

Short term closure orders for licenced premises



Independent
Liquor & Gaming
Authority

Overview

This guideline provides information to stakeholders, and guidance to the Director General of the Department of Trade & Investment, Regional Infrastructure and Services and the NSW Commissioner of Police, as to the Authority's arrangements for making orders to close licensed premises for up to 72 hours.

Background

- Sections 82 and 83 of the *Liquor Act 2007* (“**Act**”) concern the power of the Authority or an “authorised officer” (a magistrate, registrar of a Local Court or employee of the Department of Attorney General and Justice authorised by the Attorney General) to order the closure of a licensed premises for a period of up to 72 hours (“**Short Term Closure Order**”).
- Section 82(2) of the Act provides that the Authority may only make a Short Term Closure Order if:
 - an application (“**Application**”) is made to the Authority by either the Director General of the Department of Trade and Investment, Regional Infrastructure and Services (“**Director General**”) or the Commissioner of Police (“**Commissioner**”); and
 - the Authority is satisfied that a “serious breach” of the Act has occurred, or is likely to occur, on the licensed premises; and
 - the Authority is satisfied that the closure of the premises is necessary to prevent or reduce a “significant threat or risk to the public interest”.

Note: *The Authority notes the particular sense in which the word “necessary” was used by the NSW Court of Appeal in Commissioner of Police v Ryan [2007] NSWCA 196 with regard to short term closure orders made under the former Liquor Act 1982. At paragraph 22 of the judgment of Basten JA (with whom Spigelman CJ and Santow JA agreed) stated:*

“The terms upon which an order may be made under either ss 104A or 104C provide a clear indication that closure of the premises must be “necessary” to prevent or reduce a significant threat or risk to the public interest, as defined. In Elcham v Commissioner of Police (2001) 53 NSWLR 7, O’Keefe J held that “necessary” was to be understood as engaging a power to make orders which are reasonably required in order to accomplish the specific protective purposes identified: at [47]-[60],

adopting a meaning “by reference to concepts of reasonableness, common sense and appropriateness to the accomplishment of the relevant statutory purpose” (at [56]), as explained in Pelechowski v Registrar, Court of Appeal (NSW) [1999] HCA 19; (1999) 198 CLR 435 at 452 (Gaudron, Gummow and Callinan JJ), as well as other authorities to similar effect. This approach was not challenged in the present appeal and should be accepted.”

- “Significant threat or risk to the public interest” is not exhaustively defined by the Act, and may cover a wide range of circumstances. While not limiting its meaning, section 82(3) provides that circumstances in which there may be a “significant threat or risk to the public interest” include circumstances in which there is:
 - a threat to public health or safety;
 - a risk of substantial damage to property;
 - a significant threat to the environment; or
 - a risk of serious offences (having a maximum penalty of not less than 2 years imprisonment) being committed on the premises.

Note: *The Authority will apply the ordinary meaning of the word “significant” when determining whether a significant threat or risk exists. The Australian Concise Oxford Dictionary (3rd Edn) defines the word, inter alia, as meaning “noteworthy; important; consequential”. The Authority considers that the alleged threat or risk should be one that could be prevented or at least substantially reduced by the proposed closure, due to the connection of the identified risk or threat with the premises. For example, that the risk is likely to occur on or near the premises and on or reasonably soon after the proposed days of closure.*
- A Short Term Closure Order serves to prevent or reduce an identified threat or risk to the public interest. In light of this underlying legal policy, it would not be appropriate for an Applicant to seek an order simply as a “punitive” measure against a licensee. It is noted that offences against the Act may be dealt with by means of a criminal prosecution.
- Although section 82(4) of the Act provides that a Short Term Closure Order may not require the closure of premises for a period longer than 72 hours, section 82(5) provides that an order may be cast in terms that require the closure of premises until “specified conditions” are met.

IMPORTANT NOTICE

Under s.36 *Gaming and Liquor Administration Act 2007* and s.307A *Crimes Act 1900*, it is an offence to provide information to the Authority that is false or misleading.

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6. Section 82(7) of the Act provides that no more than one Short Term Closure Order may be made with regard to the same licensed premises during a period of one week.

Making an Application

7. There is no prescribed form for making an Application. Aside from urgent Applications made by telephone using the procedure available under section 83 of the Act (discussed at paragraphs 19-29 of this Guideline), Applications should be made to the Authority in writing and submitted by email via ilga.secretariat@liquorandgaming.nsw.gov.au. The Applicant must also promptly make telephone contact with the Authority's Chief Executive or General Council to advise that the Application has been made.
8. An Application should note at the commencement of the documentation that it is an "Application for a Short Term Closure Order under section 82 of the *Liquor Act 2007*". The Application should comprise a brief sworn statement (for example, a Statutory Declaration) duly signed and witnessed and in the form of a PDF file when submitted electronically ("**Sworn Statement**"), attesting that the Applicant has: *"reasonable grounds for believing that a serious breach of the Liquor Act 2007 has occurred, or is likely to occur, on the specified licensed premises [such premises to be identified by trading name, address, name of licensee and licence number] and that a Short Term Closure Order is necessary to prevent or reduce the risk of a significant threat to the public interest"*.
9. The Sworn Statement should annex a separate, more detailed statement ("Statement of Particulars"), in the form of a WORD file when submitted electronically, that sets out:
 - a) the relevant section(s) of the Act that the Applicant contends have been, or are likely to be breached on the licensed premises;
 - b) the alleged facts and circumstances that give rise to the Applicant's belief that a serious breach of the Act has occurred or is likely to occur;
 - c) any relevant antecedents - for example, whether circumstances similar to those identified in the Application have been the subject of recent formal or informal compliance action with regard to the licensed premises, and if so, to what end;
 - d) whether any part of the information contained in the Application should not be disclosed to third parties and if so, why. For example, that there are specific operational reasons for non-disclosure, or that disclosure would identify an undercover police officer, or that there are reasonable grounds for believing that disclosure of third party's details may expose that third party to harm;
 - e) why the alleged serious breaches of the Act constitute a "significant threat or risk to the public interest" - by reference to subsections 82(3)(a), (b), (c) or (d) of the Act, or the wider meaning of that phrase;
 - f) why an order is a necessary and proportionate response to the identified significant threat or risk to the public interest;
 - g) in the case of a Police Applicant, why it would not be more appropriate for Police to address the significant threat or risk to the public interest by means of an order under Part 6A of the *Law Enforcement (Powers and Responsibilities) Act 2002*;
 - h) a recommended period, not exceeding 72 hours, for which an order should remain in force, with an explanation as to why an order of that duration and timing is necessary to prevent or reduce the identified threat or risk to the public interest;
 - i) any conditions which, if met, would avert the need to continue an order beyond a period of 12 hours, or any change in circumstances which, if met, would justify the early cessation of an order at that point (for example, a licensee dismissing a specified staff member, or preventing a specified person from being on the premises);
 - j) an index of all material tendered in support of the Application; and
 - k) the name, office held, place of work and contact details of the Applicant and confirmation (if the Applicant is an officer exercising delegated power) that the Applicant is "an officer authorised pursuant to section 157 of the *Liquor Act 2007*".

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10. The Sworn Statement may also annex any other evidence or material in support of the Application, including but not limited to: third party witness statements; letters or emails; maps; diagrams; photographs; video surveillance footage; and extracts from databases or other business records. Each annexure should be provided separately and not in the form of a consolidated document, so that it may be readily extracted from the rest of the documentation. All supporting material should, wherever practicable, be submitted in electronic form, or otherwise delivered to the Authority contemporaneously with the making of an Application. When larger files cannot readily be emailed and are delivered in physical form (for example, audio-visual material on DVD, CD or portable hard drive) two (2) copies should be provided. Any audio-visual material should be submitted in a format that is viewable with commonly used media player software.

Note: *When preparing an Application, Applicants should consider paragraph 14 of this Guideline. The Authority will provide to the licensee, in the form of a Notice of Application for Short Term Closure Order, a summary of the allegations made against the licensed premises, prior to determining an Application. If an Application primarily relies upon third party witness statements or complaints (as opposed to direct evidence provided by the Applicant or their staff) then the gist of that third party material may require disclosure to the licensee or person apparently in charge of the licensed premises, to enable him or her to understand and potentially address the issues of concern raised in the Application. If an Application contains insufficient or imprecise information, this may delay the making of a decision while the Authority seeks clarification.*

Informal Process

11. The Authority is an independent administrative body, not a Court. Section 36B of the *Gaming and Liquor Administration Act 2007* provides that a formal hearing involving the legal representation of parties is not required to be held in relation to any application or other matter that may be dealt with or decided by the Authority under the Act.
12. The Authority administers its power to make Short Term Closure Orders in a manner that is efficient and informal, with a view to minimising time and costs to all stakeholders. While the Authority may, in its discretion, decide to conduct an interview, convene a conference or receive submissions either orally or in writing, the Authority generally expects to determine Applications “on the papers”. If an Application is in order, the Authority expects to issue a determination speedily, although Applicants should be aware that the Authority Members will need to be briefed with the relevant material prior to making a decision.
13. The Authority is not bound by the rules of evidence when considering an Application. While material submitted to the Authority need not be presented in “admissible” form, Applicants may nonetheless receive some guidance from the rules of evidence when preparing a non-urgent Application. For example:
 - material submitted in support of an Application should be relevant to satisfying the Authority that a Short Term Closure Order is necessary;
 - in some circumstances, the Authority may give greater weight to direct witness evidence than (say) second-hand hearsay evidence;
 - opinion evidence proffered by an expert concerning a field of expert knowledge may be given greater weight than the opinion of a non-expert on that subject matter; and
 - the use of direct speech in witness statements may help to clarify those matters that are of central importance to an Application.

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Natural Justice

14. The Authority must observe the requirements of administrative law, including principles of natural justice or procedural fairness, when undertaking administrative action. The content of the duty to accord natural justice may vary according to the circumstances of each case, but the courts have indicated that a degree of prior warning may be appropriate before a Short Term Closure Order is sought. Aside from Applications that are dealt with under the procedure provided by section 83 of the Act or in circumstances whereby prior notice may be contrary to the public interest in that (for example) it would compromise a law enforcement operation, the Authority will ensure that some prior warning is given by issuing to the licensee or person apparently in charge of the licensed premises a notice (“**Notice of Application for Short Term Closure Order**”), usually sent by email or fax, that:

- advises that an Application has been made;
- briefly identifies those provisions of the Act that the Applicant alleges have been or are likely to be breached on the licensed premises;
- summarises the relevant facts and circumstances alleged by the Applicant;
- identifies the 72 hours period during which an order, if issued, may be in force;
- specifies a strict period of time (up to 24 hours, not including Saturdays or Sundays) within which written submissions may be submitted to the Authority via email or facsimile as to why a Short Term Closure Order should not be made, or if an order is made, upon what terms and why.

15. If written submissions are received by the Authority within the time frame specified in the Notice of Application for Short Term Closure Order, the Authority will consider those submissions prior to making its decision. If no submissions are received within time, the Authority may promptly make its decision upon the basis of the material before it. To avoid doubt, the provision of notice by the Authority does not entitle a licensee or person apparently in charge of a premises to receive, either prior to or upon notification of the decision, a copy of all material that was submitted to the Authority in support of an Application,

16. The Authority will exercise an independent judgement as to whether an order should be made, and if so, upon what terms.
17. If an order is made, the Authority will serve a concise written notice of the terms of that order on the licensee or person apparently in charge of the licensed premises (“**Notice of Short Term Closure Order**”). Service of this notice may be effected by email, fax or by delivery of a hard copy to the licensed premises in advance of the commencement of the specified closure period.
18. A Notice of Short Term Closure Order will require the closure of premises between specified times and/or until specified conditions are met. This notice will also indicate the date and, in the case of an urgent order, the time when the order was made. (A model Notice of Short Term Closure Order is **Annexure A** to this Guideline).

Urgent Applications

19. By reason of their urgent nature, Applications made pursuant to the procedure described in section 83 of the Act will ordinarily be determined by the Authority without the issue of a Notice of Application for Short Term Closure Order or any prior consultation with a licensee or person apparently in charge of the licensed premises.
20. Section 83 contemplates that urgent Applications may be made by:
- *telephone* (“**telephone**” is here defined to include radio, facsimile or “other communication device”); or
 - *facsimile* (“**facsimile**” is here defined to include “any electronic communication device which transmits information in a form which written material is capable of being reproduced with or without the aid of any other device or article”. This would include, for example, email).

However, section 83(3) of the Act provides that an urgent Application must be made by *facsimile* if the facilities to do so are readily available for that purpose. Applicants intending to make urgent Applications should first telephone the Authority to confirm whether staff assisting the Authority are readily available to receive and respond to an urgent *facsimile* Application (including an email Application), or whether a telephone Application is required. Urgent Applications made outside of the Authority’s business hours may require a *telephone* Application. In the alternative, after hours

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Applications may be made to an authorised officer. (see paragraph 1).

21. Whatever medium is used, Applicants making urgent Applications should:

- state that the Application is an “Urgent Application for a Short Term Closure Order under the *Liquor Act 2007*”;
- address those matters outlined under paragraph 9(a)-(k) above, in sufficient detail to satisfy the Authority that an order is necessary; and
- satisfy the Authority as to why an urgent order is required and that it is not practicable for the Application to be made on a non-urgent basis.

Note: *Section 83(2) of the Act provides that the Authority must not issue an order on an Application made by telephone unless satisfied that the order is required urgently and that it is “not practicable for the Application to be made in person”. Whether an urgent Application is made by telephone or facsimile, Applicants should carefully consider whether the matter is properly the subject of an urgent Application. The Authority expects that Applicants will use the “non urgent” procedure unless an urgent Application is necessary to address a significant threat or risk to the public interest. It will closely scrutinise an Applicant’s reasons for bringing an urgent Application. If not satisfied as to the urgency of a matter, the Authority may advise an Applicant that it will deal with the matter under the procedure for (non-urgent) applications under section 82 of the Act.*

22. An urgent Application made by facsimile may take the form of a facsimile letter or an email that, with due precision, addresses all matters listed in paragraph 21 of this Guideline. Separate attachments with material in support of an Application may be furnished if readily available to an Applicant, but are not necessary if sufficient information is contained in the body of the Application letter or email.

23. If the Authority decides to make an order in response to an urgent Application made by telephone or “facsimile” (which includes email) and written communication facilities are readily available to send the signed decision, a member of the Authority communicating the order will complete and sign a written notice on behalf of the Authority (“**Notice of Urgent Short Term Closure**

Order”) (see **Annexure B**). The Authority will furnish the completed and signed notice to the Applicant and the Applicant must serve the licensee or person apparently in charge of the licensed premises with a copy of this notice, plus a copy of the urgent Application letter/email that gave rise to the order. Service may be effected by email, facsimile or delivery of a hard copy, in advance of the closure period specified in the notice.

24. If the Authority makes an order in response to an urgent Application made by telephone or facsimile and written communication facilities are not readily available, the Authority Member communicating the decision will inform the Applicant of the terms of the order and may request the Applicant to complete and sign a Notice of Urgent Short Term Closure Order on the Authority’s behalf (see **Annexure C**). The Applicant must then:

- complete a Notice of Urgent Short Term Closure Order in the terms advised by the Authority Member;
- write on this notice the name of the Authority Member who communicated the order and the date and time when the order was communicated to the Applicant; and
- write on this notice the name, position and signature of the Applicant completing the notice on behalf of the Authority.

25. In the circumstances described in paragraph 24 of this Guideline, the Applicant must serve upon the licensee or person apparently in charge of the licensed premises a completed copy of the Notice of Urgent Short Term Closure Order. Service of this notice may be effected by email, facsimile or personal delivery of a hard copy of this notice. Personal delivery to the premises is recommended to avoid any concern that the notice was not received.

26. In any case where the service of a Notice of Urgent Short Term Closure Order is effected by the Applicant, the Applicant must promptly thereafter provide written confirmation to the Authority of the time, date and manner in which service was effected, plus a copy of the material that was served.

27. Within 20 hours of the Authority making an urgent order in response to an Application made by *telephone*, the Applicant must prepare and serve upon the licensee or person apparently in charge of the licensed premises a letter or email concisely recording the key facts and contentions that were

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communicated orally to the Authority in support of the urgent Application. The Applicant must also send a copy of that letter or email to the Authority.

28. If a Short Term Closure Order is issued in response to an urgent Application made by *telephone* or *facsimile*, the licensee is entitled to request in writing that the Authority review the continued operation of the order beyond the initial 24 hours (“**Initial Closure Period**”) of any prescribed closure period, by providing reasons why it is not necessary for the order to remain in force beyond that Initial Closure Period. To avoid doubt, this entitlement to seek review does not apply in the case of a Short Term Closure Order that was issued pursuant to a “non urgent” Application.

Appeal Rights

29. There is no statutory mechanism for review on the merits of a decision made by the Authority regarding an application for a short term closure order. In New South Wales judicial review of administrative action is available only at common law, which is accessed via section 69 of the *Supreme Court Act 1970*.

Review of this Guideline

30. The Authority may review the operation of the Guideline from time to time and may update the Guideline as and when considered appropriate.

APPROVED by the Independent Liquor & Gaming Authority

On 12 May 2014



Chris Sidoti

Chairperson



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Model Notice of Short Term Closure Order

[see paragraph 17]

[name, business address
and contact email or fax number
of licensee or person in charge
of licensed premises to which this notice is sent]

[date of order]

Notice of Short Term Closure Order

Dear Sir/Madam

I refer to the Authority's Notice of Application for Short Term Closure Order dated [date] concerning an application under section 82 of the *Liquor Act 2007* for a short term closure of the licensed premises known as [name of licensed premises] situated at [address of licensed premises].

After considering the application and your submissions dated [date/s] in response to the Notice of Application, the Authority is satisfied that a serious breach of this Act has occurred, or is likely to occur on the premises, being a breach of [insert brief description of the relevant sections of Act in breach] and that the closure of the premises is necessary to prevent or reduce a significant threat or risk to the public interest.

Order:

You are hereby ordered to close the licensed premises known as [name of premises] for [number] hours from [time and date] to [time and date];

or until the following specified conditions are satisfied (whichever is the sooner):

[insert any specified conditions, if ordered by the Authority, otherwise delete the sentence immediately above]

You must comply with this order.

The maximum penalty for failure to comply is \$55, 000 or 6 months imprisonment, or both.

Yours sincerely

[name and signature]

Chief Executive for an on behalf of the Authority

Model Notice of Urgent Short Term Closure Order (completed by Authority Member)

[see paragraph 23]

Our Ref:

Your Ref:

[insert name, business address and
contact email or fax number
of licensee or person in charge
of licensed premises to which this notice is sent]

Notice of Urgent Short Term Closure Order

Dear Sir/Madam

I advise that the Authority has received an urgent application under section 82 of the *Liquor Act 2007* for a short term closure of the licensed premises known as [name of premises] situated at [address of premises].

After considering the application, the Authority is satisfied that a serious breach of this Act has occurred, or is likely to occur, on the premises being a breach of [insert brief description of the relevant sections of Act in breach] and that the closure of the premises is necessary to prevent or reduce a significant threat or risk to the public interest.

Order:

You are hereby ordered to close the licensed premises known as [name of premises] for [length of period] from [time and date] to [time and date];

or until the following specified conditions are satisfied (whichever is the sooner):

[insert any specified conditions, if ordered by the Authority, otherwise delete the sentence immediately above]

You must comply with this order.

The maximum penalty for failure to comply is \$55, 000 or 6 months imprisonment, or both.

Date and time that the order was made:

[insert date and time that the order is made and the name, position and signature of the Authority Member completing this notice on behalf of the Authority]

Model Notice of Urgent Short Term Closure Order (completed by Applicant)

[see paragraph 24]

Our Ref:

Your Ref:

[insert name, business address and contact email or fax number of licensee or person in charge of licensed premises to which this notice is sent]

Notice of Urgent Short Term Closure Order

Dear Sir/Madam

I advise that the Authority has received an urgent application under section 82 of the *Liquor Act 2007* for a short term closure of the licensed premises known as [name of premises] situated at [address of premises].

After considering the application, the Authority is satisfied that a serious breach of this Act has occurred, or is likely to occur, on the premises being a breach of [insert brief description of the relevant sections of Act in breach] and that the closure of the premises is necessary to prevent or reduce a significant threat or risk to the public interest.

Order:

You are hereby ordered to close the licensed premises known as [name of premises] for [length of period] from [time and date] to [time and date];

or until the following specified conditions are satisfied (whichever is the sooner):

[insert any specified conditions, if ordered by the Authority, otherwise delete the sentence immediately above]

You must comply with this order.

The maximum penalty for failure to comply is \$55, 000 or 6 months imprisonment, or both.

Order communicated by:

[name and position of member of the Authority who communicated the order]

Date and time that the order was made:

[date and time that the order was made]

Details of Applicant

[name, position and signature of the applicant]