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Samuel Montreal Luke Director, SNS Ventures Pty Ltd Business Owner 31 Lemonwood Cct THORNTON NSW 2322 By express post	Mr Peter Rogers Moroney Rutter Mantach Lawyers 9 Church Street Maitland 2320 <a href="mailto:peter.rogers@mrm.com.au">peter.rogers@mrm.com.au</a>

18 December 2017

Dear Sirs

**Decision Under Section 51(9)(b) of the *Liquor Act 2007* to Revoke Primary Service Authorisation – Soho on Darby, Newcastle (LIQO600493254)**

On 10 July 2017 the Independent Liquor and Gaming Authority (**Authority**) received an application (**Application**) from Sean Goodchild, Director of Compliance, Liquor & Gaming NSW (**LGNSW**) in his capacity as delegate of the Secretary of the NSW Department of Justice (**Secretary**).

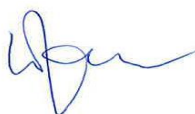
The Application seeks that the Authority exercise its power under section 51(9)(b) of the *Liquor Act 2007* (**Act**) to revoke the primary service authorisation attaching to the on-premises (restaurant) licence for premises known as *Soho on Darby*, located at 171 Darby Street, Cooks Hill 2300, inner Newcastle (**Premises**).

The Authority has decided to **revoke** the authorisation as it is not satisfied that the continuation of this authorisation is in the public interest.

Under section 36C of the *Gaming and Liquor Administration Act 2007*, the Authority is required to publish statements of reasons with respect to those types of decisions prescribed by clause 8 of the *Gaming and Liquor Administration Regulation 2016*. The following statement of reasons has been prepared in the context of a high-volume liquor jurisdiction that requires the publication of statements of reasons as soon as practicable.

Please contact [lga.secretariat@liquorandgaming.nsw.gov.au](mailto:lga.secretariat@liquorandgaming.nsw.gov.au) if you have any enquiries about this letter.

Yours faithfully



Philip Crawford  
**Chairperson**

For and on behalf of the Independent Liquor & Gaming Authority

# STATEMENT OF REASONS

## INTRODUCTION

1. On 10 July 2017 the Independent Liquor and Gaming Authority (**Authority**) received an application (**Application**) from Mr Sean Goodchild (**Applicant**), Director of Compliance, Liquor & Gaming NSW (**LGNSW**) in his capacity as delegate of the Secretary of the NSW Department of Justice (**Secretary**).
2. The Application seeks that the Authority exercise its power under section 51(9)(b) of the *Liquor Act 2007* (**Act**) to revoke the authorisation that has been granted under section 24(3) of the Act (**Primary Service Authorisation**) in respect of the on-premises (restaurant) licence number LIQO600493254 for premises known as *Soho on Darby* located at 171 Darby Street, Cooks Hill 2300 (**Premises**). Cooks Hill is an inner suburb of Newcastle.
3. The Application arose from a submission made by NSW Police to LGNSW dated 16 September 2016 in relation to the Premises, which resulted in the Secretary determining, in a decision dated 12 December 2016, to impose several new conditions upon the licence pursuant to section 54 of the Act (the **New Conditions**).
4. The New Conditions imposed requirements upon the licensee to comply with the “LA10” restriction on noise emissions; use a noise limiter for any amplified entertainment; close all doors and windows of the Premises while amplified music is played; prevent any amplified music on the first floor balcony after 9:00pm on Wednesday through Saturdays; provide a licensed security guard after 8:00pm on Wednesdays through Saturdays; patron capacity of 100 for the first floor of the Premises; observe minimum requirements as to CCTV coverage and comply with NSW Police *Crime Scene Preservation Guidelines* in the event of an act of violence occurring on the Premises.
5. The New Conditions, which commenced effect on 23 December 2016 were in addition to pre-existing licence conditions that prohibit the sale of drinks commonly referred to as “shots” or “shooters” that are designed to be consumed rapidly; prohibit the sale of any more than 4 alcoholic drinks per person at any one time; require that the licensee not permit the stockpiling of more than 2 alcoholic drinks per person at any one time, and require the licensee to be an active participant in the Local Liquor Accord.
6. The Applicant’s case for revoking the Primary Service Authorisation is based upon two contentions. First, that the designated primary purpose of the business carried out on the Premises is an *on-premises licensed restaurant* yet the Premises is in reality operating in the mode of a bar or nightclub, with the primary purpose of selling liquor. Second, that the numerous incidents of alcohol related disturbance or anti-social conduct that are occurring on, or linked to, the Premises is a consequence of the mode in which the licensed business is being operated.

## LEGISLATION

7. Sections 21 to 28 of the Act make provision for on-premises liquor licences.
8. Relevantly, section 22 provides that an on-premises licence must not be granted in respect of any premises if the *primary purpose* of the business or activity carried out on the premises is the sale or supply of liquor.
9. Section 23 requires that an on-premises licence specify the kind of business or activity carried out on the licensed premises or the kind of licensed premises to which the licence relates. More than one kind of business or activity or kind of premises may be specified in respect of the same on-premises licence.

10. Section 24 provides the following:

*(1) An on-premises licence authorises the sale or supply of liquor only if the liquor is sold or supplied for consumption on the licensed premises with, or ancillary to, another product or service that is sold, supplied or provided to people on the licensed premises.*

***(2) Regulations may limit products or services provided on licensed premises***

*A product or service is not to be considered a product or service for the purposes of subsection (1) if it is, or is of a class, specified by the regulations for the purposes of this subsection.*

***(3) Authorisation to sell or supply liquor without other product or service***

*Despite subsection (1), the Authority may, on application by the holder of an on-premises licence, endorse the licence with an authorisation that allows liquor to be sold or supplied for consumption on the licensed premises otherwise than with, or ancillary to, the other product or service referred to in that subsection.*

**Note:** *Section 51 applies to any such authorisation.*

*(3A) However, the other product or service must be available on the licensed premises at all times while the authorisation operates to allow liquor to be sold or supplied otherwise than with, or ancillary to, the product or service.*

11. Once an authorisation under section 24(3) of the Act has been granted, the Authority has the power to vary or revoke such authorisation, from time to time, pursuant to section 51(9)(b) of the Act. The Authority may take such action on its own initiative or upon application by the licensee, the Secretary or the New South Wales Commissioner of Police.
12. Section 51(13) of the Act provides that the Authority may not vary or revoke any licence related authorisation unless it has given the licensee a reasonable opportunity to make submissions and taken any such submissions into account.
13. Section 51(9)(b) is silent as to the express legal test to be satisfied when varying or revoking an authorisation. In those circumstances, the Authority will consider whether taking such action would be in the public interest in respect of the Act. The decision-making process will be informed by the statutory objects provided by section 3(1) of the Act and the Authority must have regard to the statutory considerations prescribed by section 3(2). Section 3 states:

*(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.*

## APPLICATION MATERIAL

14. The Application comprises a 17-page submission letter from the Applicant to the Authority signed, dated and filed on 10 July 2017 by Mr Goodchild (**Application Letter**). Briefly, this document provides a chronology of changes in ownership and operation of the Premises from 1 July 2015 to 5 June 2017; a summary of liquor legislation relevant to the scope of authorisation conferred by an on-premises liquor licence; a summary of observations made by NSW Police and LGNSW Inspectors during their attendance on the Premises between 25 July 2015 and 8 April 2017; photographs taken by LGNSW Inspectors inside the Premises as well as screenshots of CCTV footage, apparently obtained by LGNSW Inspectors during their inspections; sales data for the Premises for the period from 1 July 2016 to 24 September 2016 obtained by Police indicating the contribution made by sales of meals, alcoholic drinks and non-alcoholic drinks during breakfast, lunch and dinner trade to the revenue of the licensed business; a summary of an interview between LGNSW and the former licensee (and current sole director of the business owner), Mr Samuel Luke, held at the Newcastle LGNSW office on 16 January 2017 and the Applicant's submissions on why the Primary Service Authorisation should be revoked.
15. The Applicant describes the past and current regulatory action taken by LGNSW in relation to the Premises, including the imposition of the New Conditions on 12 December 2016 by a delegate of the Secretary under section 54(1) of the Act in response to a submission from NSW Police.
16. The Applicant further contends that on 21 January 2017, Police detected breaches of licence conditions in respect of the Premises and issued the licensee, Mr Samuel Luke, with 2 Penalty Notices. On 27 January 2017, Police detected breaches of the same licence conditions and issued a further 2 Penalty Notices to the licensee.
17. The Applicant advises that at the time of the Application Letter the following related prosecutions for contraventions of the Act are being pursued by LGNSW in the Local Court:
  - A prosecution against Mr Sean Driver, the former licensee and former director of the corporate business owner for four (4) counts of *Sale or supply of liquor contrary to licence* contrary to section 9(1)(b) of the Act allegedly committed on 26 August 2016, 27 August 2016, 2 September 2016 and 9 September 2016.
  - A prosecution against Mr Samuel Luke, the former licensee of the Premises for one (1) count of *Sale or supply of liquor contrary to licence* contrary to section 9(1)(b) of the Act allegedly committed on 9 December 2016.
  - A prosecution against Mr Luke for one (1) count of *Fail to comply with condition of licence* contrary to section 11(2) of the Act allegedly committed on 31 December 2016.
18. The first Annexure to the Application Letter provides detailed descriptions of observations made and photographs taken by LGNSW Inspectors during attendance on the Premises on six occasions between 26 August 2016 and 8 April 2017.
19. A second Annexure provides detailed descriptions of observations made by NSW Police officers during their inspections of the Premises on 19 August 2016, 10 September 2016 and 23 September 2016.
20. A third Annexure provides what the Applicant describes as a "representative sample" of 9 Computerised Operational Policing System records (**COPS Reports**) recorded by NSW Police between 12 September 2015 and 16 July 2016. The Applicant submits that these events establish a pattern of the Premises trading contrary to the primary purpose test for an on-premises licence, trading contrary to the scope of the Primary Service Authorisation and illustrate instances of permitting intoxication on the Premises, the commission of alcohol-

related violence involving patrons of the business and other anti-social behaviour occurring on the Premises.

21. The third Annexure also refers to a statement of Senior Constable Harvey of NSW Police dated 10 November 2016, which forms part of the Application material, in which the officer states that he conducted a search of the Alcohol Related Crime Information Exchange (**ARCIE**) system (a New South Wales Police database) in respect of the Premises for the period 19 December 2013 to 28 June 2015 - a period before Mr Sean Driver became the licensee. This search indicated that during this period, only two (2) incidents were recorded in respect of the Premises – one in respect of an assault and one reported instance of lost property.
22. The Applicant sets out Officer Harvey's submission in his statement of 10 November 2016 that he conducted another search for the period 28 June 2015 to 10 November 2016, which showed a total of **21** incidents, including **5** assaults occurring at the venue for an approximate 17 months period in which the Premises was under the control of Mr Sean Driver and Mr Sam Luke.
23. The following supporting material is provided with the Application Letter:
  - Table of Exhibits to Application
  - Exhibit 01 - OneGov licence record for Premises as at 29 June 2017
  - Exhibit 02 - Google Maps photograph of street view of Premises
  - Exhibit 03 - 2-page diagram of the Premises
  - Exhibit 04 - 6 pages of screen shots of liquor promotions for the Premises
  - Exhibit 05 - 7-page Police Evidence Matrix for COPS events dated July 2015 to August 2016
  - Exhibit 06 - LGNSW Section 54 decision dated 12 December 2016 imposing 6 conditions
  - Exhibit 07 - LGNSW Interview dated 18 January 2017 with Mr Samuel Luke, business owner
  - Exhibit 08 - LGNSW Epper/McCluskey File Note 26 August 2016 on a covert inspection
  - Exhibit 09 - LGNSW Gooding File Note 1 September 2016 on events of 26 August 2016
  - Exhibit 10 - LGNSW Dodd File Note 31 August 2016 on events of 27 August 2016
  - Exhibit 10A - LGNSW Dodd video clip (4 second) taken on Premises on 27 August 2016
  - Exhibit 10B - LGNSW Dodd video clip (5 seconds) taken on Premises on 27 August 2016
  - Exhibit 11 - LGNSW Amber Read File Note 5 September 2016 for 2-4 September 2016
  - Exhibit 12 - LGNSW Dave Simmons File Note 12 December 2016 for 9 December 2016
  - Exhibit 13 - LGNSW Arguelles file note dated 26 April 2017 for events of 8 April 2017
  - Exhibit 14 - Statement in *Police v Soho on Darby* by Cons Parker 4 November 2016
  - Exhibit 15 - Statement re Soho on Darby by Sen Cons Harvey 10 November 2016
  - Exhibit 16 - Statement re Soho on Darby by Sen Cons Sirol 20 October 2016
  - Exhibit 17 - Statement re *Police v Soho on Darby* by Sen Cons Virk 24 October 2016
  - Exhibit 18 - Statement re Soho on Darby by Sgt Ward 31 October 2016
  - Exhibit 19 - Statement re *Police v Soho on Darby* by Sen Const Jordan 27 October 2016
  - Exhibit 20 –Statement re Soho on Darby by Sgt Holstein 26 October 2016.

### **(Application Material)**

### **ADDITIONAL POLICE MATERIAL**

24. On 20 July 2017, the Authority Secretariat provided a copy of the Application to NSW Police and invited Police to update the Authority with any further information pertaining to the matters raised in the Application, noting the time that had elapsed since the Secretary's decision dated 12 December 2016.
25. On 4 August 2017 NSW Police provided the following further material:

- Tab 1 – Complete text of all COPS Reports for events dating from 25 July 2015 to 19 August 2016 summarised in the Police Evidence Matrix that were submitted to LGNSW by Police on 16 September 2016 – some 180 pages of material.
- Tab 2 – Additional Evidence Matrix in respect of further COPS-reported events that occurred during the period from 20 August 2016 to 22 July 2017.
- Tab 3 – Complete text of all COPS Reports referred to in Additional Evidence Matrix – some 90 pages of material.
- Tab 4 – Documents listing 7 alleged offences attributed to licensees of the Premises and the current status of the prosecutions in respect of those matters.
- Tab 5 – Six (6) Penalty Notices issued by NSW Police to Mr Sam Luke between 1 March 2017 and 7 April 2017 and one (1) Penalty Notice issued by NSW Police to Mr Sean Driver on 9 February 2016 in respect of 6 alleged breaches of the Act and 1 alleged breach of the *Security Industry Act 1997*.

**(Additional Police Material)**

**LICENSEE'S RESPONSE TO APPLICATION**

26. On 21 August 2017 the Authority Secretariat wrote to Mr Kris Nabil Hanna, the current licensee of the Premises who (according to LGNSW licensing records) has held the licence since 5 June 2017. This letter provided the entire Application Material and Additional Police Material and invited Mr Hanna to provide any evidence or submissions in reply by 11 September 2017.
27. On 7 September 2017 the Authority received a letter from Mr Peter Rogers, a solicitor from Moroney Rutter Mantach Lawyers, advising that his firm had "received instructions" (without specifying whether from Mr Luke and/or Mr Hanna) in relation to the Application. An extension was sought to provide submissions until 9 October 2017 to enable a "forensic analysis" of sales data and the operation of the business, noting that Mr Samuel Luke, the "former provisional Licensee", is due to appear in the Newcastle Local Court on 11 September 2017 in relation to two prosecutions brought by NSW Police and LGNSW.
28. The Authority granted an extension until 25 September 2017 only, noting that the Authority's determination of the Application was not contingent upon the outcome of any related criminal prosecution.
29. On 25 September 2017, the current licensee Mr Hanna and Mr Samuel Luke, a former licensee and current sole director of the corporate business owner, SNS Ventures Pty Ltd (referred to hereafter as the **Respondents**) provided an unsworn submission letter of 18 pages through their solicitor Mr Rogers (the **Respondents' Submission**).
30. The Respondents' Submission attached the following supporting material:
  - Table 1 – Two simple bar graphs indicating the sales of meals and beverages by the licensed business on a monthly basis for the four months from August to November 2016 (it is unclear whether these graphs represent the proportion of sales of alcoholic beverages or of both alcoholic and non-alcoholic beverages).
  - Table 2 – A further bar graph comparing sales of meals and beverages by the licensed business for each month between August and November 2016.
  - Annexure "A" – 55 pages of screenshots of the Facebook page for *Soho on Darby* taken between December 2016 and September 2017 - including photographs of food and various posts advertising events, food and other promotions at the Premises (including "RnB Ladies Night" on Friday nights, \$4 tacos and DJ entertainment on Wednesday nights, and a Thursday "50c wing night").
31. In summary, the Respondents contend that the evidence relied upon by the Applicant is "dated" in that it concerns events that occurred prior to the imposition of the New Conditions by

LGNSW in December 2016. The Respondents contend that the New Conditions are “achieving their purpose” and for this reason the “status quo should be maintained”.

32. Briefly, the Respondents contend that they are trading “in accordance with the PSA”; that they are seeking consent from Newcastle City Council (**Council**) to alter the development consent for the Premises to enable the operation of the first floor as a “bar” and the ground floor as a restaurant. They submit that they should be given the “opportunity” to do so.
33. The Respondents submit that “no weight” should be given to the prosecutions that are currently underway against Mr Samuel Luke as the proceedings are not yet determined and “no weight” should be given to the prosecutions underway against Mr Sean Driver by reason that he “no longer has any involvement with the business”.
34. The Respondents “do not dispute” the chronology of events set out in the Application Letter, but submit that it is “incomplete” in that it does not recognise that prior to the provisional transfer of the liquor licence to Mr Luke, Mr Luke had actively engaged with NSW Police to address any concerns about the manner in which the business was trading. The Respondents contend that the New Conditions were imposed by LGNSW in December 2016 “in part” as a result of the active steps taken by Mr Luke to address those regulatory concerns.
35. On the Applicant’s contention, made in paragraph 3 of the Application Letter, that evidence gathered by LGNSW and Police demonstrates that the Premises regularly trades as a nightclub during the evenings, contrary to the primary purpose test and the scope of the Primary Service Authorisation, the Respondents make the broad submission that the evidence relied upon is “incorrect, irrelevant or improperly interpreted”. The Respondents further contend that the Premises is in fact trading in accordance with the New Conditions imposed by LGNSW in December 2016.
36. On the Applicant’s contention, in paragraph 4 of the Application Letter, that from 9:00pm to close the first floor of the Premises operates as a nightclub, the Respondents contend that the first floor opens only on Wednesday, Friday and Saturday nights; that food is available on both floors of the Premises at all times (although patrons must order food on the lower floor) and while there is a DJ and a dancefloor on the first floor, there are also tables available for patrons to be served and consume food on that level.
37. The Respondents contend that the first floor is a “relaxation and a light entertainment area” with “mood lighting” that is frequented during later hours by patrons who have “enjoyed a meal in the earlier part of the evening”.
38. The Respondents dispute the Applicant’s contention, in paragraph 5 of the Application Letter, that while patrons consume food on the ground floor earlier in the evening it is “predominantly used as a waiting area” later in the evening for those patrons seeking to access the “first floor nightclub operation”.
39. The Respondents contend that the ground floor is used “throughout each trading night” for food and beverage service.
40. The Respondents dispute the Applicant’s contentions, in paragraph 6 of the Application Letter, that during the evenings the majority of patrons are on the first floor, dancing to music played by a DJ, consuming alcohol and *not* consuming meals at tables.
41. The Respondents submit that these are conclusions “reached by limited observations” and are not supported by the photographs provided by the Applicant which show that the “seated area” is larger than the dancefloor area.

42. The Respondents dispute the Applicant's contention, in paragraph 7 of the Application letter, that sales data for the business shows that during the evenings alcohol sales constitute an average of around 95% of all sales.
43. The Respondents submit that this data concerns the period between 1 July 2016 and 24 September 2016, which was prior to the provisional transfer of the licence to Mr Luke and "significantly before" the imposition of the New Conditions by LGNSW in December 2016.
44. The Applicant submits that this data "skews the food against beverage sales" by including only sales occurring between 9:00pm-12:00am and if the *entire* evening is taken into consideration, the proportion of meal sales is closer to 40%.
45. The Respondents dispute the Applicant's contention, in paragraph 8 of the Application Letter, that the promotion of the venue focuses heavily on the sale and supply of discounted alcohol rather than food. They contend that the business in fact focuses heavily on "promoting meals".
46. The Respondents "strenuously oppose" the Applicant's contentions, in paragraph 9 of the Application Letter, that the former licensee Mr Driver and the current company director Mr Luke have displayed little regard for the objects of the Act and have continued to operate the Premises in the manner of a nightclub despite being put on notice by LGNSW and NSW Police that the business was trading contrary to its designated primary purpose.
47. The Respondents submit that by "coupling" the allegations made against Mr Driver and Mr Luke the Application is "misleading" in that Mr Driver is no longer involved with the licensed business. This "skews" the allegations made against the licensed business over the course of a lengthy period, including a period before the New Conditions came into effect during December 2016.
48. The Respondents submit that they have "displayed significant regard" to their obligations under the Act by engaging with NSW Police prior to the imposition of the New Conditions. They submit that they have ensured that no "significant or repetitive breach" of the Primary Service Authorisation has occurred after January 2017. They have also engaged with Council to obtain advice on requirements to obtain development consent to "split" use of the Premises to facilitate the upstairs area operating as a bar and the ground floor operating as a restaurant.
49. The Respondents add that this action with Council is not to be taken as a "concession" that they are trading contrary to the scope of the licence, but are attempting to "alleviate the concerns" raised by NSW Police and LGNSW and ensure that Mr Luke meets the expectations upon him to be a "responsible business owner".
50. The Respondents dispute the Applicant's contentions, made in paragraph 10 of the Application Letter, that the operation of the Premises as a nightclub during the evenings has resulted in a "significant increase in alcohol-related harm" including patron intoxication, violence and anti-social behaviour requiring "significant regulatory intervention". The Applicant refers to the issue of a Notice under section 102A of the Act, the imposition of the New Conditions under 54(1) of the Act, the issue of four (4) Penalty Notices for breaches of licence conditions and the commencement of prosecutions for offences against the Act.
51. In reply, the Respondents submit that the incidents of alcohol-related harm referred to by the Applicant occurred "well before" the provisional transfer of the licence to the former licensee Mr Luke and before the further provisional transfer of the licence to the current licensee Mr Hanna. They also occurred before the imposition of the New Conditions in December 2016. They submit that all of these matters have "no bearing" on the current Application by reason that they are "not reflective of the operation of the business post December 2016".



52. The Respondents further submit that the Applicant's reference to prosecutions underway in the Local Court is "misleading" by reason that the prosecutions concern "regulatory breaches" of licence conditions rather than incidents involving the occurrence of alcohol-related harm.
53. The Respondents dispute the Applicant's contentions, in paragraph 11 of the Application Letter, that there is evidence that at times during the evenings meals have not been available to patrons in contravention of section 24(3) of the Act and the venue is in "clear breach" of section 22 of the Act, which prohibits the primary purpose of an on-premises (restaurant) licensed venue being the sale or supply of liquor.
54. In reply to this, the Respondents contend that meals *are* available to patrons "at all times whilst the premises is trading" and that this is supported by the "meals data", the "promotional data" and the repeated observations made by Police during inspections during 2017 that the kitchen was "operational". The Respondents also refer to the sales graph data provided in Table 1 to the Respondents' Submissions and the walk-through inspection records contained in the Evidence Matrix in Tab 2 of the Additional Police Material.
55. The Respondents accept the Applicant's statement, at paragraph 20 of the Application Letter, that SNS Ventures Pty Ltd is the current business owner and took over the venue in July 2015 and that Mr Sean Driver, one of its directors, was then appointed licensee.
56. However, the Respondents dispute the Applicant's contention, in paragraph 21 of the Application Letter, that after SNS acquired the business its mode of operation quickly changed from a "traditional restaurant" to a "nightclub" targeting a younger demographic with associated promotions of cheap alcohol drinks, particularly sweet cocktails.
57. The Respondents deny that the venue has shifted away from a "traditional restaurant offering" and submit that this is supported by the "extensive meal sales" on the Premises. They contend that the change in patron demographics is not evidence, in itself, of a nightclub mode of operation but rather is consistent with a "change of ownership" and a "revitalisation of the business".
58. The Respondents state that they "cannot make any submission" in response to the Applicant's contentions in paragraph 22 of the Application Letter that the venue has attracted the attention of local Police following takeover of the Premises by the current business owner, and this has occurred due to a "significant surge in incidents of alcohol related harm".
59. The Respondents "agree" with paragraphs 23-26 of the Application Letter, which describe the location of the Premises. They also agree with the Applicant's description of trading hours for the indoor and outdoor areas and the operation of the Primary Service Authorisation in the indoor area from 10:00am to 12:00am Monday to Saturday and from 10:00am to 10:00pm on Sunday.
60. The Respondents do not dispute the Applicant's summary of licence conditions currently imposed upon the licence relating to minimum CCTV requirements, compliance with the LA10 noise emissions requirement, use of a noise limiter, the closing of all doors and windows whenever amplified music is provided, a requirement for security patrols, a patron capacity of 100 for the first floor, restrictions on drinks and drink stockpiling, participation in the Local Liquor Accord and compliance with NSW Police Crime Scene Preservation Guidelines. However, they submit that these conditions were imposed "effective on 23 December 2016".
61. The Respondents also agree with the description of the Premises provided at paragraphs 28-31 of the Application Letter of a two-storey venue with an upper level balcony, located on a street corner on a "popular restaurant and bar strip near the Newcastle CBD", with three main entry/exit points, one of which opens onto a footpath with outdoor seating which can be utilised under the licence until 10:30pm (Monday through Saturday). The Respondents do not dispute

the Applicant's description of the ground floor as "characteristic of a restaurant" with "bright lighting, tables and chairs" set with "cutlery, serviettes, salt and pepper shakers, drinking glasses and table numbers".

62. However, the Respondents dispute the Applicant's description of the first floor of the Premises in paragraph 32 of the Application Letter insofar as the Applicant contends that it does not function as a restaurant, is "dimly lit" and that signage promotes alcoholic drinks. The Respondents contend that meals are "routinely consumed" on the first floor; that the dancefloor area "only has lowered lighting when music is playing" and is otherwise "well lit" and that signs on the Premises "vary depending on the promotions of the business at any one time" and frequently feature meal deals rather than alcoholic drinks.
63. The Respondents accept the Applicant's account of the history of the licensed business provided in paragraphs 33-35 of the Application Letter, including that the venue was taken over in July 2015 by Mr Sean Driver and Samuel Luke as the directors of SNS Ventures Pty Ltd; that Mr Driver commenced as licensee on 28 July 2015; that on 28 October 2016 LGNSW granted provisional transfer of the licence to Mr Luke but that this was revoked on 21 April 2017 following objection from Police and that on 5 June 2017 LGNSW granted provisional transfer of the licence from Mr Luke to Mr Kris Hanna, who was head of security on the Premises for the previous 2 years.
64. On the Applicant's contentions, in paragraph 36 of the Application Letter, that NSW Police have attended the Premises "over 50 times" between 25 July 2015 to 19 August 2016 and detected a "pattern of trading contrary to the primary purpose test and [the venue's] primary service authorisation" as well as instances of intoxication, alcohol-related violence and anti-social behaviour, the Respondents submit that there is "no evidence" to support these claims.
65. The Respondents further submit that this period of Police inspections occurred prior to either Mr Luke or Mr Hanna holding the licence and prior to the New Conditions imposed by LGNSW commencing effect during December 2016.
66. On the Applicant's contentions, in paragraph 37 of the Application Letter, that on 19 August 2016 NSW Police identified evidence suggesting that the venue was operating as a nightclub, and that inspections on 10 and 23 September 2016 confirmed this, the Respondents submit that this conclusion is "not substantiated".
67. The Respondents submit that the evidence provided in relation to the events of 19 August 2016 appear to be an "Event Reference Summary" created on 20 August 2016 which refers "only to the upper level" of the Premises, whereas the Application Letter describes the venue "as a whole" operating as a nightclub and this contention is "misleading".
68. On the Applicant's contention, in paragraph 38 of the Application Letter, that during 6 inspections performed between 26 August 2016 and 8 April 2017 LGNSW Inspectors determined the mode of operation to be a "nightclub", the Respondents submit that this is "not substantiated".
69. The Respondents reiterate their contentions that meals were available to patrons at all times while the officers were inspecting the Premises. Notwithstanding the photographic evidence provided in the Application Letter they further submit that there is "no documentary material" that "underpins" the Applicant's description of the inspections that were conducted by LGNSW and Police officers provided in paragraphs 39-48 of the Application Letter. The Respondents argue that they are "significantly prejudiced" by "not having the source material" that is referred to in this part of the Application.
70. On the Applicant's contentions, in paragraphs 49-52 of the Application Letter, that the venue heavily promotes the sale and supply of discounted liquor to a younger demographic,

particularly women, including events such as ‘Candy Vodka Saturdays’, ‘Friday Ladies Night’ and ‘Soho on Darby Saturday’ (for which photographic evidence of promotional material is provided), the Respondents submit that these matters should be given “limited to no weight” by reason that they have been “taken out of context” of the venue’s other promotional material which includes food promotions on its website and social media accounts as well as promotional signage on the Premises.

71. The Respondents submit that the promotional material used by the licensed business is in accordance with the Primary Service Authorisation and that the evidence provided by the Applicant predates the imposition of the New Conditions during December 2016.
72. The Respondents refer to the Applicant’s reliance upon sales data that is referred to at paragraphs 53-56 of the Application Letter, indicating that sales of alcohol across all periods of trade from 1 July 2016 to 24 September 2016 amounted to **85.63%** of total sales and that during “dinner” the proportion of liquor sales to total sales was 94.98%.
73. The Respondents submit that this data is “outdated”, but the data nonetheless demonstrates that the Premises would “readily satisfy the primary purpose test for the morning and lunch periods”. They further contend that “platters serving large groups” are not included in this sales data, despite most functions ordering 3-8 platters.
74. The Respondents contend that since food is *available* to be consumed by patrons on the Premises at all times, the licensed business is “meeting the obligations of the PSA” and is “complying with section 24(3) and (3A) of the Act”.
75. The Respondents take issue with the Applicant’s contention, at paragraph 57 of the Application Letter, that the 52 COPS Reports recorded by Police between 25 July 2015 and 19 August 2016 (summarised in the Evidence Matrix that is Exhibit 05 to the Application Material) involve incidents which either demonstrate that the venue has a “pattern of trading contrary to the primary purpose test and its primary service authorisation” or incidents that are relevant to patron intoxication, alcohol-related violence and anti-social behaviour.
76. The Respondents submit that these COPS Reports concern a period of time that was “well before” the imposition of the New Conditions in December 2016 and there is no evidence of any similar incidents occurring since December 2016.
77. The Respondents submit that they are “unable to comment” on the contentions made in paragraphs 59-61 of the Application Letter, which describes NSW Police as having made several applications to LGNSW to address risks arising out of the operation of the Premises. The Applicant specifically notes a submission from NSW Police dated 15 August 2016 seeking the issue of a Direction under section 75 of the Act to restrict the sale of drinks designed for rapid consumption, made on the basis of NSW Police observations of intoxicated patrons during inspections of the Premises on 27 February 2016 and 11 June 2016. The Applicant also refers to the Direction issued by a delegate of the Secretary under section 102A of the Act prohibiting the sale of shots and the promotion or sale of liquor with confectionery and the further submission lodged by NSW Police on 16 September 2016 seeking the imposition of licence conditions under section 54(1) of the Act on the basis of 52 COPS Reports recorded between 25 July 2015 and 19 August 2016, which the Secretary imposed in a further decision dated 12 December 2016.
78. The Respondents concede that, as submitted by the Applicant at paragraphs 62-63 of the Application Letter, that two Penalty Infringement Notices were issued by Police against Mr Luke on 29 January 2017 for alleged breaches of licence conditions (in respect of a failure to close bi-fold windows and the entrance door open at times when patrons were not entering or leaving the Premises, and the noise limiter not being contained within a secure area) with two

further Penalty Infringement Notices for breaches of the same conditions issued by Police to Mr Luke on 27 January 2017.

79. The Respondents note that Mr Luke has pleaded not guilty to all of these alleged offences, that the matter was heard at the Newcastle Local Court on 15 September 2017 and is set down for judgment on 31 October 2017.
80. At paragraph 64 of the Application Letter, the Applicant states that during the course of an interview with LGNSW Inspectors (Exhibit 07) Mr Luke described a typical weekend night trade at the venue as receiving “30-40 bookings downstairs for dinner” and then “between 200-300 patrons would come through on a Friday night with a little bit more on a Saturday night” and that “the services of a DJ would be used for entertainment purposes and people could go upstairs and enjoy a cocktail with family and friends”. The Authority notes that these statements are made at page 8 of the interview transcript.
81. The Respondents “make no comment” in response to the Applicant’s description, in paragraphs 64-67 of the Application Letter, of an interview between LGNSW and Mr Luke, since the record of this interview is contained in Exhibit 07 to the Application Material.
82. On the regulatory action taken against Mr Luke and Mr Driver that is described by the Applicant at paragraph 68 of the Application letter, the Respondents submit that they can “neither confirm nor deny” the prosecutions being pursued against Mr Driver, as he is no longer a director of the corporate business owner and that any outcome should have “no bearing” on this Application.
83. The Respondents submit that Mr Luke has pleaded not guilty to the charge of failing to comply with a licence condition on 31 December 2016 and this matter is set down for hearing at Newcastle Local Court on 20 November 2017.
84. The Respondents accept the submission at paragraph 69 of the Application Letter that the primary purpose of the licensed business conducted on the Premises must at all times be the preparation and service of “genuine” meals “consumed by patrons at a dining table”.
85. The Respondents also accept the submission at paragraph 70 that a primary service authorisation does not permit the primary purpose of a business to be the sale or supply of liquor. The Respondents contend that they *are* operating the business in accordance with its Primary Service Authorisation and that the business conducted on the Premises satisfies the primary purpose test.
86. The Respondents dispute the Applicant’s contention, at paragraph 72 of the Application Letter, that the evidence collected by LGNSW and NSW Police clearly demonstrates that the Premises has been regularly operating as a nightclub from 9:00pm to close and that this supports a compelling case for the revocation of the Primary Service Authorisation.
87. The Respondents submit that the evidence relied upon by the Applicant is “insufficient” to establish that the Premises is being operated contrary to the Primary Service Authorisation that would warrant its revocation. In particular, the evidence post-dating the imposition of the New Conditions in December 2016 does not establish a compelling case to justify revocation of the “licence” as there have been no “significant issues” since that time involving intoxication or alcohol-related violence, and that therefore the new licence conditions are “achieving their purpose” and are “preferable to revocation”.
88. The Respondents make the more specific submission that there are no allegations that the Premises is trading contrary to the Primary Service Authorisation during the *breakfast, lunch or early evening trading periods* and for this reason revoking the authorisation would “significantly interfere” with trading during those periods and is “inappropriate”.

89. The Respondents accept the factors described in paragraph 73 of the Application Letter (evidence of breaches of the section 22 primary purpose test, trading contrary to a primary service authorisation, and any increase in or unacceptable level of alcohol-related harm or detriment to the local and broader community, particularly where this leads to regulatory intervention) as relevant matters that could go to Authority's consideration of whether to revoke a primary service authorisation, but deny that any of those factors weigh against the Respondents in this case.
90. The Respondents agree with the Applicant's contention, in paragraph 74 of the Application Letter, that the Premises previously held a "dine-or-drink authority" under the former *Liquor Act 1982* and that from 30 June 2008 the licence was deemed to have the benefit of the Primary Service Authorisation under the current Act.
91. In response to the Applicant's contention, at paragraph 75 of the Application Letter, that there has never been a formal application for any Primary Service Authorisation for the Premises and therefore no community impact statement has been considered to assess the overall social impact of granting such authorisation, the Respondents repeat that they are currently liaising with Council with a view to applying for development consent to change the permitted use of the upstairs area of the Premises to a bar. Their "understanding" is that the development consent process will "likely involve obtaining expert evidence and opinion and will engage with community impact".
92. In response to the Applicant's summary of submissions in paragraph 76 of the Application Letter, the Respondents counter as follows:
- In response to the submission that there have been "repeated instances detected" where no "restaurant type meals" were available at the Premises, the Respondents contend that there have been no "significant instances" when restaurant-type meals have not been available on the Premises since the December 2016 licence conditions were imposed;
  - The Respondents dispute the submission that evidence of patrons sitting, standing or dancing and consuming alcohol but no food on the first floor of the Premises proves that the primary purpose of the business was the sale and supply of alcohol in breach of section 22 of the Act, and submit that this must be viewed in context of the "evidence in its totality", including the "consistency of the restaurant being available to serve meals";
  - In response to the submission that the promotion of the venue focuses "heavily" on the sale and supply of alcohol to a younger, particularly female, demographic and that promotion of food is "significantly less prominent", the Respondents contend that meals are consistently featured in the promotional material for the Premises;
  - In response to the submission that there has been a "marked increase" in alcohol-related incidents occurring on the Premises since Mr Driver and Mr Luke took over the business in July 2015, the Respondents submit that incidents of alcohol-related harm have occurred since July 2015, but the "relevant consideration" for *this* Application is the occurrence of such incidents *after* December 2016 and there have been "few to no" such incidents since that time;
  - The Respondents accept that the operation of the business is a matter of concern to NSW Police and LGNSW and they submit that they are "actively working towards curing those concerns" by working with NSW Police and seeking advice from Council on a revised development consent.

### **Further Material Provided by the Applicant on Court Proceedings and Penalty Notices**

93. On 24 October 2017 the Authority Secretariat wrote to the Applicant seeking documentation updating the Authority on the outcome of several Penalty Notice matters (discussed in the

findings below) that were noted in the Application Material but pending hearing by Newcastle Local Court on 31 October 2017.

94. On 31 October 2017 the Applicant sent preliminary advice to the Authority by email advising that Penalty Notice number 4920275407 was dismissed on 26 August 2016 at Newcastle Local Court. The Applicant has provided a copy of the JusticeLink record in *R v Sean Mathew Driver* on 26 August 2016 which advises that “2016/00093812-001 / Unlawfully provide persons to carry on security activities” was dismissed. [The Authority notes that the Penalty Notice number is not mentioned in the JusticeLink record]. The Applicant advised that the five defending Penalty Notices (Numbers 4923341098, 4923341107, 4923341125, 4923341116 and 4923341180) are listed for final determination by the Newcastle Local Court on 31 October 2017. The Applicant submits that Penalty Notice number 4928107800 was enforced on 30 June 2017 and has provided a copy of the State Debt Recovery Office data, which supports this submission.
95. On 2 November 2017 the Applicant sent further confirmation of the outcome of the matters heard in the Newcastle Local Court on 31 October 2017, with a Justice Link record of the convictions and orders made. In relation to Penalty Notice numbers 4923341098, 4923341107, 4923341125, 4923341116 and 4923341180, the outcome for each Penalty Notice was recorded as convicted and Samuel Luke was ordered to pay a \$300 fine for each penalty notice (totalling \$1,500).

### **Respondents Final Submission**

96. On 6 November 2017 the Respondents made a final submission by way of a two-page letter through their solicitor Mr Rogers. Briefly, the key contentions and arguments advanced were that the Applicant’s account of the outcome of Penalty Notices listed for judgement on 31 October 2017 is accurate but it should be noted that a *plea of guilty* was entered by Mr Luke in relation to Penalty Notice 4923341180 and that although each Penalty Notice stipulated a fine of \$1,100, the Court reduced the fines to be imposed to \$300 per breach. The Respondents submit that this is a “significant point” as it demonstrates that the Court exercised a discretion regarding the seriousness of the breaches to reduce each infringement, which is “consistent with the breaches being to the lessor [sic] end of the spectrum of seriousness”.
97. The Respondents seek that the decision in relation to the revocation of the licence be delayed until the 6 breach notices issued upon Mr Luke (five of which pertain to alleged breaches of section 22 of the Act and one of which relates to an alleged breach of section 11 licence condition in relation to security), which are listed for hearing on 20 November 2017, have been determined by the Newcastle Local Court.
98. The Respondents further advise that a Town Planner has been engaged to prepare a development application to lodge with Council, with a view to varying and regularising the trade activities of Soho on Darby. The Respondent also requests the Authority delay determination of this Application until Council has finally determined the development application. The Respondent contends that this may provide an outcome that is “preferable to revocation” of the licence.

### **FINDINGS**

99. The Authority notes that the bulk of evidence and material relied upon by the Applicant takes the form of COPS Reports. These are contemporaneous narratives of events attended by reporting Police officers that note their observations of an incident and/or record accounts given to the officers by witnesses to an incident.
100. By way of background to the history of ownership and control of the licensed business, the Authority is satisfied that:

- The Premises is owned by the Crown and leased to SNS Ventures Pty Ltd, as evident from the NSW Land and Property Information Title Search dated 4 October 2017 for Folio Identifier 135/845667 for land described as Lot 135 in Deposited Plan 845667.
  - The previous owner of the business was Caaus Pty Ltd, who owned the business from 9 December 2013 to 28 July 2015, as evident from the OneGov record for the licence.
  - The current business owner is SNS Ventures Pty Ltd, which has operated the business from 28 July 2015 to the present time, as evident from the OneGov record for the licence.
  - The sole company director and secretary of SNS Ventures Pty Ltd at this time is Mr Samuel Luke, as evident from the Australian Securities and Investments Commission Current & Historical Company Extract for the company dated 4 October 2017. Mr Luke has held that role from 1 July 2015 to the present day.
  - Mr Sean Driver was previously a co-director of SNS Ventures Pty Ltd from 1 July 2015 until 6 September 2016.
  - The current licensee of the Premises, as evident from the OneGov record for the licence as at 28 June 2017 is Mr Kris Nabil Hanna. Mr Hanna has held the licence from 5 June 2017 until the present time.
  - The previous licensee, as evident from the OneGov record for the licence as at 28 June 2017, was Mr Samuel Montreal Luke who held the licence from 28 October 2016 to 4 June 2017.
  - The licensee before that, as evident from the OneGov record for the licence as at 28 June 2017, was Mr Sean Driver who held the licence from 28 July 2015 (when SNS Ventures Pty Ltd became the owner and operator of the business) to 28 October 2016.
101. The Application is primarily based upon COPS Reports recording the occurrence of various alleged adverse events that either occurred on the Premises or are linked to the operation of the licensed business on the Premises.
102. Some COPS Reports record adverse observations to the effect that the business did not appear to be operating in the mode of a restaurant, while other Reports record Police attendance upon patrons engaging in misconduct constituting an offence or requiring the intervention of Police.
103. There are a total of **81** COPS Reports before the Authority, provided with the initial Application Material and the Additional Police Material. The time of day for these events range from as early as 11:00 am to as late as 12:25 am. The COPS Reports span a period of time from 25 July 2015 to 22 July 2017.
104. According to the chronology provided in the Application Letter, SNS Ventures Pty Ltd was entered on the licence record as business owner with Mr Sean Driver commencing as licensee on 28 July 2015.
105. It is unclear from one COPS Report dated 25 July 2015 (the only Report predating the official transfer of ownership and control of the Premises to SNS Ventures) who, if someone other than the current business owner, was operating the Premises on that date. Other than this ambiguity, the Authority is satisfied that all of the COPS Reports concern events that occurred after SNS Ventures Pty Ltd assumed ownership and control of the licensed business that is conducted upon the Premises.
106. By reference to the Police description of events in the text of each COPS Report, these events fall into the following broad categories (with some COPS Reports recording events that fall into more than one category).
107. First, **54** COPS Reports record the operation of the licensed business, as observed by NSW Police during business inspections, in a manner that suggests a mode of business operation

that is contrary to the primary purpose test and the primary service authorisation and/or in contravention of other licence conditions. These events demonstrate a pattern of NSW Police observations that the vast majority of patrons in attendance were on the first floor of the venue, with DJ entertainment being provided, with no tables and chairs set up in that area, and with few if any patrons seen consuming a meal. In these reports Police also frequently made observations to the effect that no staff could be seen in the kitchen, that the kitchen was completely clean and upon enquiring with staff they were informed that only a limited menu was available. Of these 54 events:

- **39** occurred at times when a former licensee, Mr Driver held the licence (E59112576, E59039418, E60938982, E60223553, E59808164, E61544680, E60328577, E61553880, E60020848, E61106339, E59516915, E62562784, E60204607, E61098416, E62876883, E116457701, E61402941, E60739446, E61375277, E366289192, E60974005, E62316141, E64061383, E61263152, E62211267, E61993407, E61651417, E62109434, E62275459, E231235896, E63878880, E63926280, E62172332, E65037488, E62895762, E62681107, E63364241, E62902138 and E64499082)
  - **11** occurred at times when former licensee, Mr Luke held the licence (COPS Reports E62465914, E62911656, E61915520, E63312447, E63645952, E63996838, E63998348, E64712079, E64134603, E64440776 and E65203163).
  - **4** have occurred since Mr Hanna became the licensee of the Premises (COPS Reports E63901230, E64804507, E64762317 and E394020092).
108. Second, **9** COPS Reports record patrons of the Premises being involved in assault incidents. All of these events occurred between 25 July 2015 and 20 August 2016, while former licensee and former company director Mr Driver held the licence (COPS Reports E59513978, E59330779, E5910232, E59721572, E217006497 and E64844386).
109. Third, **5** COPS Reports record patrons of the Premises being issued with infringement notices for Offensive Behaviour offences by NSW Police. All of these events occurred between 25 July 2015 and 2 July 2016, while former licensee and former company director Mr Sean Driver held the licence (COPS Reports E59548626, E61416743, E60875140, E118478801 and E61378127). COPS Report E61378127 (2 July 2016) involved an incident where a patron of the Premises was issued an infringement notice in relation to a Malicious Damage to Property offence as well as Offensive Behaviour, and COPS Report E60875140 (9 April 2016) involved an incident where a patron was issued an infringement notice for a Resist/Hinder/Assault Officer offence.
110. Fourth, **8** COPS Reports record offences against licensing legislation allegedly committed by the former licensee and former company director Mr Driver as follows:
- E59691049 – licensee failing to comply with a condition of the licence for the Premises on 17 October 2015 (in contravention of section 11(2) of the Act) by failing to provide CCTV footage taken within the Premises upon request by NSW Police.
  - E60649346 – licensee failing to comply with a condition of the licence for the Premises on 27 February 2016 (in contravention of section 11(2) of the Act) by failing to provide CCTV footage upon request by NSW Police and permitting intoxication on the Premises.
  - E62316141 – actual intoxicated person on the Premises on 11 June 2016 (in contravention of section 11(2) of the Act).
  - E12149602 – licensee permitting intoxication on the Premises on 23 September 2016 (in contravention of section 73 of the Act).
111. Fifth, **4** COPS Reports record alleged offences against licensing legislation by the former licensee Mr Samuel Luke as follows:



- E63438164 – licensee failing to comply with a condition of the licence for the Premises on 23 December 2016 (in contravention of section 11(2) of the Act) by failing to ensure entrance doors were closed at all times except when patrons were entering and existing the Premises.
  - E63901042 – licensee failing to comply with conditions of the licence for the Premises on 21 January 2017 (in contravention of section 11(2) of the Act) by failing to ensure entrance doors were closed at all times except when patrons were entering and existing the Premises and failing to store the venue’s noise limiter in a secure location. Two Infringement Notices issued to Mr Luke (as detailed below).
  - E63101317 – licensee failing to comply with conditions of the licence for the Premises on 27 January 2017 (in contravention of section 11(2) of the Act) by failing to ensure entrance doors were closed at all times except when patrons were entering and existing the Premises and failing to store the venue’s noise limiter in a secure location. Two further Infringement Notices issued to Mr Luke (as detailed below).
  - E63645952 – licensee failing to comply with conditions of the licence for the Premises on 27 January 2017 (in contravention of section 11(2) of the Act) by failing to ensure that patrons do not stockpile drinks. Infringement Notice issued to Mr Luke (as detailed below).
112. Sixth, **2** COPS Reports disclose alleged offences against licensing legislation by a customer of the Premises for which Infringement Notices were issued. Both of these events occurred while Mr Driver held the licence (COPS Report E58672635 relating to a fight on the dancefloor on 16 September 2015, and COPS Report E62391221 relating to an Excluded Person Re-enter Vicinity of Licensed Premises on 10 September 2016).
113. Seventh, **2** COPS Reports concern alleged offences against the *Security Industry Act 1997* in relation to security services provided on the Premises while Mr Driver held the liquor licence (COPS Reports E61713882 on 12 December 2015 and E5972332 on 26 December 2015). A Penalty Notice was issued to Mr Driver by Police on 9 February 2016 in relation to the latter incident, as discussed below.
114. Eighth, **3** COPS Reports record business inspections of the Premises, classified by Police as “other” matters during the period when Mr Driver held the licence. These reports describe the following incidents:
- E60531024 – on 10 February 2016 Police met with Mr Driver and Mr Luke to discuss their concerns regarding the conduct of the Premises including “liquor sales overshadowing food sales, DJ music, overcrowding upstairs, not set tables upstairs”
  - E61993407 – on 2 August 2016 Police attended a Newcastle Liquor Accord meeting and after the Chairperson’s Report and the Treasurer’s Report were delivered, Police noticed that Mr Driver had left the meeting.
  - E61809236 – on 11 August 2016 Police met with Mr Driver and Mr Luke to discuss concerns that the Premises was “trading as a pseudo nightclub”. Police played footage obtained by them of a fight which occurred between patrons on the street outside the Premises on 6 August 2016 (which is the subject of COPS Report E61510737).
115. Finally, **1** COPS Report is classified by Police as a “Miscellaneous offence” and concerns Police observations, made during an inspection on 30 July 2016, that more than 100 patrons were on the first floor of the Premises, which the reporting officer contends is contrary to a Council “fire safety order”. The report notes that a staff member told Police he “thought it was 120”. Police describe referring this matter to Council (COPS Report E62410279).
116. The Respondents submit that much of the Application Material pertains to a period before 23 December 2016, when the New Conditions commenced effect.

117. However, the Authority notes that **15** COPS Reported incidents *post-date* the commencement of the New Conditions and describe the Premises as operating in a manner that is apparently inconsistent with the primary purpose test and licence conditions, insofar as each Report describes DJ entertainment being provided on the first floor of the Premises, with very few if any patrons remaining in the ground floor restaurant area upon entering, but rather preceding upstairs to the bar, dancefloor or balcony areas.
118. The information provided in Penalty Notice No. 4920275407 dated 9 February 2016 issued against Mr Sean Driver was that on 26 December 2015 NSW Police detected an alleged offence of *Unlawfully provide persons to carry on security activities*. However, a Justice Link record provided by the Applicant to the Authority on 31 October 2017 indicates that this Penalty Notice was **dismissed** by Newcastle Local Court on 26 August 2017. The Authority makes no adverse finding in relation to the Premises on the basis of this matter.
119. The Authority is satisfied, on the contemporaneous information provided in Penalty Notice No. **4923341098** issued against Mr Samuel Luke dated 1 March 2017, that on 21 January 2017, NSW Police detected an alleged offence of *Licensee fail to comply with conditions of licence* (which the Authority notes is a contravention of section 11(2) of the Act) in respect of a licence condition requiring the licensee to ensure that both bi-fold windows and entrance door onto Darby Street were closed during times when patrons were not entering or exiting the venue. The Authority is satisfied on the balance of probabilities that this contravention did occur, resulting in the issue of a Penalty Notice against Mr Samuel Luke in the amount of \$1,100. Mr Luke elected to have the Penalty Notice heard by the Newcastle Local Court and on 31 August 2017 was convicted and ordered to pay a fine of \$300, as established in information provided by the Applicant on 2 November 2017 with a Justice Link record for matter 2017/00143235.
120. The Authority is satisfied, on the contemporaneous information provided in Penalty Notice No. **4923341107** issued against Mr Luke dated 1 March 2017, that on 21 January 2017 NSW Police detected another alleged offence of *Licensee fail to comply with conditions of licence* (which the Authority notes is a contravention of section 11(2) of the *Liquor Act 2007*) by reason that the licensee failed to comply with a requirement to ensure that the noise limiter be kept in a locked container when it was in fact accessible to the DJ and members of the public. The Authority is satisfied on the balance of probabilities that this contravention of the Act did occur and resulted in the issue of a Penalty Notice in the amount of \$1,100. Mr Luke elected to have the Penalty Notice heard by the Newcastle Local Court and on 31 August 2017 was convicted and ordered to pay a fine of \$300, as established in information provided by the Applicant on 2 November 2017 with a Justice Link record for matter 2017/00143201.
121. The Authority is satisfied, on the contemporaneous information provided in Penalty Notice No. **4923341125** issued against Mr Luke dated 1 March 2017, that on 27 January 2017 NSW Police detected another alleged offence of *Licensee fail to comply with conditions of licence* (which the Authority notes is a contravention of section 11(2) of the Act) in that the licensee failed to comply with a condition requiring the noise limiter kept in a locked container when it was in fact accessible to the DJ and members of the public. The Authority is satisfied on the balance of probabilities that this contravention did occur and resulted in the issue of a Penalty Notice against Mr Luke in the amount of \$1,100. Mr Luke elected to have the Penalty Notice heard by the Newcastle Local Court and on 31 August 2017 was convicted and ordered to pay a fine of \$300, as established in information provided by the Applicant on 2 November 2017 with a Justice Link record for matter 2017/00123635.
122. The Authority is satisfied, on the contemporaneous information provided in Penalty Notice No. **4923341116** issued against Mr Luke dated 1 March 2017, that on 27 January 2017 NSW Police detected another alleged offence of *Licensee fail to comply with conditions of licence* (which the Authority notes is a contravention of section 11(2) of the Act) in that the licensee failed to comply with a condition requiring that both bi-fold windows and entrance door onto Darby Street were closed during times when patrons were not entering or exiting the venue.

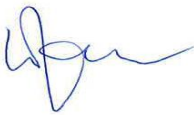
The Authority is satisfied on the balance of probabilities that such contravention of the Act did occur and resulted in the issue of a Penalty Notice against Mr Luke in the amount of \$1,100. Mr Luke elected to have the Penalty Notice heard by the Newcastle Local Court and on 31 August 2017 was convicted and ordered to pay a fine of \$300, as established in information provided by the Applicant on 2 November 2017 with a Justice Link record for matter 2017/00143255.

123. The Authority is satisfied, on the basis of Penalty Notice No. **4923341180** issued against Mr Luke dated 1 March 2017, that on 27 January 2017 NSW Police detected another alleged offence of *Licensee fail to comply with conditions of licence* (which the Authority notes is a contravention of section 11(2) of the *Liquor Act 2007*) in that the licensee failed to comply with a condition requiring that at least one staff member is on the Premises at all times who is able to access and fully operate the CCTV system, in that the manager on duty was unable, upon request, to operate the venue's CCTV system. The Authority is satisfied on the balance of probabilities that this contravention of the Act did occur, resulting in a Penalty Notice being issued against Mr Samuel Luke in the sum of \$1,100. Mr Luke elected to have the Penalty Notice heard by the Newcastle Local Court and on 31 August 2017 was convicted and ordered to pay a fine of \$300, as established in information provided by the Applicant on 2 November 2017 with a Justice Link record for matter 2017/00123834.
124. The Authority is satisfied, on the basis of Penalty Notice No. **4928107800** dated 7 April 2017, that on 18 February 2017 NSW Police detected another alleged offence of *Licensee fail to comply with conditions of licence* (which the Authority notes is a contravention of section 11(2) of the Act) in respect of a condition requiring that the Licensee ensure no patron of the venue is stockpiling more than 2 unconsumed drinks at any one time, in that patrons were able to stockpile drinks on the Premises. The Authority is satisfied on the balance of probabilities that this contravention of the Act did occur, resulting in the issue of a Penalty Notice against Mr Luke in the amount of \$1,100. The Authority is satisfied, on the basis of the document at TAB 4 of the Additional Police Material, that this infringement is listed by Police as "closed enforced". On 31 October 2017 the Applicant provided business records from SDRO confirming that the status of this Notice is "enforced". That is, the Notice has not been paid, set aside, nor defended in Court and has proceeded to enforcement action.
125. The Authority notes that all of the misconduct giving rise to the seven Penalty Notices relied upon by the Applicant occurred at times when the licensed business was owned and operated by the current corporate business owner, SNS Ventures Pty Ltd.
126. Six of these Penalty Notices involved conduct that was detected by NSW Police during January and February 2017 - at times when the Premises was under the responsibility of the former provisional licensee, Mr Samuel Luke.
127. Observations in those 4 COPS Reports were to the effect that the majority of patrons were observed on the first floor or "upstairs"; that between 50-100 patrons were on the Premises and that a DJ was providing live entertainment. The Authority accepts those COPS Reports as an accurate, contemporaneous record of how the business was being conducted at the times of those inspections.
128. The Authority further notes that a COPS Report for 9 June 2017 records a photographer and 2 "glassies" (being staff assigned to collect used glass drinking vessels from the venue) as among staff on the Premises and that at 10:30pm the kitchen was "open but cleaned, no one eating" and that a COPS Report for 1 July 2017 records that at 9:45pm the kitchen was "open however no food could be observed in the kitchen area". The Authority accepts these COPS Reports as an accurate, contemporaneous record of how the business was being conducted at that time.

129. While the NSW Police analysis provided by the Applicant comparing liquor and other sales revenue gives rise to a reasonable suspicion that the venue is not operating in accordance with its primary purpose, particularly during the evening, that financial evidence is somewhat limited, confined to a period of around three months during August to November 2016 and does not appear to cover the entire takings over the course of a trading day.
130. The Authority notes that the financial data provided by the Respondents in Tables 1 and 2 in support of this submission was also quite limited, in the form of limited, unsworn information that is not verified by an accountant pertaining to the same limited period identified by Police. The Respondents have provided some more recent evidence or material by way of social media communications indicating that the Premises offers café style food, particularly breakfast and lunch offerings, which the Authority accepts is occurring. Neither the Police evidence of the revenue breakdown nor the Respondents' information provides a comprehensive or particularly current account of the revenue profile for the Premises.
131. The Respondents have also taken issue with the fact that much of the Application Material pertains to a period before Mr Hanna became the licensee on 5 June 2017, but the Authority notes that the Applicant's case spans the period of ownership by the current licensed business owner. The adverse amenity impacts generated by *patrons* of the business have occurred over a substantial period of time, notwithstanding changes in the individual holding the licence.
132. The Authority notes that whilst COPS Reports contained in the Additional Police Material recording Police walk-throughs on 9 June 2017, 24 June 2017, 1 July 2017 and 22 July 2017 do not record any incident of assault or alcohol-related violence or anti-social behaviour, those reports *do* indicate that, in the evening, the Premises operates substantially in the mode of a bar or nightclub rather than a restaurant, with liquor service being the apparent primary service in evidence at the times of those NSW Police inspections on Level 1 of the Premises.
133. Taking due care with fact finding, on the balance of probabilities, the Authority finds that there is insufficient evidence currently before it to conclude that the licensed business *on the whole* has operated outside of the scope of authorisation provided by its on premises (restaurant) licence. The evidence or material provided by the Applicant gives rise to a reasonable suspicion that the sale of liquor and the provision of live entertainment are the dominant purposes of the business in the evenings.
134. The Authority has considered the licensee's request for the Authority to defer consideration of this Application until further prosecutions, brought by LGNSW against the licensee for alleged breaches of section 22 are heard by the Local Court. The Authority notes that on 20 November 2017, Newcastle Local Court adjourned these matters to 9 February 2018. The Authority does not consider that any further adjournment of the matter is in the public interest, given the substantial body of adverse evidence and material that is before the Authority and that has accumulated over some months.
135. While the Authority has not found that the licensee has contravened section 22 of the Act, the number, range and density of adverse incidents involving alcohol related disturbance and anti-social conduct requiring the intervention or engagement of NSW Police establish that the mode of operation of the licensed Premises is contrary to the public interest, having regard to the statutory objects and considerations in section 3 of the Act.
136. The evidence and material before the Authority indicates that the patrons of this small licensed restaurant are giving rise to a disproportionate level of anti- social conduct and adverse interaction with law enforcement that is at odds with the public interest. The Authority is satisfied that the preferable course of action to serve the public interest would be for the Primary Service Authorisation to be revoked. This will ensure that the licensed business operates more comprehensively in the mode of a licensed restaurant, with the service of liquor ancillary to the service of food at all times. This will more likely than not to reduce the risk

profile of liquor service on the Premises. The venue should no longer attract large numbers patrons who are only looking for another place to drink.

137. The Authority has also rejected the Respondent's submission that the Authority defer consideration of this Application until such time as a new development application is considered by Council. Section 45(3)(c) requires the operator of a licensed premises to demonstrate that any required development consent is in force from the point at which a licence is granted.
138. The Respondents have had a reasonable opportunity to address the Applicant's case and the Authority is satisfied that the licensed business has been operating contrary to the public interest for some months, and the Primary Service Authorisation is facilitating substantial adverse impacts upon local amenity which require an appropriate regulatory response.
139. The Authority notes that notwithstanding the action taken in this matter, the licensed business will remain able to sell or supply liquor in accordance with the designated primary purpose of the business conducted on the Premises - the conduct of a restaurant. The Respondents' submissions to the effect that the Authority not revoke the *licence* are misconceived. That is not the Application before the Authority.
140. The Primary Service Authorisation is **revoked** pursuant to section 51(9)(b) of the Act.
141. In making this decision the Authority has given weight to the consideration in section 3(2)(a) of the Act – the need to minimise harm associated with the misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour) and section 3(2)(c) of the Act – the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.



Philip Crawford  
Chairperson