

Disciplinary complaints under section 129 of the *Gaming Machines Act 2001*



Overview

Part 8 of the *Gaming Machines Act 2001* (“Act”) confers on the Authority the power to take disciplinary action in relation to certain regulated participants in the NSW gaming machines industry, if one or more specified grounds of a complaint made under the Act (“Complaint”) have been established.

This guideline provides information about the Authority’s processes for making and determining complaints under the Act.

Making a Complaint to the Authority

1. Section 129(1) of the Act provides that a Complaint may be made to the Authority in relation to a licensee or close associate of a licensee (“Respondent”).
2. A Complaint under section 129 of the Act can only be made by parties specified in the section (“Complainant”), currently limited to either the Secretary of the Department of Customer Service (“Secretary”) or the Commissioner of Police (“Complainant”).
3. Section 127 defines a licensee as a hotelier, club or the holder of a gaming-related licence. The definition of a ‘close associate’ is set out in section 4 of the Act and section 5 of the *Gaming and Liquor Administration Act 2007* (“GALA Act”).
4. While a person authorised by the Gaming Machines Regulation 2019 (“Regulation”) may also make a Complaint under part 8 of the Act, at the time of this guideline the Regulation has not authorised any person for this purpose.
5. Section 129(2) of the Act requires a Complaint to be in writing and specify the grounds on which it is made. The grounds on which a Complaint may be made are set out in section 129(3) of the Act.
6. Complaints should be made via Form AM0222 (“Form”), which is available on the Liquor & Gaming NSW website at liquorandgaming.nsw.gov.au. Complaints should be submitted by email to ilga.secretariat@liquorandgaming.nsw.gov.au.
7. The Form should be signed and dated by the Complainant, and accompanied by a separate, more detailed submission setting out:
 - a. the grounds of Complaint and the parties against whom such grounds relate,
 - b. a concise statement of the particulars for each ground, identifying the key facts and contentions that, if found by the Authority, will establish that ground,
 - c. supporting evidence or other material on which the Complainant relies with regard to each ground of Complaint (if any ground of Complaint relies on the contentions in another ground, or a common set of background facts, that should be clearly stated in the ground),
 - d. a recommendation as to what action, if any, the Authority should take under section 131(2) of the Act, should each ground of Complaint be established,
 - e. whether any circumstances of aggravation exist for the purposes of section 131(5),
 - f. any relevant antecedents - for example, whether issues similar to those raised in the Complaint have been the subject of past formal or informal compliance action in relation to the Respondent, and if so, to what end,

- g. whether any information in the Complaint should not be disclosed to the Respondent, should be disclosed in part or should only be disclosed on a confidential basis and, if so, why (for example, to protect the identity of an undercover police officer or a third party witness in cases where the Complainant has reasonable grounds to believe that disclosure may cause harm to the third party),

Note: The Authority has a duty to afford procedural fairness to the Respondent, and prefers to release all material that forms part of a Complaint to the Respondent, wherever appropriate. A Complainant should carefully consider whether any material that is too sensitive to be disclosed to the Respondent should be relied on at all.

- h. if any material is not to be disclosed to the Respondent, a separate “non-confidential” version of the Complaint with sufficient detail to enable the Respondent to respond to the facts alleged by the Complainant in relation to them,
- i. an index of all material submitted in support of the Complaint, and
- j. advise the name, office held, place of work and contact details of the Complainant or his or her representative and confirmation (if the Complainant is an officer exercising delegated power) that the Complainant is delegated with the authority to make the Complaint.
8. The Authority will not make any determination on whether any disciplinary action is appropriate until after it has decided whether the grounds of Complaint are established. However, in the interests of efficiency and giving advance notice of the Complainant’s position on disciplinary action to a Respondent, the Complaint should include specific contingent submissions on the question of what, if any, disciplinary action is recommended should one or more grounds of Complaint be established.
9. The Complaint should specify whether (and if so why) any circumstances of aggravation are alleged, the quantum of any monetary penalty and the period of any suspension or disqualification if that is recommended.

10. If the Secretary seeks an order for payment of its costs on an investigation, the Complainant should provide a concise breakdown of those costs.
11. The evidence or other material in support of a Complaint may include, without limitation: third party witness statements, letters or emails, maps, diagrams, photographs, video surveillance footage, and extracts from databases or other business records.
12. Each individual document should be provided separately, so that it may be readily extracted from the rest of the Complaint material. In the case of a statement of evidence that refers to annexures or exhibits, each annexure or exhibit should be provided as a separate document.
13. If the Complaint material cannot be sent by email or other electronic means due to its size, the material should be delivered to the Authority Secretariat, Liquor & Gaming NSW, on a USB drive with an additional copy of the USB drive for the Respondent. Any audio-visual material must be provided in a format that is viewable with commonly used media player software.

Process

14. The Authority is an independent administrative body, not a court. The Authority administers its disciplinary powers in a manner that is as efficient and informal as appropriate, with a view to minimising time and costs to all stakeholders.
15. Relevant procedural requirements in respect of the Authority’s handling of a Complaint are set out in part 8 of the Act and section 36B of the GALA Act.
16. The Authority may, at its discretion, convene a conference or meeting in respect of the Complaint, if it considers that doing so may assist its decision making. Any such conference or meeting will not be in the mode of a formal, adversarial hearing, and parties will not be required to be legally represented.
17. If the Authority decides to convene a conference or meeting, it is a matter for the Respondent whether they wish to participate. The matter will be determined “on the papers” if the Respondent declines or fails to respond to the offer to participate in a conference or meeting.

18. If a party attends a conference or meeting convened by the Authority, they should be prepared to discuss the grounds of the Complaint that concern them and what, if any, order should be made if a ground of Complaint is established.
19. As a general rule, parties will have less than one hour to deliver an oral submission and will be guided by the convener of the conference or meeting as to the key issues for discussion. Parties should be prepared to answer questions from the Authority.
20. The Authority is not bound by rules of evidence when considering a Complaint, but is required to comply with relevant legislative provisions and the rules of natural justice or procedural fairness.
25. When a Complainant asserts that a penalty notice was issued to a Respondent in respect of an alleged offence, the Complainant should provide details of that penalty notice and a copy of written advice from Revenue NSW as to the current payment status of the notice.

Making a submission about a Complaint

Standard of Proof

21. The Authority will make its findings about a Complaint in accordance with the civil standard of proof. However, to the extent that a Complaint is based upon allegations that the Respondent has engaged in criminal conduct, fraud, moral wrongdoing or other matters that may, if established, lead to serious adverse consequences for a Respondent, the Authority will apply the approach to fact finding that was discussed by the High Court of Australia in *Briginshaw v Briginshaw* (1938) 60 CLR 336.
22. This will require the Authority to reach, on the material before it, a level of satisfaction that is commensurate with the gravity of the allegation, reached fairly and properly in accordance with the kind of processes that are appropriate to a statutory authority, not a Court of law.
23. When a Complainant asserts that a Respondent or other party has been convicted of a past criminal or other offence, the Complainant should have regard to the operation of spent convictions legislation and provide appropriate formal evidence of the conviction(s). Wherever practicable, certificates of conviction should be furnished from the relevant jurisdiction.
24. While it is open to the Authority to proceed with and determine a Complaint that is, in whole or part, founded upon unproven allegations of criminal conduct, a Complainant may wish to carefully consider the timing of regulatory action if a related prosecution is underway and not completed, including any appeal.
26. Consistently with the principles of procedural fairness, section 130 of the Act requires the Authority to write to a Respondent inviting them to show cause why disciplinary action should not be taken against them on the grounds of the Complaint ("Show Cause Notice").
27. If the Complaint relates to a gaming-related licensee, the Authority is also required by section 130(3) of the Act to invite written submissions from all persons disclosed to the Authority under sections 91 and 118 of the Act.
28. In responding to a Show Cause Notice, the Respondent and any other parties invited to make a written submission should:
 - a. address all grounds of the Complaint, including the particulars for each ground; and
 - b. make contingent submissions on the question of what, if any, disciplinary action should be taken by the Authority in the event that any one or more of the grounds for the Complaint are established.
29. The Authority's discretion to take disciplinary action, and the actions it may take, are set out in section 57H(2) of the Act and at the end of this Guideline. Sections 131(3) and (5) of the Act set out some further provisions on the consequences of failure to pay a monetary penalty, and circumstances of aggravation which may apply.
30. If a party wishes to be heard again on the question of penalty in the event that any one or more of the grounds of the Complaint are established, they should make this request when responding to the Show Cause Notice. In an appropriate case the Authority will issue a decision with reasons detailing its findings on the grounds of Complaint, together with any orders with respect to disciplinary action.

31. The Show Cause Notice will specify a reasonable period of time (usually 28 days) within which written submissions may be made to the Authority addressing the Complaint. If submissions are not received within the specified time, the Authority may determine the matter on the material before it.
32. If a matter is complex, the Authority may give the Complainant an opportunity (usually 14 days) to make further written submissions in reply to a party's response to the Complaint, followed by a second round of written submissions from the Respondents (usually within 14 days). The Authority may also elect to convene a conference or meeting.
33. Parties should not assume there will be two rounds of written submissions or a conference or meeting. A Complainant should present their entire case in the Complaint, and a Respondent should provide a comprehensive response to the alleged facts and contentions relating to the Complaint and the disciplinary actions which may be taken on the grounds of the Complaint.
34. The Authority expects written submissions to be articulated in clear and explicit terms. This will ensure, in the event that a conference or meeting is convened, that the Authority may use the conference time productively, and no party is "taken by surprise" by matters raised at the conference or meeting.
35. The Authority notes its power under section 131(2) (i) of the Act to order a licensee to pay certain costs incurred by the Secretary or the Authority in relation to a Complaint. The Authority will usually contemplate making an order to recover costs, subject to consideration of any submissions received on this issue.
36. All written submissions to the Authority in respect of a Complaint should be made by email to ilga.secretariat@liquorandgaming.nsw.gov.au, wherever practicable.

Disciplinary Powers of the Authority

37. If a Complaint is established, the Authority may, under section 131(2) of the Act, decide not to take any action or may:
 - a. order the hotelier or gaming-related licensee to pay, within such time as is specified in the order —
 - i. a monetary penalty not exceeding 500 penalty units (in the case of a corporation) or 200 penalty units (in any other case), or
 - ii. if circumstances of aggravation exist in relation to the Complaint—a monetary penalty not exceeding 1,000 penalty units (in the case of a corporation) or 400 penalty units (in any other case),
 - b. order the club to pay, within such time as is specified in the order, a monetary penalty not exceeding 2,500 penalty units or, if circumstances of aggravation exist in relation to the Complaint, not exceeding 5,000 penalty units,
 - c. if the ground that applies is any of the grounds referred to in section 129 (3) (a), (b), (c), (d) or (f) —
 - i. cancel the hotelier's or club's licence under the *Liquor Act 2007* or the gaming-related licence, or
 - ii. suspend the hotelier's or club's licence under the *Liquor Act 2007* or the gaming-related licence for such period as the Authority thinks fit, or
 - iii. cancel, suspend or modify any authorisation or approval under this Act for the hotelier or club to keep approved gaming machines, or
 - iv. disqualify the hotelier or club from keeping approved gaming machines for such period as the Authority thinks fit,
 - d. cancel the gaming-related licensee's licence or suspend the licence for such period as the Authority thinks fit,
 - e. impose or vary a condition to which the gaming-related licence is subject,
 - f. disqualify the gaming-related licensee from holding a gaming-related licence for such period as the Authority thinks fit,

- g. disqualify the close associate from being a close associate of a licensee for such period as the Authority thinks fit,
- h. disqualify the close associate from holding a gaming-related licence for such period as the Authority thinks fit,
- i. order the licensee to pay the amount of any costs incurred—
 - i. by the Secretary in carrying out any investigation or inquiry under section 128 in relation to the licensee or close associate, or
 - ii. by the Authority in connection with the taking of disciplinary action against the licensee or close associate under this section,
- j. reprimand the licensee or close associate.

Determination

- 38. If the Authority decides to take disciplinary action against a Respondent, it is required by section 131A of the Act to notify the Respondent and provide reasons for its decision.
- 39. A copy of the Authority's decision letter will be sent to the Respondent and any other interested parties who were consulted in respect of the Complaint. The decision letter will usually be published on the Liquor & Gaming NSW website at liquorandgaming.nsw.gov.au.
- 40. The time spent by the Authority processing a Complaint will depend upon the complexity of a matter, the material submitted by the parties and the scheduling of a conference or meeting.

Appeal rights

- 41. Under section 131C of the Act, a decision made by the Authority in relation to a Complaint may be subject to review by the NSW Civil and Administrative Tribunal ("NCAT"). An application for review may be made by either the Complainant or a Respondent against whom disciplinary action has been taken by the Authority. An application for review may be filed with the NCAT within 28 days of the Authority's decision. For more information, visit NCAT's website at www.ncat.nsw.gov.au.

Review of this Guideline

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

APPROVED by the Independent Liquor & Gaming Authority

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PHILIP CRAWFORD
Chairperson