

## Review of the Three Strikes Disciplinary scheme in NSW - Community

### **Introduction**

This submission incorporates three case studies that establish that the regulation of alcohol in NSW including the Three Strike scheme is flawed. This cannot be redressed by minor modifications and a band-aid approach to the problem.

The main factors contributing to the defects include:-

1. An anachronistic approach to the positive legal duties and responsibilities of the owners and controllers of licensed premises and their capacity to prevent alcohol related harms within and external to their premises linked to their sale and supply of alcohol to their intoxicated patrons.
2. Failure of the law to reflect the contemporary nature of the alcohol industry including:
  - a. the concentration of the ownership and control of liquor outlets in a smaller number of large influential corporations
  - b. the shift in consumption patterns where the majority of alcohol is now purchased from off-license premises
  - c. the existence of conclusive independent scientific research establishing the most cost effective measures to sustainably **prevent** alcohol fuelled violence and related harms.
3. Too much “complexity”, “discretion” and “loopholes” in the construction and application of the Three Strikes scheme leading to non-transparent and unaccountable sub-optimal outcomes in the effective prevention of alcohol related violence and associated harms.

Key symptoms of the failure of the NSW alcohol regulatory system identified in the case studies include:-

1. Enforcement officers appear impeded from instigating breaches when “prescribed” offences are detected in a number of high risk and prominent licensed premises. A successful “[conviction](#)” is the key prerequisite for the issuing of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> strikes.
2. Some of the consistent most violent and well-connected premises in NSW avoid any strikes and are allowed to continue to operate. Conversely, small lower risk licensed premises are the main recipients of strikes.
3. Substantial costs and delays are occurring in the consideration of 2<sup>nd</sup> and 3<sup>rd</sup> strikes and (Part 9) disciplinary action against offending premises. Public costs to enforce liquor laws are not recouped from the industry.

4. The Land & Environment Court appears to have insufficient regard for attitudinal repeated non-compliance with liquor related DA requirements and consequential public safety.
5. The public and local communities are the most disadvantaged and marginalised stakeholders. They have no legal capacity to have their interests independently presented and taken into account by any of the decisions makers involved in the Three Strike scheme and all other liquor/planning disciplinary related process including reviews of the conduct/compliance of licensed premises with DA conditions in the Land & Environment Court.
6. Loss of public confidence in the administration of justice in NSW and the lack of independence and transparency.

This submission critically examines and refutes the claim that NSW has “tough” and effective disciplinary liquor laws that satisfy the community’s overarching objectives and expectations for public safety remaining paramount and the consistent application of the Rule of Law (including transparency, objectivity and impartiality).

### **The sale, service and supply of alcohol in NSW**

Alcohol is no ordinary commodity and is widely recognised as having an extensive [burden of harm](#) warranting specialised, timely and effective regulation free from industry interference.

The dangerous promotion, oversupply and service of alcohol is the single largest catalyst of domestic and non-domestic violence and related harms, a Group 1 [carcinogen](#) associated with several forms of cancer including breast cancer, the most common form of non-genetic birth defects (FASD), a teratogen and neurotoxin for developing foetuses.

Paradoxically, **the legal standard of non-delegable duty of care for the supply, promotion and service of alcohol in NSW appears lower than for any similar harmful consumer product and higher risk operations.**

The submission details the extent of unnecessary discretion, complexity and loopholes in the system (p17) and concludes with a list of practical recommendations (p21) advocating for the replacement of or key changes to the existing Three Strike scheme.

This is intended to provide the public and frontline enforcement officers with much greater certainty that any no-compliance with NSW liquor laws and related DA conditions will have timely, tough, proportionate and predictable consequences regardless of the owners, their connections and the size/patronage of the establishment or event.

The ultimate goal is an effective and simple/streamline integrated legal deterrent system that demonstrably prevents alcohol related harms and restores public confidence in its construction and application.

## Case study 1 - Scary Canary Pub Sydney 2014/2015

Base Backpackers Pty Ltd successfully appealed in the NSW Land & Environment Court a Sydney City Council decision to not extend a further trial of late trading hours because of an extensive range of adverse indicators supplied by the Police, OLGR and its own officers (see 30, 31, 32 of decision linked below). This included a Police allegation that the pub failed to report assaults on premises and “there were issues with intoxicated persons on the premises” (a “prescribed” offence that is capable of attracting a strike under [s144B](#) of the Liquor Act 2007) [Base Backpackers Pty Limited v Sydney City Council \[2014\] NSWLEC 1249](#)

The failure of to various authorities imposing to take legal action against the venue for non-compliance over an extended period was cited by the L&E Commissioner as a contributing factor in overturning Sydney Council’s refusal to extend a trial of late trading and granting the premises their extension of trading hours.

The Commissioner observed in relation to the Police evidence

“...Whilst in her (Police Officer) opinion, there were issues in relation to the responsible service of alcohol (RSA) within the premises, she confirmed that no RSA tickets had been issued and, that as a general policy, **this does not occur within the City of Sydney, the preferred course of action is to deal with the licensee.** There are no records of this having occurred in relation to the site. She estimated that she had attended the site around 40 times in the past three years and also driven past it on around another 20 times and **had not issued any infringement notices** or any other form of advice to management of the site...” emphasis added (33)

“...Mr Smith and Mr Saville advised that it was the **council's practice to work with management rather than issue PINs...** Mr Saville says that the council does not have a 'heavy-handed' approach with licensed premises and tend to work with management rather than issue a fine for each and every infringement” (36)

This first instance decision was upheld in an appeal lodged by the Council to a Judge of the Court. The Judge relied in part upon the limited more reactive view (25) of the obligations of a licensed premise, required standard of legal compliance and its contemporary relationship (what constitutes “responsible management”) with due diligence, director liability, risk management and public safety. [Council of the City of Sydney v Base Backpackers Pty Ltd \[2015\] NSWLEC 63](#)

### Consideration of Case study 1

This is an example where undue leniency provided to an at risk and non-compliant licensed premise by various authorities charged with oversight, subsequently backfired and was used as a stick against them when the authorities belatedly attempted to revoke a DA trial condition of extended trading hours.

From even the limited information provided in the above judgement it is inconceivable that the authorities were unaware of a number of offences committed that should have attracted an “automatic” strike under the scheme.

This case study reveals the crucial lack of correlation and consistency between the actual number of “prescribed” offences committed by selected licensed premises and the capacity of the relevant authorities to convert the same into a recorded strike.

This is not the first time the community’s interest in ensuring public safety through effective and consistent liquor compliance/enforcement regimes has been compromised by apparent expediency and leniency afforded high risk/high profile repeatedly non-compliant licensed premises.

The Byron Bay community who advocate for a modest reduction in their current 3am closing times, brought to the attention of ILGA the very high level of alcohol related incidents revealed in Police COPS linking data for Byron’s high risk late trading licensed premises.

The same community was disappointed with the relative leniency of an ILGA disciplinary decision against one of the late trading premises because of the **failure of the authorities to effectively convert the noted non-compliance incidents and related COPS linking data into actually prosecutions against the same premise.**

Not only have some of the most consistently violent premises in NSW been effectively protected from incurring strikes, **NSW taxpayers have been subsidising these multi-million dollar private corporations and registered clubs** by the provision of substantial free compliance advice from OLGR and the Police acting as effective “nursemaids” for some of the most persistently violent premises in NSW.

A further risk associated with the practice of enforcement/compliance officers being obliged to provide large private corporations with free compliance/regulatory advice is **“Regulatory Capture”**.

Individual officers charged with the responsibility of “working with” a high risk venue to reduce for example the level of alcohol fuelled violence, are effectively compromised. Any potential prosecution during this period of “support” or “working with...” is seen as a failing by the enforcement authority as opposed to the supposed non-delegable statutory obligation of the licensee and as it must be - the ultimate owners and controllers of the same licensed premises.

**The same liquor outlets owners effectively privatise the profits from the sale of excessive volumes of alcohol whilst socialising the reciprocal compliance costs.**

No other ordinary NSW businesses or members of the public receive such concessions from enforcement authorities. Most businesses whether large or small are required to engage their own OHS and other business consultants to advise on compliance issues.

There can be no effective deterrence and equity from any liquor regulatory system that appears to favour the rich at the expense of the poorer venues and the NSW public.

## Case study 2: The Ivy – Sydney and Macarthur Tavern – Campbelltown

Both of these licensed premises have been [identified](#) as the most violent premises in NSW and provide good subjects to consider the effectiveness and weaknesses of the application of the Three Strike scheme and other disciplinary processes.

Commonality between the two venues include:-

1. They both have prominently featured over an extended period of time at the top of the lists of the “Declared Premises” - most violent premises in NSW based on the number of reported assaults on premises (see Table 1. below). Note the Three Strikes scheme took effect from 1 January 2012
2. They are both controlled by wealthy and prominent corporations capable of making their own substantial private business investments in compliance systems and conditions
3. Both venues have large patron capacity
4. Both venues have accrued a substantial number of alcohol related incidents linked with their premises. This police COPS Linking Data data is used in part as an important intelligence tool or indicator of the level of RSA non-compliance
5. Both venues have high risk extended late trading
6. Neither premises have received any strikes

**Table 1: NSW Violent Venues Lists for The Ivy and Macarthur Tavern**

Round	Period	The Ivy		Macarthur Tavern	
		Assaults	Level	Assaults	Level
14	2014/15	14	L2		
13	2014	23	L1 1st	12	L2
12	2013/14	26	L1 1st	21	L1 =2nd
11	2013	24	L1 =1st	24	L1 =1st
10	2012/13	26	L1 1st	13	L2
9	2012	24	L1		
8	2011/12	23	L1 2nd	13	L2
7	2011	21	L1	30	L1 =2nd
6	2010/11	15	L2	24	L1
5	2010	13	L2		
4	2009/10	14	L2		
3	2009	14	L2		
2	2008/9	14	L2		
1	2007/8*	-		-	

\*Round 1 identified the top 48 most violent premises in NSW

Figures from OLGR [list](#) of most violent premises. Assaults are only reported on OLGR list of most violent premises when equal to or greater than 12 per annum. ILGA estimates that only around 25% of assaults are

reported and the above number of assaults depends upon the licensed premise reporting the same to the Police. We note ILGA’s caution about the use and reliance upon Police COPS linking data individual entries.

Source: [http://www.olgr.nsw.gov.au/alcohol\\_restrictions\\_for\\_violent\\_venues.asp](http://www.olgr.nsw.gov.au/alcohol_restrictions_for_violent_venues.asp) recorded by NSW Police

The following page is a **List** of legal offences observed by Police at the Tavern and some other De Angelis hotel group premises for the period of March 2012 to February 2015.

The list obtained by a GIPAA request from local Casula residents contains a substantial **number** of three strikes prescribed offences allegedly committed including “allowing intoxication on premises”, “permit violent/quarrelsome conduct” etc. See Table 2 below. This broadly correlates with, and what one would normally expect from, violent premises with failed legal RSA obligations that attract a large number of reported assaults recorded by the Police.

**Table 2: Observed offence and other incidents Macarthur Tavern for the period January 2012 – February 2015**

Offence	Number of Incidents
[REDACTED]	[REDACTED]

\*Figures from OLGR [list](#) of most violent premises. Assaults are only reported on OLGR list of most violent premises when equal to or greater than 12 per annum. ILGA estimates that only around 25% of assaults are reported. Source: Police COPS Linking data and offence incidents obtained under GIPAA

\*\*COPS linking data is sourced from Police recording an alcohol related incident outside of a licensed premise where the person(s) involved identify a licensed premise where they last consumed alcohol. The data includes an observation of the level of intoxication of the person involved. A proportion of the above 827 identified incidents include normal police operations involving business inspections. **Appendix 1** identifies the 827 recorded incidents



## Consideration of Case Study 2

The above features common to both of these licensed premises exemplify the failure of the Three Strikes scheme to meet community expectations for a robust, transparent and objective deterrence system that cost effectively prevents alcohol related harm.

**The surprising feature of this case study is that neither of these licensed premises have ever received an automatic first strike including for the offence of “permitting intoxication or indecent, violent or quarrelsome conduct” ([section 73\(1\)\(a\) or \(b\)](#)).**

The provision of COPS linking data for the Macarthur Tavern provides an important policy laden perspective of the true community impact of a large late trading violent licensed premise.

BOCSAR has [identified](#) that the majority of assaults associated with licensed premises occur outside of the premises but within relative close proximity to the venue where the persons involved last consumed alcohol. These assaults occurring outside of the premises are not normally captured by the Declared Premises scheme or is a “prescribed” offence attracting a “automatic” first strike.

[REDACTED]

[REDACTED]

BOCSAR [research](#) has identified the extent of the infiltration of adverse alcohol related incidents from licensed venues into surrounding residential communities. However, the law including the Three Strikes and Declared premises schemes has totally failed to acknowledge and reflect the existence of such preventable harm.

More importantly, NSW liquor laws fail to hold the owners and controllers of licensed premises who profit from failed RSA practices that contribute to the documented levels of intoxication of an offender after they leave the premise, partly responsible and accountable for the predicable all too deadly consequences.

The absence of such legal causative links between the misconduct/negligence of the owners and controllers of licensed premises and the subsequent damage/harm caused by their intoxicated patrons once they leave the premises, ensures there is no effective legal deterrence system in NSW that directly impacts upon the majority of alcohol related harms involving licensed premises that occur outside of premises.

The Undue Disturbance complaint provisions of the Act provide inadequate relief for the community and the victims of an intoxicated offender.

This case study also demonstrates from the public's point of view, that there is a disconnect between the general nature and character of those (mainly low risk) licensed premises that receive one or more strikes, and those most violent high risk predominantly late trading premises in NSW who appear immune from the same "deterrent" action.

The 156 strikes [issued](#) to date appear to predominantly fall upon the lower risk venues not located within higher risk late trading precincts including Newcastle, Hamilton, Kings Cross, Central Sydney and some regional centres where the majority of alcohol non - domestic violence occurs around or after midnight.

The larger late trading licensed premises located within the areas where the majority of alcohol related non-domestic violence and associated harms occur, are more likely to generate larger incomes streams from the supply of alcohol and therefore can afford legal challenges to licensing prosecutions.

The persistent and consistent appearance of the Ivy and Macarthur Tavern in Table 1 above demonstrates the relative ineffectiveness of the Declared Premises Scheme (s11(1A)) - Most violent premises list – to rapidly prevent the reoccurrences of reported assaults in some high profile licensed premises. Part of the reason is the inadequate and ineffective prescribed consequences of becoming a declared premise.

Most notably, the "remedial action" prescribed in Part 9A (Three Strikes) of the Act avoids the single most effective and proven life/cost - saving measure to significantly reduce assaults - earlier last drinks as proven in Newcastle and more recently Kings Cross and Central Sydney.

The process of "preload"/"reload"/failed RSA is the main precursor for alcohol fuelled violence and related harms including unintended injuries. The high levels of intoxication of patrons observed by community members in late trading drinking precincts is inconsistent with the relatively very low level of first (automatic) strikes awarded (60 - [p4](#)) for the same offences relating to permitting intoxication since the instigation of the Three Strikes scheme in 1 January 2012.

It appears enforcement officers have difficulty in initiating and securing successful convictions for RSA related offences and associated automatic strikes. This is undermining the current effectiveness of the Three Strikes scheme. This must be urgently addressed including an independent review of the

- a. effectiveness of the "[steps](#)" to be taken to prevent intoxication to ensure that the attainment of the "means" do not outweigh the actual "outcomes"
- b. levels of proof and evidence required to establish the offence

- c. “generosity” of the available defences
- d. adequacy of the penalty provisions attaching to the offences
- e. administrative burden and associated likelihood of a successful conviction

### **Size and patron capacity**

In considering the application of a second or third strike, the decision maker **must** “take into account ... to the extent that the decision-maker **considers it to be relevant** to the decision” ([144G\(2\) \(c\)](#))

“(ii) 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 size and patronage of licensed premise in respect of being issued a strike and effective remedial action **should not matter** and should not impede enforcement officers issuing prosecutions for non-compliance and decision makers issuing second and third strikes.

Larger premises owned by substantial corporations including The Ivy and Macarthur Tavern have sufficient private financial resources to ensure effective systems are in place to prevent intoxication and violence in their premises. This legal responsibility should not be subsidised by NSW taxpayer funds in the form of enforcement officers having to “work with” the same premises whilst simultaneously diminishing their capacity to issue prosecutions as proven in the first case study above.

A common strict liability, due diligence and positive non-delegable duty of care should apply to all licensed premises given alcohol is [no ordinary consumer product](#), a fact acknowledged by a former [Executive Director](#) of OLGR and more recently the Harper Inquiry into National Competition Policy.

There is no public policy imperative why a consistent high standard of liability should not apply to all owners and controllers of licensed premises and why this standard should be effectively lower to that consistently applying in NSW occupational, health and safety laws.

### **Public interest for a more effective scheme to promptly end the violence**

The fact that many assaults over an extended period have been reported by the Police at the “declared” [Ivy](#) and/or [Macarthur Tavern](#) suggests the inadequacy of the combination of the Declared Premises scheme and the Three Strikes scheme to timely prevent/deter assaults and secure successful convictions and associated strikes regardless of their size and patron numbers.

The combined application of these two disciplinary schemes to these two licensed venues has failed the public interest test.

Despite the alleged best endeavours of the management, if a licensed venue regardless of its owners' political connections or its size proves a persistent magnet for troublemakers and associated with violence and/or illicit drug or other illegal activities (a "black spot"), it should be promptly and permanently closed in the overarching **paramount interest of public safety**. Equally those who own and control the same premises could be automatically barred from operating in the industry for extended periods of time.

We recommended the adoption of a simpler and effective scheme to achieve the above objectives tentatively called the **"NSW Black spot" elimination program**.

Essential to this project is a process to ensure the effective reporting of all assaults. There is widespread acknowledgement, including from industry and Police that assaults are not being reported. This is demonstrative in part of the failed concept of industry self-regulation.

### Case Study 3: Beachhaus hotel – Kings Cross

This case study emphasises the urgent need to examine the overall (holistic) effectiveness (fit for purpose) and integrity of the package or suite of individual deterrence/compliance schemes, the interactions between police, OLGR, ILGA and local government **and** the interaction of both the liquor licensing and planning jurisdictions in NSW, to satisfy the community/public expectations of sustained alcohol harm prevention at no additional cost to the community.

#### Background

The Beachhaus has been the focus of local resident complaints in Kings Cross over a long period. The DA approval of late trading provisions was dependent upon a successful trial of the same. Due to poor management and breaches of DA conditions and the Liquor Act, this “trial” was extended on a number of occasions.

Similar to the Scary Canary case study, Sydney Council finally refused the last DA variation application for an addition extension of the trial of late trading.

Substantial evidence of non - compliance by Beachhaus operators was compiled from the Kings Cross Police, OLGR and Council’s Compliance Officers which formed the basis for Council’s refusal. The venue successfully appealed to the Land & Environment Court and secured a further extension to their late trading “trial” through a conciliation process that excluded any local community representation.

Some of the evidence prepared by the Council in support of its decision to deny a further extension included examples where the venue operators had breached the Liquor Act and DA conditions. Some of these breaches fell within s144B of the Act – offences attracting a strike.

Following are extracts from various Council DA reports.

#### **City of Sydney Section 96 Application Assessment Report Approved 11 June 2013 --- City of Sydney Section 96 Application Assessment Report**

##### **Approved 11 June 2013 - D/2007/1889/F, p.10**

“An infringement notice was issued to the licensee for failing to notify Police of an assault which occurred at the premises on 28 October 2012, **despite conditions imposed on the liquor license** which compel staff to notify Police when a serious act of violence has occurred, to preserve crime scenes and prohibit patrons entering staff only areas.... (emphasis added)

A review of the additional liquor license conditions imposed on the premises by the Independent Liquor & Gaming Authority was held in June 2012. It was concluded that there had been numerous occasions where glasses and bottles were left unattended around the

premises including broken glass, **displaying a degree of laxity in relation to management of the premises**".

### **City of Sydney Section 96 Application Assessment Report**

#### **Approved with Conditions 22 October 2014 - D/2007/1889/E, p. 3**

"The NSW Police Force noted **six assaults, three drug detections**, one breach of development consent and one compliance notice in a 12 month period. In addition to the incidents cited by the Police, Council's records show four noise complaints between January and May 2010" ...

(p6) "Police have sighted 20 separate incidents that they consider to demonstrate a **persistent inability by management to prevent unacceptable levels of intoxication and anti-social behaviour by patrons**, and **contradict provisions of the liquor license** and the **Kings Cross Liquor Freeze** (emphasis added). These include the following:

- i. one incident in which patrons **were permitted entry to the premises after 1:30am lockout**, and the premises failed to produce CCTV footage of the incident when requested by Police;
- ii. one incident in which 8 patrons were **permitted entry without having their ID scanned** as a result of the scanner not being turned on at the time specified in the Plan of Management;
- iii. two incidents in which **Police identified highly intoxicated patrons within the venue** who were removed;
- iv. three incidents in which intoxicated patrons had been ejected from the premises **due to intoxication** and who had gone on to create public disturbances requiring Police intervention, including one incident of malicious damage to private property resulting in an arrest;
- v. **five incidents of assaults within the premises and one assault in the queue outside** the premises involving intoxicated patrons;
- vi. two incidents in which Police encountered intoxicated individuals in the vicinity of the premises, who had allegedly consumed alcohol within the premises, where medical attention was required;
- vii. **three incidents in which it is alleged that drug use was occurring within the premises**; and
- viii. two incidents in which Police were notified of noise complaints from adjoining residents".

The Secretary of Department of Trade and Investment/ OLGR

“On 13 March 2012 an additional condition relating to the preservation of a crime scene was added to the venue’s liquor licence.

On 24 December 2014 the Secretary imposed yet another condition on the Beachhaus Liquor Licence”.

“The licensee must ensure that the licensee and staff involved in the sale, supply, or service of alcohol on the licenced premises **do not consume alcohol while on duty**”.

In September 2013, OLGR posted a [warning](#) on its website for Kings Cross licensed premises to comply with the special licensing provisions. It identified a number of successful prosecutions against a variety of local licensed premises for prescribed breaches. However, not all of the identified premises including the Beachhaus appear to have received an automatic strike.

### **Consideration of Case study 3 and general impact on Kings Cross residents**

Despite the three arms of liquor related enforcement – Police, OLGR and Sydney Council unanimously supporting the view that the Beachhaus owners had exhibited a “**persistent inability by management to prevent unacceptable levels of intoxication and anti-social behaviour by patrons**, and **contradict provisions of the liquor license** and the **Kings Cross Liquor Freeze**” (emphasis added) and successful prosecution for offences attracting a strike – Beachhaus operators have never received a strike or other form of liquor disciplinary sanction.

The lack of effective, decisive and timely legal action against the Beachhaus operators with a documented poor compliance record and an unacceptable “degree of (management) laxity” is a clear example of how both the liquor and planning regimes continue to fail the Kings Cross community including its long term residents and front line enforcement and health staff.

This failure was more recently exacerbated by the reported Police operation resulting in the temporary closure of the [Bada Bing](#) and [Dreamgirls](#) Kings Cross venues for alleged drug dealing. Both these notorious venues have been subjected to extensive [attention](#) by the liquor authorities including ILGA and leaves the community to wonder why so much [leniency](#) and so many delays, more so than any comparable jurisdiction, are afforded such disreputable high risk venues when NSW supposedly has the “[toughest](#) laws in the country”.

An examination of ILGA’s [decision](#) of 9 September 2015 not to determine a third strike against the Dreamgirls’ liquor license reveals the venue had committed more than three relevant licensing offences during the relevant period to attract the cancellation of their license. In fact four prescribed offences appear to have been committed between January and August 2014 alone.

Yet further evidence of the failure of the regulatory system include ILGA's disciplinary [decision](#) of 13 May 2015 against the **Déjà vu** Kings Cross nightclub identifying a number of serious offences. **Not one strike appears to be recorded against this venue in OLGR's Three Strike Register.** This begs the question from the surrounding community who have had to long suffer disturbances emanating from the same premises "how bad does a licensed premise have to be before the authorities finally take effective decisive action and shut them down"?

## 5 layers with 19 steps of discretion and complexity of the Three Strike scheme

Too much legislative “discretion” is perceived by the OCED and [others](#) as a form of regulatory weakness. It can increase the vulnerability to nepotism, [corruption](#), regulatory capture and “to arbitrariness, inconsistencies, unpredictability and decisions based on officials’ personal predelictions” (Black p2)

The regulation of alcohol and gambling in NSW has been historically prone to undue influence and corruption. Greater community levels of trust and confidence in the legislation, administration and regulation of alcohol in NSW can be re-established by limiting the level of discretion and complexity in the Three Strikes scheme.

Reducing the levels of discretion for the treatment of non-compliant licensed premises would be more consistent with the government and industry’s shared approach to the mandatory sentencing of drunken violent offenders.

The current Three Strikes scheme provides for

1. An **enforcement officer** can
  - a. act upon or ignore a breach of the law
  - b. Issue warning
  - c. Issue a form of penalty notice/breach
  - d. “work with” the venue and not prosecute
  
2. **Local Magistrate “automatic” - first strike**
  - a. Dismiss complaint
  - b. find guilty (s10) but not proceed to conviction – does not attract a strike
  - c. convict – may lead to 1<sup>st</sup> strike
  
3. **Secretary of Department (OLGR) – first and second strike**
  - a. May impose relatively weak remedial action for a first strike
  - b. Consider awarding of a second strike and remedial action after repeat of steps 1 and 2 above
  - c. May discount and negate impact of first strike or offence
  - d. Determine how many separate offences may constitute a single strike (see ILGA’s [Dreamgirls](#))
  - e. Determine any “aggravating” circumstances
  - f. “Decides that 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” ([s144D\(2\)\(c\)](#)).
  - g. Take into account a range of statutory factors and excuses prescribed in [s144G \(2\) \(c\)](#) and the **unlimited discretion** provided for in [s144G \(3\)](#) of the Act (see Act extract below)

- h. Consider if the breach exceeds the so called “threshold”
- i. A second strike including associated remedial action decision on application can be **reviewed** by ILGA. See for example to Golden Sands Tavern - Nambucca Heads [decision](#) of 18 August 2015. This decision provides a good summary (26ff) of the operation of the Three Strikes scheme and **acknowledges its complexity** (29).

**4. ILGA** to consider the awarding of a third strike and remedial action

- a. Review decisions of Secretary to impose a second strike and/or remedial action
- b. Take into account a range of statutory factors and excuses prescribed in [s144G \(2\) \(c\)](#) and the **unlimited discretion** provided for in [s144G \(3\)](#) of the Act when also considering a third strike and remedial action after repeat of steps 1 and 2 above

**5. Reviewable decision to NCAT** that takes the same above statutory factors into account.

Sections [144G \(2\) \(c\)](#) and [s144G \(3\)](#) of the Liquor Act

The Secretary and ILGA **must**

“(c) take into account each of the following to the extent that the [decision-maker](#) considers it to be relevant to the decision:

(i) 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,

(ii) 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](#),**

(iii) 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](#),

(iv) the history and nature of violent incidents that have occurred in connection with the [licensed premises](#),

(v) **whether other action would be preferable,**

(vi) whether there have been changes to the persons who are the [licensee](#), [manager](#) or business [owner](#),

(vii) whether there have been changes to the business practices in respect of the business carried on under the [licence](#),

(viii) any other matter prescribed by the regulations.

(3) Nothing in this section prevents a [decision-maker](#) from **taking into account any other matter** that the [decision-maker](#) thinks is relevant to the proper making of a decision under this Part” (emphasis added).

### **Discretion and decisions of Local Magistrates to find a conviction for a prescribed offence**

**Local Magistrates** vary significantly in their attitude towards non-compliant licensed premises. It is understood one Magistrate viewed 16 prior offences as constituting a “good record”. Serving **10 pizzas** to 750 patrons helped one violent nightclub escape a failed RSA [conviction](#) and strike. This is not reflective of our so-called “tough” liquor laws.

Another Magistrate who regularly dealt with offenders and their victims associated with drinking at a major late trading hotel fined the same hotel (then the most violent premises in NSW) \$33,000 for breach of a number of liquor related offences. This was reduced to only \$6,000 on appeal on the basis of reported “**comparative sentencing**”.

This example directly impacts on the effectiveness of regulation when the **ultimate financial deterrent is miniscule** to both the level of turnover of a premise and the disproportionate level of risk and harm associated with the premises/owners’ (repeated) non - compliance.

Some others Magistrates prefer to issue more than one [Section 10](#) (guilty but no conviction recorded) against the same offending licensee. This inconsistent approach by local Magistrates is unacceptable and generally works in favour of the offending premise. It inconsistent approach risks undermining the administration of justice in NSW.

The Local Court’s inconsistent approach and willingness to apply the full force of the law to liquor offenders also forces OLGR and Police to pursue other courses of disciplinary legal action such as Part 9 of the Act that causes additional unnecessary substantial delays, prolongs risks and causes higher preventable costs.

It is an unwritten law that no NSW government agency will appeal or seek a review of another agency’s decision. This effectively leaves **local communities with no legal recourse** where a government agency(s) fails to act in the best interests of the community and public safety as illustrated in the above case studies.

### **Response to some industry assertions**

The industry’s call to remove and/or significantly reduce the possibility for hotels etc to ultimately lose their license and thereby achieve **parity with the status of registered clubs (eg sporting, RSL clubs etc)**, who under this scheme cannot lose their license, is fundamentally flawed.

The industry also suggests the scheme's public official authors did not anticipate the "**unintended consequences**" where a so called "automatic" first strike may result in a non-compliant venue losing its financial loan. They use this as an excuse to further water-down the deterrent impact of a first strike.

It is our information that public officials who developed the Three Strikes policy were aware of this above financial scenario and considered this as an appropriate response.

We note when ILGA reviewed the [decision](#) of the Secretary to apply a second strike to the Golden Sands Tavern, its response to the argument that the strike would have a detrimental commercial impact was

"In any event, those potential commercial ramifications do not, in the circumstances of this case, provide a sufficient basis for the Authority not to incur a second strike against the licence in the face of a Scheme designed to remedy and prevent the recurrence of prescribed offences (168)".

Why should non-compliant liquor businesses be treated more favourably than ordinary members of the public who lose their driver's license for drink driving and their employment suffers accordingly?

Any private financial arrangement between a licensed premise and financial institution (who are obliged to consider risk) is too remote from the germane issue of the effectiveness and efficiency of the NSW liquor regulation system including sufficient deterrence and sanctions. As the Federal Treasurer encourages ordinary members of the public – the pubs need to shop around for better loan conditions in a competitive financial market (and simply ensure ongoing compliance in the first instance).

## **Summary of Recommendations**

### **Systemic recommendations**

1. Restore community trust and confidence in the regulation of liquor and gambling in NSW by treating the community as equal informed stakeholders and ensuring the same access to Ministers, senior policy makers and legal liquor, gambling and planning processes as the industry.
2. Ensure local communities are provided a fair and equal say in all alcohol and gambling related decisions that may impact upon them before such decisions are made including proposed legislation and related policies, liquor, gambling and planning decisions.
3. Increase the level of openness and transparency of all alcohol and gambling relating decisions by government and representations by the industry to government.
4. Substantially increase the positive non delegable duty of care obligations and liability of licensed venues and event owners and controllers to ensure they have safe systems of operations, due diligence and compliance that are not compromised by vague and ineffective defences. Reverse the erosion of the level of legal responsibility and accountability for liquor and gaming compliance at the Board room level of the largest corporations involved in the industry.
5. Extend the scope of owners and controllers' shared responsibility to encompass the foreseeable and connected conduct of their intoxicated patrons once they leave their licensed premises or events

### **Alcohol Regulatory System Recommendations**

6. Eliminate the level of discretion and complexity associated with the Three Strike scheme by:-
  - a. Make all strikes and associated remedial action mandatory in a similar fashion applying to the "one punch" laws supported by the industry
  - b. Remove enforcement officers' discretion not to prosecute for breaches of the relevant legislation
  - c. Create a specialised smaller pool of decentralised Magistrates to consistently determine all liquor and gaming prosecutions including second and third strikes. This will remove all risk of perceived political interference
  - d. Remove s144G (2) (c) - (serious harm barrier) and (3) of the Act

- e. Impose strict time limits between the date of prosecution and determination by Magistrates
  - f. Tighten the controls on s10 determinations by Magistrates. Limit the same only to the first offence of any breaches of the Liquor, Gaming and Planning laws
  - g. Remove the involvement/layers of the Secretary of the Department and ILGA from the three strike determination process
  - h. Only allow for jurisdictional appeals for Magistrate decisions on the issuing of a third strike and mandatory loss of licensee for the premise
  - i. Reverse the onus of proof particularly for offences relating to alleged failed RSA
  - j. Persons found intoxicated on premises be automatically deemed to have consumed alcohol on the same premises representing a prima facie breach of their RSA legal [obligations](#) and failure in their overall strict legal duty. Remove the descriptive list of what may constitute “steps” in the Prevent Intoxication OLGR [guidelines](#) as part of the defence under s73(4)(a1) because of their actual ineffectiveness and difficulty in prosecuting.
  - k. Do not provide for stays of decisions of Magistrates and automatic stays for reviews of strikes and the application of remedial action in the current system
  - l. Multiple offences in 24hrs attract multiple strikes
7. Significantly expand the list of prescribed offences that attract a strike in s144B to include failure to following directions of police, remove all the **limitations** to breach of s11(2) – comply with conditions of the license, intoxicated staff, failure to notify of an assault or other serious incident. Prescribe all such offences as strict liability and ensure they are applied as the same.
  8. Amend s144G (2) (b) to allow local communities adversely impacted upon by the operations of licensed premises to make submissions at hearings involving the possible issuing of strikes and related appeals.
  9. Amend the Environmental Planning & Assessment Act to ensure the Court gives much greater weight to the adverse impact upon the community and others of the operations and non-compliance of licensed premises (similar to the recent amendment that required ILGA to take greater notice (“due regard”) of submissions from the Secretary of the Department).
  10. Allow the community adversely impacted upon by the operation of licensed premises to be independent represented in all conciliations, mediations and hearings involving the above Planning jurisdiction.
  11. Extend strikes to serious incidents involving intoxicated patrons once they have left the premises where it can be shown that failed RSA contributed to the intoxication

of the patron and was linked to the incident. This would involve greater reliance on Police COPS linking data and the more accurate and diligent recording of the same by Police.

12. Introduce Dram shop laws and the statutory right for victims of intoxicated patrons to sue venue owners and controllers who have failed in their positive and non-delegable duty of care to prevent intoxication on premises.
13. Substantially increase the transparency of the current decision making process regarding the issuing and commissioning of legal proceedings against licensed premises including publishing all decisions of the Secretary relating to the issuing of a second strike and imposing remedial action. The public should be made readily aware of the number of all warnings and the results of legal proceedings against all licensed premises for non-compliance.
14. Independently review and address the real effectiveness and evidence base of remedial measures contained in s 144 (E ) and (F) of the Act.
15. Ensure the total costs of the operation of the NSW Alcohol and Gambling regulatory system is fully recovered from the industry including incidents where enforcement authorities are “working with” specific premises. The public expectation is that private businesses should pay for their own private expert compliance/risk management advice.
16. Prohibit the practice of enforcement authorities “working with” repeat offending licensed premises and thereby avoiding the provision of legal infringement notice and associated strikes.
17. Establish a much closer correlation between the Three Strikes scheme and the Declared Premises - Violent Premise Lists. Promptly and permanently close all licensed premises and ban their owners and controllers for 5 years if their venue is identified as a Level 1 on the List of most violent premises for more than 12 months as part of a **“Black Spot Elimination Program”**.
  - a. Ensure all assaults reported to the Police and actually recorded on a public list. Police should indicate why they believe a particular assaulted reported should not be counted on the list
  - b. Level 1 and 2 venues should automatically be reduced to standard trading hours of a midnight closing and other proven harm prevention measures. Those on existing midnight closing should revert to 10pm closing

18. Registered clubs should be treated consistently as all other licensed premises and subject to the same risk of losing their license on the issuing of a third strike by a special Magistrate.

19. In line with penalties against offending patrons including refusals to quit premises, substantially increase the penalties against the owners and controllers (including Directors of corporations) of licensed premises and their licensees or managers for non-compliance with their legal obligations.

These penalties should automatically attract a known escalation (eg doubling or 10x increase) for subsequent repeat offences.

20. Reflective of the increased capacity and resources of large businesses to fund effective risk management/harm prevention and compliance programs across multiple sites, strikes should accumulate and be combined for all their different liquor outlets for a minimum three year period.

21. Given the history of undue industry influence and to ensure essential independence and public confidence, the Ombudsman or some other independent agency should urgently investigate and review the outcome of this internal Review of the operation of the Three Strikes scheme and its interaction with NSW liquor, gaming and planning systems.

**This would necessitate the government making public all the submissions and representations it has relied upon to determine the outcome of this Review.**

It would also be appropriate for the Ombudsman to investigate why so many documented primary breaches of the Liquor Act failed to be prosecuted and attract a strike.

## **Conclusion**

Many disaffected communities would welcome the opportunity to collaborate with the government and an industry mature enough to recognise that the sustained prevention of well-documented alcohol related harms is a **shared legal and moral responsibility** between the producers, promoters and suppliers of alcohol and consumers whose drinking patterns are influenced by major drivers such as trading hours, price and promotion controlled primarily by the industry.

We welcome more constructive and informed input into this Review and all other matters pertaining to the improved effective regulation of alcohol and gambling in NSW across a number of jurisdictions to ensure it becomes and remains fit for purpose.

**Tony Brown**

**18 January 2015**





















































