the last 12 months of operation.
66. The Authority has considered the Licensee's contention that many of the Adverse Incidents cited by Police occurred at a time when the business was operating pursuant to an ostensible Primary Service Authorisation. This submission refers to the fact that the Government Licensing Service ("GLS") record of the liquor licence for the Premises had, from the time of the creation of that record, incorrectly indicated that the licence had the benefit of a Primary Service Authorisation under section 24 (3) of the Act, which enables the holder of an on-premises licence to serve liquor to individual patrons without a meal.
67. It would seem that when the business was acquired by the Licensee's mother in March 2009 the new owners did not conduct a proper search of the historical licence file for the Premises (which is the usual practice when persons acquire licensed businesses). This search would have revealed that the former "Dine or Drink Authority" granted to a previous business owner at the Premises had actually been cancelled under the former *Liquor Act 1982* due to a failure to pay the relevant fees to the NSW Licensing Court.
68. Licensed premises that held a Dine or Drink Authority under the former Act transitioned to holding a Primary Service Authorisation under the current Act. However, due to an apparent

data entry error, the GLS licence record incorrectly indicated that a Primary Service Authorisation at the Premises was in effect. This error was identified by the Authority and notified to the Licensee on 1 October 2010, following a review of the historical licence file for the Premises.

69. The Authority accepts that, until 1 October 2010, the Licensee may have held a bona fide belief that the business had the benefit of a Primary Service Authorisation. For this reason, the Authority has not, for the purposes of this Application, counted any Adverse Incident cited by Police that is solely based upon Police observations regarding the supply of liquor without a meal – if that event occurred before 1 October 2010.
70. Nevertheless, any business that holds a Primary Service Authorisation remains subject to an obligation to not have intoxicated persons on the Premises. Even if the Licensee believed that he held a Primary Service Authorisation until 1 October 2010 that is no answer to the rate of occurrence of assaults or other alcohol related disturbance incidents on the Premises. An on-premises licensee who holds a Primary Service Authorisation must also observe the requirement that the business overall does not have the primary purpose of the supply of liquor.
71. The Police material discloses numerous assaults (some very serious in nature), the frequent observation of intoxicated persons in premises by Police, disorderly behaviour and substantial cases of drug detection on the Premises. The Authority is satisfied that the supporting material provided by Police demonstrates a heightened risk of these types of incidents occurring as the Premises trades late and that it is in the public interest for the trading hours of the Premises to be wound back to the standard trading hours provided by the Act, in order to reduce the likelihood of such incidents occurring at these Premises.
72. In making this decision, the Authority has turned its mind to all of the statutory objects and considerations prescribed by section 3 of the Act:

3 Objects of Act

(1) The objects of this Act are as follows:

- (a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,
- (b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,
- (c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.

(2) In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following:

- (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),
- (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,
- (c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

73. In making this decision, the Authority has given weight to the need to minimise harm associated with the misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour), in accordance with subsection 3 (2) (a) of the Act, and to ensure that the sale,

supply and consumption of liquor contributes to, and does not detract from, the amenity of community life, in accordance with subsection 3 (2) (c) of the Act.

74. The Authority is aware that by taking this action the business of the Eye Bar may become financially unviable (to the extent that the business model revolves around very late trading) and that this decision will also indirectly affect the Landlord (albeit to an extent that has not been quantified) in that the Premises will no longer have the commercial advantage of a 24 hour liquor licence.

75. However, given the nature of the material presented by Police and the Licensee's poor regulatory record, the Authority is satisfied that revocation of the Extended Trading Authorisation is the correct and preferable decision in the circumstances, for the protection of the public.

Yours faithfully

A handwritten signature in black ink, appearing to read 'C. Sidoti', with a small flourish at the end.

Chris Sidoti
Chairperson