



Mr Sean Goodchild Director, Compliance Liquor and Gaming NSW Level 6, 323 Castlereagh Street SYDNEY NSW 2000 sean.goodchild@olgr.nsw.gov.au	Mr Marshall Lukman [Private address not published]
The Directors Buena Vista Sydney Pty Ltd Business Owner, El Toro Tapas and Pizza Bar 35 McKeon Street MAROUBRA NSW 2035 eltoro@hotmail.com.au	Mr Arthur Premetis Premises Owner [Private address not published]

Via Email and/or Express Post

10 August 2017

Dear Sir/Madam

**Notice of Final Decision with Reasons on Complaint under Part 9 of the
Liquor Act 2007 in relation to Mr Marshall Lukman, Licensee of El Toro Tapas
and Pizza Bar, Maroubra**

At its meeting of 19 July 2017 the Independent Liquor and Gaming Authority (Authority) has considered a disciplinary complaint (Complaint) made under Part 9 of the *Liquor Act 2007* (Act) to the Authority on 13 September 2016.

The Complaint is made by Mr Sean Goodchild, the Director of Compliance, Liquor and Gaming New South Wales (LGNSW) in his capacity as a delegate of the Secretary of the Department of Justice. At the time of this decision the responsible Department is now the NSW Department of Industry.

The Complaint is made in relation to Mr Marshall Lukman, licensee of the on-premises (restaurant) licensed premises subject to an extended trading authorisation currently trading as "El Toro Tapas and Pizza Bar", located at 35 McKeon Street, Maroubra NSW 2035 (Premises).

The Authority has decided, pursuant to section 141(2)(f) of the Act, to disqualify Mr Marshall Lukman from holding a licence, being the approved manager of licensed premises or being the close associate of a licensee, with respect to any licensed premises in New South Wales, for a period of five (5) years. The period of disqualification commences the day after the date of this letter.

The Authority has also decided, pursuant to section 141(6)(a) of the Act, that Mr Lukman and his company, Buena Vista Sydney Pty Ltd, be disqualified from being a person interested in the business or in the conduct or profits of the business carried on under a

liquor licence in New South Wales, for a period of five (5) years. The period of disqualification commences the day after the date of this letter.

The Authority has also decided, pursuant to section 141(2)(c)(i) of the Act, that Mr Lukman pay a monetary penalty in the sum of \$10,000 to the New South Wales Department of Industry within 28 days after the date of this letter. An invoice will be issued to you shortly with arrangements for payment.

The Authority has further decided, pursuant to section 141(2)(l)(i) of the Act, that Mr Lukman pay the Secretary of the Department of Industry's costs on the investigation in relation to the Complaint in the sum of \$3,619.27, payable to the Department within 28 days after the date of this letter. An invoice will be issued to you shortly with arrangements for payment.

Enclosed is a statement of reasons for the Authority's decision. Rights to seek review of this decision by the New South Wales Civil and Administrative Tribunal are detailed at the end of that document.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'P Crawford', is written over a light blue horizontal line.

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

STATEMENT OF REASONS

INTRODUCTION

1. The Independent Liquor and Gaming Authority (Authority) received a complaint dated 13 September 2016 (Complaint) made by Mr Sean Goodchild (Complainant), Director of Compliance Operations, Liquor and Gaming NSW (LGNSW) in his capacity as a delegate of the Secretary of the then (then) NSW Department of Justice. At the time of this decision the responsible Department is now the NSW Department of Industry.
2. The Complaint is made under Part 9 of the *Liquor Act 2007* (Act) in relation to Mr Marshall Lukman, the licensee of the on-premises licensed premises known as “El Toro Tapas and Pizza Bar”, trading at 35 McKeon Street, Maroubra NSW 2035 (Premises). The Complaint agitates three grounds that are available under Part 9 of the Act (Grounds).

Complaint Material

3. The Complaint comprises a cover letter from the Complainant dated 13 September 2016 (Complaint Letter) and a bundle of supporting evidence or material (Complaint Material).
4. The Premises has the benefit of an on-premises (restaurant) licence with an extended trading authorisation. The liquor licence number LIQO624005194 authorises the sale or supply of liquor for consumption on the Premises from 5:00am until 3:00am on Monday through Saturday and from 10:00am until 12:00 midnight on Sunday.
5. The Complainant contends that between May 2015 and March 2016 LGNSW have detected 11 breaches of liquor legislation and that when considered on a cumulative basis these ongoing breaches demonstrate Mr Lukman’s lack of diligence and respect for the obligations that arise from the “privilege” of holding a liquor licence.
6. The Complaint Material comprises 18 Exhibits which include a copy of the *OneGov* liquor licence record for the Premises as at 12 September 2016; a copy of Mr Lukman’s Responsible Service of Alcohol (RSA) Competency Card number CCH10446214; a copy of an expired RSA Certificate for Mr Lukman; transcripts of two LGNSW interviews with Mr Lukman dated 13 July 2015 and 13 April 2016; a Notice to Produce dated 5 May 2015 issued to Mr Lukman by LGNSW under section 21 of the *Gaming and Liquor Administration Act 2007* (GALA Act) and Mr Lukman’s response to that Notice dated 5 May 2015 furnishing point of sale receipts for the Premises; copies of five Penalty Notices issued by LGNSW to Mr Lukman for alleged offences against the Act and *Liquor Regulation 2008* (Regulation); a copy of a Compliance Notice (official warning) issued by LGNSW to Mr Lukman on 12 August 2015 in respect of further detected contraventions of the Act and Regulation; and various other miscellaneous documents gathered during the course of the investigation.

Grounds of Complaint in Brief

7. **Ground 1** is based upon section 139(3)(b) of the Act, which provides:

that the licensee or manager has failed to comply with any of the conditions to which the licence is subject.

8. Ground 1 alleges that Mr Lukman failed to comply with section 56 of the Act. This section imposes a statutory condition upon the licence that requires, in the case of a licensed premises that is authorised to sell or supply liquor after midnight at least once a week on a regular basis, the licensee to maintain an incident register in the form approved by the Secretary. The Complainant alleges that LGNSW inspectors detected a breach of this statutory condition on 4 May 2015, for which Mr Lukman was issued a Compliance Notice dated 12 August 2015.

9. **Ground 2** is based upon section 139(3)(d) of the Act, which provides:

that the licensee or manager has failed to comply with any other requirements under this Act or the regulations (or under the former Act), relating to the licence or the licensed premises.

10. Ground 2 alleges that in addition to the breach of licence condition alleged in Ground 1 above, a further 10 alleged contraventions of the Act and Regulation were detected by LGNSW officers between May 2015 and March 2016.

11. **Ground 3** is based upon section 139(3)(i) of the Act, which provides:

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).

12. Ground 3 alleges that Mr Lukman has demonstrated an inability or an unwillingness to comply with the Act and Regulation and that, on the basis of the allegations in Grounds 1 and 2, Mr Lukman is not a fit and proper person to hold a liquor licence.

Complainant Submissions on Mr Lukman's Fitness and Propriety

13. The Complainant submits that Mr Lukman's conduct over the period from May 2015 to March 2016 calls for disciplinary action that is proportionate with the objective seriousness of his offending and that acts as a "general and specific deterrent" to those industry participants contemplating similar conduct.
14. The Complainant submits that the licensee's failure to ensure legal compliance and responsible practices on the Premises over an extended period reflects a "lack of ability and knowledge" that is expected by the community and the industry in respect of a person charged with the responsibility of managing licensed premises.
15. The Complainant contends that the "recidivist nature" of this offending extends beyond the immediate concerns surrounding the commission of the offences alone and has a potentially negative effect upon industry and community confidence in the regulatory regime. The Complainant submits that it is "not in the public interest" to have a licensed premises operated in this "perpetually non-compliant manner".

Disciplinary Action Recommended by the Complainant

16. The Complainant recommends that the Authority take the following disciplinary action should the Grounds of Complaint be established:

1. Disqualification of Mr Marshall Lukman from holding a licence for “such period as the Authority thinks fit”.
2. That the Authority order the licensee to pay the amount of any costs incurred by the Secretary in carrying out any investigation or inquiry under section 138 of the Act in relation to this Complaint.
3. That the Authority take any other disciplinary action as the Authority sees fit.

PROGRESS OF THE COMPLAINT

Show Cause Notices

17. On 20 December 2016, the Authority Secretariat sent a notice to Mr Lukman (Show Cause Notice) enclosing the Complaint Letter and Complaint Material and inviting Mr Lukman to show cause, by way of written submissions, as to why disciplinary action should not be taken against him on the basis of the Grounds of Complaint.
18. On 20 December 2016, the Authority Secretariat sent similar correspondence to Buena Vista Sydney Pty Ltd (the business owner) and Mr Arthur Premetis (the Premises owner).
19. No response to the Complaint was received by the Authority from Mr Lukman, the business owner or the Premises owner. As a consequence, the Authority will determine this matter on the basis of the uncontested Complaint Material.

FINDINGS

20. A disciplinary complaint under Part 9 of the Act is an administrative matter, and findings are made to the civil standard of proof.
21. 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.

Fitness and Propriety at General Law

22. 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.
23. 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.
24. 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.

25. Section 45(5A) of the Act, to which section 139(3)(i) refers, prescribes non-exhaustive statutory considerations to which the Authority must have regard when determining the fitness and propriety of a licensee, including whether that person:
- (a) is of good repute, having regard to character, honesty and integrity; and
 - (b) is competent to carry on that business or activity, being the relevant licensed business in question.

Ground 1 – Mr Lukman failed to comply with a condition on the licence

26. Particular 1.1 states that the licence authorises the sale of liquor from 5:00am until 3:00am on Monday to Saturday, and from 10:00am until 12:00 midnight on Sunday. The Authority accepts that this is the case, on the basis of the *OneGov* licence record for the Premises as at 12 September 2016 (Exhibit E01). Particular 1.1 is established.
27. Particular 1.2 alleges that on 4 May 2015 LGNSW Inspectors Trevor Dodds and Brett Fowler attended the Premises and requested Mr Lukman to provide the incident register for the Premises. Mr Lukman was unable to produce an incident register at that time.
28. Particular 1.3 alleges that during a record of interview between LGNSW inspectors and Mr Lukman conducted on "31 July 2015" [*sic*, 13 July 2015], Mr Lukman made admissions to inspectors that he did not maintain an incident register for the Premises.
29. The Authority is satisfied, on the basis of the statements made by Mr Lukman at page 10 of the transcript of his interview with LGNSW inspectors dated 13 July 2015 (Exhibit E03), that Mr Lukman did not maintain an incident register for the Premises at the time of an inspection of the Premises by LGNSW officers on 4 May 2015. Particulars 1.2 and 1.3 are established.
30. Particular 1.4 alleges that in failing to maintain an incident register, Mr Lukman contravened a condition to which the licence is subject and that this contravention was dealt with by way of a Compliance Notice (official warning) issued to Mr Lukman.
31. The Authority is satisfied, on the basis of the Compliance Notice letter from LGNSW Inspector Sarina Wise to Mr Lukman dated 12 August 2015 (Exhibit E16), that Mr Lukman was issued with an official warning in respect of breach of a licence condition – maintenance of incident register contrary to sections 11(2) and 56 of the Act, which was detected by LGNSW officers on 4 May 2015. Particular 1.4 is established.

32. The Authority is satisfied, on the basis of the above findings, that Mr Lukman failed to comply with a condition on the licence, being a condition that arises through the operation of sections 56 and 11(2) of the Act.

33. Ground 1 is established.

Ground 2 – Mr Lukman failed to comply with requirements of the Act or Regulation

Particular 2.1

34. Particular 2.1 alleges that Mr Lukman failed to comply with legislative requirements relating to the on-premises licence, in that he served liquor contrary to the authority granted by the licence under section 24(1) of the Act, in that liquor was sold for consumption not on the licensed Premises.
35. Particular 2.1(a) alleges that on 4 May 2015 LGNSW Inspectors Dodds and Fowler attended the Premises and reviewed point of sale receipts for the retail sale of liquor to customers.
36. Particular 2.1(b) alleges that on 5 May 2015, LGNSW Inspector Fowler issued Mr Lukman a Notice to Produce under section 21 of the GALA Act. Among other matters, the Notice to Produce required Mr Lukman to produce the point of sale receipts for the period from 1 April 2015 to 4 May 2015.
37. The Authority is satisfied, on the basis of the copy of the Notice to Produce issued to Mr Lukman by LGNSW Inspector Fowler on 5 May 2015 (Exhibit E04), that Particulars 2.1(a) and 2.1(b) are established.
38. Particular 2.1(c) alleges that LGNSW inspectors identified that the point of sale receipts indicated a number of sales of liquor to persons who had received liquor as part of a takeaway food delivery, or who subsequently carried the liquor away from the Premises with a takeaway meal.
39. The Authority is satisfied, on the basis of Mr Lukman's response to the LGNSW Notice to Produce dated 5 May 2015 and the attached point of sales receipts for the period from 1 April 2015 to 4 May 2015 (Exhibit E05), that Particular 2.1(c) is established.
40. Particular 2.1(d) alleges that during an interview with LGNSW inspectors on 13 July 2015, Mr Lukman made admissions to inspectors that he had allowed liquor to be served, sold and/or supplied from the restaurant for consumption *off* the licensed Premises.
41. The Authority is satisfied, on the basis of the statements made by Mr Lukman at pages 13 to 15 of the transcript of his interview with LGNSW inspectors conducted on 13 July 2015 (Exhibit E03), that Particular 2.1(d) is established.
42. Particular 2.1(e) alleges that this contravention of section 24(1) of the Act in turn constitutes a contravention of section 9(1) of the Act, in that Mr Lukman served liquor contrary to the authority granted by the licence (by effectively selling takeaway liquor).

43. The Authority is satisfied, on the basis of the above findings and evidence, that Mr Lukman served liquor contrary to the authority granted by the on-premises licence for the Premises. Particular 2.1(e) is established.
44. Particular 2.1(f) alleges that on 12 August 2015 LGNSW Inspector Dodds served three Penalty Notices (Nos. 3015752960, 3015752970 and 3015752989) on Mr Lukman, each in respect of the alleged offence of *Licensee sell/supply liquor not in accordance with authority*. The Complainant further alleges that these Penalty Notices were unpaid and that a Penalty Notice Enforcement Order was made pursuant to the *Fines Act 1996* on 29 October 2015.
45. The Authority is satisfied, on the basis of the following evidence, that LGNSW Inspector Dodds served three Penalty Notices on Mr Lukman for the offence of *Licensee sell/supply liquor not in accordance with authority*:
- (a) Penalty Notice No. 3015752960 in the amount of \$1,100 in respect of the offence of *Licensee sell/supply liquor not in accordance with authority* which was detected by LGNSW officers between 31 March 2015 and 13 April 2015 (Exhibit E07);
 - (b) Penalty Notice No. 3015752970 in the amount of \$1,100 in respect of the offence of *Licensee sell/supply liquor not in accordance with authority* which was detected by LGNSW officers between 14 April 2015 and 27 April 2015 (Exhibit E08); and
 - (c) Penalty Notice No. 3015752989 in the amount of \$1,100 in respect of the offence of *Licensee sell/supply liquor not in accordance with authority* which was detected by LGNSW officers between 28 April 2015 and 11 May 2015 (Exhibit E09).
46. The Authority is further satisfied, on the basis of business records provided to the Complainant by the State Debt Recovery Office (SDRO) dated 12 September 2016 (Exhibit E11), that Penalty Notice Enforcement Orders were issued by the SDRO to Mr Lukman in respect of Penalty Notice Nos. 3015752960, 3015752970 and 3015752989 on 28 October 2015. Particular 2.1(f) is established.
47. The Authority is satisfied, on the basis of the above findings, that Particular 2.1 is established.

Particular 2.2

48. Particular 2.2 alleges that Mr Lukman failed to comply with clauses 40(1)(a) and 40(1)(b) of the Regulation in that he served, sold and/or supplied liquor to patrons (and caused liquor to be served, sold and/or supplied) while not holding a current responsible service of alcohol certification.
49. Particular 2.2(a) alleges that on 4 May 2015 LGNSW Inspectors Dodds and Fowler attended the Premises and, among other audit activities, asked Mr Lukman to produce his RSA competency card.
50. Particular 2.2(b) alleges that when LGNSW inspectors asked Mr Lukman to produce his current RSA certification, he was unable to do so.

51. The Authority is satisfied, on the basis of the statements made by Mr Lukman at pages 22 to 24 of the transcript of his record of interview with LGNSW inspectors on 13 July 2015 (Exhibit E03), that Mr Lukman was unable to produce a current RSA competency card when LGNSW inspectors attended the Premises on 4 May 2015. Particulars 2.2(a) and 2.2(b) are established.
52. Particular 2.2(c) alleges that Mr Lukman's RSA certification is dated 25 February 2008 and as such, expired on 30 June 2014 by virtue of clause 39C(2) of the Regulation and the Order made on 1 May 2012 and published in *New South Wales Government Gazette No. 49* on 11 May 2012. The Authority is satisfied that this Particular is established on the basis of the RSA certification for Mr Lukman dated 25 February 2008 (Exhibit E06) and the copy of the *New South Wales Government Gazette No. 49* published on 11 May 2012 (Exhibit E18). While clause 39C(2) has been repealed, that clause had the effect of deeming all RSA Certificates issued between 1 January 2007 and 21 December 2008 as expiring on 30 June 2014.
53. Particular 2.2(d) alleges that during an interview with LGNSW inspectors on 13 July 2015, Mr Lukman made admissions to inspectors that he was unable to produce his RSA certification because it had expired. The Authority is satisfied that Particular 2.2(d) is established on the basis of the statements made by Mr Lukman at pages 22 to 24 of the transcript of the LGNSW interview conducted on 13 July 2015 (Exhibit E03).
54. Particular 2.2(e) alleges that on 11 May 2015 Mr Lukman attended an RSA training course and obtained a current RSA certification. The Authority is satisfied that Particular 2.2(e) is established on the basis of the copy of an Interim Certificate No. 10000626059 recording Mr Lukman's successful completion of an RSA Course conducted by Hospitality Training Victoria Pty Ltd on 11 May 2015 (part of Exhibit E02).
55. Particular 2.2(f) alleges that on 12 August 2015 LGNSW Inspector Dodds served Penalty Notice No. 3108015002 on Mr Lukman in respect of the alleged offence of *Licensee sell/supply liquor, or cause liquor to be sold/served without holding a current recognised RSA certification*. Particular 2.2(f) further alleges that this Penalty Notice remains unpaid and that on 29 October 2015 a Penalty Notice Enforcement Order was issued by SDRO to Mr Lukman pursuant to the *Fines Act 1996*.
56. The Authority is satisfied that on 12 August 2015 Mr Lukman was in fact issued with Penalty Notice No. 3108015002 in the amount of \$1,100 in respect of the alleged offence of *Licensee sell/supply liquor, or cause liquor to be sold/served without holding a current recognised RSA certification* which had been detected by LGNSW officers between 31 March 2015 and 11 May 2015 (Exhibit E10).
57. The Authority is further satisfied, on the basis of business records provided to the Complainant from SDRO dated 12 September 2016 (Exhibit E11), that a Penalty Notice Enforcement Order was issued by the SDRO to Mr Lukman in respect of Penalty Notice No. 3108015002 on 29 October 2015. Particular 2.2(f) is established.
58. The Authority is satisfied, on the basis of the above findings, that Particular 2.2 is established.

Particular 2.3

59. Particular 2.3 alleges that during the inspection of the Premises on 4 May 2015, LGNSW Inspectors Fowler and Dodds also detected four further breaches of the Act and Regulation.
60. The Authority is satisfied that Particular 2.3(a), which alleges that Mr Lukman failed to display the name of the licensed Premises in accordance with section 95(1) of the Act, is established on the basis of the statements made by Mr Lukman at pages 3 to 4 of the transcript of his record of interview with LGNSW inspectors dated 13 July 2015 (Exhibit E03).
61. The Authority is further satisfied that Particular 2.3(b), which alleges that Mr Lukman altered the name of the licensed Premises without obtaining the approval required under section 95(2) of the Act, is established on the basis of the statements made by Mr Lukman at pages 4 to 5 of the transcript of his record of interview with LGNSW inspectors dated 13 July 2015 (Exhibit E03).
62. The Authority is also satisfied that Particular 2.3(c), which alleges that Mr Lukman failed to produce the licence document on the request of LGNSW inspectors as required by section 107(1) of the Act, is established on the basis of the statements made by Mr Lukman at pages 5 to 7 of the transcript of his record of interview with LGNSW inspectors dated 13 July 2015 (Exhibit E03).
63. The Authority is satisfied that Particular 2.3(d), which alleges that Mr Lukman failed to display a notice advising that the sale or supply of liquor to persons under the age of 18 is prohibited, as required by clause 31 of the Regulation, is established on the basis of the statements made by Mr Lukman at pages 7 to 8 of the transcript of his record of interview with LGNSW inspectors dated 13 July 2015 (Exhibit E03).
64. The Authority is further satisfied, on the basis of the letter from LGNSW Inspector Sarina Wise to Mr Lukman dated 12 August 2015 (Exhibit E16), that Mr Lukman was issued with Compliance Notices (official warnings) for these four offences as of 12 August 2015. Particulars 2.3(a) through 2.3(d) are established.
65. The Authority is satisfied, on the basis of the above findings, that Particular 2.3 is established.

Particular 2.4

66. Particular 2.4 alleges that on 15 January 2016, officers from the NSW Police Force (Eastern Beaches Local Area Command) (Police) attended the Premises and observed a delivery driver leaving the restaurant with takeaway food and a sealed bottle of wine.
67. Particular 2.4(a) alleges that Mr Lukman initially advised Police that the liquor was the driver's own liquor for personal consumption but subsequently admitted to Police that the liquor was for delivery to a customer.
68. The Authority is satisfied that Particular 2.4(a) is established on the basis of the contemporaneous summary of events recorded by a Police officer in the Computerised Operational Policing System (COPS) database for COPS Event number E60546477 (Exhibit E12).

69. Particular 2.4(b) alleges that by serving liquor outside the authority granted by the on-premises licence under section 24(1) of the Act, Mr Lukman contravened section 9(1) of the Act.
70. Particular 2.4(c) alleges that on 26 January 2016 Police issued Mr Lukman with Penalty Notice No. 4921997439 for the offence of *Licensee sell/supply liquor not in accordance with authority*. Particular 2.4(c) further alleges that this Penalty Notice remains unpaid and a Penalty Notice Enforcement Order was issued under the *Fines Act 1996* on 5 April 2016.
71. While the actual record of the Penalty Notice No. 4921997439 has not been provided with the Complaint Material, the fact that the Penalty Notice was issued for the non-compliance in question has not been contested by any respondent. SDRO advice to LGNSW dated 12 September 2016 (Exhibit E11) establishes that a Penalty Notice Enforcement Order was in fact issued in respect of the non-payment of this Penalty Notice.
72. The Authority is satisfied that Particulars 2.4(b) and 2.4(c) are established on the basis of the business records provided to the Complainant by the SDRO dated 12 September 2016 (Exhibit E11).
73. On the basis of the above findings, the Authority is satisfied that Particular 2.4 is established.

Particular 2.5

74. Particular 2.5 alleges that on 6 March 2016 LGNSW Inspectors Walker-Munro and McCluskey conducted a covert inspection of the Premises. During the inspection, they were able to purchase a bottle of liquor (a 355mL *Strongbow* Classic Pear Cider) without purchasing any food.
75. Particular 2.5(a) alleges that as the licence for the Premises is not endorsed with a “primary service authorisation” under section 24(3) of the Act, liquor must be sold with or ancillary to a meal (as required by section 24(1) of the Act).
76. Particular 2.5(b) alleges that this contravention of section 24(1) of the Act in turn constitutes a contravention of section 9(1) of the Act, in that Mr Lukman served liquor contrary to the authority granted by the (on-premises) licence for the Premises.
77. The Authority is satisfied, on the basis of the contemporaneous file notes recorded by LGNSW Inspector McCluskey regarding the covert business inspection of 5 to 6 March 2016 (Exhibit E13) and the statements made by Mr Lukman at pages 6 to 15 of the transcript of his record of interview with LGNSW inspectors conducted on 13 April 2016 (Exhibit E14), that LGNSW inspectors were able to purchase a bottle of liquor on the Premises without purchasing any food, contrary to the authority granted by the on-premises licence for the Premises.
78. The Authority is satisfied that the LGNSW Inspectors were in fact able to purchase liquor without purchasing any food. Particular 2.5(a) is established to this extent.
79. Particular 2.5(c) alleges that on 20 April 2016 LGNSW Inspector McCluskey served Penalty Notice No. 3108016378 on Mr Lukman for *Licensee sell/supply liquor contrary to authority*. Particular 2.5(c) further alleges that this Penalty Notice remains

unpaid and a Penalty Notice Enforcement Order was made by SDRO pursuant to the *Fines Act 1996* on 12 July 2016.

80. The Authority is satisfied that Mr Lukman was issued Penalty Notice No. 3108016378 in the amount of \$1,100 in respect of the offence *Licensee sell/supply liquor contrary to authority* which was detected by LGNSW officers on 6 March 2016 (Exhibit E17). The Authority is further satisfied, on the basis of business records provided to the Complainant by the SDRO dated 12 September 2016 (Exhibit E11) that a Penalty Notice Enforcement Order was in fact issued by the SDRO to Mr Lukman in respect of Penalty Notice No. 3108016378 on 12 July 2016. Particular 2.5(c) is established.
81. However, as discussed below, Mr Lukman provided a late submission contesting the circumstances in which the liquor was ordered by the undercover officers in respect of Particular 2.5 and whether the service of liquor contravened the authorisation conferred by the licence in the particular circumstances of this event. By reason that Ground 2 is otherwise established on the basis of the Authority's findings on Particulars 2.1 to 2.4, the Authority has not considered it necessary to reopen and make a finding on Particular 2.5.
82. Ground 2 is established.

Ground 3 – Mr Lukman is not a fit and proper person to hold a licence

83. Particular 3.1 alleges that by virtue of the allegations contained in Grounds 1 and 2 of the Complaint, Mr Lukman has “clearly” demonstrated an inability or an unwillingness to comply with the Act and Regulation.
84. Particular 3.2 is a submission that Mr Lukman has been issued with five warnings and six Penalty Notices for contraventions of the Act over an 11-month period from May 2015 to March 2016. These have included what the Complainant describes as “basic” failures to display appropriate signage and carry a current RSA competency card, through to “more serious” breaches of selling liquor in a manner that is inconsistent with the type of licence that he holds.
85. Particular 3.3 is a submission that the “systemic non-compliance” with the liquor laws that has been displayed by Mr Lukman, as well as the “recidivist” nature of the offending, demonstrates a “high level of regulatory disengagement” on his part. The Complainant cites the issue of three Penalty Notices by LGNSW officers against Mr Lukman for allowing the sale of takeaway liquor between the months of March and May 2015. Despite this regulatory action, on 15 January 2016 NSW Police again detected that Mr Lukman was allowing the sale of takeaway liquor from the restaurant, contrary to the licence. This, it is submitted, demonstrates a clear failure on Mr Lukman's part to address the offending conduct, despite being offered a number of opportunities to do so, through the various interactions with the regulators.
86. Particular 3.4 is a submission that the “consistent” contraventions of the Act and Regulation, borne out through the evidence provided in this Complaint, demonstrate that Mr Lukman is “unable” to operate a liquor licence in a manner that is compliant with the liquor legislation and in accordance with community expectations. The Complainant concludes that Mr Lukman is not a fit and proper person to be the holder of a liquor licence.

- 87.** The Authority is satisfied that the Complainant has established, on the balance of probabilities, that Mr Lukman has contravened the Act and/or the Regulation on **11** occasions between May 2015 and March 2016.
- 88.** The regulatory contraventions established by this Complaint range in seriousness, as reflected by the maximum penalties prescribed by the Act and Regulation in the event of conviction for an offence. A failure to display the name of a licensed premises in accordance with section 95 of the Act is a more minor and technical contravention, attracting a maximum penalty of 5 penalty units if prosecuted. More serious are contraventions of licence conditions, which, if prosecuted by way of a breach of section 11(2) of the Act, attract a maximum penalty of 100 penalty units or imprisonment for 12 months, or both. Equally serious is a contravention of section 9(1) of the Act, punishable by a maximum penalty of 100 penalty units or imprisonment for 12 months, or both.
- 89.** Further, Mr Lukman's failure to pay the Penalty Notices issued against him, in circumstances where there is no evidence of those matters being defended in Court, demonstrates a degree of impunity on the part of the licensee. The Authority notes that Penalty Notice Enforcement Orders have been issued to Mr Lukman in respect of all six of the Penalty Notices issued to him between May 2015 and March 2016.
- 90.** The Authority accepts the Complainant's submission that these regulatory contraventions of the Act are not only a threat to the public interest in their own right, but their nature and frequency poses a broader threat to public and industry confidence in the regulatory system.
- 91.** It is unfair to compliant licensed businesses for licensees like Mr Lukman to act with disregard for the regulatory scheme. The threat to the public interest is particularly apparent when this licensee operates with the benefit of an extended trading authorisation, enabling the business to sell or supply liquor for consumption on the Premises until 3:00am on Monday through Saturday and until 12:00 midnight on Sunday.
- 92.** The contraventions of the Act and Regulation that have been established by the Penalty Notice and Compliance Notice evidence provided by the Complainant reflect adversely upon the ability of the licensee, Mr Lukman to comply with the demands of the liquor licensing regime in NSW.
- 93.** The Authority is also satisfied that Mr Lukman's conduct indicates a degree of dishonesty. The five separate Penalty Notices for contravening licensed trading hours indicates a calculated attempt to gain an improper commercial advantage through the unlawful supply of liquor, as does the sale or supply of liquor for consumption off the Premises, beyond the authorisation of his licence.
- 94.** Mr Lukman must have known that he did not have the authority to sell or supply liquor outside of the licensed trading hours and that the sale or supply of liquor was confined to liquor consumed on the Premises. Mr Lukman's lying to Police when they attended the Premises on 15 January 2016 underscores the degree of deliberation and dishonesty involved with this conduct.
- 95.** Considered cumulatively and having regard to the 11 months' time frame in which the contraventions occurred, Mr Lukman's conduct indicates a lack of ability and honesty with regard to regulatory compliance. These matters reflect poorly upon Mr Lukman's

character and his competence to hold a liquor licence. Mr Lukman has not elected to respond to the allegations in this Complaint and no evidence has been provided as to his general character or his competence as a licensee for the purposes of section 45(5A) of the Act.

96. In conclusion, on the basis of the Authority's findings on Grounds 1 and 2, the Authority has no difficulty finding that Mr Marshall Lukman is not a fit and proper person to be the holder of a liquor licence.
97. Grounds 1, 2 and 3 of the Complaint are established.

Final Submissions on Disciplinary Action

98. On 28 March 2017 the Authority Secretariat wrote to the Complainant, Mr Lukman, the corporate business owner Buena Vista Sydney Ptd Ltd and the corporate Premises owner, providing detailed findings on the Grounds of Complaint (Findings Letter).
99. The Authority invited the Complainant to make any final submissions within 7 days thereafter, confined to the question of what, if any disciplinary action should be taken on the basis of the Authority's findings. The other parties were given 14 days to make submissions on the question of disciplinary action, with the benefit of the Complainant's submissions.
100. As no response was provided to the Authority's Findings Letter from Mr Lukman, on 29 May 2017 the Authority Secretariat sent a copy of the Findings Letter to Mr Lukman's personal address offering him another 7 days to make submissions.
101. Out of caution, on 29 May 2017 the Authority Secretariat also sent a copy of the Findings Letter to the new business owner, Mr Teezar Tirtajaja, who had received provisional approval to transfer the liquor licence to him on 24 January 2017. Mr Tirtajaja was also given 7 days to make any submissions if he wished to do so.

Final Submission from Complainant

102. On 3 April 2017 the Complainant made a written submission in response to the Findings Letter. Briefly, the Complainant submits that the Authority should order, pursuant to section 141(2)(f) of the Act, that Mr Lukman be disqualified from holding a licence or acting as an approved manager of any licensed premises for a period of five (5) years.
103. The Complainant further submits that the Authority should order, pursuant to section 141(2)(c) of the Act, that Mr Lukman pay a monetary penalty as "considered appropriate by the Authority" in light of the seriousness and consistency of breaches of the Act that have been established by the Complaint and the degree of deliberation and dishonesty found by the Authority demonstrated by Mr Lukman lying to Police when they attended the Premises on 15 January 2016. The Complainant submits that when fixing a penalty the Authority should have regard to the "general and specific deterrence" that such a penalty will have upon industry, licensees and approved managers who may be contemplating similar conduct.
104. Finally, the Complainant submits that the Authority order, pursuant to section 141(2)(l) of the Act, that Mr Lukman pay the costs associated with the conduct of the

investigation under section 138 of the Act that preceded the Complaint, in the sum of **\$3,619.27**. The Complainant provides a detailed breakdown of the Secretary's staff and other costs of the investigation.

Late Submission from Licensee

- 105.** After not making any response to the allegations in the Show Cause Notice, Mr Lukman provided a brief (7 paragraphs) unsworn email submission in response to the Authority's Findings Letter after it was resent to Mr Lukman on 29 May 2017. This was his first and only submission in response to the Complaint.
- 106.** In summary, Mr Lukman advances "no objection" to the matters raised against him by the Complainant, save for the incident referred to in Particular 2.5, being an incident of 6 March 2016 when undercover LGNSW officers claimed to have detected the supply of liquor not ancillary to a meal, in contravention of the licence.
- 107.** Mr Lukman claims that the LGNSW officers "barged into the premises" opened a fridge, grabbed the alcohol in question and opened it straight away. Mr Lukman contends that he has witnesses who will support his version of events and that he did not have a reasonable opportunity to offer the undercover officers the opportunity to order food. Mr Lukman also claims that he felt intimidated and that the officers refused a menu when they were offered it.
- 108.** Mr Lukman argues that the circumstances of 6 March 2016 are similar to a New South Wales District Court case from 2012 in the matter of *Hackett v R* (neither a citation nor a copy of this judgment was provided to the Authority). Mr Lukman claims that in that case the Court found that a waitress involved in that matter would have reasonably expected the undercover (Police) officers to order food during the short time they spent on the relevant premises between ordering drinks and leaving the venue. The officers had been provided with a menu yet had not indicated that they would not be ordering food.
- 109.** While the Authority accepts that Mr Lukman now disputes this event, his account of the facts is very brief and was provided very late in the Complaint process. Mr Lukman's account is provided by way of an unsworn email without any supporting evidence or material from the witnesses that he claims are available to support his version of events. Mr Lukman was invited in the Show Cause Notice to provide any evidence by way of statutory declaration, but has elected not to do so.
- 110.** While it is open to the Authority to consider information provided in an informal or unsworn submission, the form and brevity of the submission goes to the weight that may be given to it. Out of an abundance of caution, the Authority would require further submissions and evidence from the parties to reach a state of satisfaction as to whether or not Particular 2.5 is established.
- 111.** However, having regard to the Authority's findings in respect of Particulars 2.1 to 2.4, Ground 2 is otherwise established. The Authority does not consider it necessary to make a finding with respect to the allegations in Particular 2.5.

DECISION AND REASONS

- 112.** The Authority's disciplinary jurisdiction provided by Part 9 of the 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.

113. 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.

114. 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.

115. 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.

116. 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).

117. The Authority notes that Mr Lukman has not contested all but one of the adverse incidents raised against him, and has provided minimal submissions addressed to the question of disciplinary action, asserting that he always ensured that his staff were RSA trained and that he maintained an incident register.

118. Accepting that this was the case, the multiple contraventions of the liquor legislation established in this Complaint indicate that Mr Lukman has demonstrated a pattern of serious laxity with regard to a range of licensing requirements.

119. The Complainant has proven the occurrence of numerous adverse incidents for which Penalty Notices were issued that were neither paid nor defended in Court, demonstrating a sense of impunity on the part of Mr Lukman towards the licensing scheme provided by the Act.

120. There is little positive evidence or material demonstrating Mr Lukman’s good repute (having regard to character or reputation) or competence as a liquor licensee, for the purposes of section 45(5A) of the Act. With regard to the common law indicia of

fitness and propriety, Mr Lukman has not demonstrated the degree of honesty or ability that is reasonably expected of a licensee in New South Wales.

121. Mr Lukman's recent email signature indicates that he is now working in the insurance industry. Mr Lukman has provided no indication as to any prejudice that would arise should the disciplinary action recommended by the Complainant be taken against him disqualifying him from the liquor industry, or the extent of his involvement in that industry other than as apparent from this Complaint.
122. While Mr Lukman has now transferred the licence to a third party, the potential for Mr Lukman to be in a position to control or influence a licensed business in the future poses a significant threat to public interest in respect of the sale and supply of liquor.
123. The repeated proven contraventions of the Act, committed within a period of only 11 months, include acts of dishonesty when dealing with law enforcement and flagrant breaches of the authorisation conferred by his licence. This conduct calls for a substantial regulatory response that will send a signal to others in the industry who may be contemplating similar conduct, or who may, like Mr Lukman, show little regard for the regulatory scheme.
124. The Authority agrees with the Complainant's submission that a period of disqualification for five (5) years is appropriate in all the circumstances, for the protection of the industry and the general public. The Authority considers that this period of disqualification should commence without delay.
125. The Authority has considered the Complainant's submission that a monetary penalty should be ordered by the Authority. The Authority is satisfied that a monetary penalty is appropriate, given the degree of deliberation and dishonesty involved with the Complainant's repeated contraventions of the Act. The Authority has had regard to the \$6,600 in penalties that have been issued against Mr Lukman and that remain unpaid.
126. The Authority notes that the maximum penalty that may be ordered in respect of an individual (other than in circumstances of aggravation, which have not been specified in this Complaint) when disciplinary action is taken under Part 9 of the Act is 200 penalty units. As the *Crimes (Sentencing Procedure) Act 1999* prescribes that one penalty unit is \$110, the maximum penalty is \$22,000.
127. The Authority is satisfied that an appropriate penalty that acknowledges the escalating seriousness of Mr Lukman's conduct and his apparent disregard for the regulatory and disciplinary process is a penalty in the sum of \$10,000.
128. Finally, the Authority notes the Complainant's uncontested submission that Mr Lukman be ordered to pay the Secretary's costs on the Complaint. The Authority is satisfied, noting that all grounds of the Complaint have been established and having regard to the Complainant's evidence of its costs, Mr Lukman should pay the Secretary's entire costs on the investigation in the sum of \$3,619.27.

ORDERS

129. The Authority orders, pursuant to section 141(2)(f) of the *Liquor Act 2007*, that Mr Marshall Lukman be disqualified from:

- (a) holding a licence, or
- (b) being the manager of licensed premises, or
- (c) being the close associate of a licensee

for a period of five (5) years.

- 130.** The Authority further orders, pursuant to section 141(6)(a) of the *Liquor Act 2007*, that Mr Marshall Lukman and Buena Vista Sydney Pty Ltd (ABN 92 155 877 464) be disqualified from being a person interested in the business or in the conduct or profits of the business carried on under any liquor licence in New South Wales, for a period of five (5) years.
- 131.** The Authority further orders, pursuant to section 141(2)(c)(i) of the *Liquor Act 2007*, that Mr Marshall Lukman pay a monetary penalty in the sum of **\$10,000**.
- 132.** The Authority further orders, pursuant to section 141(2)(l)(i) of the *Liquor Act 2007*, that Mr Marshall Lukman pay to the Secretary of the Department of Industry, the Secretary's costs on the investigation in relation to the Complaint, in the sum of **\$3,619.27**.
- 133.** The Authority's Orders under sections 141(2)(f) and 141(6)(a) of the Act shall commence on the day after the date of this letter. The costs ordered pursuant to section 141(2)(l)(i) shall be paid by Mr Lukman to the New South Wales Department of Industry not later than 28 days after the date of this letter, while the monetary penalty ordered pursuant to section 141(2)(c)(i) of the Act shall be paid to the Department of Industry within 28 days after the date of this letter.
- 134.** Mr Lukman is requested to contact sean.goodchild@justice.nsw.gov.au to make arrangements for payment of the monetary penalty and costs, and to notify the Authority Secretariat via ilga.secretariat@justice.nsw.gov.au when payment has been made.

REVIEW RIGHTS

- 135.** Pursuant to section 144 of the Act, an application for review of this decision may be made to the New South Wales Civil and Administrative Tribunal (NCAT) by the Complainant or any person against whom any disciplinary action is taken, no later than 28 days after those parties receive notification of this decision.
- 136.** For more information, please visit the NCAT website at www.ncat.nsw.gov.au or contact the NCAT Registry at Level 9, John Maddison Tower, 86-90 Goulburn Street, Sydney.

Yours faithfully



Philip Crawford

Chairperson

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