

Our Ref: L 188  
Your Ref:

Commander Zenio Fezcuk  
Local Area Commander  
NSW Police  
317 High Street  
PENRITH 2750

13 April 2010

*By email:*

*habe1guy@police.nsw.gov.au*  
*tschwartz@bsv.com.au*

Dear Sir

**Complaint under section 139 of the *Liquor Act 2007* ("Act") regarding Penrith Rugby League Club Ltd - Licence No LIQC300241858**

**BACKGROUND**

1. On 9 October 2009 the Authority received a letter dated 2 August 2010 comprising a complaint ("the **Complaint**") made in your capacity as a delegate of the Commissioner of Police, regarding the operations of the Penrith Rugby League Club Limited whose premises are located at Mulgoa Road, Penrith, New South Wales ("the **Respondent**").
2. The Complaint concerns the conduct of the Respondent from 1 December 2007 to 30 August 2009 ("the **Relevant Period**").
3. The Complaint specifies one of the grounds that are available under section 139 (3) of the Act:
  - (h) that Acts involving violence against persons or damage to property have frequently been committed on or near the licensed premises by persons who have been on the licensed premises.
4. The Complaint requests that the Authority consider imposing a penalty upon the Respondent in the form of the following new licence conditions:
  - (i) Low alcohol and non alcoholic beverages must be available at all times when full strength liquor is available. The pricing structure of low alcohol beverages is to reflect the lower wholesale costs of those beverages
  - (ii) On any night the licensed premises trades past midnight, no persons are to be admitted to the licensed premises after midnight
  - (iii) The availability and nature of food upon the premises shall be clearly advertised at all times, by way of signage and the display of menus, in such a way that it can be reasonably seen by patrons
  - (iv) Immediately after the person in charge of the licensed premises becomes aware of an incident involving an act of violence causing an injury to a person on the premises, the person must:
    - (a) Take all practical steps to preserve and keep intact the area where the act of violence occurred, retain all material and implements associated with the act of violence in accordance with the Crime Scene Preservation Guidelines issued by the NSW Police; and

(b) Make direct and personal contact with the Local Area Commander or his/her delegate, and advise the Commander or delegate of the incident; and

(c) Comply with any directions given by the Commander or delegate to preserve or keep intact the area where the violence occurred.

## PROCEDURAL FAIRNESS

5. On 5 November 2009 the Authority's General Counsel wrote to the Complainant, observing that, while Part 9 of the Act was relatively untested, there were alternative avenues whereby a law enforcement agency may seek the imposition of new conditions upon the liquor licence of a premises that is of concern to an agency.
6. Those alternatives include making an application to the Authority under section 53 of the Act or filling a submission to the Director-General of Communities NSW ("**Director-General**") seeking the exercise of her power under section 54 of the Act (the latter option being the primary approach that has been adopted by NSW Police since the commencement of the Authority's operations in July 2008).
7. The Authority's General Counsel observed that *prima facie* these alternative regulatory powers conferred by the Act present a more straightforward means of imposing new conditions upon a liquor licence than seeking conditions by way of disciplinary proceedings under Part 9 of the Act.
8. On 9 November 2009 Commander Guy Haberley of the NSW Police Alcohol and Licensing Enforcement Command ("**ALEC**") wrote to the Authority on behalf of the Complainant confirming the intention of Police to proceed by way of a disciplinary complaint.
9. The Authority tabulated and indexed the 235 documents and 2 DVD discs of material that comprise the Complaint material and served that material upon the General Manager of the Respondent on 5 December 2010.
10. The Respondent's Counsel accepted the Authority's offer of an oral hearing and a timetable was agreed for the filing of written submissions with the Respondent's Solicitor, Mr Tony Schwartz, who confirmed that he also acted for other parties with whom the Authority is obliged to consult pursuant to section 140 (3) of the Act.
11. After several requests for extensions of time, the Respondent filed and served a statement prepared by Mr Warwick Brown, the Respondent's Manager of Safety and Security, dated 1 March 2010 ("**Respondent's Statement**"). The Complainant was invited to make written submissions in reply to the Respondent's Statement and did so by way of a four page letter to the Authority dated 11 March 2010 ("**Complainant's Reply**").

## THE COMPLAINT MATERIAL AND SUBMISSIONS IN REPLY

12. In a six page letter to the Authority, the Complainant contended that that either "61" or "65" (this discrepancy was not clarified) acts of violence against persons or damage to property had occurred on the premises of the Respondent during the Relevant Period.
13. The Complainant filed a considerable amount of material to substantiate each alleged incident of assault, including NSW Police Computerised Operational Policing System reports ("**COPS Reports**"); NSW Police Computerised Incident Dispatch System messages ("**CIDS Messages**"); the Respondent's own Security Incident Register reports; and (in a minority of cases) more direct evidence in the form of witness statements, signed Police notebook entries and CCTV footage.
14. The Complainant cited Bureau of Crime Statistics and Research ("**BOCSAR**") data for the period April 2008 to March 2009, whereby the Respondent ranked highest for reported assaults on licensed premises in NSW. The Complainant further submitted that for the period December 2007 to August 2008 the Respondent received a risk rating, according to the NSW Police Escalated

Licensing Operational Response Model ("ELORM"), as "extreme" for violence; that from September 2008 to March 2009 this rating dropped to "medium"; that from March 2009 to May 2009 the ELORM rating was once again "extreme"; and that this rating persisted for the period from June to August 2009. The BOCSAR and Police statistical material referred to in the Complaint letter formed part of the material filed in support of the Complaint.

15. The Respondent's primary written submission to the Authority took the form of a very detailed 26 page Respondent's Statement, accompanied by some 14 annexed bundles of documents, mostly concerning the club's internal processes and policies.
16. In the Respondent's Statement Mr Brown advises that he has been employed in his present capacity since June 2009 and has worked in security industry management since 2001. The document annexes Mr Brown's resume and notes his relevant qualifications and experience in the stated fields of "risk management, workplace training and business management".
17. The Respondent's Statement advises that the club premises occupy some 84 hectares and the licensed area occupies 2.5 hectares. The Respondent received 2,411,138 visitors during the Relevant Period and enjoys an average annual attendance of around 1.8 million persons. The Respondent's premises have a capacity to "comfortably accommodate 8888 people" and operate from 9 am to 6 am, 7 days a week.
18. Mr Brown contends that the Respondent's crowd management arrangements are, in his experience, "among the very best, both in design and operations". He advises that from December 2007 to November 2009 the Respondent performed renovations costing \$31.7 million, with separate zones established for gaming, food service and entertainment.
19. Mr Brown provides a breakdown of the Respondent's two bars located on Level 1, four bars on Level 2 and two bars on Level 3 of the premises, outlining the deployment of licensed security staff at those bars and throughout the premises and detailing the venue's extensive CCTV facilities.
20. The Respondent's Statement annexes material that sets out, *inter alia*, the club's policies and practices with regard to the management and reporting of security matters and the service of liquor. The document goes on to address other relevant matters, including the use of Responsible Service of Alcohol marshals throughout the premises; the training of security and bar staff; the availability of food and water to patrons; the monitoring of entrances and exits; measures directed at under-age drinking; the operation of a secure taxi rank and the Respondent's disciplinary procedures for dealing with misconduct by club members.
21. The Respondent's Statement notes that the club's liquor licence is already subject to special licence conditions that apply by force of Schedule 4 to the Act. The document outlines how the club's house policies have, in some respects, imposed equivalent restrictions with regard to the service of liquor that preceded the commencement of the Schedule 4 special licence conditions in December 2008.
22. Mr Brown concludes the Respondent's Statement with his description of the Respondent's "positive relationship" and "regular liaison" with local Police, noting various operations conducted by ALEC at the venue, and detailing seven (7) Penalty Notices that have been issued to the Respondent for breaches of liquor and gaming legislation during the Relevant Period.
23. In the Complainant's Reply Commander Haberley made the following key points:
  - (i) Notwithstanding that the Respondent is subject to special licence conditions, the venue remains an "extreme risk" venue for alcohol related crime and violence according to the Police ELORM model.
  - (ii) The special licence condition imposed by Schedule 4 of the Act requiring a 2 am lockout does not greatly impact the Respondent, because that requirement does not restrict the entry of members to a registered club, and the Respondent has a large membership base of over 64,000 persons. Police note that a previous voluntary agreement between Penrith LAC and the club imposed a lockout for all non-member patrons from 1 am.

(iii) Panthers "works proactively with law enforcement", but the club's initiatives are said to have had "little effect" on reducing incidences of violence.

(iv) While the Respondent notes that 2,411,138 persons attended the venue during the Relevant Period, the attendance figures cited for high risk Saturday evenings is, according to the Respondent's Statement, from 2000 to 2400 persons and no specific figures are available on the actual attendance levels at times when the reported assaults occurred.

(vii) The Respondent's Statement does not contest the "63" incidents of violence that are relied upon by Police and the Authority should find that the Ground of Complaint has been established. Mr Brown's submissions contained in the Respondent's Statement are "made by way of mitigation".

(viii) It would set a "dangerous precedent" for the Authority to accept the Respondent's patronage levels as an "excuse" for the incidents of violence taking place at the premises. Police note that the considerations to which the Authority is to have regard when determining this matter are set out in section 3 of the Act.

(ix) If the Respondent's systems and policies are, as asserted, "among the very best" in the industry yet violence is still occurring, "sanctions and licence conditions are required" to reduce the levels of violence.

(x) Mr Brown has not provided a way forward to deal with the recorded incidents of violence at the premises. Police submit that, were the Authority to impose new licence conditions, the following measures would go to addressing the problems at the venue:

- a. *On any night the licensed premises trades past midnight, no persons, including full members and honorary members, are to be admitted to the licensed premises after 2am*
- b. *The availability and nature of food upon the premises shall be clearly advertised at all time, by way of signage, announcements and the display of menus, in such a way that it can be reasonably seen and heard by patrons*
- c. *Any member or guest responsible for an act of violence or malicious damage will automatically receive a 2 year banning period from the premises*
- d. *New and renewals of membership are not to be carried out after 6pm on any Friday and Saturday.*

(xi) Police further propose that the following initiatives be incorporated into a Plan of Management:

*Patron education signs indicating the range of penalties in the event of contravening the venue By-Laws and Conditions of Membership, including incidents of violence.*

*Amendments to the venue Dress Standards after 8pm until the cease of trading, improving patron attire.*

*Provision of 'free' food to patrons after 12 midnight on any Friday and Saturday.*

## **THE CONFERENCE**

24. The Authority convened a Conference pursuant to section 155 of the Act on 25 March 2010. The Complainant was represented by Mr Jeff Dean, a Legal Officer for the NSW Police. The Respondent was represented by Mr Terrence Lynch, Barrister, instructed by Mr Tony Schwartz, Solicitor.

25. The Authority noted that a central issue for consideration was whether a disciplinary complaint based upon subsection 139 (3) (h) of the Act requires that a complainant establish some element of "fault" - that some misconduct or negligence on the part of a licensee gave rise to the matters complained of.

26. There was no contest between the Complainant and the club at the Conference that there were 63 reported assaults in issue for the Relevant Period.
27. Mr Lynch did not contest the proposition put to him by the Authority that there was a significant level of violence occurring at or near the club, nor did the Respondent contest in its written submissions the sufficiency of the material relied upon by the Complainant in support of each alleged assault to satisfy the Authority that an "act of violence" had actually occurred.
28. Rather, Mr Lynch contended that the 63 events, when broken down over the Relevant Period, did not demonstrate that acts of violence were occurring "frequently" at the premises within the meaning of subsection 139 (3) (h) of the Act. Mr Lynch argued that for much of the Relevant Period assault incidents were occurring, on average, at the rate of one per week.
29. In the alternative, Mr Lynch argued that it is implicit in the notion of a disciplinary action that a ground for such action reflects a "lack of discipline" in the person about whom the complaint is made - that is, the ground for complaint must be the consequence of "fault" or "laxity" by the licensee.
30. Much of the discussion at the Conference centred upon whether a substantive case of fault had been alleged by the Complainant against the Respondent, and whether subsection 139 (3) (h) requires an element of fault for this ground to be established.

31. The Authority drew the parties' attention to the following statement in the Complaint:

*Whilst it can be acknowledged that the Panthers licensee pro actively worked with local police to reduce incidents of crime of violence occurring within and in the vicinity of the premises, these measures are having little effect on the ensuing violence occurring*

32. This statement suggests to the Authority that the licensee is working proactively to reduce incidents involving acts of violence, yet having little effect in reducing their occurrence. The latter assertion does not explain whether, in the Complainant's view, these events reflect some shortcoming on the part of the Respondent that requires correction.
33. Furthermore, the Authority drew the parties' attention to the following statements in the Complainant's Reply, neither of which level any substantive allegation of fault at the Respondent:

*The fact that the "very best systems and policies" are in place and complied with and the fact that the acts involving violence are still occurring at the premises justify the submission by the police to the Authority.*

.....

*Mr Brown, on behalf of the club, at no time provides a way forward or suggests a range of measures to be implemented to reduce the number of incidents of violence. Management appears content with the measures they have in place are sufficiently dealing with the violence emanating from the premises.*

34. The Authority further notes the following concluding remarks in the Complaint:

*Statistics provided by Sergeant Frost of ALEC confirm that since the introduction of the imposed special conditions, declared premises, schedule 4, upon the club there has been an overall reduction in the number of assaults committed*

....

*Local police praise the efforts made by the club in their attempts to achieve a reduction in the alcohol related crime incidents.*

...

*The clubs have self-imposed policies and procedures that target harm minimisation relating to the responsible service of alcohol and prevention of intoxication. All of these policies and procedures have been insufficient in making a positive long-term impact on the reduction of alcohol related crime.*

35. Again, these statements do not, in the Authority's view, identify a substantive case of fault - that (for example) the Respondent's staffing, procedures, practices and resources devoted to managing the risk of alcohol related crime fall short of the standard that a licensee with this scale of operations is expected to maintain.
36. The Complaint makes no mention of breaches of licence conditions or other breaches of liquor and gaming legislation by the Respondent. As noted above, the Respondent's Statement addresses this issue, noting that from December 2008 to February 2010 seven (7) Penalty Notices have been issued against the Respondent. According to the Respondent's uncontested account, three of those matters concerned the absence of a notification sticker on one of the poker machines at the venue and one matter concerned a failure to display a notice on an Automatic Teller Machine.
37. One of the matters, concerning permitting intoxication on the premises, was defended by the Respondent and the charge was dismissed at Mount Druitt Local Court on 23 September 2009. One other matter, concerning a breach of club rules, was withdrawn by Police at Mount Druitt Local Court on 22 January 2010. One further intoxication matter was being defended by the Club and the Authority is not aware of the outcome.
38. In the Authority's assessment, the Complaint has not demonstrated a recent pattern of misconduct or omissions on the part of the Respondent evidencing the inadequate risk management of alcohol related violence.
39. During the Conference, Mr Dean was asked by the Authority whether Police allege that the Respondent is at fault for the matters identified in the Complaint. After taking instructions, Mr Dean advised the Authority in the following terms:

*"I think it is fair to say, Mr Chair, that the level of fault that the complainant - and probably the only level of fault that the complainant can rely upon - is as the Chair read out from one of the comments earlier, the fact that there seems to be a heavy reliance upon the club of all the practice and procedures that they have in place and despite those practices and procedures, the premises still attracts the amount of incidents and acts of violence that we see here in the complaint and as mention has been made before to Schedule 4, remains up there as a level 1 premises on Schedule 4. So I think, from that respect, the only fault that could be alleged or attributed is with respect to, perhaps, an omission to try to enhance practices or procedures or something like that with regards to the problems that still arise."*

40. Mr Dean argued that the ground of complaint provided by subsection 139 (3) (h) is not one whereby a Complainant needs to prove or attribute any fault in order for the Authority to take disciplinary action.
41. Mr Dean contrasted the wording of subsection 139 (3) (h) with the wording of subsections 139 (3) (a), (b), (e) and (f) of the Act. Mr Dean submitted that, where the legislature has required some element of fault on the part of a respondent, it has specifically stated this in the relevant ground of complaint. Mr Dean argued that the grounds specified under subsections 139 (3) (g) and s 139 (3) (h) involve no element of fault.
42. Mr Dean accepted the Authority's proposition that, even if section 139 (3) (h) involves no element of fault, when the Authority comes to consider what, if any, penalty should apply it may have regard to an absence of fault on the part of a licensee.
43. In reply, Mr Lynch argued that subsection 139 (3) (g) is not a faultless ground when read in the context of the Act, noting the section 73 prohibition against permitting intoxication on premises. Mr Lynch argued that the "whole range of penalties" prescribed by section 141 of the Act "points to fault", and that it would be anomalous for Parliament to have created only one ground, subsection 139 (3) (h), for which no element of fault was required.
44. Mr Lynch further argued that subsection 139 (3) (h) has:

*"perhaps embedded in it a presumption that if an act of violence is occurring there may be fault and that is a matter to be ascertained, but in this case we certainly read the Police case as not alleging fault in any relevant sense and we assert no fault in any event."*

45. In response to a question from the Authority, legal representatives for both parties advised that there is no NSW Supreme Court authority clarifying this issue. Nor is there guidance from the case law on the equivalent ground of complaint that was contained in the former *Liquor Act 1982*.

## DETERMINATION

46. The Authority has considered relevant provisions of the Act, including but not limited to Part 9 of the Act and the statutory objectives and relevant considerations that are set out under 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.

47. Having considered all the submissions provided by the parties and the oral arguments made at the Conference, the Authority prefers the position advanced by the Respondent. It is satisfied that subsection 139 (3) (h) does implicitly involve an element of fault which is apparent when that subsection is read in the context of section 139 as a whole and Part 9 of the Act.

48. Part 9 of the Act is headed "Disciplinary Action". According to the *Butterworths Australian Legal Dictionary* (1997), the meaning of "disciplinary action" is "action taken in response to misconduct or a breach of discipline". "Discipline" is defined as "the exercise of control by instruction and punishment".

49. The Authority acknowledges that the purpose of the Act's disciplinary provisions is not simply punitive, but directed towards the protection of the public.

50. However, it is difficult in the context of this Complaint for the Respondent or the Authority to identify a deficiency in the Respondent's operations that poses a threat to the public and hence how discipline may be restored through appropriate action.

51. The Authority notes that Part 9 of the Act comprises only one aspect of the spectrum of regulatory power that may be exercised against a liquor licensee under the Act.

52. Part 10 of the Act contains provisions for the criminal prosecution of offences against the Act. Part 4 contains a range of more general administrative powers relating to licensing, including (relevantly) the Authority's power under 53 of the Act to impose, vary or revoke licence conditions and the Director-General's power under section 54 to impose, vary or revoke licence conditions.

53. Those general condition-making powers give considerable scope to an administrator to impose new licence conditions for the good management of a premises, if there is a reasonable basis for doing so and having regard to the objects and considerations that are prescribed by section 3 of the Act. There is no need for an applicant under section 53 or a submission under section 54 of the Act to demonstrate some "fault" on the part of a licensee giving rise to the identified regulatory concern.
54. For example, following the commencement of the Act in July 2008 the former Director of Liquor and Gaming has, on numerous occasions, imposed licence conditions (often affirmed or varied by the Authority on review) in response to reported glassing assaults at various licensed premises. This administrative action was taken in the absence of any necessary submission by Police that a licensee or its staff had contributed to the occurrence of such incidents by their acts or omissions.
55. By contrast, Parliament has included the condition-making power in Part 9 of the Act as a form of "disciplinary" sanction. Subsection 139 (3) (h) is one of some twenty grounds specified in that section that may activate such a sanction. These other grounds, in the Authority's view, have a consistent theme of fault on the part of the person who is the subject of complaint.
56. The Authority notes that section 141 of the Act provides a range of potentially severe sanctions that the Authority may impose upon a licensee, close associate or "interested person" (as the case may be) should a ground of complaint be established. Having regard to the objects of the Act in section 3, the Authority does not consider that it was the intention of Parliament to expose a licensee to the prospect of serious penalty in the absence of some identified element of fault.
57. In conclusion, the Authority is satisfied that, when making a complaint based upon sub-section 139 (3) (h), a complainant must identify a case of "fault" on the part of the respondent. The circumstances demonstrating fault may vary from case to case and need not involve something comparable to the level of criminality, but the circumstances should call for "discipline" and not merely invite new measures that may result in the improved management of a premises.
58. If the Authority is to impose licence conditions under Part 9 of the Act, it does so in the context of imposing "discipline" upon a licensee. A complainant should, in the Authority's view, establish a pattern of conduct or omissions that are less than one would expect of a licensee. It may be open to the Authority, when determining a complaint, to draw certain inferences from numbers of assaults recorded at a licensed premises but in relation to this complaint, on the Authority's assessment of the material before it, no substantive case of fault has been made out or even alleged.
59. The Authority has considered the prospect that its interpretation of subsection 139 (3) (h) may be wrong and that no element of fault is required, as a matter of law, for this ground to be established. The Authority has considered what action it would have taken in those circumstances. The Authority considers that, even if the Complaint can be made out in the absence of any substantive allegation or evidence of fault, that absence is a significant factor that goes to the question of penalty. The Authority is satisfied that it would, on the material before it, have exercised its discretion under section 141 of the Act to not impose a penalty.
60. In making this decision the Authority expresses no view as to the adequacy of the measures taken by the Respondent to date in response to the levels of violence that have been acknowledged by both parties.
61. It may be that the Police and the Respondent will now discuss and decide upon further steps that may be taken to reduce the reported incidents of violence at the venue. It may be that Police reach a view that an application under section 53 of the Act to the Authority or a submission under section 54 of the Act to the Director-General is appropriate.
62. Should the Authority receive an application under section 53, it will consider afresh whether the existing measures implemented by the Respondent are all that are required to address any matter of concern to Police.

63. Finally, by reason of this decision, it has not been necessary for the Authority to deal with the Respondent's other submissions advanced at the Conference, including arguments that the "lockout" condition proposed by the Complaint would be *ultra vires* the Authority's condition making power under subsection 141 (2) (e) of the Act; that the parameters and operation of the ELORM model are not explained in the Complaint; that the absolute numbers of incidents for which the ELORM rating may be attributable do not establish "frequency" or the "density" of incidents, given the large scale of the venue's operation; that the Respondent has been deliberately targeted for compliance action since 1 August 2008; that the Complaint pre-dated the commencement of amendments to Schedule 4 that commenced on 1 December 2009; and that the Complaint has misapprehended the Act's requirement to "minimise" harm with a view that the Respondent is required to "eliminate" harm.
64. However, as a matter of general principle, the Authority notes its agreement with the Complainant's submission that it is not appropriate to treat a high volume of patrons at a venue as an absolute "excuse" for not imposing a disciplinary penalty, if a ground is otherwise established.

#### **REVIEW RIGHTS**

65. Section 144 of the Act provides that an application for review of this decision may be made to the Administrative Decisions Tribunal of New South Wales ("**ADT**"). Such application may be made by the person against whom any disciplinary action is taken by the Authority in relation to the Complaint, or the Complainant.
66. An application for review must be made in the manner and form prescribed by the ADT, within 28 days of the day on which the applicant for review was notified of this decision. For more information contact the Registry of the ADT at Level 15, 111 Elizabeth Street, Sydney NSW 2000.

Yours sincerely

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

Chris Sidoti  
**Chairperson**