



Our ref: L 234

Your ref:

Mr Dominic Kaikaty  
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*By express post and email*  
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6 December 2011

**Decision and Statement of Reasons on Disciplinary Complaint Against Mr Dominic Kaikaty,  
Licensee of the "Eye Bar", Kings Cross**

**INTRODUCTION**

1. I refer to a disciplinary complaint ("**Complaint**") filed with the Authority on 6 July 2011 by the Local Area Commander of Kings Cross Police ("**Complainant**") under section 139 of the *Liquor Act 2007* ("**Act**") against you ("the **Respondent**"), in your capacity as licensee of the premises known as the Eye Bar, located at 68 Darlinghurst Road, Kings Cross ("**Premises**"). On 18 October 2011 the Authority convened a conference with you ("**Conference**"), representatives of the Complainant and representatives of Toftwood Pty Ltd, the landlord of the Premises ("**Premises Owner**") to discuss this matter.

**MATERIAL BEFORE THE AUTHORITY**

2. The Authority has before it the following material:
  - The Complainant's 67 page cover letter and attached material filed with the Authority on 6 July 2011.
  - The Respondent's submissions on the initial Complaint, filed with the Authority on 23 September 2011.
  - The Police submissions dated 6 October 2011 made in reply to the Respondent's submissions of 23 September 2011.

- A short submission dated 29 August 2011 from the Premises Owner.
  - Copies of Penalty Notices that have been issued against the Respondent by Police for alleged offences against the Act and other legislation. This material was provided to the Authority by Police on 11 October 2011.
  - A State Debt Recovery Office (“**SDRO**”) document entitled *Instalment Payment History* dated 26 September 2011 regarding Penalty Notices issued against the Respondent. This document was provided to the Authority on 11 October 2011.
  - Copies of further Penalty Notices issued against the Respondent and relied upon by Police in the Complaint. This material was provided to the Authority on 13 October 2011.
  - A Police spread sheet entitled “Conference Breakdown” which identifies each adverse incident upon which Police rely in relation to each ground of the Complaint. The document notes the relevant supporting evidence for each incident (certificate of conviction, Penalty Notice or other material) for any offences or alleged offences committed by the Respondent. This document was provided to the Authority by Police on 13 October 2011.
  - A Police excel spread sheet entitled “Evidence Matrix” which provides a colour coded summary of all incidents relied upon by Police in this Complaint. The spread sheet identifies those events that were accepted as proven by the Authority for the purposes of the Authority’s decision dated 1 July 2011 under section 51(13) of the Act to revoke the extended trading authorisation for the Premises (“the **Section 51 Decision**”); those incidents that were not accepted for the purposes of the Section 51 Decision and those new incidents that are relied upon in the Complaint but were not before the Authority when it made the Section 51 Decision. This document was provided to the Authority on 14 October 2011.
  - Submissions from Mr Michael Spartalis, Counsel for Police, dated 18 October 2011 outlining Mr Spartalis’ oral submissions during the Conference.
  - A transcript of the Conference held on 18 October 2011 prepared by Auscript recording the oral submissions made by the Conference participants.
3. All of the above material, save for the Conference transcript, was made available to Mr Kaikaty as it became available to the Authority. A copy of this material was also made available to the Premises Owner.

## **JURISDICTION**

4. The grounds upon which a disciplinary complaint may be made are set out under section 139 of the Act:

### **139 Grounds for making complaint**

- (1) A complaint in relation to a licensee, manager or close associate of a licensee may be made to the Authority by any of the following persons (referred to in this Part as ***the complainant***):
  - (a) the Director-General,
  - (b) the Commissioner of Police,
  - (c) a person authorised by the regulations to make a complaint under this Part.
- (2) A complaint must be in writing and specify the grounds on which it is made.
- (3) The grounds on which a complaint in relation to a licensee, manager or close associate may be made are as follows:
  - (a) that the licensee or manager has, while holding a licence or managing licensed premises, been convicted of an offence under this Act or the regulations (or under the former Act) or of an offence prescribed by the regulations,
  - (b) that the licensee or manager has failed to comply with any of the conditions to which the licence is subject,
  - (c) that the licensee has failed to comply with any of the conditions to which any authorisation or approval held by the licensee under this Act is subject,
  - (d) that the licensee or manager has failed to comply with any other requirement under this Act or the regulations (or under the former Act), relating to the licence or the licensed premises,
  - (e) that the licensee or manager has failed to comply with a direction or other requirement of the Authority, the Director-General or the Commissioner of Police under this Act (or of the Director-General or the Commissioner under the former Act),
  - (f) that the licensee or manager has engaged in conduct or activities that are likely to encourage misuse or abuse of liquor (such as binge drinking or excessive consumption),
  - (g) that intoxicated persons have frequently been on the licensed premises or have frequently been seen to leave those premises,
  - (h) that acts involving violence against persons or damage to property have frequently been committed on or near the licensed premises by persons who have been on the licensed premises,
  - (i) that the licensee is not a fit and proper person to be the holder of a licence (whether for the same reason as that set out in section 45 (5) or otherwise) or the manager is not a fit and proper person to be the manager of the licensed premises (whether for the same reason as that set out in section 68 (4A) or otherwise),
  - (j) that the close associate is not a fit and proper person to be a close associate of a licensee,
  - (k) that a complaint against a licensee under this section has been made and that:
    - (i) the close associate knew or ought reasonably to have known that the licensee was engaging (or was likely to engage) in conduct of the kind to which the complaint relates, and
    - (ii) the close associate failed to take all reasonable steps to prevent the licensee from engaging in conduct of that kind,
  - (l) that the close associate is (or has become) a close associate of a licensee while disqualified by the Authority from being a close associate,
  - (m) that a person who is interested in the business, or in the conduct or profits of the business, carried on under the licence is not a fit and proper person to be so interested,
  - (n) that a person is (or has become) a person who is interested in the business, or in the conduct or profits of the business, carried on under a licence while disqualified by the Authority under this Part from being a person so interested,
  - (o) in the case of a limited licence—that the licensee has not exercised proper control and supervision over a function held under the licence,

- (p) in the case of a limited licence—it is not in the public interest for liquor to be sold or supplied at functions held by or under the auspices of the non -proprietary association on whose behalf the licence is held,
- (q) in the case of a licence held by a corporation—that a person who occupies a position of authority in the corporation is not a fit and proper person to occupy such a position in a corporation that is the holder of a licence,
- (r) that public entertainment has been conducted on the licensed premises otherwise than in accordance with any requirements under the *Environmental Planning and Assessment Act 1979* relating to the use of the premises for public entertainment,
- (s) that the licence has not been exercised in the public interest,
- (t) that the continuation of the licence is not in the public interest.

(4) In subsection (3), **former Act** means the *Liquor Act 1982* or the regulations made under that Act and includes, in the case of a licensee that is a registered club, the *Registered Clubs Act 1976* as in force immediately before the repeal of section 9 of that Act by Schedule 2 to the *Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Act 2007*.

5. The powers that the Authority may exercise when determining a disciplinary complaint are provided by section 141 of the Act:

#### **141 Disciplinary powers of Authority**

- (1) The Authority may deal with and determine a complaint that is made to it under this Part.
- (1A) If the Authority is satisfied that the criminal organisation associate ground applies in relation to a licensee, the Authority must do one or both of the following:
  - (a) disqualify the licensee from holding a licence for such period as the Authority thinks fit,
  - (b) cancel the licence.
- (1B) If the Authority is satisfied that the criminal organisation associate ground applies in relation to a manager, the Authority must do one or both of the following:
  - (a) disqualify the manager from being the manager of licensed premises for such period as the Authority thinks fit,
  - (b) withdraw the manager’s approval to manage licensed premises.
- (2) If the Authority is satisfied that any of the grounds (other than a criminal organisation associate ground) on which the complaint was made apply in relation to the licensee, manager or close associate, the Authority may decide not to take any action or may do any one or more of the following:
  - (a) cancel the licence,
  - (b) suspend the licence for such period not exceeding 12 months (or, if circumstances of aggravation exist in relation to the complaint, not exceeding 24 months) as the Authority thinks fit,
  - (c) order the licensee or manager to pay, within such time as is specified in the order:
    - (i) a monetary penalty not exceeding 500 penalty units (in the case of a corporation) or 200 penalty units (in the case of an individual), or

- (ii) if circumstances of aggravation exist in relation to the complaint—a monetary penalty not exceeding 1,000 penalty units (in the case of a corporation) or 400 penalty units (in the case of an individual),
  - (d) suspend or cancel any authorisation or other approval (other than the licence itself) held by the licensee under this Act,
  - (e) impose a condition to which the licence, or any authorisation or approval held by the licensee under this Act, is to be subject or revoke or vary a condition to which the licence or any such authorisation or approval is subject,
  - (f) disqualify the licensee from holding a licence for such period as the Authority thinks fit,
  - (g) withdraw the manager’s approval to manage licensed premises,
  - (h) disqualify the manager from being the manager of licensed premises,
  - (i) in the case of a limited licence held on behalf of a non-proprietary association—order that a limited licence is not, for a period of not more than 3 years from the date on which the decision takes effect, to be granted to any person on behalf of the non-proprietary association,
  - (j) disqualify the close associate from being a close associate of a licensee for such period as the Authority thinks fit,
  - (k) disqualify the close associate from holding a licence for such period as the Authority thinks fit,
  - (l) order the licensee, manager or close associate to pay the amount of any costs incurred by:
    - (i) the Director-General in carrying out any investigation or inquiry under section 138 in relation to the licensee, manager or close associate, or
    - (ii) the Authority in connection with the taking of disciplinary action against the licensee, manager or close associate under this section,
  - (m) reprimand the licensee, manager or close associate.
- (3) If the Authority orders a licensee or manager to pay a monetary penalty under this section and the penalty is not paid within the time specified in the order, the Authority may:
- (a) cancel the licence, or
  - (b) suspend the licence until such time as the penalty is paid (or for such other period as the Authority thinks fit).
- (4) While a person is disqualified by the Authority from being a close associate of a licensee, the person is conclusively presumed for the purposes of this Act to be a person who is not a fit and proper person to be a close associate of a licensee.

**(5) Action against other interested persons**

In deciding whether to take disciplinary action under this section against a licensee in relation to a complaint, the Authority may take disciplinary action against a person who is interested in the business, or in the conduct or profits of the business, carried on under the licence (regardless of whether the Authority takes any disciplinary action under this section against the licensee concerned).

(6) If the Authority decides to take disciplinary action against any such interested person, the Authority may do any one or more of the following:

- (a) disqualify the person, for a period commencing on a specified day, from being a person interested in the business, or in the conduct or profits of the business, carried on under a licence,
- (b) reprimand the person.

**(7) Circumstances of aggravation**

For the purposes of this section, circumstances of aggravation exist in relation to a complaint if (and only if) each of the following paragraphs applies:

- (a) the complaint concerns a contravention or alleged contravention of section 73 or 74,
- (b) the complaint alleges that for the reasons specified in the complaint the matter of the complaint is so serious as to warrant the taking of action that is available to the Authority when circumstances of aggravation exist,
- (c) the Authority, in finding that the matter of the complaint has been made out, is of the opinion (having regard to any matter such as the number of contraventions of the Act involved, the seriousness of the contravention involved, the number of people involved in the contravention or the seriousness of the outcome of the contravention, or any other relevant consideration) that the matter of the complaint is so serious as to warrant the taking of action that is available to the Authority when circumstances of aggravation exist.

(8) In this section:

***criminal organisation associate ground*** means:

- (a) in relation to a licensee—that the licensee is not a fit and proper person to be the holder of a licence for the same reason as that set out in section 45 (5), or
- (b) in relation to a manager—that the manager is not a fit and proper person to be the manager of the licensed premises for the same reason as that set out in section 68 (4A).

6. When determining this matter the Authority has also had regard to the statutory objects and considerations provided by section 3 of the Act:

**3 Objects of Act**

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

- (a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,

- (b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,
  - (c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.
- (2) In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following:
- (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),
  - (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,
  - (c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

## **THE GROUNDS OF COMPLAINT**

7. The Complaint as it was filed on 6 July 2011 specified eight grounds:

- (i) Section 139(3)(a) – that the licensee has, while holding a licence, been convicted of an offence under this Act or the regulations or of an offence prescribed by the regulations
- (ii) Section 139(3)(b) – that the licensee has failed to comply with any of the conditions to which the licence is subject
- (iii) Section 139(3)(d) – that the licensee has failed to comply with any other requirement under this Act or the regulations
- (iv) Section 139(3)(g) – that intoxicated persons have frequently been on the licensed premises or have frequently been seen to leave those premises
- (v) Section 139(3)(h) – that acts involving violence against persons or damage to property have frequently been committed on or near the licensed premises by persons who have been on the licensed premises
- (vi) Section 139(3)(i) – that the licensee is not a fit and proper person to be the holder of the licence
- (vii) Section 139(3)(s) – that the licence has not been exercised in the public interest
- (viii) Section 139(3)(t) – that the continuation of the licence is not in the public interest.

8. However, in an email sent to the Authority dated 13 October 2011, licensing officer Michael Foot from Kings Cross Police advised that:

“we will no longer be advancing the complaint under s139(3)(t) - that the continuation of the licence is not in the public interest.”

## **SHOW CAUSE NOTICE TO COMPLAINANT**

9. The initial Complaint material was tabulated by the Authority and on 9 August 2011 was delivered to the Respondent’s then solicitors, JDK Legal, inviting the Respondent to show cause why the Authority should not take disciplinary action against him. A second copy of the Complaint material was delivered to the Respondent’s home address.

10. The Respondent was requested to make written submissions in response to the Complaint by not later than 5pm on 10 September 2011. On 8 September 2011 the Authority's General Counsel received an email from Mr Kim Stapleton of JDK Legal advising:

"I have only in the last week received instructions to act for Mr Kaikaty in making submissions on his behalf and there is a plethora of information to be digested prior to the submissions being properly made. I should be grateful, therefore, if the Authority would allow a short extension of time until Wednesday 14 September next to file submissions."

11. This extension was granted. On the afternoon of 15 September 2011, one day after submissions were due, the Authority's General Counsel received an email from Mr Stapleton advising the Authority that he is no longer instructed to make submissions in this matter.

12. On 16 September 2011 the Respondent sent to the Authority's General Counsel an email attaching forms indicating an application to transfer the licence and the record of business owner to Mr Steven Stylianidis, who proposes to run the Premises as "The Diamond Lounge". The Respondent states:

"Please be advised that I have had tremendous trouble organizing funds for my solicitor so that he may act on my behalf.

I would like to advise you that I will no longer be Licensee for "Kings Cross Eye Bar" (please see attached Liquor License Transfer Documents). I cannot possibly continue to operate a business that continues to consume me with such irreconcilable debt. This will be my final weekend as Licensee of Kings Cross Eye Bar.

I am pleading with you not to cancel this liquor license or take any disciplinary action towards myself, at this stage.

**I would kindly ask for an additional seven (7) day extension for my submissions to be made;** in order to organize funds for my solicitor. I can not bear the thought of this liquor license being cancelled; as I have an obligation to my landlord and the future licensee / business owner.

I am not asking for an extension to exhaust you further with this matter; therefore, i am deeply sorry for any inconvenience you may incur in granting me this extension.

If you would like to discuss this matter further, please do not hesitate to contact me at any time

Please Note: The documents attached are copies of the Liquor License Transfer Application Form being made by: Steven Stylianidis. It has already been acknowledged by Kings Cross Police and has been signed. The completed forms (along with his payment details), will be submitted in person at the OLGR Office in the CBD this afternoon. "

13. This further request for an extension of time to make submissions was granted.

## INVITATION TO PREMISES OWNER TO MAKE SUBMISSIONS

14. On 9 August 2011 a copy of the Complaint material was also sent by express post to the Premises Owner.
15. On 30 August 2011 lawyers for the Premises Owner, Rhodes Associates, faxed a one page submission dated 29 August 2011 to the Authority, briefly reiterating and enclosing written submissions that the Premises Owner had made on 19 April 2011 in relation to the Section 51 Decision.
16. The Premises Owner submits that neither the Premises Owner nor its estate agent has knowledge of the matters relied upon in the Complaint, but submits that the current licence for the Premises should be maintained, for the reasons stated in the Premises Owner's submission to the Authority dated 19 April 2011.
17. In those previous submissions the Premises Owner explained the difficulties it had faced in recent years leasing the Premises due to the fact that the Premises is close to the Medically Supervised Injecting Centre which makes the Premises unattractive for day time trade. While the Premises remains licensed, this increases the prospects of the property deriving rental income from a night time enterprise. The Premises Owner submits that the shareholders of the landlord company will be "unduly penalised" if adverse action is taken against the licence itself.
18. On 13 October 2011 the Authority informed the Premises Owner that Police no longer press the ground under s139(3)(t) of the Act. Nevertheless, the Conference was attended by the Premises Owner's company director, Mr Albert Strykowski, and the Premises Owner's estate agent, Mr Matt Davoren. Mr Davoren informed the Conference that no transfer of the lease to Mr Stylianidis would be granted unless the approximately \$6000 owing to the Premises Owner by way of unpaid rent was settled by the Respondent.
19. In their submissions in reply dated 6 October 2011 Police characterise the timing of the proposed transfer of the licence and business as "suspicious" but have not provided any evidence suggesting that the transaction is a sham to avoid regulatory action being taken against the licence itself.
20. Police noted in those submissions that the Respondent still holds the lease to the Premises. However, on 31 October 2011 the Authority received a facsimile letter from Rhodes Associates, solicitors for the Premises Owner, advising that the Premises Owner had terminated the Respondent's tenancy and had re-entered the premises. Rhodes Associates advise that the Respondent is no longer associated with the Premises. The letter adds:

"As owners in possession we are instructed that the landlord and its nominee will apply for a dormant licence in due course to be held in respect of the premises.

We are instructed that Kaikaty had defaulted on payment of rent and payment of outgoings in respect of the Eye Bar premises."

## THE RESPONDENT'S SUBMISSIONS AT THE CONFERENCE

21. The Respondent drew the Authority's attention to the fact that of the Penalty Notices issued against him, many of them relate to a period in which he was operating with (what he assumed was) a Primary Service Authorisation. This reduces the total value of unpaid Penalty Notices when those matters are removed from consideration. The Respondent generally contests those incidents when he was penalised for serving liquor without a meal
22. On the allegations made by Police that he was in fact running a bar, not a restaurant, the Respondent noted that his premises trades late and caters to the "party" crowd that visit venues in Kings Cross. The Respondent submits that he has been providing genuine meals, whether or not this involves the provision of pizzas free of charge. The venue does have a kitchen and is a venue where patrons come to eat and drink. The alcohol service goes "hand in hand" with service of food.
23. The Respondent explained the difficulties he had in securing the transfer of the lease to him from his brother David, which took 8 months to finalise. The transfer of the lease had been requested by the Authority as a result of the Short Term Closure Order issued against the Premises on 30 July 2010 arising, in part, from the prosecution of David for a drug offence committed on the Premises. The Respondent stated that the lease had involved a co tenancy between David and his former girlfriend who had "left town" and "fled the scene". The Respondent advised that he had real difficulties obtaining her consent to the transfer of the lease, signing over her bond money, etc. The Respondent submits that this was not a case of him disregarding the requirements of the law or disregarding the several requests made by the Authority to ensure that David had no further association with the Premises.
24. In response to Police allegations that the Eye Bar serves cheap liquor, the Respondent notes that, while they do serve \$3.50 shots, those shots are only 18% alcohol, not the usual 30%. The Respondent advises that this was a measure to reduce intoxication.
25. The Respondent also notes the preparation of a compliance manual in early 2011 as another management initiative. There was a previous version of the compliance manual that he had given to Kings Cross Police in 2010 based on material the Respondent had downloaded from the OLGR website.
26. The Respondent questions the circumstances in which the second Short Term Closure Order was issued against the Premises by an Authorised Officer (a officer in the Attorney General's Department) late in the evening during May 2011. The Respondent concedes that he was in breach of a licence condition regarding CCTV that evening but contests whether there was any serious breach of the Act that warranted the imposition of this order.
27. The Respondent refers to an incident when he was issued a Penalty Notice for trading outside the hours authorised by the Act, on Good Friday in 2009. The Respondent states that he had "misinterpreted" information about Good Friday trading that had been provided on the OLGR website.

28. The Respondent refers to the issue of Penalty Notices for obscuring his front windows in contravention of a condition of development consent. The Respondent advised the Authority that he put curtains up for the privacy of his patrons, and had noted that other premises in Kings Cross had curtains in their front windows. This was not done to obscure the venue from Police, yet he was fined \$1500 for each of the two days they were up, which meant “\$3000 in one hit” for what was a first offence. The Respondent submits that he is not a person who deliberately re-offends but has learned from his mistakes.
29. The Respondent concedes that he “can’t argue” with the intoxication incidents and the incidents of violence relied upon by Police, but does question the Police record of one assault, which alleges that the victim was taken through a locked door, a locked gate and then through a residential premises. The COPS Report alleges that the victim had been on the Premises, but the Respondent submits that there is uncertainty about this.
30. On his conviction for the offences of larceny by a bailee, the Respondent submits that he did not obtain the goods fraudulently as has been suggested by Police. Rather, he “stupidly” withheld the goods as “collateral” towards someone who owed him money for an event held at the function centre.
31. In response to a proposition by the Authority Chairperson that the Respondent was completely out of his depth running the Premises, the Respondent stated:

“Well I mean, look, well, clearly not. I would have to agree with that then. I mean, there were certain areas, yes, that I failed as a licensee, as a manager of this venue, and I can’t argue with that. I said that before, I probably can’t. There are areas that I have failed, but I have learnt from them as well. I mean the venue has improved. I mean, it went – it went from a point when there was all these bulk incidents and intoxication and all that and then started, you know, expanding out. I mean, towards, you know, 2011, we can probably note down two, two incidents that have occurred. And then after that I had my – and the whole point of having the hours slashed was to say that all these incidents occurred after midnight. So if we had fixed that issue, well then what are we still going ahead for?

....

I don’t want to be punished for it in a very serious way. But I just, then again – this probably isn’t for me. Probably it’s not for me. Probably if it’s for me, it’s for me just to move on to a different career, what I know, what I do best, and I’m happy to move on, to move forward with my life. I just don’t want this to be, you know, a bullet in the brain, you know, this is it, so were going to dub you as not a fit and proper person. If there’s anything, if there’s any points I needed to make, it’s probably just an apology to the Office of Liquor and Gaming, an apology to the community, to those that have been hurt or assaulted or intoxicated or have been affected in any way. I apologise to my landlord and to the owners of the property for, you know, disturbing their licence.”

## **ANALYSIS OF THE GROUNDS OF COMPLAINT**

32. While Police have made submissions by reference to the Authority’s previous findings with respect to the Premises in the Section 51 Decision, the Authority is now considering the

separate matter of a disciplinary complaint against the Respondent himself under Part 9 of the Act.

33. While there may be some overlap between the facts alleged by Police in both matters, the Authority has considered afresh any factual contentions made for the purposes of the Complaint that may have been the subject of consideration before the Authority made the Section 51 Decision.
34. Simply because a matter was found to be a relevant and proven “adverse incident” for the purposes of the Section 51 Decision, that incident is not automatically accepted as proven for the purposes of the matter now before the Authority.
35. While the Authority’s findings on this Complaint have been made on the civil standard of proof, the Authority is conscious of the principle discussed by the High Court in *Briginshaw v Briginshaw* [1938] 60 CLR 336 requiring a decision maker in a civil case to exercise care when making findings of fact if allegations of offences, fraud or serious moral wrongdoing may lead to grave consequences for the defendant.
36. Broadly speaking there are three categories of adverse incidents that are relied upon by Police in support of the Complaint:
  - (i) Offences committed by the Respondent that have been proven beyond doubt and resulted in recorded convictions.
  - (ii) Alleged offences by the Respondent that have given rise to Penalty Notices.
  - (iii) Adverse incidents that have not given rise to any conviction or Penalty Notice but are linked by Police to the Premises and relied upon in support of one or more of the grounds identified in the Complaint. The evidence recording such incidents often takes the form of COPS Reports noting contemporaneous observations made by Police or reports by witnesses to events involving the Premises. In some cases these incidents are evidenced by extracts from the incident register maintained by the Premises or CCTV footage from the Premises or other sources.
37. Police have provided the Authority with a *Criminal History/Bail Report* for the Respondent (“**Police Record**”) dated 16 September 2011 plus copies of certificates of convictions for all of the convictions relied upon in the Complaint. Notwithstanding the great many adverse incidents linked by Police to the Premises, certificates of conviction confirm that the following matters have actually resulted in a conviction being recorded against the Respondent:

| <b>Date of conviction</b>                   | <b>Offence</b>                             | <b>Penalty</b>                   |
|---|--|----------------------------------|
| 5 August 2008<br>Downing Centre Local Court | Fail to give particulars to another driver | Fine \$600 plus \$73 Court Costs |
| 7 December 2010<br>Burwood Local Court      | Larceny as a bailee >\$15000 (two counts)  | Good Behaviour Bond 2 years      |

|  |   |                                      |
|--|---|--------------------------------------|
| 7 December 2010<br>Burwood Local Court     | Larceny as a bailee \$5000-<br>\$15,000   | Good Behaviour Bond 2<br>years       |
| 6 May 2011<br>Downing Centre Local Court   | Fail to comply with condition<br>of liquor licence (ensure<br>immediate access for Police<br>and OLGR to CCTV system)       | Fine \$750 plus \$79 Court<br>Costs  |
| 14 June 2011<br>Downing Centre Local Court | Fail to comply with condition<br>of liquor licence (sale of<br>liquor for consumption on<br>premises only)                  | Fine \$2500 plus \$79 Court<br>Costs |
| 14 June 2011<br>Downing Centre Local Court | Fail to comply with condition<br>of liquor licence (kitchen be<br>accessible to staff only, with<br>door latch operational) | Fine \$3000 plus \$79 Court<br>Costs |
| 23 June 2011<br>Downing Centre Local Court | Fail to comply with<br>conditions (4 counts)<br>Provide false information in<br>response to a notice                        | Fine \$600 x 4<br><br>Fine \$4000    |
| 4 July 2011<br>Downing Centre Local Court  | Fail to comply with condition<br>of licence (regarding CCTV)  | Fine \$5000                          |
| 4 July 2011<br>Downing Centre Local Court  | Fail to comply with<br>requirement of the Act (fail<br>to produce business records<br>required under notice)                | Fine \$4000                          |
| 28 July 2011<br>Downing Centre Local Court | Fail to comply with licence<br>condition  | Fine \$1500                          |

38. Since the Conference, in an email to the Authority dated 29 November 2011, Police advise (and have provided certificates of conviction verifying) that the Respondent received the following further convictions at the Downing Centre Local Court:

| <b>Date of Conviction</b> | <b>Offence</b>                           | <b>Penalty</b>   |
|---------------------------|--|--|
| 9 November 2011           | Supply liquor to a minor<br>(six counts) | 6 x 50 hours<br>community service<br>for each conviction<br>(to be served<br>concurrently)<br><br>Disqualification from<br>holding a licence for<br>12 months. |

23 November 2011

Failure to comply with licence condition regarding CCTV Fine \$8000

39. Police advise that the Respondent has said to Police that he proposes to appeal the 12 months suspension.
40. The Authority is satisfied that the ground advanced by reference to section 139(3)(a) of the Act has been established. The Authority notes the above mentioned convictions for offences against the Act.
41. The Authority is satisfied that the ground advanced by reference to section 139(3)(b) of the Act has also been established. The Authority notes those of the abovementioned liquor convictions that involved an offence of breaching a licence condition.
42. The Authority is satisfied that the ground advanced by reference to section 139(3)(d) has been established. This ground concerns failure to comply with any "other" requirement under the Act or Regulations. In relation to this ground, Police cite a COPS Report and a Penalty Notice detailing one incident whereby the Respondent failed to display "under 18" signage which is required to be displayed on premises by clause 31(1) of the Regulation. The Authority is satisfied that the Respondent committed this offence, although this is a relatively minor and technical infringement in the context of this Complaint.
43. The Authority is satisfied that the ground advanced by reference to section 139(3)(i) of the Act has been established. The Respondent licensee is not a fit and proper person to hold a liquor licence. The Authority has reached this conclusion having regard to all of the above convictions. The repeated nature of the convictions over numerous occasions alone establishes that the Respondent is not a fit and proper person to hold a liquor licence.
44. When considering this matter, the Authority has had regard to the following principles arising from the common law on fitness and propriety of a licensee.
45. First, 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 the 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 indication of likely future conduct) or reputation (because it provides 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 – *Australian Broadcasting Tribunal v Bond* [1990] 170 CLR 321 at 380.

46. Second, being fit and proper means having a requisite knowledge of the Act under which the person is to be licensed and the obligation and duties imposed thereby – *Ex parte Meagher* (1919) 36 WN 175 and *Sakellis v Police* (1968) 88 WN (pt 1) (NSW) 541. It normally comprises the three characteristics of honesty, knowledge and ability – *Hughes and Vale (No 2) Pty Ltd v State of NSW* (1955) 93 CLR 127, 156-7
47. Third, where a person has been convicted of offences, the decision maker must consider the circumstances of those convictions, the general reputation of the person apart from the convictions and the likelihood of repetition – *Claraham v Register of Motor Vehicle Dealers in the ACT* (1994) 17 FLR 445.
48. According to the Complainant, the two larceny convictions arose from the acquisition and retention of goods by the Respondent in order to furnish the Grand Barclay Restaurant and Reception Centre at Rockdale, of which the Respondent was a business owner from 6 November 2009 to 6 October 2010. Police submit that the property that is the subject of the larceny convictions amounted to a total value of \$100,500.53. The Authority notes that this value is apparent from the certificates of conviction.
49. The Authority considers that these convictions are particularly pertinent to the Complaint in that they concerned (i) the unlawful and dishonest retention of another person's property (ii) goods of significant value and (iii) offences that were committed in a hospitality industry context. It is apparent from the Local Court transcript provided with the Police submissions that the Respondent committed the offences when he withheld property that he was not entitled to retain as part of a misguided attempt to gain leverage over a third party (not the owner of the goods in question) who owed the Respondent money for use of the function centre that he managed. It is clear that the Court regarded the Respondent's conduct as a very serious matter that could, in other circumstances, have led to the Respondent being sent to gaol.
50. The Authority further notes the Respondent's convictions for breach of liquor licence conditions recorded during 2011. The Authority notes that significant fines were imposed by the local courts for those matters, reflecting the seriousness with which the courts regarded these liquor offences. The offences were committed within a relatively compressed timeframe.
51. During the Conference the Respondent submitted that he is not a person who deliberately breaks the law. As noted above, the Authority put to the Respondent the proposition that he was completely out of his depth and the Respondent accepted this proposition.
52. The Authority considers that the Respondent has not demonstrated anything like the degree of knowledge of the law or competence that the Authority would expect of a reasonably competent liquor licensee. The Premises appears to have been poorly managed and disorderly in several respects, generating a disproportionate amount of Police attention for what was ostensibly a small licensed restaurant.

53. The Respondent's non-compliance with licence conditions, including conditions that were imposed by the Authority (and accepted by the Respondent in order for the Respondent to reopen his business following a Short Term Closure Order issued on 30 July 2010) demonstrates a serious lack of diligence on the Respondent's part.
54. The Authority notes that, while convictions have occurred during 2011, there has been some improvement in the frequency of commission of liquor offences, with most of the more serious convictions pertaining to acts or omissions that occurred during 2009 and 2010. This apparent improvement in the regulatory performance of the Premises may have coincided with the appointment by the Respondent of Mr Stylianidis to manage the Premises in April 2011. The Authority notes that Mr Stylianidis, who attended the Conference, is an experienced manager of licensed premises, having managed a 300 person capacity club in Marrickville.
55. The Authority is not satisfied that the ground advanced by reference to section 139(3)(g) of the Act has been established. This ground requires that intoxicated persons have frequently been on the licensed premises or have frequently been seen to leave those premises. "Frequent" is not defined by the Act. A plain English definition is provided by the *Oxford Concise Australian Dictionary* (3<sup>rd</sup> Ed) as follows:

Frequent *adj.* & *v.* **1** Occurring often or in close succession. **2** habitual, constant (a frequent caller). **3** found near together, numerous, abundant. **4** (of the pulse) rapid.

56. In support of this ground, Police have identified four incidents involving the detection of persons by Police on the Premises, as recorded in COPS Reports, who were either "severely" or "very" intoxicated. The first incident occurred on 25 September 2009 and involved 3 very intoxicated females. The second incident occurred on 6 June 2010 involving a single male patron slumped on a seat in the Premises with vomit over himself. The third incident occurred on 28 December 2010 and involved a single female who was too intoxicated to walk unassisted and who vomited shortly after leaving the Premises. The fourth incident occurred on 9 January 2011 when Police observed two very intoxicated males, one at the rear of the venue and one being carried out of the Premises by his friends. While the nature of those events is troubling, they do not, in the Authority's view, establish the "frequent" observance of intoxicated persons when the Authority takes into account the fact that these four incidents spanned a period from September 2009 to January 2011, or if the Authority considers the entire period of the Respondent's tenure as licensee, up until the filing of the Complaint in July 2011.
57. The Authority is not satisfied that the ground advanced by reference to section 139(3)(h) has been established. This ground requires that acts involving violence against persons or damage to property have frequently been committed on or near the licensed premises by persons who have been on the licensed premises.
58. In support of this ground, Police identify four incidents, all recorded in COPS Reports. In the first incident involving a brawl that occurred on 23 August 2009, a patron of the Premises was reportedly struck with a stool rendering him unconscious, while a second patron was punched and kicked on the footpath directly outside the Premises. In the second incident

involving a brawl on 8 November 2009, a male patron was punched and kicked into an unconscious state after intervening in an argument with two others. His female companion was assaulted and defended herself by throwing glass bottles at her attackers. In a third incident occurring on 22 November 2009, a patron was removed from the Premises by persons unknown to Police and while outside was punched and head butted to the face. The event is recorded in a COPS Report with photographs of the victim. The fourth event occurred on 30 May 2010 when a patron inside the Premises being forced to the ground was punched and kicked by a “large number of unknown offenders”. The patron was robbed during the attack. The event is recorded in a COPS Report, with CCTV still shots of the attack and victim photographs before the Authority.

59. The Authority regards all of these incidents to be particularly troubling. The Authority is satisfied that all of these acts of violence did in fact occur and were committed by persons who had been on the Premises. However, the four events occurred from August 2009 to May 2010 - a period of ten months. While this is a borderline case, when the Authority considers the entire period of the licensee’s tenure at the Premises, up to filing the Complaint in June 2011, the Authority does not regard those four incidents as demonstrating the requisite quality of “frequency” for the purposes of section 139(3)(h) of the Act.
60. Without detracting from the seriousness of these events, any of the “declared premises” that are currently listed under Schedule 4 of the Act would, for example, have experienced more incidents of violence on premises than the four incidents relied upon in this Complaint.
61. The final ground pressed by Police is section 139(3)(s) – that the licence has “not been exercised in the public interest”. In this regard the Authority accepts that the following events identified by Police demonstrate that the licence has not been exercised in the public interest:
  - On 30 May 2010, as detailed in a COPS Report for the incident, the Respondent failed to provide Police with CCTV footage after a violent assault and robbery of a man on the Premises.
  - On 9 January 2011, Police issued a notice under the *Casino Liquor and Gaming Control Authority Act 2007* for the production of CCTV footage following the observance of intoxication incidents. The Respondent failed to comply with and was prosecuted for his failure to produce information required under a notice. The Respondent was convicted and fined \$4000.
  - On 5 February 2011, as detailed in a COPS Report for the incident, Police attended the Premises and observed a number of drug affected patrons. Patrons admitted to smoking methamphetamine on the Premises. The Respondent was present at the time. Police located an abandoned sports bag on the Premises containing \$305 in cash, 22 tablets of methamphetamine and 6 resealable bags of methamphetamine. The owner of this bag was not identified.
  - On 6 February 2011 a Police investigation into an assault upon a manager of the Premises occurred and the Respondent was subsequently convicted of failing to record an act of violence on the incident register, two counts of failing to supply CCTV footage in accordance with a licence condition, failing to ensure that the

kitchen is accessible only to staff members, and fraudulently altering the incident register. The Respondent was convicted and fined \$600 for each offence.

- On 30 July 2011 the Authority issued a Short Term Closure Order against the Premises, in part by reason of recent incidents of drug supply detected by Police officers on the Premises, including in the kitchen of the Premises. As a result of one of these incidents, the then manager and lease holder of the Premises (the Respondent's brother, David Kaikaty) was convicted for the supply of a small quantity of prohibited drugs.
62. Furthermore, the Authority notes that the Respondent has accumulated an extraordinary amount of fines. Many of these Penalty Notices concern alleged offences against the Act, or matters closely related to the operation of licensed premises, such as breaches of conditions of development consent or failure to observe fire safety regulations.
63. While the *issue* of a Penalty Notice is not, of itself, proof of the commission of the offence described in the Notice, the *payment* of a Penalty Notice for a liquor offence is deemed by section 150 of the Act to be a *conviction* for that offence for the purposes of a complaint under Part 9 of the Act.
64. The Authority notes that the Respondent has only paid in full a few of the Penalty Notices that have been issued against him, but the Respondent has entered into a long term payment arrangement with SDRO for the other Penalty Notices.
65. There is a legal issue as to whether the *part* payment of a Penalty Notices is sufficient for the purposes of section 150 of the Act. Whether or not section 150 *deems* the part payment of a Penalty Notice to be a conviction for the purposes of a disciplinary complaint the Authority is otherwise satisfied, on the basis of the contemporaneous and uncontested narratives that are recorded by the issuing Police officers, that the following Penalty Notices provide sufficient evidence to establish, on the balance of probabilities, that the Respondent actually committed the following further offences:

| Penalty Notice # | Date              | Offence   |
|------------------|-------------------|---|
| 402232421        | 22 June 2009      | Licensee sell liquor outside authorised trading hours   |
| 4024223244       | 25 September 2009 | Licensee permit intoxication on premises  |
| 4024223235       | 26 September 2009 | Licensee failed to comply with condition of licence – fail to produce RSA certificate for security staff member on duty |
| 4025761520       | 2 November 2010   | Licensee fail to display notice regarding sale of alcohol to persons under 18 as required by cl 31 Liquor Regulation    |
| 4024224234       | 24 November 2009  | Licensee fail to comply with condition of licence – fail to produce RSA certificate for security staff member on duty   |

|            |                 |   |
|------------|-----------------|---|
| 4025248527 | 5 December 2009 | Failure to maintain an incident register in the prescribed format   |
| 4025249645 | 13 January 2010 | Fail to comply with development consent condition requiring the provision of single use towels for hand drying or an effective drying facility in the kitchen |
| 4019621037 | 5 January 2010  | Exit light not illuminated. Fail to comply with fire safety requirement   |
| 4019621046 | 5 January 2010  | Another exit light not illuminated. Fail to comply with fire safety requirement   |
| 4025249939 | 2 March 2010    | Breach of development consent conditions requiring that the glass shop front be unobscured  |
| 402549948  | 2 March 2010    | Another breach of development consent conditions requiring that the glass shop front be unobscured  |
| 4028735132 | 1 June 2010     | Breach of development consent condition requiring an alarm be available within the cool room.   |

66. Police do not press any Penalty Notice that concerns an alleged breach of the on premises licence involving the service of liquor without a meal. The Authority notes that, due to a data entry error by staff working on behalf of the Authority within the Office of Liquor Gaming and Racing following the transition of liquor licences from the former *Liquor Act 1982* to the current Act, the Government Licensing System (“GLS”) record of the licence incorrectly indicated that the Premises had the benefit of a Primary Service Authorisation, enabling the licensee to serve liquor with or without a meal.
67. In fact, the former “Drink or Dine” authorisation that the Premises had enjoyed under the *Liquor Act 1982* had been cancelled prior to the licence transitioning to a licence under the current Act. This was due to the non-payment of an application fee by a former licensee. Cancellation of that authorisation is apparent from the historical (physical and electronic) licensing files, but apparently neither the Respondent nor his mother (who purchased the business in 2009) had inspected the Authority’s files when acquiring the business.
68. The Authority notified the Respondent of this error on the GLS record on 1 October 2010 shortly after the error was identified. Out of fairness to the licensee, the Authority has not taken into account any Penalty Notice relating to or any other allegation of service of liquor without a meal that pre-dates 1 October 2010.
69. When discerning the relevant “public interest” the Authority has been guided by the statutory objects and considerations in section 3 of the Act. Specific offence provisions within the Act are further matters that concern the relevant public interest. The Authority is satisfied that, during the tenure of the Respondent as licensee, the licence was not exercised in the public interest.

70. A finding that a licence has not been exercised in the public interest would ordinarily require action to be taken against the licence itself. However, in light of the Respondent being recently locked out from the Premises and the assurances of the Premises Owner, the Authority is satisfied that the Respondent will no longer have any involvement with the Premises.
71. The Authority notes that the Section 51 Decision has already limited the scope for the Premises to be a source of harm to the community, by winding back what was a 24 hour licence (for six days of the week) to the standard hours prescribed by section 12 of the Act. As Police no longer press the ground under section 139(3)(t) of the Act, no further action against the licence is necessary at this time.

### **DISCIPLINARY ACTION**

72. Counsel for the Police submits that in light of his convictions the public should be protected from the Respondent for a period of up to 5 years, by the imposition of a disqualification from holding the position of licensee.
73. While the Respondent resists a finding that he is not a fit and proper person he concedes in his submissions to the Authority that he “cannot possibly continue to operate a business that continues to consume me with such irreconcilable debt”. The debt to which he refers has mainly accumulated through an extraordinary level of unpaid fines, even if the Authority discounts those fines that were imposed at a time when the Respondent believed that he had the benefit of a Primary Service Authorisation.
74. The Respondent has further conceded during the Conference that he was out of his depth and that “maybe this is not for me”.
75. The Authority notes that, after the Respondent pleaded guilty to six counts of minors on premises, Magistrate Wahlquist of the Downing Centre Local Court saw fit to impose a supplementary sanction upon the Respondent under section 148 of the Act, suspending the Respondent from holding a liquor licence for a period of 12 months, which is the maximum period of suspension that a Local Court may impose under that section.
76. By contrast to the essentially punitive power of the Local Court to suspend a licensee under Part 10 of the Act, the Authority’s power to disqualify a licensee under Part 9 of the Act serves a broader purpose, that of protecting the community. By contrast to section 148, the Authority’s power to disqualify a licensee is not limited to a maximum period of 12 months – although any period of disqualification that may be imposed by the Authority when determining a disciplinary complaint should be reasonable and proportionate to the facts found by the Authority.
77. The Respondent has provided documents that have apparently been tendered in support of his good character, including a letter from World Vision Australia noting the conclusion of the Respondent’s sponsorship of a child in a developing country, and some medical information pertaining to the Respondent’s grandparents. This material is not particularly helpful in

establishing the Respondent's good reputation. In any event, the Authority is more concerned with the Respondent's demonstrated lack of knowledge and competence pertaining to the responsibilities of a liquor licensee than the Respondent's character in the broader sense.

78. The Authority has determined, pursuant to subsection 141(2)(f) of the Act, that it is in the public interest to disqualify Mr Dominic Kaikaty from holding the position of a liquor licensee for a period of 5 years commencing from the date of this letter.

#### **REVIEW RIGHTS**

79. Either the Respondent or the Complainant may seek review of this decision by the NSW Administrative Decisions Tribunal ("**ADT**"). Such application must be made within 28 days of the date of this decision. Further information may be obtained from the ADT website: <http://www.lawlink.nsw.gov.au/adt>.

Yours faithfully

A handwritten signature in black ink, appearing to read "Chris Sidoti".

Chris Sidoti  
**Chairperson**