

NSW Independent Liquor & Gaming Authority

Mr Agostinho Pestana Licensee The Vinyl Room	Superintendent Craig Middleton C/o Darrin Thompson Sutherland Shire Police Area Command
Section 140(3) – Third parties The Vinyl Room Pty Limited Business owner	

Our ref: DOC24/199169

26 August 2024

Dear Sir/Madam

Decision regarding complaint about Mr Agostinho Pestana under section 139 of the *Liquor Act 2007*

Our decision

We are satisfied that the grounds of complaint are established and have determined to:

- **reprimand** Mr Agostinho Pestana under section 141(2)(m) of the *Liquor Act 2007* (Act).

Background

On 26 September 2022, an application was made to Liquor & Gaming NSW by the Sutherland Shire Police Area Command under section 54 of the *Liquor Act 2007* (Act) seeking the imposition of numerous conditions on the liquor licence of The Vinyl Room following several incidents of violence at the venue.

On 13 October 2022, the Sutherland Shire Police Area Command made an application to the Authority under section 82 of the Act seeking a Short-Term Closure Order due to the incidents continuing. The Authority received submissions from the venue opposing its closure and instead proposed an alternative option that the licensee implement several additional measures to mitigate the concerns of Police. The Authority therefore determined that the issues may be better managed using alternative legislative provisions.

A further application was made under section 75 of the Act which resulted in a written direction being issued on 14 October 2022 under section 75(1) of the Act by a delegate of the Secretary. The written direction contained 10 conditions which were to be in force from 9pm Friday 14 October 2022 until 3am Sunday 23 October 2022. Condition five stated the following:

‘Two security guards to be positioned on the dance floor who will continuously monitor patrons in this area’.

Application for complaint under section 139 of the Act

On 4 February 2023, NSW Police submitted a complaint in relation to Mr Agostinho Pestana, licensee of The Vinyl Room (LIQ0624006858), located at 52 Gymea Bay Road, Gymea for failing to comply with the written direction.

Details of complaint

Police attended the venue around 9:30pm on 15 October 2022 to conduct an inspection and observed one of the security guards run to the dancefloor and stand in place. The security guard was meant to be positioned on the dancefloor for the duration of his shift, along with another security guard who was standing in her position. As a result of the behaviour observed, police requested CCTV footage from the entire weekend of 14 to 16 October 2022. Police reviewed the CCTV footage and observed that the male security guard left his position on the dancefloor multiple times across the weekend.

Grounds of complaint

That the licensee has failed to comply with a direction of the Secretary pursuant to section 139(3)(e) of the Act.

Submissions and consultation

On 16 January 2024, we issued a show cause notice to NSW Police, the licensee and the business owner. The submissions in response are detailed below.

Back Schwartz Vaughan on behalf of the licensee and business owner, received 12 February 2024:

- it is accepted that there were times that two security guards were not positioned on the dance floor.
- the patrons in this area were monitored at all times, apart from a very short period of 1 minute and 19 seconds, by either two security guards, one security guard with another staff member (such as the licensee or one of the RSA Marshals), one security guard only, one RSA Marshal or the licensee.
- the unsupervised 1 minute and 19 seconds occurred out of a total trading period of 12 hours over two nights when the security guards had to deal with another task away from the dance floor and where other staff including the licensee were not able to take their place.
- in consideration of the brief timeframe associated with a short-term closure application, the venue had no option but to accept the conditions to ensure the business was not closed during that weekend.
- the venue complied with 9 out of the 10 conditions imposed by the delegate. The only issue that arises is Police's allegation in relation to condition five.
- Police's interpretation of condition five does not take into consideration the actual practice of any venue when trading to high capacity. Security guards need to move around to fulfil their duties which include monitoring liquor consumption by patrons and supervising the safety and well-being of patrons.
- at a meeting with staff, security and Police on 14 October 2022, the following conversation occurred:
Licensee: "In relation to the dance floor condition, can the guard leave the dancefloor to perform a task nearby?"
Police: "Yes, he can perform a task, but then he must return directly to the dance floor."
- the guards only left their position to intervene or assist with any potential situation that arose, until they were able to return to their position.
- the venue took the necessary steps to ensure the continuous monitoring of patrons within the dance floor area ensuring the safety and well-being of its patrons.

- consequently, the disciplinary complaint made by the Police should be dismissed.

NSW Police, received 28 March 2024:

- Summary of events on Saturday 15 October 2022:

Time	Description
21.00.00 - 21.30.00	No evidence of a staff meeting as highlighted on the previous night
21.11.24	Female security guard is directed to dance floor by the licensee
21.11.40	Female security guard enters dance floor and does not leave
21.11.50	Licensee points towards dance floor
21.12.10	Male security guard moves towards dance floor
21.12.17	Male security guard enters dance floor
21.13.43	First patrons enter nightclub
21.14.54	Male security guard leaves dance floor
21.16.15	First patrons enter dance floor
21.17.02	Male security guard enters dance floor after speaking with female patrons and flashing his torch at them. The male security guard then goes back and forth from his position on the dancefloor talking to patrons and taking 'selfies' with them
21.24.44	Male security guard talks to girls at table after a period of being off the dance floor
21.27.30	Male security guard runs back to dance floor after seeing Police and the licensee enter

- for the duration of this short sequence the female security guard remains on the dance floor, which police submit were the instructions given to both security guards.
- the male security guard was clearly not monitoring patrons on the dance floor when he removed himself from this position. However, this is inconsequential to compliance with the condition in that it firstly requires that two security guards be positioned on the dance floor.
- this matter does not relate to non-compliance because a security guard left the dance floor in response to an incident. It is because one of the security guards, who was subsequently dismissed after the Saturday night, was flippant in his duties relating to compliance when it should have been identified, corrected, and managed prior to police identifying this compliance issue.
- furthermore, and irrespective of conversations Police had with the licensee on the night, this apparent lack of regard in relation to security guards being on the dance floor continued, by the respondent's own submission, throughout the night.
- Police recollection of their conversation relating the interpretation of this condition differs, which was also discussed with the licensee on the Saturday night after seeing the male security guard run back to the dance floor.
- the section 75 direction was only in operation for four trading days and strict compliance should have been achieved with consideration to the many concerns Police had raised.
- Police identified two other compliance issues, as evidenced by the contemporaneous notes made by police within COPS Event E91747942:
 - s95(1) Liquor Act 2007 - Licensee not display sign with correct prescribed particulars (missing type of on-premises licence)

- s75(3) Liquor Act 2007 - Licensee fail to comply with a section 75 order (One security guard to continuously conduct external security patrols to address patron congregation and street offences within the vicinity of the premises)
- Police submit that this complaint is made out, irrespective of the passing of time, and police now consider it appropriate that the licensee be only reprimanded in accordance with section 141(2)(m) of the Act.

Back Schwartz Vaughan on behalf of the licensee and business owner, received 23 April 2024:

- at no point did the Licensing Police provide written advice or instructions in relation to the interpretation and application of the conditions in the direction. The only instructions that were provided by Police occurred when they attended the venue.
- contrary to the Police submission, the licensee did have staff meetings before the venue opened to the public on Saturday, 15 October 2022.
- during most of the night, the guards only left their position to intervene or assist with any situation that arose and then returned to their position.
- the male security guard was the only guard available on that weekend under short notice, he had not worked for The Vinyl Room before that weekend and his last shift was on Saturday, 15 October 2022. He was present during staff meetings on both nights which confirm the licensee's efforts to correct the issues and commitment to operating the venue in accordance with the conditions of the direction.
- the compliance issue under Section 95 (1) of the Act in relation to signage was not pursued. However, the issue was addressed by the licensee promptly and the signage was rectified on 25 October 2022.
- the Police complaint should be dismissed for the following reasons:
 - when considering the context in circumstances the non-compliance is minor in nature.
 - the venue diligently supervised and monitored the dance floor for nearly 12 hours over two weekends, with only a brief lapse of 1 minute and 19 seconds.
 - the alleged breach was promptly rectified before the subsequent weekend, during which it did not recur.
 - contradictory advice from the Police regarding the application of condition five was received by the licensee and their staff.
 - the director and shareholder of the Vinyl Room has been involved in the ownership of the venue since 1998 and has held the position of Secretary of the Local Liquor Accord since 2008 attending meetings, keeping minutes, and maintaining regular contact with the complainant and their staff.
 - there were no adverse consequences resulting from the subject matter of this complaint. There was no harm caused by anyone to anyone.
 - the other nine conditions within the direction were complied with and it is not a case where the condition was ignored it was simply misinterpreted and not applied strictly for a relatively very short period of time.
 - the Police informed the delegate a few days later (specifically on 20 October 2022) that they would continue monitoring the premises but were satisfied with its overall operation.
 - no demerit points have been recorded against the licensee or licence with this venue having the same owners and licensee and a very good record over a significant period of time.
 - the Police are now asking the Authority to reprimand the licensee under section 141(2)m of the Act. It is an obvious recognition of the weakness of the complaint.

Our findings

The male security guard left the dancefloor on numerous occasions during his shifts on the weekend of 14 to 16 October 2022. This was a direct breach of condition five of the written direction issued to the licensee which required two security guards to be positioned on the dancefloor.

In consideration of the previous incidents of violence at the venue, the short period to which the written direction applied and the failure to comply with the direction, we are of the view that disciplinary action is warranted in this instance in the form of a reprimand.

Relevant legislation

Prescribed grounds of complaint

We are satisfied that the complaint was made validly and that the established ground of complaint is a prescribed ground under section 139(3)(e) of the Act.

The material we considered

In determining the disciplinary complaint, the following material was considered:

- disciplinary complaint from NSW Police dated 26 January 2023, including seven annexures.
- submission from Back Schwartz Vaughan on behalf of the licensee and business owner, received 12 February 2024.
- submission from NSW Police, received 28 March 2024.
- submission from Back Schwartz Vaughan on behalf of the licensee and business owner, received 23 April 2024.

If you are dissatisfied with this decision

The respondent or complainant may apply to NCAT for a review of this decision under the *Administrative Decisions Review Act 1997*.

For more information, please contact the NCAT Registry at 1300 006 228 or visit the NCAT website.

This decision may be published on the website.

If you have any questions

Please contact the Office of ILGA at office@ilga.nsw.gov.au if you have any questions.

Yours sincerely



Jeff Loy

Board Member

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