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8 March 2017

Dear Sir

**Review of Second Strike under Part 9A of the *Liquor Act 2007*  
Plantation Hotel, Coffs Harbour**

On 3 August 2016 the Independent Liquor and Gaming Authority (Authority) received an application (Review Application) made under section 144H of the *Liquor Act 2007* (Act) seeking review of a decision dated 13 July 2016 (Reviewable Decision) made by Mr Feargus O'Connor, Acting Deputy Secretary, Liquor & Gaming NSW (LGNSW) in his capacity as delegate (Delegate) of the Secretary of the NSW Department of Justice.

In the Reviewable Decision, the Delegate decided, pursuant to section 144D of the *Liquor Act 2007* (Act) that a second strike should be incurred in respect of licence number LIQH400109229 for the Plantation Hotel trading at 88 Grafton Street, Coffs Harbour NSW 2450 (Premises).

At its meeting on 22 February 2017, the Authority considered the Review Application and all submissions received in relation to it. Having regard to the relevant considerations in section 144G(2)(c) and the overarching statutory objects and considerations provided by section 3 of the Act, the Authority has decided, pursuant to section 144I of the Act, to **confirm** the Reviewable Decision.

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 6 of the *Gaming and Liquor Administration Regulation 2016*. The 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 the Authority Secretariat via email to [ilga.secretariat@justice.nsw.gov.au](mailto:ilga.secretariat@justice.nsw.gov.au) if you have any advice or 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 3 August 2016, the Independent Liquor and Gaming Authority (Authority) received an application for review (Review Application) made by Plantation Hotel Holdings Pty Ltd (Review Applicant) the corporate licensee and business owner of the Plantation Hotel, Coffs Harbour located at 88 Grafton Street, Coffs Harbour NSW 2450 (the Premises).
2. The Review Application is made under section 144H of the Liquor Act 2007 (Act) in respect of a decision dated 13 July 2016 to incur a second “strike” in relation to the Premises (Reviewable Decision), made by Mr Feargus O’Connor, Acting Deputy Secretary, Liquor & Gaming NSW (LGNSW) in his capacity as delegate (Delegate) of the Secretary of NSW Department of Justice (Secretary). The Reviewable Decision does not indicate that the Delegate has yet turned his mind to whether remedial action should be taken pursuant to section 144E of the Act in response to the second strike.
3. The Authority notes, by way of background, that the Premises has the benefit of the hotel liquor licence number LIQH400109229 which permits the sale or supply of liquor for consumption on the Premises and off the Premises. An extract from the *OneGov* record of the licence as at 28 June 2016, which forms part of the material before the Authority, indicates that an extended trading authorisation attaches to the licence enabling the hotel to sell or supply liquor for consumption on the Premises from Monday to Saturday between 5:00am and 5:00am and on Sunday from 10:00am to 12:00 midnight.
4. At the time of filing the Review Application, licensing records indicated that the approved manager of the hotel was Mr Daniel Howard Knox and the Premises owner was another company, Tenakau Investments Pty Ltd. The licensee, business owner, approved manager and the Premises owner at the time of the Review Application all continue to occupy their respective roles at the time of this decision.
5. The Reviewable Decision discloses that on 8 February 2015, the prescribed offence of *licensee permit intoxication on licensed premises* was detected by NSW Police officers on the Premises. On 2 June 2015, the corporate licensee was convicted of this offence at the Coffs Harbour Local Court. As noted by the Delegate, since no strike was then in force against the licence, the conviction automatically resulted in a first strike being incurred (pursuant to the operation of sections 144C and 144D of the Act).
6. The Reviewable Decision further discloses that on 6 August 2015, a second prescribed offence of *licensee permit intoxication on licensed premises* was detected by NSW Police on the Premises. Police issued a Penalty Notice dated 3 September 2015 in respect of this offence, which was paid on 5 January 2016. As noted by the Delegate, through the operation of section 144C of the Act, payment of this Penalty Notice was deemed to constitute “commission” of the prescribed offence for the purposes of Part 9A of the Act. This enlivened the Secretary’s discretion, under section 144D of the Act, whether a second strike *should* be incurred.
7. Without repeating the detail of the Reviewable Decision, on the Delegate’s analysis of the facts of the prescribed offence and the statutory considerations provided by section 144G(2)(c) of the Act, most of those factors pointed towards incurring a second strike. Notably, since this was the *second* permission of intoxication offence committed on the Premises since 2015, the Delegate was satisfied that taking action other than incurring a strike would not be appropriate.
8. The Delegate found that the licensee’s failure to adequately implement appropriate controls to guard against recurrence of the same prescribed offence suggests an

“indifference or disregard” for its obligations under the Act and the high risk of alcohol related harm that *may* arise from the offence of permitting intoxication on licensed premises.

9. On the requirement in section 144D of the Act for a decision maker to consider whether a strike *should* be incurred, the Delegate observed that this test requires consideration of harm that *may* have resulted from the commission of this *type* of prescribed offence (that is, permitting intoxication on licensed premises). This, it was said, necessitates a measure of extrapolation from the facts of the offence and the consideration of the nature of harm that may have arisen from permitting intoxication. That is, the Delegate was not confined to considering the *actual* harm that flowed from the intoxicated patron’s conduct on this occasion.
10. The Delegate was satisfied that the potential harms that *may* have resulted from permitting intoxication on licensed premises ranged from “harassment of other persons” to “injury to the intoxicated person or others” to “undue disturbance to the neighbourhood” and “assault on hotel staff or a member of the public”.
11. The Delegate also observed that “repeat offending” with regard to the permission of intoxication adversely affects industry and community confidence in the regulatory environment. This, the Delegate found, was compounded by the fact that this hotel is located in a “lower socio-economic area” where there is a prevailing “propensity for alcohol related violence and alcohol related harm”.

#### **THE “THREE STRIKES” SCHEME**

12. The disciplinary scheme provided by Part 9A (the Scheme) was inserted into the Act by the *Liquor Amendment (3 Strikes) Act 2011*. The Scheme provides a supplementary scheme for taking disciplinary action against participants in the liquor industry that is separate from, and does not limit, the pre-existing disciplinary provisions contained in Part 9 of the Act.
13. The Scheme is reasonably complex, with provisions designating, *inter alia*:
  - (i) those offences against the Act that are deemed to be “prescribed offences” which may potentially form the basis of a strike;
  - (ii) the circumstances in which a “relevant person” is deemed to have “committed” a “prescribed offence” in relation to a liquor licence for the purposes of the Scheme;
  - (iii) the parties who must be consulted before a decision maker (the Secretary in respect of a second strike or the Authority in respect of a third strike) may decide that a second or third strike should be “incurred”;
  - (iv) discretionary factors that must be considered before a decision maker may decide that a second or third strike should be “incurred”;
  - (v) the circumstances in which a strike commences, or ceases, to be “in force” against a licence.
14. Briefly, for a “strike” to be incurred, a relevant person must be deemed to have “committed” a “prescribed offence” in relation to the licensed premises in question.
15. The definition of “prescribed offence” provided by section 144B of the Act identifies eleven types of offences. The section states:

## 144B Definitions

**prescribed offence**, in relation to a licence, means an offence against any of the following provisions of this Act (or a provision of this Act or the regulations that is prescribed by the regulations) that was committed on or in relation to the premises to which the licence relates:

...

(c) section 73(1)(a) or (b) (permitting intoxication or indecent, violent or quarrelsome conduct),

16. Section 144C sets out those circumstances in which a “prescribed offence” is *deemed* to have been “committed” for the purposes of the Scheme. The section states:

### 144C Committing a prescribed offence

- (1) For the purposes of this Part, a person commits a prescribed offence if:
- (a) a court convicts the person for the offence (whether or not it imposes any penalty), or
  - (b) an amount is paid under a penalty notice in respect of the offence, or
  - (c) a penalty notice enforcement order under the Fines Act 1996 is made against the person in respect of the offence.
- (2) However, if:
- (a) the conviction is overturned on appeal, or
  - (b) the person elects, after an amount is paid under the penalty notice, to have the offence dealt with by a court, or
  - (c) the penalty notice, or the penalty notice enforcement order to the extent that it applies to the penalty notice, is withdrawn or annulled,
- any strike based on the conviction, penalty notice or enforcement order is revoked and any remedial action taken as the result of the strike ceases to have effect.
- (3) Prescribed offences that are committed in relation to a particular licence within a single 24-hour period are taken, for the purposes of this Part, to be a single prescribed offence.

## Incurring a First, Second or Third Strike

17. Under the Scheme, a first strike is automatically incurred once a prescribed offence is deemed to have been “committed” within the meaning of section 144C of the Act. By contrast, incurring a second or third strike is a *discretionary* matter, requiring that an assessment be made by a decision maker whether a strike should be incurred pursuant to section 144D, having regard to a number of statutory considerations in section 144G of the Act.

## Review of Second Strike

18. An application may be made to the Authority under section 144H of the Act for review of a “reviewable decision” made by the Secretary to incur a second strike, within 21 days of such decision being notified.
19. A reviewable decision is defined by section 144B of the Act as a decision made under Division 2 of Part 9A. Relevantly to this matter, that includes decisions with respect to the

incurring of a second strike under section 144D, and decisions made with respect to the taking of remedial action in respect of a second strike under section 144E.

20. Section 144I of the Act provides that, in determining an application for review, the Authority may confirm the decision that is the subject of the application, or vary that decision, or revoke that decision.

## MATERIAL BEFORE THE DELEGATE

21. The material before the Delegate that is now before the Authority comprises the following:

- Three-page internal briefing from LGNSW Compliance Staff to the Delegate recommending that a second strike be incurred dated 6 July 2016;
- **Attachment 1:** NSW Police Computerised Operational Policing System (COPS) event number E57955709 detailing covert Police observations at the Premises on 6 August 2015 (the date on which the second prescribed offence occurred);
- **Attachment 2:** Section 144D(2) Decision dated 13 July 2016 (the Reviewable Decision);
- **Attachment 3:** SDRO data extract dated 15 December 2015 indicating that Penalty Notice 4926239340 in the amount of \$1,100 for the offence of *Licensee permit intoxication on licensed premises* which occurred at 9:20pm on 6 August 2015 at the Premises was issued on 3 September 2015. The status of this Penalty Notice as at 15 December 2015 was "Closed Paid";
- **Attachment 4:** NSW Police submission dated 7 January 2016. In this submission, Police argue that a second strike should be incurred on the licence for the Premises. The Police case may be summarised as follows:
  - o The Premises is currently (as at 7 January 2016) a "Level 1" declared premises under Schedule 4 to the Act, with 21 assaults having occurred on the Premises during the "nominated period". Prior to 1 December 2015 the Premises was a "Level 2" venue with 16 assaults attributable to the Premises;
  - o On 7 February 2015 Police conducted observations on the Premises and detected two incidents of intoxication and two incidents of breaching licence conditions. The first intoxication incident occurred at 11:45pm when Police recorded details of an intoxicated male's behaviour over 15 minutes, including impaired speech, balance and coordination. The second incident occurred at 12:32am where a male appeared intoxicated and identified as an "off duty" security guard employed by the hotel;
  - o The incidents detected on 7 February 2015 led to the incurring of a first strike against the licence. However, Police contend that this event has not been a deterrent to the approved manager or staff of the hotel;
  - o When Police attended the Premises on 6 August 2015, a further two offences of permitting intoxication were detected by Police who observed that not all of the hotel patrons had their identifications scanned upon entry (including the covert Police officers);
  - o Police also received a report regarding a patron who attended the Premises on 27 November 2015, when the Premises was holding a liquor promotion offering \$4 spirits and cocktails, who allegedly consumed between 10 and 12 drinks between 9:30pm and 11:30pm, became physically ill and vomited, was escorted by an RSA Marshal to the hotel's courtesy bus and taken to the hotel she was staying at. The female patron was placed in her room by the male

- RSA Marshal and left there alone “with no consideration as to the duty of care and ongoing welfare of the female”.
- Upon review of these incidents and the ongoing detection of breaches, inappropriate liquor promotion and violence, Police assert that the issue of penalties has not acted as an appropriate or effective deterrent for the venue and its licensee, management and staff.
  - Police attach to this submission an Evidence Matrix summarising numerous incidents occurring on the Premises or involving patrons of the hotel that were recorded on COPS (COPS Reports) during 2015. Police also provide a copy of the Local Licensing Agreement signed on behalf of the hotel by Mr Dennis Morson (the previous approved manager) dated 4 March 2015.
  - **Attachment 5:** Submission by JDK Legal on behalf of the licensee dated 4 May 2016. In this submission the licensee argues that a second strike should not be incurred upon the licence. The key points may be summarised as follows:
    - The Coffs Cup Race Day (6 August 2015, the date the second prescribed offence occurred) is “no ordinary day” in Coffs Harbour and Police “expected” that all licensed premises in the area would experience problems with intoxication;
    - Having regard to the circumstances of the offence, including the “exponentially” increased number of patrons inside the Premises and the “lack of harm” resulting from the offence, no strike should be incurred;
    - The Secretary would “fall into error” were he to impose a strike based on a consideration of what “hypothetical harm” may have flowed from the breach without having regard to the “actual incident”;
    - It would not be appropriate to take remedial action in circumstances where there is currently an application by Police for the imposition of conditions under section 54 of the Act;
    - Parliament did not intend a hotel to be heavily penalised for harm that “did not eventuate”;
    - “Harm” is not defined in the Act and should therefore bear its ordinary English meaning, as defined in the Oxford Dictionary as “physical injury, especially that which is deliberately inflicted”;
    - It is expected that the Premises will return to a Level 3 declared premises in the next round, following the current “downward trend” of violent incidents occurring at the Premises;
    - The hotel has voluntarily adopted new measures including an ID scanner, strict RSA training to both staff and security, increased amount of free water bottles, employment of a new security firm and a new Venue Safety Plan submitted to the (then) OLGR on 6 October 2015.
  - Attached to this submission are copies of the following documents:
    - The hotel’s submissions, dated 25 February 2016, on the potential imposition of licence conditions pursuant to section 54 of the Act;
    - List of “Second and Third Strike Decisions” made by the Authority between 11 June 2013 and 25 February 2016;
    - Police Incident Register recording no violent incidents and over 130 removals from the Premises on 6 August 2015;
    - Security sign-on sheet for 6 August 2015;
    - OneGov liquor licence extract for the Premises as at 1 February 2016;
    - Management Plan for the Premises dated February 2015;
    - Coffs Harbour Liquor Accord Terms signed on behalf of the Hotel by Mr Morson dated 24 April 2015;

- Venue Safety Plan for the Premises (undated) signed by Mr Knox.
- **Attachment 6:** OneGov liquor licence extract for the Premises as at 28 June 2016;
- **Attachment 7:** Extract of relevant legislation.

## REVIEW APPLICATION MATERIAL

22. The Review Application was filed with the Authority on 3 August 2016 by the Review Applicant's solicitor, Mr Andrew Wennerbom of the law firm Lands Legal.
23. In a covering legal submission the Review Applicant submits that the Delegate applied "an incorrect test" when considering whether a second strike *should* be incurred because of the seriousness of any harm that may have resulted from or been associated with the commission of the offence pursuant to section 144D(2)(c) of the Act.
24. The Review Applicant later submits that the types of harm to which regard may be had when considering an intoxication offence include harm associated with anti-social or violent behaviour, health outcomes, disturbance to the good order of the neighbourhood, underage drinking and undermining public confidence in the liquor regulatory system.
25. The Review Applicant submits that "the facts [of this offence] do not fall within any of the above matters" in that, in the circumstances of this offence, the intoxicated person in question was not violent or anti-social or disruptive to the good order of the neighbourhood, nor was he a minor, nor did his actions undermine the liquor industry. The Review Applicant contends that the observations of Police in the COPS Report indicate that the intoxicated person "verged on the minimum loss of senses to categorise someone as intoxicated triggering a prescribed offence".
26. The Review Applicant further contends that this male patron, who was behaving in a boisterous rather than violent manner, could not be said to have caused, or even *potentially caused*, harm. The Review Applicant submits that there is no other evidence that establishes any harm caused or potentially caused by the commission of the prescribed offence that meets the threshold of "serious harm" that is envisaged by section 144D(2)(c) of the Act.
27. In relation to the size and capacity of the Premises, the Review Applicant submits that the Delegate has not "fairly considered" the "unusual nature and rarity" of the event which took place at the Premises on 6 August 2015 and that it was "highly prejudicial and unfair" for the Delegate to take at "face value" the submission made by the licensee's previous representatives, JDK Legal, that the increased patronage at the Premises would not impact the ability of the hotel management and staff to comply with the Act. The Review Applicant submits that the Delegate erred in "not giving the Hotel credit" for the systems in place to meet the additional demands of the increased patronage on Coffs Cup Day, including additional security, free bottled water, early lockout, extra staff and security training.
28. In relation to the Delegate's findings regarding the "recidivist" nature of the offence, the Review Applicant submits that the facts presented to the Delegate "clearly indicate" that the hotel did not have a disregard or indifference to its obligations under the Act and that the Delegate has not "fairly considered" this evidence. The Review Applicant contends that more than 130 patrons were removed from the Premises due to "RSA observations" made by "vigilant and proactive staff and security" and that "there was no violence at the hotel on this night".

- 29.** Attached to the Review Applicant's legal submission is a copy of the *Plantation Hotel Review* prepared by the Premises owner's consultant, Hospitality Compliance Solutions dated 1 August 2016. The conclusions may be summarised as follows:
- Trading hours for the hotel should be reduced on Friday and Saturday nights to end at 12 midnight rather than 3:00am, requiring the business to not operate a nightclub;
  - Disk jockeys and nightclub performing acts booked for entertainment at the Premises (including 16 events over the next two months) should be cancelled;
  - New Compliance Folder information should be implemented correctly;
  - A new House Policy should be finalised and implemented;
  - A Staff Meeting Policy should be drafted along with agenda and minute templates;
  - Further review and analysis of entertainment operations, functions or events should be carried out once the licensee and business owner have defined what type of customers or clientele it wishes to target in line with its new business model;
  - Comprehensive and individual event management plans for future hotel entertainment should be developed;
  - A more detailed hotel barring policy and procedure should be developed;
  - Security guard operations and training regime and CCTV record-keeping procedures should be reviewed;
  - Training material for RSA, licence conditions and other key compliance areas should be developed.
- 30.** The following further material accompanies the Review Applicant's submission:
- "Plantation Booking Summary" detailing the names of acts and performance dates which have been marked as "cancelled" between 23 July 2016 and 30 September 2016;
  - One-page document detailing the obligations of staff in relation to "RSA and RCG" and "Voluntary Self-Exclusions";
  - Photographs of mandatory and voluntary signage at the Premises.
- 31.** The Review Applicant submits that the Premises owner, Tenakau Investments Pty Ltd, has commissioned an independent review of the hotel's operations by Hospitality Compliance Solutions. The Review Applicant contends that the hotel has immediately adopted the recommendations made by the consultant with effect from 1 August 2016 - that trading hours on Friday and Saturday nights be reduced from 3:00am to 12:00 midnight (meaning that the business will not operate as a nightclub) and that disk jockeys and nightclub performing acts (which included some 16 pre-booked events over the following 2-month period) will be cancelled.
- 32.** The Review Applicant contends that the adoption of these recommendations constitute "major structural initiatives or concessions" that should "sway" the Authority to not impose a second strike.

## **CONSULTATION ON REVIEW**

- 33.** On 1 November 2016 the Authority Secretariat provided copies of the Review Application material and the LGNSW Material to NSW Police, LGNSW and BOCSAR. On 9 September 2016 LGNSW sent an email to the Authority advising that it did not propose to make any further submission. On 23 September 2016 BOCSAR sent an email to the Authority advising that it did not intend to make a submission.
- 34.** On 1 November 2016 the Authority provided the Review Applicant with a bundle of all material before the Delegate, as provided to the Authority by LGNSW, and invited any further written submissions on the review. On 2 November 2016 the Authority sent a



similar invitation to make submissions to the Premises owner, Tenakau Investments Pty Ltd.

35. On 22 November 2016 the Authority received a submission from the Review Applicant via Mr Wennerbom. The submission attaches a letter dated 7 September 2016 from LGNSW to Mr Knox, the approved manager of the Premises, advising that since there were fewer than 12 incidents of violence recorded on the Premises during the assessment period between 1 July 2015 and 30 June 2016, a revised Venue Safety Plan for the venue may be submitted to LGNSW, by 10 October 2016, to demonstrate why the Premises should be removed from Schedule 4. The LGNSW letter attached a copy of the LGNSW *Violent Venues Scheme Fact Sheet*.
36. On the basis of this communication from LGNSW the Review Applicant expects that the Premises will, upon the next assessment, be removed from the list of violent venues in Schedule 4 and that any concerns arising pursuant to the Authority's analysis of section 144G(2)(c)(i) of the Act will be "overcome".
37. The Review Applicant submits that the reduction in the number of acts of violence recorded on the Premises during the most recent Schedule 4 assessment period has been achieved through "radically changing" the business model - by not booking live bands or operating a nightclub on weekends, by cancelling all events planned for the hotel after 1 August 2016, by focusing on "gastro pub" style food offering and by targeting families.
38. The Review Applicant contends that the financial cost of this shift in the hotel's business model has been "very significant" and has resulted in three months of losses whereas previously the hotel was profitable. Nevertheless, the business is committed to this change in approach.
39. The Authority notes that no submissions on the review were received from the Premises owner, Tenakau Investments Pty Ltd or NSW Police.
40. On 9 January 2017 the Authority wrote to the Review Applicant and the Premises owner advising that it was still deliberating on the matter but would consider taking alternative regulatory action to incurring a strike *if* the licensee consented to the imposition of a new, enforceable licence condition pursuant to section 53(2)(b) of the Act preventing the operation of the Premises as a nightclub and if the licence consented to variation of the extended trading authorisation, pursuant to section 51(9)(b) of the Act, so that licensed trading ceased at 12:00 midnight on Friday and Saturday.
41. On 12 January 2017 the Review Applicant wrote to the Authority through Mr Wennerbom agreeing to the Authority's proposal but only if those regulatory measures were subject to a time limit of two years running from 13 January 2017. The Review Applicant submits that while it has "no intention" of reactivating a nightclub, the objectives of the legislation can be achieved through this counter proposal.
42. On 31 January 2017 the Authority Secretariat wrote to Mr Wennerbom advising that the Authority would require the imposition of ongoing enforceable licencing measures to contemplate not incurring a strike. The Review Applicant was invited to reconsider the Authority's proposal for alternative regulatory action.
43. On 1 February 2017 the Review Applicant advised the Authority that it does not agree to the Authority's proposed alternative regulatory action. The Review Applicant reiterates that it "fully intends to comply with" the proposed measures set out in its letter of 12 January 2017 (not operating a nightclub or exercising the extended trading authorisation on Friday and Saturday nights) *until 13 January 2019*.

44. The Review Applicant accepts that, as a consequence of taking this position, the Authority may decide to confirm the Reviewable Decision. The Review Applicant advises that it would be “content for this letter to be used against it” should the licensee seek to operate the hotel business in a manner contrary to the licensee’s counter proposal before 13 January 2019.
45. On 9 February 2017, in response to a request from the Authority Secretariat for the Review Applicant to provide a copy of the latest Plan of Management for the Premises, Mr Wennerbom provided a Plan of Management dated 27 July 2016.

## DECISION ON REVIEW AND REASONS

### Findings on Relevant Statutory Considerations in Section 144G(2)(c) of the Act

46. The Authority has considered the Review Application and all of the submissions, evidence or other material before it pertaining to the Review Application.
47. By reference to section 144G(2)(c)(i) of the Act (which requires a decision maker to consider whether the licensed premises were “declared premises” within the meaning of Schedule 4 when the offences that caused a strike are alleged to have been committed) the Authority is satisfied, on the basis of Schedule 4 to the Act, that the Premises is not currently a “declared premises”. However, the Premises was a declared premises at the time that the prescribed offence that is now under consideration occurred, as established by the information provided by the licensee and Police to the Delegate about the venue’s regulatory history. That is, the hotel has a recent history of acts of violence being recorded on the Premises, though this position has somewhat improved at the time of this decision.
48. By reference to section 144G(2)(c)(ii) of the Act (which requires a decision maker to consider the size and patron capacity of the licensed premises and how this may impact on the ability of the licensee or manager to prevent the commission of prescribed offences) the Authority finds, on the basis of the Police submission to the Delegate dated 7 January 2016 and the submission from JDK Legal dated 4 May 2016, that the Premises has an operating capacity of **1,180** patrons and that on 6 August 2015 there were approximately **900-920** patrons at the Premises.
49. The Authority finds that the measures taken by hotel management on the date of the second prescribed offence, being Coffs Cup Race Day (6 August 2015) were substantial measures. The Authority is satisfied, on the information provided in the licensee submission dated 4 May 2016 that its harm management measures included 13 security guards, providing free bottled water, removing 130 patrons from the venue that day. The information about the size and patron capacity of the hotel indicate that the large scale and considerable patron capacity may present challenges in ensuring compliance on those occasions where a larger than usual number of patrons attend the hotel.
50. The Authority notes that the prescribed offence of intoxication on premises was detected by Police *despite* the substantial measures taken by hotel management. While the Authority accepts that Coffs Cup Race Day is a major local event, the Review Applicant has not suggested that the hotel does not otherwise trade at or over 75% patron capacity on other busy trading days or evenings. On the information before it, the hotel’s scale and patron capacity are ongoing risk factors that are more likely to increase the risk of prescribed offences occurring on the Premises, rather than any particular event.
51. By reference to section 144G(2)(c)(iii) of the Act (which requires a decision maker to consider the history and nature of the commission of prescribed offences by relevant persons in relation to the licence or on or in relation to the licensed premises) the Authority is satisfied, on the basis of the submission from Police dated 7 January 2016, that

offences involving the permission of intoxication on the Premises have occurred on at least two occasions during the past two years, giving rise to the first strike and now the second strike under review.

52. By reference to section 144G(2)(c)(iv) of the Act (which requires a decision maker to consider the history and nature of violent incidents that have occurred in connection with the licensed premises) the Authority is satisfied, on the basis of the Police submission dated 7 January 2016, that the Premises has been listed on Schedule 4 of the Act in Round 13 (Level 2), Round 14 (Level 1) and Round 15 (Level 2). That is, the hotel has, in recent years, recorded repeated levels of violence on the Premises that have attracted the imposition of special licence conditions pursuant to Schedule 4 to the Act. The Authority is also satisfied, noting the current Schedule 4 to the Act, that violence recorded on the Premises has decreased to a point where the venue is not a declared premises at the time of this decision. The Authority has had regard to the information provided in the Police Evidence Matrix summarising numerous adverse incidents recorded on the COPS database whereby Police have been engaged with incidents involving violence on the Premises or involving patrons of the hotel near the Premises during 2015. The credibility of that information has not been subject of challenge and the Authority accepts, on the balance of probabilities, that those events occurred on or in connection to the Premises.
53. Section 144G(2)(c)(v) of the Act requires a decision maker to consider whether other action (that is, other than incurring a strike) would be preferable. The Authority has reviewed all of the material before it and notes that both LGNSW and Police are of the view that action other than incurring a second strike on the licence for the Premises is not appropriate, noting the repeat incidence of intoxication on the premises. Police note that there are several harm reduction conditions on the licence already and submit that in light of the recent Schedule 4 history of the Premises the incurring of a second strike is the most appropriate response.
54. The Authority has considered the changes in the business model of the hotel that were outlined by the licensee in its submissions to the Delegate and the Review Applicant in submissions on the Review. The Authority accepts, on the basis of the Review Applicant's submission dated 22 November 2016, that the recommendations made in a report dated 1 August 2016 by Hospitality Compliance Solutions, a consultant engaged by the Premises Owner have been voluntarily implemented from 1 August 2016.
55. The Authority accepts that the current licensee and business owner are *currently* committed to a change in this business model away from its previous nightclub themed entertainment. The Authority accepts the Review Applicant's submission that the suite of voluntary measures introduced by the licensee at the recommendation of the Premises owner's consultant have come at some (albeit unquantified) financial cost to the business owner.
56. The Review Applicant's commitment to harm management is qualified by the licensee's reluctance to accept licence conditions that would make *enforceable* and *ongoing* the most substantial measures upon which the Review Applicant now relies – the move away from nightclub entertainment and midnight closing on Friday and Saturday.
57. Given that the purpose of the Scheme is to prevent the occurrence or recurrence of prescribed offences, and having regard to the conditions presently on the licence and the position taken by the Review Applicant in response to the Authority's offer of alternative licensing action, the Authority is not satisfied that action in the alternative to incurring a strike is appropriate in the circumstances of this large, late trading venue.
58. By reference to section 144G(2)(c)(vi) of the Act (which requires a decision maker to consider whether there have been any changes to the persons who are the licensee,

manager or business owner), the Authority is satisfied, on the basis of the Reviewable Decision and the *OneGov* licence record for the Premises, that the approved manager for the Premises has changed since the date that the second prescribed offence was detected by Police. On 13 August 2016, the approved manager for the Premises became Mr Knox. The corporate licensee/business owner and the premises owner have not changed since that time.

59. By reference to section 144G(2)(c)(vii) of the Act (which requires a decision maker to consider whether there have been any changes to the business practices in respect of the business carried on under the licence) the Authority is satisfied, on the basis of the licensee's legal submissions, supported by the Hospitality Compliance Solutions report dated 1 August 2016, that the business practices on the Premises have changed significantly since the commission of the second prescribed offence.
60. The Authority is also satisfied, on the basis of the Reviewable Decision and the Review Applicant's submissions on review, that this change has been demonstrated through the employment of a new security firm, increasing the number of security guards on duty, holding regular meetings with local licensing police, the "strict" use of an ID scanner (although there is credible Police evidence to the contrary) and the implementation of a new Venue Safety Plan.
61. The Review Applicant has provided its latest Plan of Management, dated July 2016, which details a number of these and other voluntary business planning measures designed to reduce alcohol related harm and disturbance among other operational measures.
62. Notably, the various operational and security measures discussed in the Plan do not specify closure of the Premises at midnight on Friday and Saturday nor do they specify that the venue will not operate in the mode of a nightclub, on those nights or otherwise.

#### **Does the Commission of the 6 August 2015 Prescribed Offence Warrant a Second Strike?**

63. The Authority is satisfied that the first strike is in force against the licence on the basis of the information provided in the Reviewable Decision. That is not in dispute.
64. When determining whether a second strike *should* be incurred under section 144D(2) of the Act, the Authority must consider not only what harm *has* occurred in relation to the prescribed offence under consideration, but what harm *may have resulted from*, or been associated with, this prescribed offence.
65. The Authority does not accept the Review Applicant's contention that more serious harm may not have resulted from the patron's intoxication. The Authority agrees with the Review Applicant that it must consider the facts of the prescribed offence in question, but section 144D of the Act requires it to speculate as to the harm that *may* result from that *type* of prescribed offence. That harm may reasonably be expected to range from minor nuisance to staff or patrons through to disturbance to the neighbourhood or harm to the intoxicated person or others should an alcohol fuelled accident or assault occur.
66. The Authority is satisfied, on the basis of the information provided in the COPS Report 57955709, that on 6 August 2015 the licensee committed the prescribed offence of permitting intoxication on licensed premises at the Premises. Accepting the Review Applicant's characterisation of the intoxicated male patron as more "boisterous" than violent, this is nevertheless the *type* of offence which represents a real risk of harm to patrons of the Premises and also to persons residing or passing through the vicinity of the Premises. While no harm resulted on that evening, it is reasonably foreseeable that an intoxicated patron, stumbling around and causing a nuisance at a well-attended hotel,

could either fall victim to an accident or become embroiled in some other incident that escalates to an act of violence perpetrated by or against the intoxicated patron.

67. The Authority considers this type of offence (permitting intoxication) to be a relatively serious matter, posing a threat to the public interest in respect of the Act. The seriousness of the matter, in the context of this Scheme, is underlined by reason that the first strike was also incurred through commission of a permit intoxication offence during 2015. The Scheme in Part 9A of the Act is focussed on the prevention and remediation of prescribed offences on licensed *premises*, not simply individual licensees or business owners.
68. Having regard to the facts of this prescribed offence, the range of harm that *may* have resulted from permitting intoxication on the Premises and having regard to the Authority's findings on the considerations prescribed by section 144G(2)(c) of the Act, the Authority has decided that a second strike ***should be incurred*** on the licence for the Premises.
69. The Authority **confirms** the Reviewable Decision pursuant to section 144I(1) of the Act.
70. In making this decision, the Authority has had regard to the statutory objects and considerations provided by section 3 of the Act, which states as follows:

### 3 Objects of Act

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

- (a) *to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,*
- (b) *to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,*
- (c) *to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.*

(2) *In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following:*

- (a) *the need to minimise the harm associated with the 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.*

71. By reason of the nature of this prescribed offence, the adverse evidence and material from Police and the Hotel's repeated status as a declared premises in recent years, the Authority has given weight to the considerations in sections 3(2)(a) and 3(2)(c) of the Act when deciding to confirming the Reviewable Decision.

72. If you have any enquiries about this decision please contact the case manager via email to [ilga.secretariat@justice.nsw.gov.au](mailto:ilga.secretariat@justice.nsw.gov.au).

Date of Decision: 22 February 2017



Philip Crawford  
Chairperson