Independent Liquor & Gaming Authority

A statutory board established under the Gaming and Liquor Administration Act 2007

Our Ref: DOC18/191145

Mr Sean Goodchild Director Compliance Operations, Liquor and Gaming NSW Level 9, 323 Castlereagh Street SYDNEY NSW 2000 sean.goodchild@liquorandgaming.nsw.gov.au	Illawarra District Rugby League Football Club Ltd Licensee and Premises Owner 1-5 Burelli Street WOLLONGONG NSW 2500 steelers@steelers.com.au jmcewan@heardmcewan.stacklaw.com.au	Mr Scott Miles Former Club Secretary, Illawarra Steelers Club C/o Commissioner for Corrective Services GPO Box 31 SYDNEY NSW 2001

Via email and Express Post

3 October 2018

Dear Sir/Madam

Reference No.	DOC18/191145
Matter	Disciplinary Complaint
Licence name	Illawarra District Rugby League Football Club Limited
Complainant	Mr Sean Goodchild, Director Compliance Operations Liquor and Gaming New South Wales
Issue	Complaint in relation to the Illawarra District Rugby League Football Club Limited and the conduct of Mr Scott Miles, the former Secretary.
Legislation	Part 6A of the *Registered Clubs Act 1976* (NSW)

Final decision on Complaint under Part 6A of the *Registered Clubs Act 1976* in relation to the Illawarra District Rugby League Football Club Limited

The Independent Liquor and Gaming Authority ("Authority") has finalised a disciplinary complaint ("Complaint") made under Part 6A of the *Registered Clubs Act 1976* (NSW) ("Clubs Act") to the Authority on 1 December 2017. The Complaint was made by Mr Sean Goodchild ("Complainant"), Director Compliance Operations of Liquor and Gaming New South Wales ("LGNSW"), in his capacity as a delegate of the Secretary of the NSW Department of Industry, in relation to the Illawarra District Rugby League Football Club Limited ("Club").

The Complaint specifies three grounds ("Grounds") that are available under sections 57F(3)(g), 57F(3)(j) and 57F(3)(a) of the Clubs Act and arise from the conduct of Mr Scott Miles, the former secretary of the Club.

The Authority has considered the Complaint material and further submissions and **is satisfied** that Ground 1 of the Complaint, being a ground available under section 57F(3)(g) of the Clubs Act, is established in that the former secretary Mr Scott Miles, is not a fit and proper person to hold the position of secretary or member of the governing body of the Club.

Furthermore, the Authority **is satisfied** that Ground 2 of the Complaint, being a ground available under section 57F(3)(j) of the Clubs Act which concerns any other ground that a

complainant considers appropriate for the taking of disciplinary action against the club or the person – is established by reason that the Club has contravened clause 55(a) of the *Gaming Machines Regulation 2010* ("GM Regulation"). Ground 2 is further established by reason that a responsible person for the Club's licence, Mr Scott Miles, has contravened section 109(1) of the *Liquor Act 2007* ("Liquor Act").

The Authority **is *not* satisfied** that Ground 3 of the Complaint, being a ground available under section 57F(3)(a) of the Clubs Act, is established in that the Club has *not* contravened section 10(1)(k) of the Clubs Act with respect to Mr Miles' contract of employment.

The Authority has made the following determination on disciplinary action:

1. Pursuant to section 57H(2)(g) of the Clubs Act, the Authority declares the former secretary Mr Scott Miles to be ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body (or both of these positions) of the Club, and all other registered clubs **for life** from the date of this letter.

2. Pursuant to section 57H(2)(e) of the Clubs Act, the Authority imposes a condition on the Club's licence in the following terms:

   > Within 7 days after 3 October 2018 the Club must submit its whistle blower policy to the Secretary of the Department of Industry for consultation via the Director of Compliance, Liquor and Gaming NSW. If any advice is received on the content of the policy from the Secretary within 14 days after provision of the document to the Secretary, the Club must formally adopt and implement a revised policy, having due regard to such advice, not later than 28 days after 3 October 2018. The Club must provide the Secretary with the revised policy and comply with that policy at all times thereafter.

3. Pursuant to section 57H(2)(a) of the Clubs Act, the Authority orders the Club to pay to the NSW Department of Industry a monetary penalty in the amount of **$100,000.00** within 28 days from the date of this letter.

4. Pursuant to section 57H(2)(i) of the Clubs Act, the Authority orders the Club to pay to the NSW Department of Industry **$27,642.81**, in respect of the Secretary's costs in carrying out the investigation relating to this Complaint, within 28 days from the date of this letter.

Enclosed is a statement of reasons for the Authority's decision.

If you have any questions about this letter, please contact staff at the Authority's Reviews and Secretariat Unit via email at ilga.secretariat@liquorandgaming.nsw.gov.au

Yours faithfully

Philip Crawford
Chairperson
For and on behalf of the Independent Liquor and Gaming Authority

STATEMENT OF REASONS

INTRODUCTION

Background

1. On 1 December 2017, the Independent Liquor and Gaming Authority ("Authority") received a complaint ("Complaint") from Mr Sean Goodchild ("the Complainant"), Director of Compliance Operations, Liquor and Gaming NSW ("LGNSW"), in his capacity as a delegate of the Secretary of the New South Wales Department of Industry.

2. The Complaint is made under Part 6A of the *Registered Clubs Act 1976* (NSW) ("Clubs Act") in relation to the Illawarra District Rugby League Football Club Limited ("the Club"). The Complaint comprises a cover letter from the Complainant dated 1 December 2017 ("Cover Letter"), a 17-page complaint letter dated 1 December 2017 ("Complaint Letter") and a bundle of supporting evidence or material ("Complaint Material").

3. By way of background, an extract of the OneGov record of the Club's liquor licence as at 2 March 2017 (Complainant Exhibit E00) indicated that the Club holds a registered club licence number LIQC324002704 under the *Liquor Act 2007 (NSW)* ("Liquor Act"), which was first granted on 30 March 1990. The Club premises are located at 1-5 Burelli Street, Wollongong NSW 2500 ("Premises")

4. The licence permits the sale or supply of liquor for consumption on the licensed Premises 24 hours a day, and for the consumption off the Premises from 5:00 am to 11:00 pm on Monday to Saturday and from 10:00 am to 10:00 pm on Sunday. The gaming machine threshold for the venue is 110 and the Club holds 110 gaming machine entitlements, meaning that its gaming machine operations are operating to the limit of that threshold.

5. The Complainant has provided (Complainant Exhibit E01) a copy of a letter dated 9 February 2017 from the Club sent to Mr Miles terminating his employment.

6. While the OneGov record provided with the Complaint (Complainant Exhibit E00) records that Mr Scott Miles commenced his role as the Secretary/Manager of the Club on 21 April 2005, an updated copy of the licence as at 1 December 2017 provided with the Complaint (Complainant Exhibit E14) discloses that as of the 1 December 2017, the Club's Secretary/Manager is recorded as Mr Luke Barker, who commenced in that role on 10 March 2017.

GROUNDS OF COMPLAINT

7. The Complaint Letter specifies three (3) grounds, all of which are based upon statutory grounds available under section 57F(3) of the Clubs Act ("Grounds").

8. **Ground 1** is based on section 57F(3)(g) of the Clubs Act, which provides:

> *That the secretary of the club or any member of the governing body of the club is not a fit and proper person to act as such.*

9. Ground 1 alleges that the former secretary of the Club, Mr Miles, is not a "fit and proper" person on the basis of the allegations made in Particulars 1, 2 and 3 of the Complaint, which are detailed in the Findings section of this letter. The Club alleges that Mr Miles

does not have the requisite honesty, character or integrity to carry out the functions of a secretary of a registered club.

10. **Ground 2** is based on section 57F(3)(j) of the Clubs Act, which provides:

> *Any other ground that the complainant considers appropriate for the taking of disciplinary action against the club or the person.*

11. Ground 2 alleges in Particular 1 that the Club breached clause 55(a) of the *Gaming Machines Regulation 2010* ("GM Regulation"), which prohibits a hotelier or registered club from offering, supplying or permitting to be offered or supplied any free or discounted liquor as an inducement to play, or to play frequently, the gaming machines on the premises.

12. Ground 2 alleges in Particular 2 that the Club breached section 109(1) of the Liquor Act, which provides that a responsible person for licensed premises must not, in any credit transaction, describe or represent any cash advance extended to another person who the responsible person knows, or could reasonably be expected to know, intends to use the cash advance to gamble on the licensed premises to be a payment for goods or services lawfully provided on the licensed premises or elsewhere.

13. **Ground 3** is based on section 57F(3)(a) of the Clubs Act, which provides:

> *That the requirements specified in section 10 (1) are not being met, or have not been met, by the club or the person.*

14. Ground 3 alleges that the Club has not met the requirements of section 10(1) through the alleged contravention of the requirement in section 10(1)(k) of the Clubs Act that a club secretary, manager, employee or member of the governing body or of any committee of the Club not receive any payment calculated by reference to the quantity of liquor purchased, sold, supplied or disposed of by the club or the club's receipts from such supply or disposal, nor from the keeping or operation of approved gaming machines.

COMPLAINT MATERIAL

15. The Complaint Letter is accompanied by the following material:

- Dramatis Personae prepared by Complainant (undated).
- Complainant's chronology of events from 30 March 1990 to 6 September 2017.
- Official LGNSW disciplinary complaint form lodged on 1 December 2017.
- Exhibit E00: OneGov licence document for the Club's liquor licence LIQC324002704 as at 2 March 2017.
- Exhibit E01: Procare Forensic Services Report dated 17 May 2017 reporting on the circumstances surrounding the alleged employee theft and quantifying the loss to the insured, accompanied by relevant attachments.
- Exhibit E02: Employment contracts between the Club and Mr Scott Miles.
- Exhibit E03: Details of Mr Scott Miles' Earnings Before Interest, Tax, Depreciation and Amortisation ("EBITDA") bonus payments.
- Exhibit E04: Transcript of the Police interview with Mr Scott Miles dated 13 February 2017.
- Exhibit E05: Transcript of the Police interview with Mr Scott Miles dated 30 May 2017.
- Exhibit E06: Transcript of the interview between LGNSW inspectors and Mr Luke Barker (acting general manager) dated 19 April 2017 ("Barker Interview").
- Exhibit E07: Transcript of the interview between LGNSW inspectors and Mr James Summerrell (doorman and relief supervisor) dated 19 April 2017 ("Summerrell Interview").

- Exhibit E08: Transcript of the interview between LGNSW inspectors and Mr Graham Crittenden (duty manager) dated 19 April 2017 ("Crittenden Interview").
- Exhibit E09: Transcript of the interview between LGNSW inspectors and Mr Chris Hart (supervisor) dated 19 April 2017 ("Hart Interview").
- Exhibit E10: Transcript of the interview between LGNSW inspectors and Mr Simon Reay (full-time day supervisor) dated 19 April 2017 ("Reay Interview").
- Exhibit E11: Transcript of the interview between LGNSW inspectors and Mr Paul Jones (Club supervisor) dated 19 April 2017 ("Jones Interview").
- Exhibit E12: Transcript of the interview between LGNSW inspectors and Mr Scott Miles dated 24 July 2017 ("LGNSW Miles Interview").
- Exhibit E13: Transcript of the interview between LGNSW inspectors and Mr Peter Newell (director of the Club serving as chairman) dated 16 August 2017 ("Newell Interview").
- Exhibit E14: OneGov liquor licence document for the Club's liquor licence LIQC324002704 as at 1 December 2017.
- Exhibit E15: Justicelink record for *R v Scott Miles* 2017/00163129-001 held at Wollongong Local Court on 6 September 2017.
- Exhibit E16: Email correspondence between Stacks Heard McEwan and LGNSW dated 5 April 2017 and 6 April 2017.

CONSULTATION ON THE COMPLAINT

Show Cause Notices

16. On 1 March 2018 the Authority sent a notice to the Club and Mr Miles ("Show Cause Notice") enclosing the entire Complaint Material and inviting the respondents (the Club and Mr Miles) ("Respondents") to show cause, by way of written submissions, as to why disciplinary action should not be taken on the basis of the Grounds of Complaint.

Request for Further and Better Particulars

17. On 22 March 2018 the Club, through its legal representative Mr John McEwan of Stacks Heard McEwan solicitors, sent a three-page letter to the Complainant seeking further and better particulars of all three Grounds.

Response to Request for Particulars

18. In a three-page letter dated 19 April 2018 the Complainant responded to the Club's request for further and better particulars. This letter was accompanied by a two-page letter from LGNSW to Clubs NSW dated 30 November 2015 regarding section 10(1)(k) of the Clubs Act.

Submission from Club on the Merits of Complaint dated 23 May 2018

19. On 23 May 2018 the Club sent to the Authority a one-page cover letter dated 22 May 2018, with a table of contents page and a 14-page legal submission letter dated 23 May 2018, supported by the following material:

- Statutory declaration from Mr Peter Newell, director and chairman of the Club dated 17 May 2018;
- Statutory declaration from Mr Graeme Gulloch, director of the Club dated 23 May 2018;
- Statutory declaration from Mr Sean O'Connor, director and deputy chairman of the Club dated 18 May 2018;
- Statutory declaration from Mr Ian Neill, director of the Club dated 17 May 2018;

- Statutory declaration from Mr Robert Millward, director of the Club dated 17 May 2018;
- Statutory declaration from Mr Kevin Felgate, director of the Club dated 17 May 2018;
- Statutory declaration from Mr Colin Markham, director of the Club dated 17 May 2018;
- Statement of Mr John Thirlwell (unsworn), a previous director of the Club dated 18 May 2018;
- Service agreement between the Club and Mr Miles dated 1 March 2006 and Incentive Compensation Agreement between the Club and Mr Miles dated 22 March 2007;
- Club Data Online Salary Benchmark Report dated June 2012 referred to in Mr Thirlwell's statement.
- Letter from Clubs NSW dated 10 April 2018 to LGNSW regarding the interpretation of section 10(1)(k) of the Clubs Act;
- Letter from LGNSW to Clubs NSW dated 30 November 2015 regarding section 10(1)(k) of the Clubs Act.

20. The key contentions/submissions advanced by the Club in response to the Grounds of Complaint are briefly noted, where appropriate, in the Authority's findings below.

No Submission from Mr Miles

21. At the time of issuing this letter the Authority has not received any submission in response to the Show Cause Notice from Mr Miles.

Submission in reply from the Complainant dated 31 May 2018

22. In an email dated 31 May 2018 to the Reviews and Secretariat Unit ("Authority Secretariat"), the Complainant advises that they have nothing further in response to the Club's submission dated 23 May 2018.

FINDINGS

23. A disciplinary complaint under Part 6A of the Club Act is an administrative matter, and findings are made to the civil standard of proof. However, in accordance with the principle enunciated by the High Court of Australia in *Briginshaw* v *Briginshaw* (1938) 60 CLR 336, the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are matters that are relevant to deciding whether an allegation has been proved on the balance of probabilities.

Findings on Ground 1

<u>Ground 1 Particular 1</u>

24. The Authority is satisfied, as alleged in paragraph 28 of the Complaint Letter that Mr Miles, in his position at the Club, fraudulently acquired over one million dollars ($1,000,000.00) of Club funds over a period of about 7 years. This finding is made on the basis of Mr Miles' response to Questions 140-141 of the LGNSW Miles Interview between LGNSW inspectors and Mr Miles dated 24 July 2017 (Complainant Exhibit E12) in which Mr Miles states that "the alleged fraud took place", that he "admitted to it to the

police" and that he was "obtaining funds from the club via the club's credit card or the chit from the, through the safe and utilising that, those funds to fund a gambling addiction".

25. The Authority is satisfied, on the basis of *JusticeLink* record 2017/00163129-001 (Complainant Exhibit E15), as alleged in paragraph 29 of the Complaint Letter, that on 6 September 2017 Mr Miles pleaded guilty to a charge of dishonestly obtaining financial advantage by deception before the Wollongong Local Court. While the Complaint does not specify which legislation was contravened, this appears to be an apparent breach of section 192E of the *Crimes Act 1900* (NSW).

26. While the Complaint Letter states that Mr Miles was committed for sentencing at the District Court on 11 December 2017, there is no indication in the Complaint Letter or Complaint Material as to the outcome of this sentencing hearing. On 18 December 2017 the Authority received a copy of *JusticeLink* record 2017/00163129-001 in the matter of *R v Scott Miles* which records that on 18 December 2017 at the District Court in Wollongong, Mr Miles was sentenced to a term of 4 years imprisonment to commence on 18 December 2017 and expiring on 17 December 2021, with a non-parole period of 2 years. Mr Miles is first eligible for parole on 17 December 2019 and may be released on supervised parole when the non-parole period expires.

27. The Authority is satisfied, as alleged at paragraphs 30-32 of the Complaint Letter, that over a seven-year period between 2010 and around 27 January 2017 when the fraud was detected, Mr Miles used his position as the Club's Chief Executive Officer to cause the creation of false financial ledger entries, use his company credit card to obtain money, and take money from the Club's safe to finance a gambling habit. Mr Miles falsified the Club's monthly management accounts and financial reports that were presented to the board in order to deceive the board as to his conduct.

28. The Authority makes these findings on the basis of the transcript of the interview between NSW Police and Mr Miles dated 13 February 2017 (Complainant Exhibit E04), the transcript of interview between NSW Police and Mr Miles dated 30 May 2017 (Complainant Exhibit E05) and the LGNSW Miles Interview (Complainant Exhibit E12).

29. At Question 87 of the Police interview dated 13 February 2017 (Complainant Exhibit E04), Mr Miles responded to a question on how he would use the Club's credit card to pay for his own private debt by stating: "initially I would just take a cash advance but as it progressed I would either take a cash advance or I would just simply transfer funds off the credit card into a personal savings account". When asked how one covers up these transactions, Mr Miles stated at Question 131 that: "I'd do the transactions on the credit card, at the end of the month I would reconcile the credit card and say this is, you know, we'll call it a legitimate expense, this was promotions, this was applying for a licence, this money is outstanding and it's due to be repaid back and basically I just made up a story that it was – that I just said look, it's money that is actually going to our joint venture partners which it wasn't but I just said that as a story and I said just keep that, and we just kept that aside sitting in our debtor account and it just kept building up into that debtor account". At Question 135 Mr Miles stated that he was telling the Club's finance team that "the joint venture is struggling financially, once they're sorted they're going to repay – the money will come back in".

30. At Question 25 of the Police interview dated 30 May 2017(Complainant Exhibit E05), Mr Miles stated that: "chits were used at various stages through the safe to obtain cash to fund my gambling". At Question 47 Police asked: "So you weren't using the money to reduce the debtor account, you were using the money to free-up the credit card or to

gamble?" and Mr Miles answered "Correct". At Questions 135-136, Police stated: "For the sake of this interview we can agree that you did write chits at times that were used purely and simply for the purpose of gambling?" and Mr Miles replied "Yes". Police then asked: "Or to clear a debt on your credit card which ultimately was to further facilitate gambling" and Mr Miles replied "Correct".

31. At Question 167 of the LGNSW Miles Interview (Complainant Exhibit E12), Mr Miles stated that the finance person would prepare monthly reports, then provide them to Mr Miles. Mr Miles stated that if the finance person had highlighted the amount in the debtor account and made comments about it, Mr Miles would "remove that from the written report". At question 357 of this interview, LGNSW inspectors asked: "You were defrauding the club were you not?" and Mr Miles answered "Yes".

32. Ground 1 Particular 1 is established on the basis of these admissions from Mr Miles.

Ground 1 Particular 2

33. Section 109(1) of the Liquor Act states:

> *(1) A responsible person for licensed premises must not, in any credit transaction, describe or represent any cash advance extended to another person who the responsible person knows, or could reasonably be expected to know, intends to use the cash advance to gamble on the licensed premises to be a payment for goods or services lawfully provided on the licensed premises or elsewhere.*
> *Maximum penalty: 100 penalty units*
> *(2) In subsection (1), **credit transaction** means any transaction involving a payment to licensed premises by means of a credit facility provided by a financial institution*

34. The Authority is satisfied, on the basis of the admissions made by Mr Miles during the LGNSW Miles Interview discussed below, that the allegations in paragraph 33 of the Complaint Letter are established in that Mr Miles admitted to providing Club members with cash for gambling at the Club by facilitating fabricated or false EFTPOS transactions that were actually cash advances to patrons disguised as legitimate sales. This conduct contravenes section 109(1) of the Liquor Act.

35. The Authority accepts the further contention at paragraph 35 of the Complaint Letter that this conduct (providing members with cash for gambling at the Club by facilitating false EFTPOS transactions disguised as legitimate sales) was deliberate and systematic in nature and that Mr Miles coerced other staff to facilitate these transactions.

36. The Authority notes that Mr Luke Barker held the position of operations manager at relevant times but was appointed as the acting general manager on 30 January 2017. At Question 51 of the Barker Interview (Complainant Exhibit E06), Mr Barker stated that: "Over time the management team and myself raised it at duty managers meetings. So there was a, there was a real concern that it had gotten out of hand there. On a few occasions off the back of those duty managers meetings when I raised those concerns with Scott I received a typical response. One was, oh, look O.K. let me have a think about it, I'll revisit it and I'll come back to everyone. Little would be done." While the Complainant refers to this evidence in apparent support for Ground 1 Particular 2, this statement was made in relation to the provision of *free liquor and food* to patrons (the subject matter of Ground 1 Particular 3) and not specifically in relation to misrepresentations as to cash advances.

37. The Authority is satisfied, as alleged at paragraph 37 of the Complaint Letter, that the Summerrell Interview (Complainant Exhibit E07), the Crittenden Interview (Complainant Exhibit E08), the Hart Interview (Complainant Exhibit E09), the Reay Interview (Complainant Exhibit E10) and the Jones Interview (Complainant Exhibit E11) establish that all of those five staff members were directed by Mr Miles to provide cash to gaming patrons by fabricating EFTPOS transactions to appear as sales, rather than a cash withdrawal.

38. The Authority is satisfied that Ground 1 Particular 2 is established against Mr Miles on the basis of the admissions made by these staff members in these interviews, as set out in the allegations particularised in Ground 2 Particular 2, which are discussed in greater detail below.

Ground 1 Particular 3

39. The Authority notes that clause 55(a) of the GM Regulation states:

> *A hotelier or registered club must not:*
> *(a) offer or supply, or cause or permit to be offered or supplied, any free or discounted liquor as an inducement to play, or to play frequently, approved gaming machines in the hotel or on the premises of the club*

40. The Authority is satisfied, as alleged in paragraphs 39-40 of the Complaint Letter that Mr Miles caused or permitted free liquor to be provided as an inducement to play, or to play frequently, approved gaming machines on the Club's Premises, contrary to clause 55(a) of the GM Regulation.

41. The Authority accepts the further allegation, made at paragraph 41 of the Complaint Letter that Mr Miles' contravention of clause 55(a) was "deliberate" and "systematic" in nature and that Mr Miles not only personally engaged in this conduct but also directed other Club staff to provide free liquor to patrons as an inducement to gamble.

42. The Authority is satisfied, as alleged at paragraph 42 of the Complaint Letter, that the Summerrell Interview (Complainant Exhibit E07), Crittenden Interview (Complainant Exhibit E08), Hart Interview (Complainant Exhibit E09), Reay Interview (Complainant Exhibit E10) and Jones Interview (Complainant Exhibit E11) indicate that all five of these staff members were directed by Mr Miles to provide gaming patrons with free liquor.

43. The Authority is satisfied that Ground 1 Particular 3 is established on the basis of the admissions made by these staff members in these interviews, as set out in the allegations particularised in Ground 2 Particular 1, discussed in greater detail below.

Club response to Ground 1

44. The Authority notes that the Club, in their submission dated 23 May 2018, advised that they raise no objection or opposition to Ground 1 of the Complaint on the basis that this ground specifically relates to Mr Miles and that no admissions are made or deemed to be made or to be implied against the registered Club in relation to the materials provided in support of that complaint.

Fitness and Propriety at General Law

45. It is well established at common law for the purposes of licensing that to be "fit and proper" a person must have a requisite knowledge of the legislation under which he or she is to be licensed and the obligations and duties imposed thereby: *Ex parte Meagher* (1919) 36 WN 175 and *Sakellis* v *Police* (1968) 88 WN (Pt 1) (NSW) 541. Being fit and proper normally comprises the three characteristics of "honesty, knowledge and ability": *Hughes & Vale Pty Ltd* v *NSW* (No 2) (1955) 93 CLR 127.

46. Where a person has been convicted of offences, the decision maker must consider the circumstances of those convictions and the general reputation of the person apart from the convictions and the likelihood of repetition – *Clearihan* v *Registrar of Motor Vehicle Dealers in the ACT* (1994) 117 FLR 455.

47. In *Australian Broadcasting Tribunal* v *Bond* (1990) 170 CLR 321, the High Court of Australia has held that:

> *The expression 'fit and proper person' standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of those activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides an indication of likely future conduct) or reputation (because it provides an indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.*

Conclusion on Mr Miles' fitness and propriety

48. The Authority is satisfied, on the findings above, that Mr Miles as the former secretary of the Club is not a fit and proper person in that he does not have the requisite honesty, character or integrity to carry out the function of secretary of a registered club as alleged by the Complainant at paragraph 27 of the Complaint Letter.

49. The Authority is satisfied that Ground 1 is established

Findings on Ground 2

50. Paragraph 44 of Ground 2 alleges that evidence obtained from the Club, Mr Miles and other Club staff confirm the existence of a deliberate and systematic culture over an extended period of time that was designed to subvert the harm minimisation provisions of the *Gaming Machines Act 2001* ("GM Act") and GM Regulation by conduct that included the extension of credit and free liquor as inducements to numerous patrons.

Ground 2 Particular 1

51. While Ground 1 Particular 3 contends that Mr Miles is not fit and proper by reason of his contravention of clause 55(a) of the GM Regulation, Ground 2 Particular 1 alleges this contravention as a relevant matter in relation to the Complaint in so far as it concerns the Club itself.

52. As alleged in paragraph 45 of the Complaint Letter, Particular 1 of Ground 2 concerns a breach of clause 55(a) of the GM Regulation.

53. The Authority accepts, as alleged in paragraph 46 of the Complaint Letter, that on 19 April 2017 LGNSW inspectors attended the Club and interviewed the key managers.

54. The Authority is further satisfied, as alleged in paragraphs 47-49 of the Complaint Letter, that during the interview with LGNSW inspectors, Mr Barker disclosed that: the duty managers were instructed to provide complimentary drinks to gaming patrons; that offering free drinks was a good will gesture to Club patrons, but soon crossed over into the gaming room; that free drinks were used as an inducement to facilitate gaming; that Mr Barker raised his concerns that the provision of free liquor did not comply with legislation but his concerns were dismissed by Mr Miles, raising job security as an implied threat.

55. At Questions 53-55 of the Barker Interview (Complainant Exhibit E06), Mr Barker stated that: "we were instructed if we had a, a gaming patron that wanted a, a complimentary drink we were to give it to them" and that "It just got to the point, look, if they, if they wanted it and they were playing the gaming machines you were to provide it". Mr Barker also stated that when Mr Miles had found out that free drinks were refused to patrons: "He would say, look, no, just give them their drinks, it's O.K.". When asked at Question 60 of the interview: "Would you say that it was used as an inducement to get people to gamble", Mr Barker responded: "Initially no but, yes, once it moved into that gaming room I would say yes". At Question 61, Mr Barker stated: "It was, basically, if they're playing the gaming machines you're to provide their, their free drinks". At Questions 98-100 Mr Barker stated that he raised concerns with Mr Miles that these practices "didn't comply with legislation" and that Mr Miles' initial response (in Barker's words) was: "continue, keep doing so. If we lose certain patrons we may as well close the doors and we're all out of a job" and after that he would state "no worries, I appreciate your concerns, I'll look at it, I'll revisit it".

56. At Question 51 of the Barker Interview (Complainant Exhibit E06), Mr Barker stated that: "back when I was still duty manager there was discussion surrounding, you know, trying to lift, I guess the service that we provided and things like that and the general manager made a note that, or gave the O.K. for everyone, you know, look if you've got a couple of regulars in the bar and you do want to shout them a drink from time to time or a, a meal or a bowl of chips or, you know, if you've got a group from out of town which I can give, I guess, an example if you need but, you know he advised the management team at the time, look that is O.K. it's O.K. under the, I guess, as a means of spreading good will". Mr Barker then states that: "Off the back of that unfortunately it started to, I guess, become expected from patrons and did unfortunately spread into the, the gaming floor".

57. The Authority is further satisfied, as alleged in paragraphs 50-51 of the Complaint Letter, that during the interview with LGNSW inspectors, Mr Summerrell confirmed that Mr Miles instructed everyone to provide free liquor to regular players in the gaming room and when Mr Summerrell raised concerns about these practices with Mr Miles his concerns were dismissed.

58. In response to Questions 31-32 of the Summerrell Interview (Complainant Exhibit E07) on whether Mr Summerrell had knowledge of patrons been given free liquor, Mr Summerrell stated that this was "common knowledge" and that "Scott was the one that instructed everyone to do that". At Question 34, Mr Summerrell stated: "if you were playing a poker machine, for instance, and you were there for a couple of hours and you asked for a beer, more than likely, you'd be given that beer". At Question 40 Mr Summerrell stated that the only feedback he received from Mr Miles was that "it was to be done". At Question 41, Mr Summerrell told the interviewer that "it doesn't seem

kosher" and at "every opportunity" he would ask Mr Miles but that Mr Miles "made it very clear that, you know, that's fine".

59. The Authority is also satisfied, as alleged in paragraphs 52-53 of the Complaint Letter, that during the interview with LGNSW inspectors, Mr Crittenden also stated that he was instructed by Mr Miles to provide gaming patrons with free liquor and that when he raised the issue with Mr Miles he was told to continue providing free liquor.

60. At Question 51 of the Crittenden Interview (Complainant Exhibit E08), Mr Crittenden stated: "at times I was instructed by the then general manager [identified as Mr Miles] to give free liquor to the people, those playing machines". At Questions 53-54 Mr Crittenden added that he was instructed to give free liquor by Mr Miles who told him to do this "straight up, face to face" and the liquor was being provided to "keep people here". At Question 56 Mr Crittenden states "clearly it was wrong that's why I asked the general manager" (Mr Miles) who is said to have told Mr Crittenden "to continue it".

61. The Authority is satisfied, as alleged at paragraphs 54-55 of the Complaint Letter, that during the interview with LGNSW inspectors, Mr Hart also stated that he was instructed by Mr Miles to provide gaming and TAB patrons with free beverages and that the Club needed to do this in order to survive.

62. At Questions 44-45 of the Hart Interview (Complainant Exhibit E09), in response to a question from inspectors about the culture of providing free liquor Mr Hart states: "I was told that, like, it was, that we paid to provide it" and that it is "provided to not just specifically gaming patrons but other patrons, whether they were in the, like, in the TAB, like, the sports bar or food as well. Um, and so yeah, so pretty much we were told to provide these customers with, with the beverages". At Question 46, Mr Hart specifies that he was told to do this by Mr Miles. At Question 47 Mr Hart stated that the practice was required in order to "ensure that the club survives".

63. The Authority is also satisfied, as alleged at paragraphs 56-58 of the Complaint Letter, that during the interview with LGNSW inspectors, Mr Reay claimed that he was directed by Mr Miles to supply free liquor, to encourage people to stay longer, that it was predominantly gamblers who received free drinks and that Mr Reay considered that he had no choice regarding the directive from Mr Miles. After discussing the issues with Mr Miles, Mr Reay was directed to keep doing it.

64. At Questions 37-38 of the Reay Interview (Complainant Exhibit E10), Mr Reay stated that: "There was directed upon us by our general manager [identified as Mr Miles] to – to encourage people to stay longer in the club due to our financial difficulties". At Question 41 Mr Reay stated that the free drinks were provided "probably more – predominantly" to "punters in the gaming facilities" and at Questions 47-48 that this conduct was the product of a "verbal" direction "brought up in meetings" and that as a "directive from my boss, I sort of didn't really have a choice". When asked at Question 54 whether it was discussed with Mr Miles, Mr Reay specified that Mr Miles "asked us to basically do it" and "he was directing us to do it".

65. The Authority is further satisfied, as alleged at paragraphs 59-61 of the Complaint Letter, that during the interview with LGNSW inspectors, Mr Jones admitted to providing inducements to gamble, stated that he was told to give away alcoholic beverages, clarified that free liquor was given away to people gambling at a high level and that when raised with Mr Miles, he was told to continue so that the Club could keep its doors open.

66. At Questions 39-40 of the Jones Interview (Complainant Exhibit E11), Mr Jones answered, “yes I probably have” to a question whether he had ever provided an inducement to gamble. At Questions 41, 43, 45 and 50 Mr Jones stated that: “we were to give away alcoholic beverages” to “regular patrons” and people that had come in that were “gambling at a high level” and that it was “used as a gratitude or as a thank you for being a regular customer”. At Questions 149 and 152 Mr Jones stated that when raising the issue, Mr Miles would say to “continue doing it” because “we can’t afford to lose patrons” and so that “we keep the doors open and keep the, keep the club running”.

67. Finally, the Authority is satisfied, as alleged at paragraphs 62-66 of the Complaint Letter, that during his interview with LGNSW inspectors, Mr Miles stated that the provision of drinks was a goodwill gesture; admitted that he was advised by his managers to stop the practice but that it kept creeping back; denied instructing staff to provide free liquor; claimed that it was an inherited practice that became ingrained; stated that the board was unaware of the practice - if Mr Newell was aware he would have interjected and stopped the practice; claimed that the provision of free liquor was linked to raising gaming revenue; and admitted that the provision of free liquor was raised by the management team a number of times and that he should have stopped the practice.

68. At Question 86 of the LGNSW Miles Interview (Complainant Exhibit E12), Mr Miles stated that the free drinks were offered for the purpose of “building relationships” with patrons in the “hope” that they would “return to our venue”. At Questions 87-88, Mr Miles stated that this practice “evolved over time” and “evolved from the floor”. In response to Question 90: “Did you instruct anyone to do it” Mr Miles responded “No”. At Question 100, Mr Miles answers “No” to the question of whether the board was aware but stated at Question 101 that “I’d be naïve to think that not one director was aware”. At Question 102, Mr Miles stated that if Mr Newell was aware he “would have had me in quick smart to say what’s going on”. In response to Question 106, in which LGNSW inspectors asked whether this practice was linked to raising gaming revenues, Mr Miles stated: “You’d have to say yes”.

69. At Questions 107-111 of the LGNSW Miles Interview (Complainant Exhibit E12), Mr Miles stated that the Club operations manager, Mr Barker, raised concerns about the practice continuing on “numerous occasions” because “we’d cut it out completely for a period of time” but it “just seemed to keep creping, creeping back in” which Mr Miles stated was “my responsibility”.

Club response to Ground 2 Particular 1

70. In response to Ground 2 Particular 1, the Club makes the alternative arguments in a legal submission dated 23 May 2018 that Ground 2 has not been made out in so far as it may pertain to the *Club itself* by reason that: the evidence provided by the Complainant is insufficient to establish a breach of clause 55(a) of the GM Regulation in that there is nothing “compelling” to establish an inducement; that any breach of the clause committed by *Mr Miles* should not be attributed to the Club; that the Club constitutes the *members of the board of governing body* and that there is no evidence before the Authority that establishes that any of the Club directors were aware of Mr Miles’ conduct.

71. The Authority is satisfied, on the evidence and material noted above, that there is clear evidence that the practice of providing free drinks did occur as alleged by the Complainant. On a cumulative assessment of the admissions made by Messrs Miles, Barker, Summerrell, Crittenden, Hart, Reay and Jones the Authority is satisfied that these staff members knew that free liquor was being offered and supplied to gaming

room patrons as an inducement to prefer this venue and as an inducement to stay longer on the Premises playing gaming machines, in order to generate more gaming machine revenue for the Club. While the Authority accepts the Club's submission that the Complainant has not provided sufficient evidence that the board members were on notice of the practice, the Authority does not accept the proposition that a prolonged and systemic contravention of clause 55(a) of the GM Regulation, committed by the Club's *chief executive officer* in concert with *several managerial staff* may not be attributed to the Club itself. The Club acts through its officers and the relevant conduct was perpetrated by the Club's highest-ranking employee along with managerial staff who were responsible for the Club and its gaming machine operations at relevant times.

72. The Authority is satisfied that Ground 2 Particular 1 is established.

Ground 2 Particular 2

73. While Ground 1 Particular 2 contends that Mr Miles is not fit and proper by reason of his contravention of section 109(1) of the Liquor Act, Ground 2 Particular 2 alleges this contravention as a relevant matter in relation to the Complaint in so far as it concerns the Club itself.

74. The Authority accepts, as alleged at paragraph 68 of the Complaint Letter, that on 23 March 2017, the Club contacted LGNSW and reported that Mr Miles had instructed his duty managers to facilitate cash withdrawals via the Club's EFTPOS system that were disguised as legitimate sales in order to facilitate gambling on the Club Premises. This notification of the regulator is established on the basis of email correspondence between the Club's legal representative and LGNSW dated 5 April 2017 and 6 April 2017 (Complainant Exhibit E16).

75. The Authority accepts, as alleged at paragraph 69 of the Complaint Letter, that this report disclosed that the Club's duty managers have been directed to allow patrons to withdraw cash from their credit cards, disguising these transactions as sales with the funds then provided to the patrons for the purposes of gambling.

76. The Authority further accepts, as alleged at paragraph 70 of the Complaint Letter, that on 19 April 2017, LGNSW inspectors attended the Club and interviewed the Club's key management staff.

77. The Authority also accepts, as alleged at paragraph 71 of the Complaint Letter, that during the interview with LGNSW, Mr Barker disclosed that during a meeting held with the duty managers upon Mr Miles' termination from the Club, a number of duty managers disclosed that they had been instructed by Mr Miles to allow patrons to use the Club's EFTPOS terminals to withdraw cash.

78. At Question 68 of the Baker Interview (Complainant Exhibit E06), in response to a question by LGNSW inspectors as to whether an extension of credit to Club customers was provided, Mr Barker stated that "there was transactions processed by the clubs EFTPOS terminals that had been used to do so". At Question 69, Mr Barker stated that a number of duty managers had advised him that "contrary to the policy Scott had advised them to do otherwise and that pertained to allowing patrons to use the EFTPOS terminals to withdraw cash via the visa debit which was linked to their savings accounts".

79. The Authority is satisfied as alleged by the Complainant at paragraph 72 of the Complaint Letter, that upon Mr Miles' termination in February 2017, Mr Barker reported

the matter to the board and immediate steps were taken to ensure this practice ceased. At paragraph 73 of the Complaint Letter, the Complainant alleges that Mr Barker claimed that he was unaware of this practice; that Mr Miles bypassed him in instructions to the management team and that Mr Miles saw Mr Barker as being a roger rulebook.

80. At Question 51 of the Barker Interview (Complainant Exhibit E06), Mr Barker stated that within a few days of Mr Miles' removal, Mr Barker instructed the duty managers that "the existing, I guess, leniencies or instruction that had been provided was to stop immediately and, yeah, at that point it has completely stopped". In response to Question 87 in which LGNSW inspectors asked whether the matters were notified to the board, Mr Barker stated "Yes. Only more recently. Yep". At Question 148 of the interview, Mr Barker answers "Yes" to the question of whether Mr Miles bypassed Mr Barker when providing information to the management team and at Question 152 of the interview, in response to why Mr Miles would have bypassed him, Mr Barker stated that it was because "I've always been one for following the letter of the law. Call me a, I guess, a roger rulebook".

81. The Authority is satisfied as alleged at paragraphs 74-77 of the Complaint Letter, that during his interview with LGNSW inspectors, Mr Summerrell advised that: facilitating EFTPOS transactions started quite a while ago with some Asian clients and Mr Miles had instructed management to put these EFTPOS transactions through as a purchase; if the transaction was large, Mr Summerrell would contact Mr Miles and seek comfort and Mr Miles would advise Mr Summerrell to keep going with the transaction as they could not afford to lose that kind of patron; he held concerns regarding the large transactions, putting pressure on the Club's safe balance but when raised with Mr Miles, Mr Summerrell was told while there's money in the safe you do the transactions; and that the largest transactions that he was directed to facilitate ranged from $20,000 to $40,000.

82. At Question 54 of the Summerrell Interview (Complainant Exhibit E07), Mr Summerrell stated that "it started a long, long time ago with some of our Asian clientele" Mr Miles would "inform the management to put it through as a purchase". If the figure was a large figure Mr Summerrell would contact Mr Miles asking "This much has been taken out, do you want me to keep going" and Mr Miles would say "We can't afford to lose this kind of patron, we need to keep doing what we're doing". At Question 62 Mr Summerrell stated that after a night where he had done "a rough - $30,000 in EFTPOS" he spoke to Mr Miles stating "last night was a big night with a certain patron getting money out" which is "putting pressure on" the "safe balance". Mr Summerrell stated in the interview that Mr Miles responded by telling Mr Summerrell that "while there's money in the safe, you do the transactions". At Question 138, in response to a question from the LGNSW inspector about the average amount of transactions, Mr Summerrell stated that "Transactions at its worst, I would say there would be 20 or 30 or $40,000 on a shift".

83. The Authority notes that at Questions 55-57 of the Summerrell Interview (Complainant Exhibit E07), Mr Summerrell stated that some patrons would come up and ask for "$5,000 on purchase" between "four or five times a night" with that money being used for "Poker machines".

84. The Authority accepts, as alleged at paragraphs 78-80 of the Complaint Letter, that during the interview with LGNSW inspectors, Mr Crittenden advised that he was instructed by Mr Miles to provide a facility of extending credit to certain members via the Club's EFTPOS system, that Mr Crittenden was aware that people were pulling money

out for gaming purposes and that although he raised concerns with Mr Miles numerous times, he was pressured to continue facilitating these transactions, it was a directive.

85. At Question 86 of the Crittenden Interview (Complainant Exhibit E08), Mr Crittenden stated in relation to crediting people through the EFTPOS system that "There were certain members or clients that I was instructed to, by the general manager, to provide this facility". At Question 87, Mr Crittenden stated that people would "come up, they would have their card and they would ask for a certain amount and it would be done on a credit purchase". Mr Crittenden at Question 100 stated that the people were pulling the money out for "Gambling". At Questions 103-105 Mr Crittenden stated that he raised the issue with the general manager "Numerous times" whose response was to "keep doing it. We had to meet certain targets and if we didn't the doors were shut and fifty people would be out of a job". Mr Crittenden at Question 106 stated that this made him feel "under duress". At Questions 112-116 when asked by LGNSW inspectors whether there was a direction from Mr Scott Miles in relation to the withdrawal facilities having to continue, Mr Crittenden answered that is "Correct" and stated that "It was a directive".

86. The Authority accepts, as alleged in paragraphs 81-83 of the Complaint Letter, that in his interview with LGNSW inspectors, Mr Hart stated that: he had facilitated some EFTPOS credit transactions but that his involvement was minimal; he once turned down some customers who requested this facility but when he notified Mr Miles he was told to allow these transactions if requested in the future; and he felt that he could not report his concerns about the matter as he was instructed by his boss, Mr Miles.

87. At Question 59 of the Hart Interview (Complainant Exhibit E09), Mr Hart stated that he "personally had done some transaction" but that he had "minimal involvement in it". At Question 60 Mr Hart stated that the purpose of these transactions is for the "customer to use the money to gamble with". Mr Hart stated at Question 62 that when a patron had requested this, Mr Hart had stated "I can't", in which the patron responded with "Well, your boss does it for me". When confronting Mr Miles about patrons requesting these transactions, Mr Hart was told by Mr Miles "I want you to, to make sure next time they come up, you are to do these transactions for them". At Question 92, in response to a question by the LGNSW inspector on whether he ever raised the issue, Mr Hart contends that he had "no one else to report it to" seeing as his "boss" told him "to do so".

88. The Authority is satisfied, as alleged at paragraphs 84-86 of the Complaint Letter, that in his interview with LGNSW inspectors, Mr Reay stated that: the EFTPOS system was used to facilitate cash withdrawals by ringing up transactions as purchases; facilitating these transactions was a directive of Mr Miles; and that Mr Miles pulled Mr Reay aside and advised him to ring the transactions up as a purchase.

89. In the Reay Interview (Complainant Exhibit E10), Mr Reay stated at Questions 55-56, that "they were trying to get around the cash-out policy, and they used a certain method to get past that" and that "If a customer hit a – a daily limit on their personal card, it was told upon us to ring it up as a purchase". In response to Question 57 as to how this was facilitated, Mr Reay stated that "the managers did it, but by directive of our general manager". At Question 60 Mr Reay contends that after telling a customer that they "can't do anything more" when they had hit their daily limit, Mr Miles pulled Mr Reay aside stating "You can ring it up as a purchase and accounts will fix up the rest".

90. The Authority is satisfied, as alleged at paragraphs 87-88 of the Complaint Letter, that during his interview with LGNSW inspectors, Mr Jones stated that cash via the Club's EFTPOS system was provided to patrons for gambling purposes and that he was

directed by Mr Miles to continue facilitating these cash out requests to keep customers coming in.

91. In the Jones Interview (Complainant Exhibit E11) at Question 55, Mr Jones stated that "we were informed that um, there were certain people that we would um, use the EFTPOS system um, yeah for reasons other than just cash out. To provide money for people" and at Question 56 he stated that the purpose was for "gambling usually". At Questions 73-74, Mr Jones stated that he had asked Mr Miles "is this right that we're, we're doing this". Mr Jones stated that he "personally didn't feel comfortable with it and the majority, like I said, I had refused and I would refuse unless I was ---" "---told directly that I was to continue". At Question 75, Mr Jones stated that Mr Miles would state that "we need to keep the customers coming in. If we don't have customers coming in then you know, we're not going to have a business".

92. The Authority accepts, as alleged in paragraphs 89-90 of the Complaint Letter, that during the interview with LGNSW inspectors, Mr Miles: confirmed that some customers would utilise the EFTPOS facilities to withdraw cash; claimed to be aware but that he put steps in place to stop it from happening; and denied instructing staff to provide EFTPOS facilities, rather blaming the culture of the Club and that staff were aware that the Club was suffering financially.

93. At Question 113 of the LGNSW Miles Interview (Complainant Exhibit E12), Mr Miles stated "there was some customers that would utilise EFTPOS. That practice was going on and I won't say a hundred per cent without, I, I wasn't aware that it was occurring and when I found out that it was occurring I put steps in place to stop it but, yeah, they, so basically it was EFTPOS transaction, sale, credit card, give them cash". At Question 118 Mr Miles responds to the question of whether he allowed that facility to occur by stating "No. It was part of discussion but I don't, I never sat there and said you must do this, no". At Question 119, Mr Miles answered "No" to whether he had ever threatened staff that if they didn't do it the club might as well close its doors. At Question 120 Mr Miles stated "I never threatened the staff, it was always collaborative" but that "certainly culturally and the staff were aware and the managers were aware that the club was, you know, trading wasn't strong and that we had to do everything that we could to, you know, from culturally to, as to by those relationships and make sure people are coming in the doors".

<u>Club response to Ground 2 Particular 2</u>

94. In response to Ground 2 Particular 2, the Club argues in its submission dated 23 May 2018 that the duty imposed under section 109(1) of the Liquor Act applies to a "responsible person for licensed premises" and that person was Mr Miles, not the Club itself; that Mr Miles conduct should not be attributed to the Club but only Mr Miles personally; that none of the Club's directors were aware of the breaches of this statutory provision until after termination of Mr Miles' employment; that there is no evidence before the Authority to establish that any Club directors had any knowledge of, or reason to suspect, that such breaches had occurred; that all Club directors have provided sworn declarations to the effect that no such concerns were raised with them and that they were otherwise unaware of these matters and that there was no deliberate and systematic culture of non-compliance with this provision of the Liquor Act at the Club.

95. While the Authority accepts the Club's submission that any offence against section 109(1) would be committed by the "responsible person" (Mr Miles), section 109 is a requirement of the Liquor Act that is a condition of the liquor licence. With respect to a registered club licence, it is the *club itself* that holds the licence, not an individual. A

serious and systemic failure to comply with section 109 is a factual matter that may properly be the subject of a disciplinary complaint against the Club itself. The Authority accepts that the Club's directors were unaware of Mr Miles' conduct and this is a matter that may be raised in mitigation. Even though the *Club* has not committed any offence against section 109(1) of the Liquor Act, the facts established by this Particular of the Complaint are that section 109 was contravened by the Club's appointed "responsible person" in respect of the licence. The Club, as licensee, is ultimately responsible for compliance with licensing matters.

96. While the Authority's finding that Ground 2 is established primarily with respect to Particular 1, the extensive non-compliance with section 109 of the Liquor Act perpetrated by the Club's chief executive is a factual matter that may also be taken into account with respect to Ground 2 as it concerns the Club itself.

Findings on Ground 3

Ground 3 Particular 1

97. Ground 3 Particular 1 concerns an alleged breach of section 10(1)(k) of the Clubs Act, which states:

> *The secretary or manager, or any employee, or a member of the governing body or of any committee, of the club is not entitled to receive, either directly or indirectly, any payment calculated by reference to:*
> *(i) the quantity of liquor purchased, supplied, sold or disposed of by the club or the receipts of the club for any liquor supplied or disposed of by the club, or*
> *(ii) the keeping or operation of approved gaming machines in the club.*

98. The Authority is satisfied, as alleged at paragraph 92 of the Complaint Letter, that Mr Miles was a party of a contract for employment with the Club dated 2006, which includes provisions for an incentive bonus to be paid upon reaching certain benchmarks calculated on the Club's EBITDA.

99. A copy of Mr Miles' employment contract dated 1 March 2006, described as a "service agreement", is at Complainant Exhibit E02. At clause 4.2 under the heading "Incentive Compensation" the contract states:

> 4.2 **Incentive Compensation.** Notwithstanding the provisions of 4.1 above, the General Manager will be entitled to an incentive bonus at the end of the financial year, based on targeted levels of EBITDA being met by the club for the financial year ended 31 October each year. The incentive bonus shall be paid in December as a percentage of the current cash salary, shown in 4.1 above, and shall not be subject to any other premiums or increments such as annual leave loading, shown in clause 11.1, or superannuation, shown in clause 8.1, of this agreement.

100. The Authority accepts, as alleged in paragraph 93 of the Complaint Letter and on the basis of emails between Mr Miles and various staff and board members of the Club dated 2 December 2009, 16 December 2010, 5 January 2011, 7 December 2011, and 29 November 2013 which are in evidence at Complainant Exhibit E03, that in December of each year, the "incentive bonus" for Mr Miles was tabled and discussed, with a decision made by the board to pay the bonus by reason that the Club had exceeded the relevant EBITDA projections. While the Complainant alleges that Mr Miles was paid the incentive bonus in 2010, 2011, 2012 and 2013, there is insufficient supporting evidence among the Complaint Material to establish this payment during 2012.

101. The Authority accepts that no further incentive payments were made after 2013, as the Club's EBITDA projections were not met.

102. The Authority accepts, as alleged at paragraph 94 of the Complaint Letter, that during the interview with LGNSW, Mr Miles advised the inspectors that the EBITDA was predominantly made up from liquor sales, gaming revenue and other income from (unspecified) "internal leases".

103. The Authority accepts, as alleged at paragraph 94 of the Complaint Letter, that Mr Miles further informed inspectors that at least 100% of the EBITDA was made up of liquor and gaming income.

104. At Question 125 of the LGNSW Miles Interview (Complainant Exhibit E12) inspectors asked whether the incentive scheme was calculated upon the volume of liquor sales and Mr Miles responded by stating "Yeah, by liquor sales, gaming revenue". At Question 126 the inspectors asked whether it also included gaming revenue and Mr Miles responded "Yeah".

105. When asked at Questions 127-128 what proportion of the bonus would Mr Miles say was based upon liquor and gaming, Mr Miles responded: "I would say a hundred per cent". At Question 135 the inspectors asked whether the board was aware of what the incentive scheme was based upon, being liquor and gaming and Mr Miles stated "Yes".

106. The Complainant further alleges at paragraph 95 of the Complaint Letter, that on 16 and 17 August 2017, LGNSW inspectors attended the Club Premises and conducted interviews with a number of board members including Mr Peter Newell, Mr Graham Gulloch and Mr Bob Millward in which the operation of incentive bonuses was raised. Only a transcript of the Newell Interview (Complainant Exhibit E13) has been provided with the Complaint Material.

107. The Authority accepts, as alleged at paragraphs 96-99 of the Complaint Letter, that during his interview with LGNSW inspectors, Mr Newell stated that: EBITDA included gaming and bar sales; 82% of the EBITDA was made up of bar sales and gaming; he thought that linking EBITDA to an incentive bonus is a standard practice in the registered club industry; and that having such an incentive bonus could be an issue with regards to the Club's Articles of Association and the Clubs Act.

108. At Question 65 of the Newell Interview (Complainant Exhibit E13), Mr Newell states that the EBITDA includes "gaming" and "bar sales". At Question 66, LGNSW inspectors ask "So in terms of bar sales and gaming, what percentage would you attribute bar sales and gaming being towards the EBITDA?" and Mr Newell states "about 82%". At Question 73, Mr Newell stated that he "thought it was fairly standard practice". At Questions 75-76 Mr Newell stated that "it is possible" that an EBITDA bonus that may be linked to liquor sales could contravene clause 75 of the article of association and that "Possibly there is" an issue with Mr Miles contract of employment and the Club's compliance with clause 10(1)(k) of the Clubs Act.

<u>Club response to Ground 3 Particular 1</u>

109. Although the Authority accepts that these statements were made by Mr Miles and Mr Newell, the Authority nevertheless accepts the Club's submissions dated 23 May 2018.

110. The incentive provision at 4.2 of the service agreement dated 1 March 2006 (which is specified above) has not been structured "by reference to" the quantity of liquor purchased, supplied, sold or disposed of, or "by reference to" the keeping or operation of approved gaming machines in the Club. The adoption of the incentive bonus pursuant to Mr Miles' employment contract (as varied by the Incentive Compensation Agreement) is based upon targeted levels of EBITDA being met by the Club and that the annual EBITDA targets upon which these incentives turn are determined by the Club's board of directors.

111. The Club distinguishes the present circumstances from the 2015 disciplinary complaints in relation to the Manly-Warringah Rugby League Football Club and Parramatta Leagues Club on the basis that the incentives at issue in those cases concerned "sales targets" and sources of "profit". The Club contends that an incentive based upon EBITDA targets is "distinctly different".

112. The Authority accepts that EBITDA is not a *direct* derivative of either liquor sales or gaming machine proceeds. Whether an EBIDTA target is met may depend on the cost of goods, the expenses of providing services and apportionment, if any, of capital costs and operational expenses across all heads of revenue. These matters may be factored into the Club's EBITDA calculations.

113. Moreover, a discretionary element in the incentive compensation package arises from the fact that EBITDA targets are determined by the Club's board of directors. This further removes a nexus to either the quantity or value of liquor sold, supplied or disposed of or the keeping or operation of approved gaming machines on the Premises.

114. As the Authority has observed in two previous published decisions with respect to the Manly and Parramatta leagues clubs that are noted in the Club's submissions, a registered club that derives a very high proportion of revenue from liquor and gaming machine activity has numerous alternatives available to incentivise staff, to the extent that this may be necessary, in a manner that avoids any argument about potential non-compliance with section 10(1)(k) of the Clubs Act.

115. Nevertheless, the Authority has concluded on the evidence and submissions now before it that the discretionary EBITDA based target agreed with Mr Miles was sufficiently removed from the quantity or value of liquor (sold, supplied, disposed or consumed) and/or the keeping or operation of gaming machines to avoid the Club contravening this prohibition.

116. Ground 3 is **not** established.

CONSULTATION ON DISCPLINARY ACTION

117. On 18 July 2018 the Authority emailed a detailed letter ("Findings Letter") of that date to the Complainant and the Club, with a copy mailed on that date by express post to Mr Miles care of the New South Wales Commissioner for Corrective Services, who confirmed by email dated 20 July 2018 that Mr Miles had been served with this letter. The Findings Letter notified the Authority's findings on the Grounds of Complaint and invited final written submissions confined to the question of what, if any, disciplinary action should be taken in light of those findings.

Final Submission from the Complainant dated 1 August 2018

118. In a two-page letter dated 1 August 2018, the Complainant submits that the Authority should make the following orders:

1) Pursuant to section 57H(2)(g) of the Clubs Act, declare the former secretary Mr Scott Miles be ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body (or both of those positions) of the Club, and all other registered clubs for such period as the Authority deems appropriate.
2) Pursuant to section 57H(2)(e) of the Clubs Act, impose a condition on the Club's licence that requires the Club to maintain a formal 'whistle-blower' policy.
3) Pursuant to section 57H(2)(a) of the Clubs Act, impose a monetary penalty on the Club as the Authority deems appropriate.
4) Pursuant to section 57H(2)(i) of the Clubs Act, order the Club to pay the amount of $27,642.81 being the costs incurred by the Secretary of the NSW Department of Industry in carrying out the investigation.

119. With regard to the first proposal, the Complainant submits that the seriousness of Mr Miles' conduct warrants that a message be sent to Mr Miles and others, including industry participants, that conduct of this nature will attract sanctions from the Authority. While not specifying any time period, the Complainant submits that the Authority should impose a "substantial" period of disqualification.

120. With regard to the second proposal, the Complainant submits that the evidence indicates that Club management and operational staff were aware that the extension of credit and offering of alcohol to gaming machine patrons as an inducement was wrong, yet the Club had no readily available mechanism to alert the board to such conduct. While the Club president refers to the implementation of a whistle blower policy in his statutory declaration dated 17 May 2018, no detail has been provided. The Complainant submits that an enforceable licence condition mandating the use of such policy would mitigate the risk of future misconduct. Such licence condition should specify: a mechanism for staff to make anonymous complaints/disclosures to the board; for such complaints/disclosures to be tabled at board meetings; for complaints/disclosures to be recorded and made available to LGNSW on request; and for any action in response to complaints/disclosures to be noted in board meeting minutes.

121. With regard to the third proposal, the Complainant notes the seriousness of the findings that have been made in relation to the Club and the need for a message to be sent to this Club and other registered clubs that such conduct will attract sanctions. Without specifying a figure, the Complainant submits that the Authority impose an "appropriate" monetary penalty that reflects the seriousness of the conduct, noting that the maximum penalty is $275,000.

122. The Complainant has provided, for the purposes of section 57H(i) of the Act, a summary of the costs incurred by the Secretary of the NSW Department of Industry in carrying out the investigation relating to the Complaint, with costs amounting to $27,642.81.

123. The Complainant copied the Club when making this submission. On 3 August 2018 the Department of Corrective Services advised the Authority by email that Mr Miles had been served with the Complainant's final submission on 2 August 2018.

Final Submission from the Club dated 15 August 2018

124. In a letter from Stacks Heard McEwan solicitors dated 15 August 2018, the Club provided an 8-page submission addressing the question of disciplinary action in response to the Authority's findings, attaching a copy of the Club's *Whistleblower Policy* adopted by the Club's board of directors on 8 April 2017.

125. The Club provides background information regarding the various challenges faced by the Club since its incorporation in 1981, including the task of establishing a permanent home for the Club, construction of the Club Premises, the related football Stadium and an indoor multipurpose entertainment centre.

126. The Club contends that it has offered employment opportunities to "hundreds of people" and has "continued to provide support both socially and economically to the community" being a "standard bearer for community hope, unity and aspiration". The Club submits that it is "not a large venue" with **106** gaming machines and a current membership of "over 10000" but it "has fulfilled and continues to fulfil its reason for being in supporting and propagating the game of rugby league at all levels".

127. The Club advises that it supports a range of organisations and contends that its financial contributions to the community over the past 4 to 5 years have been in the order of $125,000.00 per annum. The Club advises that it has a strong relationship with the University of Wollongong in offering learning opportunities to young footballers throughout their career.

128. The Club contends that it has been "devastated" by the financial impact of Mr Miles' fraud on the Club, leading to the Club reporting losses for the following financial years:

- $550,000.00 for 2014;
- $278,000.00 for 2015;
- $565,000.00 for 2016.

129. The Club further contends that while a "partial recovery" of the financial position lead to a surplus of $216,000.00 during 2017, preliminary figures indicate that the Club will incur a "small loss" for the 2018 financial year.

130. In addition to the impact of fraud, the Club contends that it has expended "tens of thousands of dollars" in expert accounting and legal fees over the last 18 months, which has also been to the detriment of the Club's financial position. On this basis, it is claimed that the imposition of any significant penalty will be "extremely detrimental to the financial viability of the Club" and certainly detract from its ability to continue its community support.

131. The Club submits that each of its volunteer directors are members of the Club Directors Institute and have undertaken mandatory company director training. These directors provide "leadership, stability and aspiration" for the Club and the wider Illawarra community and their efforts have resulted in the provision of entertainment, community and social facilities for betterment of the community as a whole. The Club submits that there is no suggestion that any of the directors have obtained a benefit from any of the matters specified in this Complaint, nor is it evident that the Club has obtained any financial benefit.

132. The Club refers to statements provided by its directors to the effect that they enjoy a good relationship with senior management and duty managers and there is no impairment to maintaining an open dialogue between the board and staff. The Club

acknowledges that had a whistleblower policy been formally implemented at relevant times, some of the employees involved might not have felt so vulnerable to the threats made by Mr Miles. The board adopted its formal *Whistle-blower Policy* on 8 April 2017, which has since been implemented and widely promoted to the employees.

Club's submission on breach of Section 109(1) of the Liquor Act

133. In response to the breach of section 109(1) of the Liquor Act, the Club takes issue with the Complainant's commentary, at paragraph 36 of the Complaint Letter, which quotes Mr Barker's response to Question 51 of the Barker Interview. Paragraph 36 of the Complaint Letter states:

> *During his interview with L&GNSW officers on 19 April 2017, Mr Barker, who at the relevant times was the operations manager at the Club, told the officers that he raised these matters with Mr Miles both separately and during monthly management meetings: "Over time the management team and myself raised it at duty managers meetings. So there was a, there was a real concern that it had gotten out of hand there. On a few occasions off the back of those duty managers meetings when I raised those concerns with Scott I received a typical response. One was, oh, look O.K. let me have a think about it, I'll revisit it and I'll come back to everyone. Little would be done."* Mr Barker held the position of interim General Manager when he was interviewed.

134. The Club submits that these statements were taken "out of context" in that Mr Barker's response to Question 51 actually pertains to Question 49, when he was asked by LGNSW:

> *"Outside of the rewards program would they get, like, free drinks or anything like that?".*

135. The Club submits that Mr Barker's statement, as cited in paragraph 36 of the Complaint Letter is "not relevant" to the question of whether the Club provided "cash for gambling" or conducted "false EFTPOS transactions disguised as legitimate sales".

136. The Club submits that Mr Barker's answers to Questions 146 to 152 of the Barker Interview establish that Barker was unaware of the falsification of EFTPOS transactions until after Mr Miles' termination of employment. This is reflected at paragraph 73 of the Complaint Letter, which stated:

> *Mr Barker claimed that he was unaware of this practice, that Mr Miles bypassed him in any instruction to the management team, and he saw Mr Barker as being a "Roger Rulebook".*

137. The Club prefers the Authority's analysis at paragraph 41 of the Findings Letter, which stated:

> *The Authority notes that Mr Luke Barker held the position of operations manager at relevant times but was appointed as the acting general manager on 30 January 2017. At Question 51 of the Barker Interview (Complainant Exhibit E06), Mr Barker stated that: "Over time the management team and myself raised it at duty managers meetings. So there was a, there was a real concern that it had gotten out of hand there. On a few occasions off the back of those duty managers meetings when I raised those concerns with Scott I received a typical response. One was, oh, look O.K. let me have a think about it, I'll revisit it and I'll come back to everyone. Little would be done." While the Complainant refers to this evidence in apparent support for Ground 1 Particular 2, this statement was made in relation to the provision of free liquor and food to patrons (the subject matter of Ground 1 Particular 3) and not specifically in relation to misrepresentations as to cash advances.*

138. The Club submits that this is an "important distinction" to make, since the Club argues that the "direction" to undertake illegitimate EFTPOS transactions came "directly from Mr Miles", bypassing the operations manager, Mr Barker.

139. Aside from this point, the Club acknowledges the seriousness of the offence against the Liquor Act, accepting that this is contrary to the legislation and the "spirit and intent" of harm minimization responsibilities that are provided by "RCG protocols".

140. The Club notes the Authority's acceptance, at para 79 of the Findings Letter, that the Club self-reported the misconduct as soon as reasonably practicable. The Club submits that a detailed investigation into the misconduct was undertaken by senior management, at the direction of the board and appropriate protocols and processes to minimise future risk were adopted by the Club within a very short period of time following discovery of the section 109(1) offences.

141. The Club further submits that it has taken "all reasonable steps" to ensure that contravention of section 109 of the Liquor Act will not reoccur. The Club makes the following submissions in mitigation:

- Over the period in question where EFTPOS transactions were undertaken in breach of the legislation, the day to day financial operations of the Club were reported as part of the *Attache* software program which was oversighted by the administration manager. These reports were provided to the Club's financial officer, Mr Matt Foreman, who had been engaged since March 2009 and is a qualified Certified Public Accountant working for the Club two days per week.
- Mr Foreman prepared monthly financial statements and presented these monthly statements to Mr Miles, the then secretary and chief executive officer.
- Mr Foreman and the administration manager were responsible for reconciling weekly and monthly all financial transactions, including credit card transactions which formed part of the reports given to Miles.
- The monthly management accounts were intended to be presented by Miles to the board of directors with any explanatory comments. Unbeknownst to the board of directors, Miles was manipulating the monthly reports and falsifying various entries. The Club refers to page 11 of the *Procare Forensic Accounting Report*, Item 5.4 (which is Complaint Exhibit E01).
- It is apparent from the evidence before the Authority that Miles had instructed various duty managers to use the Club's EFTPOS terminals for withdrawal of cash to facilitate gambling and disguised those transactions as legitimate sales of goods. Whilst the duty managers expressed their concerns to Miles about this practice, they were instructed by him to continue the process, which was obviously designed to increase turnover and potentially the profitability of the Club, to facilitate access by him to available funds of which he progressively availed himself in the process of defrauding the Club.
- Miles admitted fabricating and falsifying the EFTPOS transactions and coercing other staff members to facilitate these illicit transactions. (The Club refers to paragraph 39 of the Findings Letter). The fact that the non-compliance with section 109 of the Liquor Act was perpetrated by the Club's then chief executive, without the knowledge of the governing body, is a matter which the Club contends, respectfully, ought to be considered in mitigation when considering any appropriate penalty.

- It is apparent, on the basis of question 69 of the Barker Interview, that Luke Barker, the operations manager, had no knowledge of these transactions until after Miles' employment ceased.
- There is no evidence to suggest that any member of the governing body had knowledge of this practice and no member of the governing body would have condoned or encouraged this practice.
- At Question 76 of the Barker Interview, it is evident that Mr Barker understood that such conduct was inappropriate, if not illegal, noting his comments that it was "contrary to policy".
- Following Miles' termination from employment and at the direction of the governing body, Mr Barker implemented a complete stop to using credit or EFTPOS facilities to obtain cash for the purposes of gambling and has personally advised each of the duty managers about this change to the pre-existing procedures that were adopted and encouraged by Miles. Mr Barker has also made contact with the Club's bank and merchant card provider, to clarify issues around EFTPOS and credit card use. He has adopted a thorough process for the review of all EFTPOS and credit card transactions.
- The board of directors relied upon an experienced secretary/chief executive officer, Mr Miles, to properly manage and administer the operations of the Club. The Club trusted him to undertake that role honestly and diligently and fell victim to a fraud, perpetrated by illicit and subversive means by a person who was entrusted by the board with responsibility for discharging the legal duties required of him.
- The cause of the breach of section 109 of the Liquor Act arises “wholly out of the actions of Scott Miles” and “no other person in authority”. His actions were deliberate and intentionally designed to disguise the illicit transactions which were made for Mr Miles' personal benefit.
- The Club has sustained a significant financial loss as a consequence of the fraud perpetrated upon it, in the order of one million dollars. It has also incurred damage to the reputation of the Club and its directors. Many staff members have been affected by Miles' conduct both personally and professionally. It has taken a toll on their confidence and pride in employment.

142. The Club asks the Authority to “exercise clemency” in respect of this matter and submits that it would be open to “exercise appropriate discretion” to not impose any penalty nor take action that would have any adverse impact upon the Club’s record.

<u>Club’s final submission on breach of clause 55(a) of the GM Regulation</u>

143. The Club acknowledges the Authority’s findings in relation to this breach and submits that the provision of complimentary drinks to patrons and specifically gaming patrons started out as a "goodwill gesture" but progressively developed over a period of time, at the instigation of Mr Miles to the point where gaming patrons came to expect complimentary drinks as a matter of course.

144. The Club submits that at no time has it been suggested that the staff of the Club breached their responsibilities as to responsible service of alcohol protocols in supplying complimentary drinks to patrons and specifically gaming patrons and whilst there is evidence that the practice was available to gaming patrons, it was not confined to gaming patrons.

145. The Club contends that the instigation of the practice and its escalation over time was “at the sole direction of Scott Miles” who continuously instructed duty managers to provide

free alcohol to gaming patrons, notwithstanding their expressed concerns to him at various managers' meetings and at other times, whose concerns were dismissed by Miles.

146. The Club further contends that a number of staff considered that they had no choice but comply with Mr Miles' directives, for fear of dismissal or other possible employment sanctions at the hands of Mr Miles. The Club draws the Authority's attention to Questions 98 to 100 of the Barker Interview, which show that Mr Barker made Mr Miles aware that the provision of free liquor did not comply with the relevant legislation, but when he raised these matters, he felt that his job security was under threat. The Club also refers to Question 47 of the Hart Interview and questions 147 to 152 of the Jones Interview which indicate that at least part of Miles' motivation was the "financial survival of the Club".

147. The Club submits that there is no evidence that any member of the governing body knew of the existence of this practice and no member of the governing body would have encouraged or approved of this practice instead they would have "curtailed the practice had they been aware of it".

148. The Club reiterates that the board of directors relied upon Mr Miles to properly manage and administer the Club's operations and entrusted responsibility to him, who breached that trust. The "sole cause" of this breach arises "wholly out of the actions of Scott Miles" who also placed the duty managers of the Club in the unenviable position of complying with his directives or run the risk of their job security.

149. The Club requests the Authority to "extend leniency" in respect of this matter by not imposing a penalty or taking any action that would have any adverse impact upon the Club's record.

150. The Club acknowledges and accepts the Authority's determination but submits that all reasonable and appropriate steps have been taken to ensure that breaches of this regulation will not reoccur. The Club contends that the implementation of the *Whistle Blower Policy* and the enhancement of continual education and training for management will be instrumental in ensuring strict compliance with all relevant liquor and gaming requirements.

No Final Submission From Mr Miles

151. Mr Miles has not provided any submissions in response to the Findings Letter.

DECISION ON DISCIPLINARY ACTION

152. The Authority has given further consideration to the Complaint and all of the material before the Authority, including the final round of submissions on disciplinary action provided by the Complainant and the Club.

153. The Authority accepts the Club's submission about the nature of the exchange that occurred between LGNSW inspectors and Mr Barker that is recorded at Question 51 of the Barker Interview.

154. Section 57H of the Clubs Act provides the powers of the Authority to take disciplinary action in the event that a complaint is established. The section states:

57H Disciplinary powers of Authority

1) The Authority may deal with and determine a complaint that is made to it under this Part.
2) If the Authority is satisfied that any of the grounds on which the complaint was made apply in relation to the registered club or a person who is the secretary or member of the governing body of the club, the Authority may decide not to take any action or may decide to do any one or more of the following:
   (a) order the club to pay a monetary penalty not exceeding 2,500 penalty units within such time as is specified in the order,
   (b) suspend the club's licence for such period as the Authority thinks fit,
   (c) cancel the club's licence,
   (d) suspend or cancel any authorisation held by the registered club under this Act,
   (e) impose a condition on the club's licence or on any authorisation held by the club under this Act,
   (f) remove from office the secretary of the club or a member of the governing body of the club,
   (g) declare that a specified person is, for such period (not exceeding 3 years) as is specified by the Authority, ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body (or both of those positions) of:
      (i) the club, and
      (ii) if the Authority so determines – all other registered clubs or such other registered clubs as are specified (or as are of a class specified) by the Authority,
   (h) appoint a person to administer the affairs of the club who, on appointment and until the Authority orders otherwise, has, to the exclusion of any other person or body of persons, the functions of the governing body of the club,
   (i) order the registered club to pay the amount of any costs incurred by:
      (i) the Director-General in carrying out any investigation or inquiry under section 35A in relation to the club, or
      (ii) by the Authority in connection with the taking of disciplinary action against the club or any other person under this section.

155. The Authority's disciplinary jurisdiction provided by Part 6A of the Clubs Act is protective, rather than punitive in nature. As held by the New South Wales Supreme Court in *Seagulls Rugby League Football Club Ltd v Superintendent of Licences* (1992) 29 NSWLR 357 (at paragraph 373):

> *The over-riding purpose of the jurisdiction is the protection of the public, and of members of clubs by the maintenance of standards as laid down in the Act.*

156. Nevertheless, as observed by Basten JA of the New South Wales Court of Appeal in *Director General, Department of Ageing, Disability and Home Care v Lambert* (2009) 74 NSWLR 523 (*Lambert*), while disciplinary proceedings are protective, that is not to deny that orders made by disciplinary bodies may nonetheless have a *punitive effect.* His Honour observed that a Court (and hence a regulatory decision maker such as the Authority) should be mindful that a protective order is reasonably necessary to provide the required level of public protection.

157. At paragraph 83 of the judgment in *Lambert*, Basten JA states that the "punitive effects" may be relevant to the need for protection in that:

> *…in a particular case, there may be a factual finding that the harrowing experience of disciplinary proceedings, together with the real threat of loss of livelihood may have opened the eyes of the individual concerned to the seriousness of his or her conduct, so as to diminish significantly the likelihood of repetition. Often such a finding will be accompanied by a high level of insight into his own character or misconduct, which did not previously exist.*

158. At paragraph 85 of the judgment, Basten JA observes that:

> *…the specific message of the disciplinary cases explaining that the jurisdiction is entirely protective is to make clear that the scope of the protective order must be defined by the reasonable needs of protection, as assessed in the circumstances of the case.*

159. The Authority further notes that when determining the nature of the appropriate disciplinary action, the conduct of the respondent to a complaint *up until its final determination* is relevant and should be taken into account: *Sydney Aussie Rules Social Club Ltd v Superintendent of Licences* (SC (NSW) Grove J, No. 16845 of 1990, unreported BC9101830).

Disciplinary Action Against Mr Miles

160. The Authority notes that Mr Miles has not responded to the Show Cause Notice nor made any further submissions in response to the Complaint, including the Findings Letter. There are no positive submissions or evidence before the Authority going to Mr Miles' fitness and propriety, nor has he elected to address the question of what disciplinary action is appropriate in the present circumstances.

161. The Complainant sought a "substantial" period of disqualification from Mr Miles holding a regulated role with a registered Club. The Authority is satisfied that the flagrant non-compliance with the requirements of clause 55(a) of the GM Regulation and section 109(1) of the Liquor Act, at the direction of Mr Miles while acting as the Club's highest-ranking employee, represents a most serious pattern of misconduct requiring the strongest regulatory response. Disqualifying Mr Miles for life will not only protect the community by removing him from eligibility to hold another regulated role but will send a message to others in the industry as to the consequences of contravening these two important provisions.

162. On the material before it, the Authority considers it appropriate to declare, pursuant to section 57H(2)(g) of the Clubs Act, that Mr Scott Miles is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body (or both of these positions) of the Club, and all other registered clubs in New South Wales for **life** from the date of this letter.

Disciplinary Action Against the Club

<u>Imposition of a condition pursuant to section 57H(2)(e) of the Clubs Act</u>

163. The Authority has considered the Complainant's submissions as to the minimum requirements of a whistle blower policy and is satisfied that the Secretary should be given an opportunity to provide the benefit of LGNSW's expertise, from a regulatory compliance perspective, into the content of the document.

164. While the Club itself should be given the opportunity to settle the final form of this policy, the Authority considers it in the public interest for the Club to promptly review the document and have due regard to any advice from the Secretary on its content, to make the document more effective and enforceable. To that end, the Authority has determined to impose a condition upon the licence that is designed to ensure that the policy is reviewed by the Club, in consultation with the Secretary of the NSW Department of Industry, within 28 days from the date of this letter.

<u>Monetary penalty pursuant to section 57H(2)(a) of the Clubs Act</u>

165. The Complainant seeks the imposition of a monetary penalty reflecting the seriousness of the contravention of the licensing legislation that has been established by this

Complaint. The Club seeks "clemency" with respect to its contravention of the legislation in light of the financial position of the Club, the Club's self-reporting of the non-compliance and what it submits was conduct directed by one staff member, Mr Miles.

166. The Authority does not consider this matter to provide an appropriate case to exercise discretion to take no action against the Club. The non- compliance was serious and systemic. There are financial benefits and consumer harms posed by unlawfully incentivising gamblers and obscuring credit transactions. A substantial monetary penalty is required to discourage this Club and others in the industry who may be tempted to increase gambling revenue and obscure the true nature of credit transactions.

167. While the unlawful conduct was instigated by Mr Miles, it occurred over a substantial period of time and involved substantial sums of money. It included the cooperation of managerial staff, several of whom clearly knew these practices to be wrong but acquiesced.

168. Noting that the maximum monetary penalty that the Authority may order under the Clubs Act is $275,000.00, the Authority finds that a penalty in the sum of $100,000.00 reflects the seriousness of the contravention of the licensing legislation established by this Complaint. In making this decision, the Authority accepts and has taken account of the Club's information as to its recent financial performance and losses. The Authority accepts that the Club has drifted from recording a substantial surplus during 2017 to a slight deficit in 2018. That information does not satisfy the Authority that the imposition of this appropriate monetary penalty would be "extremely detrimental" to the financial viability of the Club.

Costs order pursuant to section 57(2)(i) of the Clubs Act

169. The Authority notes that the Complainant has sought an order that the Club pay the costs incurred by the Secretary in carrying out any investigation or inquiry under section 35A in relation to the Club.

170. The Complainant specifies its costs on the investigation at $27,642.81. On the information provided by the Secretary the Authority is satisfied that these were the actual costs of the investigation.

171. The Complainant was successful with respect to two of the three Grounds agitated against the Club. While the Complainant was unsuccessful with respect to the alleged contravention of section 10(1)(k) of the Clubs Act, that was an arguable Ground of complaint and an appropriate avenue to investigate on the current facts, noting the heavy proportion of Club revenue derived from gaming machines.

172. The Authority's power to order the payment of costs is in the nature of a disciplinary action, concerning the costs of the investigation rather than the conduct of the Complaint itself. While the Authority notes that the Club takes the general position that no disciplinary action should be taken, the Club's submissions do not specifically address the question of whether a costs order should be made.

173. In those circumstances the Authority is satisfied that the Club should pay the Complainant's full costs on the investigation giving rise to the Complaint, in the sum of **$27,642.81**.

ORDERS

174. The Authority declares, under section 57H(2)(g) of the Clubs Act, that the former secretary Mr Scott Miles is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body (or both of these positions) of the Club, and all other Registered Clubs **for life**.

175. The Authority orders, under section 57H(2)(e) of the Clubs Act, that the following new condition be imposed upon the Club's liquor licence:

> Within 7 days after 3 October 2018 the Club must submit its whistle blower policy to the Secretary of the Department of Industry for consultation via the Director of Compliance, Liquor and Gaming NSW. If any advice is received on the content of the policy from the Secretary within 14 days after provision of the document to the Secretary, the Club must formally adopt and implement a revised policy, having due regard to such advice, not later than 28 days after 3 October 2018. The Club must provide the Secretary with the revised policy and comply with that policy at all times thereafter.

176. The Authority orders, under section 57H(2)(a) of the Clubs Act, that the Club pay to the Secretary of the New South Wales Department of Industry a monetary penalty in the sum of **$100,000.00** within 28 days from the date of this letter.

177. The Authority further orders, under section 57H(2)(i) of the Clubs Act, the Club to pay the Secretary of the NSW Department of Industry the sum of **$27,642.81** for the Secretary's costs in carrying out the investigation giving rise to the Complaint, within 28 days from the date of this letter.

REVIEW RIGHTS

178. Pursuant to section 57L of the Clubs Act, the application for review of this decision may be made to the New South Wales Civil and Administrative Tribunal ("NCAT") by the Complainant, the Club or any person (Mr Miles) against whom disciplinary action is taken by the Authority under Part 6A of the Clubs Act. An application for review should be made within 28 days of the date of notification of this decision.

179. Please visit the NCAT website at www.ncat.nsw.gov.au or contact the NCAT Registry at Level 10, John Maddison Tower, 89-90 Goulburn Street, Sydney for further information.

Yours faithfully

Philip Crawford
Chairperson
for and on behalf of the Independent Liquor and Gaming Authority